

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT

Date: 1 June 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

Decision of: 1 June 2021

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON DEFENCE MOTION SEEKING A STAY OF
PROCEEDINGS OR, ALTERNATIVELY, PROVISIONAL RELEASE**

Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Rashid S. Rashid
Mr. Rupert Elderkind

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

**Government of the Kingdom of the
Netherlands**

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

RECALLING that Mr. Félicien Kabuga is currently detained at the United Nations Detention Unit at the Hague Branch of the Mechanism (“UNDU”), awaiting a detailed medical assessment to determine whether and under what circumstances he may be safely transferred to the Arusha Branch of the Mechanism for trial;²

RECALLING that the Trial Chamber has been receiving bimonthly medical reports from the UNDU Medical Officer since 9 December 2020 (“Medical Reports”)³ and that, on 15 April 2021, it instructed the Registrar, pursuant to Rule 84(A) of the Rules of Procedure and Evidence (“Rules”), to appoint an independent medical expert (“Medical Expert”) to examine the Accused and submit a detailed written report,⁴ which is due by 21 June 2021;⁵

BEING SEISED OF a motion filed confidentially on 6 May 2021, in which Kabuga requests a stay of proceedings on the basis of his health and, in the alternative, his provisional release on humanitarian grounds to an appropriate facility in The Hague to be identified by the Registrar in cooperation with the Defence;⁶

NOTING the Defence’s submission that, based on the Medical Reports,⁷ there is sufficient medical information available to conclude that Kabuga is not fit to stand trial and that compelling

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

² See Decision on Félicien Kabuga’s Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020, paras. 2, 14, 15, 18.

³ See Preliminary Order Regarding Medical Examination of Félicien Kabuga, 29 October 2020, pp. 1, 2; Transcript 11 November 2020 p. 4; Order Following Initial Appearance, 25 November 2020, p. 3. See also, e.g., Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 28 April 2021 (public, with confidential Annex), Annex, Registry pagination (“RP.”) 1300, 1299; Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 12 May 2021 (public, with confidential Annex), Annex, RP. 1366, 1365; Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 26 May 2021 (public with confidential Annex), Annex, RP. 1443, 1442.

⁴ Decision on Defence Motion Seeking an Order for Expert Medical Assessments Pursuant to Rule 84, 15 April 2021 (confidential) (“Decision of 15 April 2021”), paras. 16, 19.

⁵ The Registrar appointed the Medical Expert on 21 May 2021 and his report is due within 30 days of his appointment. See Registrar’s Notification of Appointment of Medical Expert, 21 May 2021 (confidential, with confidential Annex), para. 2. See also Registrar’s Notification of Appointment of Medical Expert, 29 April 2021 (confidential, with confidential Annex), para. 2; Registrar’s Submission Regarding the Appointment of an Independent Medical Expert, 7 May 2021 (confidential), paras. 2-4.

⁶ Motion Seeking a Stay of Proceedings Against Félicien Kabuga and, in the Alternative, His Provisional Release, 12 May 2021 (original French version filed on 6 May 2021; confidential, with public redacted version filed on the same day) (“Motion”), RP. 2/1342 BIS, 1/1342 BIS.

⁷ Motion, paras. 14-19.

humanitarian reasons demand an immediate stay of the proceedings against him to preserve his rights and dignity;⁸

NOTING that, in the alternative, the Defence argues that the conditions required for provisional release under Rule 68(B) of the Rules have been established since: (i) there are compelling humanitarian grounds; (ii) Kabuga will not pose any danger to Prosecution investigations or witnesses; and (iii) in light of his condition, there is no flight risk;⁹

NOTING the Prosecution's response filed confidentially on 18 May 2021, wherein it submits that the Motion should be denied on the basis that: (i) the request for a stay of proceedings, whether temporary or permanent, is premature;¹⁰ and (ii) the requirements for provisional release are not met;¹¹

CONSIDERING that a stay of proceedings must be determined on a case-by-case basis taking into account, *inter alia*, the Accused's fitness to stand trial and the stage of the proceedings;¹²

CONSIDERING that the Defence's interpretations of the Medical Reports to suggest that Kabuga is not and will never be fit for trial are not substantiated,¹³ and that, in any event, the Trial Chamber is awaiting the independent Medical Expert assessment on Kabuga's health that was sought by the Defence to assist in determining whether the Accused is fit to stand trial;¹⁴

CONSIDERING that staying the pre-trial phase of the proceedings may in fact interfere with Kabuga's fundamental right to be tried without undue delay should it be determined that he is presently or may in the future be determined to be fit to stand trial;

⁸ Motion, paras. 21-26.

⁹ Motion, paras. 27-38.

¹⁰ Prosecution Response to Defence Motion Seeking a Stay of Proceedings, in the Alternative Provisional Release, 18 May 2021 (confidential, with public redacted version filed on the same day) ("Response"), paras. 1-6, 11.

