

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT

Date: 6 April 2021

Original: English

IN THE TRIAL CHAMBER

Before:

**Judge Iain Bonomy, Presiding
Judge Graciela Susana Gatti Santana
Judge Elizabeth Ibanda-Nahamya**

Registrar:

Mr. Abubacarr Tambadou

Order of:

6 April 2021

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC WITH PUBLIC AND CONFIDENTIAL ANNEXES

**ORDER CONCLUDING THE WRITTEN EXCHANGES
PROCEDURE FOR THE STATUS CONFERENCE**

Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

THE TRIAL CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively);¹

RECALLING that, on 9 March 2021, the Trial Chamber, with the agreement of the parties, initiated a status conference through written procedure in the spirit of Rule 69 of the Rules of Procedure and Evidence (“Rules”);²

REITERATING that the Trial Chamber intends to hold an in-person status conference as soon as it is feasible, safe, and appropriate but that the written exchanges procedure was the best way to conduct this status conference based on the advice of the Mechanism’s medical staff;³

NOTING, with appreciation, the submissions from the parties and the Registrar received in response to the Order of 9 March 2021 on 15 and 16 March 2021,⁴ as well as the responsive submissions received from the Defence and the Prosecution on 19 March 2021;⁵

CONSIDERING that the written submissions have effectively presented issues in the spirit of Rule 69 of the Rules and that the public and confidential annexes to this Order provide any necessary views, guidance, and determinations from the Trial Chamber in light of the issues addressed;

FINDING that it is appropriate to conclude the written exchanges procedure;

FOR THE FOREGOING REASONS,

INSTRUCTS the parties and the Registrar to review the annexes to this Order and to comply with any further views, guidance, and determinations contained therein, which are aimed at facilitating further fair and expeditious trial preparations; and

DECLARES the status conference concluded.

¹ See Order Assigning a Trial Chamber, 1 October 2020, p. 1.

² Order Regarding Commencement and Conduct of the Status Conference, 9 March 2021 (public, with public Annex A and confidential Annex B) (“Order of 9 March 2021”), pp. 1-3.

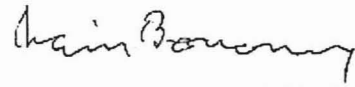
³ Order of 9 March 2021, p. 2, n. 8 and reference cited therein.

⁴ Defence Submission in Compliance with Order of Pre-Trial Judge of 9 March 2021, 24 March 2021 (original French version filed on 15 March 2021; confidential and *ex parte*, with confidential Annex, and with confidential redacted and public redacted versions filed on the same day) (“Defence Submission”); Submissions for March 2021 Status Conference, 15 March 2021 (“Prosecution Submission”); Registrar’s Submission in Compliance with “Order Regarding Commencement and Conduct of the Status Conference” of 9 March 2021, 16 March 2021 (confidential) (“Registrar Submission”).

⁵ Defence Response to Prosecution and Registry Submissions Filed in Compliance with Pre-Trial Judge’s Order of 9 March 2021, 29 March 2021 (original French version filed on 19 March 2021; confidential, with public version filed on the same day) (“Defence Response”); Prosecution Response to Defence Submissions for March 2021 Status Conference, 19 March 2021 (“Prosecution Response”).

Done in English and French, the English version being authoritative.

Done this 6th day of April 2021,
At Arusha,
Tanzania



Judge Iain Bonomy
Presiding

[Seal of the Mechanism]

ANNEX A (PUBLIC)

A. Prosecution Rule 73 Disclosure

1. The Trial Chamber observes that the Prosecution has recently made disclosures under Rule 73 of the Rules to the Defence and welcome this progress.⁶ However, the troubles the Prosecution have expressed in paragraphs 14-17 of its 15 March 2021 filing reflect a shortfall in its commitment to adhere to its fundamental obligation to disclose exculpatory material as soon as practicable. Having twice failed to justify the need for a general confidentiality order for any and all of its disclosures to the Defence,⁷ the Prosecution now argues that the absence of such an order – that could subject the Defence to contempt liability without any showing that such a drastic consequence is appropriate – is delaying it from timely fulfilment of its disclosure obligations in respect of potentially exculpatory material contained in documents, witness statements, national investigative files, and its collections.⁸ The Prosecution submissions take no account of the fact that two decades of trials before the International Criminal Tribunal for Rwanda (“ICTR”) were conducted without such orders being considered necessary.

2. The Prosecution is reminded that its obligation to disclose exculpatory material is not a secondary obligation and is as important as the obligation to prosecute.⁹ Unlike material falling within Rule 76(A) of the Rules, exculpatory material does not take on a mantle of confidentiality simply because a Prosecution staff member collected the information in the course of Prosecution investigations.¹⁰ Having sought but failed to justify orders warranting such restrictions, the Prosecution cannot avoid timely fulfillment of its disclosure obligations under Rule 73 simply because it wants to keep all information in its possession confidential.

3. In accordance with the plain language of the Rules, the Prosecution must disclose exculpatory material as soon as practicable. If restrictions apply to exculpatory material – such as work-product exemptions under Rule 76(A) of the Rules or the fact that exculpatory material was

⁶ See Prosecution Submission, para. 14; Prosecution Response, para. 5.