¹¹ Response, paras. 1, 7-11. The Prosecution contends that: (i) Kabuga was a fugitive for over 20 years and, therefore, there is a flight risk; (ii) compelling humanitarian grounds are not supported by the Medical Reports; and (iii) the Defence failed to demonstrate that provisional release could take place in the Netherlands. *See* Response, paras. 8-10.

¹² *See Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Consolidated Decision on the Continuation of Proceedings, 26 October 2015 ("Hadžić Decision of 26 October 2015"), para. 56 (identifying factors relevant to determining whether, *inter alia*, a stay of proceedings is appropriate to include "an accused's fitness to stand trial, the stage of proceedings, the availability of accommodations for health concerns which facilitate the continuation of proceedings, and the public interest in a determination of an accused's responsibility along with the gravity of the charges against an accused").

¹³ *See* Motion, paras. 19, 20, 25, 26, 35, 36.

¹⁴ *See* Decision of 15 April 2021, paras. 15 (wherein the Trial Chamber considered that it "would benefit from additional medical expertise and information at this moment in order to guide its decisions on procedurally significant matters concerning the case's scheduling, including, specifically, Kabuga's fitness for transfer to and detention in Arusha and to stand trial"), 16. *See also* Defence Motion Seeking an Order for an Expert Medical Assessment Pursuant to Rule 84 of the Rules of Procedure and Evidence, 2 February 2021 (original French version filed on 22 January 2021; confidential, with public redacted version filed on the same day), paras. 47-51.

FINDING, therefore, that the Defence has not demonstrated that a request for a stay of proceedings is presently justified;¹⁵

CONSIDERING that, under Rule 68(B) of the Rules, the Trial Chamber may grant provisional release only: (i) after having given both the host country and the State to which the accused seeks to be released the opportunity to be heard; and (ii) if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness, or other person;¹⁶

NOTING that Article 38(1) of the Host State Agreement with the Netherlands¹⁷ requires the host State to facilitate the transfer of persons granted provisional release into a State *other than the host State* and that Article 39(3) provides that a person released from the custody of the Mechanism pursuant to Article 39(1) *shall not remain* on the territory of the host State *except with the latter's consent*;¹⁸

CONSIDERING the submission filed by the Government of the Netherlands on 27 May 2021 that it is under no obligation to facilitate Kabuga's provisional release within its territory,¹⁹ and that Kabuga fails to demonstrate that he is otherwise entitled to reside in the Netherlands during any period of provisional release;²⁰

CONSIDERING FURTHER that, despite his age and current condition, Kabuga remained a fugitive for over two decades after the confirmation of his initial indictment on 26 November 1997;²¹

CONSIDERING, therefore, that the Trial Chamber is not satisfied by Kabuga's guarantees that, when necessary, he will appear for trial and surrender when required;²²

¹⁵ Cf. Order Concluding the Written Exchanges Procedure for the Status Conference, 6 April 2021 (public, with public and confidential annexes), Annex B, para. 12. To the extent the Motion seeks a termination of the proceedings, it presents no legal basis to do so. See *Hadžić* Decision of 26 October 2015, para. 66; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Remand on the Continuation of Proceedings, 24 March 2016 (confidential), para. 30.

¹⁶ See also *Prosecutor v. Maximilien Turinabo et al.*, Case Nos. MICT-18-116-AR68.2 & MICT-18-116-AR68.3, Decision on Prosecution Appeals Against the Decisions Granting Turinabo and Ndagijimana Provisional Release, 5 August 2019 (confidential; declassified on 26 August 2019), para. 7. Rule 68(B) of the Rules also provides that the existence of sufficiently compelling humanitarian grounds may be considered in granting such release.

¹⁷ Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals, 23 February 2015 ("Host State Agreement").

¹⁸ Emphasis added.

¹⁹ Note Verbale from the Ministry of Foreign Affairs, Protocol and Host Country Affairs Department, DPG Min-BuZa.2021.8542-33, 27 May 2021 (confidential), RP. 1449, referring to Article 38 of the Host State Agreement. See also Order for Submissions, 14 May 2021 (confidential), p. 2.

²⁰ See Motion, paras. 27-38. See also Response, para. 10.

²¹ See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Decision on Prosecutor's Request to Amend the Arrest Warrant and Order for Transfer, 27 May 2020, para. 2.

²² See Motion, para. 37.

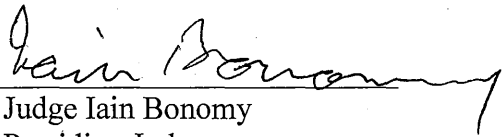
FINDING, in light of the above, that the Motion does not demonstrate that the requirements set out in Rule 68(B) of the Rules are satisfied;

FOR THE FOREGOING REASONS,

HEREBY DENIES the Motion.

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

Done this 1st day of June 2021,
At The Hague,
The Netherlands



Judge Iain Bonomy
Presiding Judge

[Seal of the Mechanism]



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