⁷ See Decision on Prosecution Motion for Confidentiality of Disclosed Information and Materials, 30 November 2020, pp. 1-5; Decision on Prosecution Motion for Reconsideration or Certification to Appeal the Decision of 30 November 2020, 11 January 2021, paras. 1-17.

⁸ Prosecution Submission, paras. 14-17.

⁹ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Judgement and Sentence, 30 September 2011, para. 134, n. 205 and references cited therein.

¹⁰ Importantly, witness statements are not exempt from disclosure under Rule 76(A) of the Rules. See *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, paras. 30-35 (providing guidance on what constitutes a statement versus internal documents prepared by a party).

provided in material shared on a confidential basis under Rule 76(B) of the Rules – the Prosecution must share the exculpatory information in some other form (and *as soon as practicable*).¹¹

4. In any case, the Trial Chamber notes that the Defence has agreed that preserving the confidentiality of evidence may be necessary and that it has ethical and professional obligations in relation to confidential information that comes into its possession.¹² The Defence suggests that, to facilitate timely disclosure, the Prosecution could disclose documents with a “confidential” designation as assessments related to the appropriateness of the classification continue.¹³ With respect to the Prosecution’s collections of relevant materials, the Defence has submitted that it will respect the confidentiality of the evidence contained therein and submits that these materials “will be used exclusively for the purposes of case preparation.”¹⁴ Bearing in mind the Defence’s professional and ethical obligations, particularly in relation to submissions before the court, the Trial Chamber encourages the Prosecution to now disclose exculpatory information on a confidential basis with the understanding that it will clarify whether specific documents must remain confidential as soon as possible. The parties are invited to inform the Trial Chamber at the next status conference, or earlier by way of notice, of their revised arrangements for disclosure of exculpatory material.

B. Prosecution Pre-Trial Filings

5. The Prosecution requests that its pre-trial brief and related Rule 70(E) filings be submitted by 15 September 2021 at the earliest, the filing of expert materials under Rule 116 of the Rules one week later, motions for adjudicated facts under Rule 115(B) of the Rules two weeks after the Rule 70(E) filings, and disclosure of witness statements under Rule 71(A)(ii) of the Rules three weeks after the Rule 70(E) filings.¹⁵ The Defence takes no position on these deadlines, but indicates that the length of trial preparations will be, in part, dependent upon the Defence’s receipt of all Prosecution disclosures and the volume of them.¹⁶

6. The Trial Chamber considers that the time frame proposed by the Prosecution for its pre-trial submissions appears excessive, even in view of the COVID-19 pandemic,¹⁷ and following

¹¹ See *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Decision on Jean de Dieu Kamuhanda’s Request Related to Prosecution Disclosure and Special Investigation, 7 April 2006, para. 7, n. 20.

¹² Defence Response, para. 9.

¹³ Defence Response, para. 9.

¹⁴ Defence Response, para. 11.

¹⁵ Prosecution Submission, paras. 6, 8, 11, 12.

¹⁶ Defence Response, paras. 4, 6.

¹⁷ This case is unique in the international criminal context when considering the breadth and extent of pre-trial investigation and evidence preservation that has occurred prior to the Accused’s arrest.

such a schedule may frustrate Defence preparations and projections for the timely commencement of trial. The Trial Chamber will continue to consider the proposals, and the Pre-Trial Judge will issue a work plan order in due course after having consulted the parties and taking into account, for example, the Prosecution's request to stagger filing deadlines for its pre-trial submissions and any other relevant points. The work plan will also take into account any views of the Defence with respect to its needs to prepare for trial, and the Trial Chamber is mindful that the earlier the Prosecution files its Rule 70(E) submissions the better it is for Defence preparations to ensure an expeditious commencement of trial. The Trial Chamber remains of the firm view that this trial must commence as soon as reasonably possible and the completion of the Prosecution pre-trial filings factors significantly in this calculation.

7. The Trial Chamber also welcomes the Prosecution's willingness to disclose key witness statements under Rule 71(A)(ii) of the Rules in English or French to the Defence in advance of any imposed deadline.¹⁸ In terms of translation, the Trial Chamber advises the Prosecution to coordinate with the Language Support Services to ensure translations as required by Rule 71(A)(ii) of the Rules are completed by the imposed deadline and in conformity with that Rule. The Prosecution should be also in touch with the Defence in this respect, and joint relief related to translations may be sought where it is in the interests of both parties.

C. Defence Request for Access

8. The Defence's request for access to confidential files from various cases before the Mechanism and the ICTR related to the present case is in briefing and will be addressed by a separate decision as a matter of priority.¹⁹ Access will be granted, and the scope of such access will be clarified soon.

9. Other aspects of the Defence submissions related to the appointment of an independent medical expert and the health of Kabuga are discussed in confidential Annex B.

¹⁸ Prosecution Submission, para. 13.

¹⁹ Defence Submission, para. 36; Defence Motion Seeking Access to Confidential Records from Various ICTR/MICT Cases Relevant to the Present Case, 24 March 2021 (original French version filed on 15 March 2021), p. 4; Prosecution Response to Kabuga's Request for Access to Confidential Materials, 29 March 2021.



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