

**UNITED  
NATIONS**



International Residual Mechanism  
for Criminal Tribunals

Case No.: MICT-13-38-I

Date: 21 October 2020

Original: English

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**BEFORE A SINGLE JUDGE**

**Before:** Judge Iain Bonomy  
**Registrar:** Mr. Abubacarr Tambadou  
**Decision of:** 21 October 2020

**PROSECUTOR**

v.

**FÉLICIEN KABUGA**

***PUBLIC***

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**DECISION ON FÉLICIEN KABUGA'S MOTION TO AMEND  
THE ARREST WARRANT AND ORDER FOR TRANSFER**

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**Office of the Prosecutor:**

Mr. Serge Brammertz

**Duty Counsel for Mr. Félicien Kabuga:**

Mr. Emmanuel Altit

1. I, Iain Bonomy, Judge of the International Residual Mechanism for Criminal Tribunals and the Single Judge assigned to this matter,<sup>1</sup> am seised of an urgent motion filed by Mr. Félicien Kabuga on 5 October 2020 requesting, *inter alia*, that his arrest warrant and order for transfer be amended to provide for his transfer to the Hague Branch of the Mechanism rather than the Arusha Branch.<sup>2</sup> The Prosecution and Registrar filed responsive submissions on 6 and 8 October 2020, respectively, which, in essence, support Kabuga’s temporary transfer to the Hague Branch of the Mechanism.<sup>3</sup> On 13 October 2020, I ordered the Registrar to provide further submissions on issues relevant to adjudicating the Motion.<sup>4</sup> On 15 October 2020, Kabuga filed further observations.<sup>5</sup> The Registrar provided further information in response to the order on 16 October 2020.<sup>6</sup>

## I. BACKGROUND

2. Kabuga is an accused before the Mechanism based on an amended indictment filed before the International Criminal Tribunal for Rwanda (“ICTR”) on 13 April 2011.<sup>7</sup> He is the subject of an international arrest warrant issued by the Mechanism on 29 April 2013, which directs his transfer to the Arusha Branch of the Mechanism to be remanded into the custody of the United Nations Detention Facility (“UNDF”).<sup>8</sup> On 16 May 2020, French authorities, acting on the basis of the Arrest Warrant and Order for Transfer, arrested Kabuga in France.<sup>9</sup>

<sup>1</sup> See Order Assigning a Single Judge, 6 October 2020, p. 1. See also Order Assigning a Trial Chamber, 1 October 2020, p. 1 (assigning the Trial Chamber to this case effective upon Mr. Félicien Kabuga’s transfer to the seat of the relevant branch of the Mechanism).

<sup>2</sup> Urgent Defence Motion for Félicien Kabuga’s Transfer to The Hague and Not to Arusha, 9 October 2020 (original French version filed on 5 October 2020) (confidential, with confidential Annex A; public redacted version filed on 5 October 2020) (“Motion”), p. 10. Kabuga further requests that his transfer to the Mechanism be suspended until a decision on the Motion rendered. See Motion, p. 10. As Kabuga is still in the custody of the French authorities as of the issuance of this decision, this request is moot.

<sup>3</sup> Prosecution Response to “*Requête urgente de la Défense afin que Félicien Kabuga soit transféré à La Haye et non à Arusha*”, 6 October 2020 (“Prosecution Response”); Registrar’s Submission in Relation to the “*Requête urgente de la Défense afin que Félicien Kabuga soit transféré à La Haye et non à Arusha*” of 5 October 2020, 8 October 2020 (confidential) (“Registrar Submission of 8 October 2020”).

<sup>4</sup> Order for Submissions, 13 October 2020 (“Order for Submissions”), p. 3.

<sup>5</sup> Defence Submission Pursuant to 13 October 2020 Order of the Single Judge, 16 October 2020 (original French version filed on 15 October 2020) (confidential, with confidential Annex) (“Defence Submission”).

<sup>6</sup> Registrar’s Submission in Relation to the “Order for Submissions” of 13 October 2020, 16 October 2020 (confidential) (“Registrar Submission of 16 October 2020”).

<sup>7</sup> See *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-PT, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, 13 April 2011 (confidential); *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-I, Amended Indictment, 14 April 2011. A detailed procedural history related to the prior ICTR indictments charging Kabuga can be seen in a prior decision in this case. See Decision on Prosecutor’s Request to Amend the Arrest Warrant and Order for Transfer, 27 May 2020 (“Decision of 27 May 2020”), paras. 2, 3.

<sup>8</sup> *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38, Warrant of Arrest and Order for Transfer Addressed to All States, 29 April 2013 (“Arrest Warrant and Order for Transfer”), pp. 1-3.

<sup>9</sup> See Decision of 27 May 2020, para. 2.

3. Subject to France's law on cooperation with the Mechanism,<sup>10</sup> Kabuga challenged the Mechanism's jurisdiction to take custody of and to transfer him to the Arusha Branch for trial before the Investigating Chamber of the *Cour d'appel de Paris*.<sup>11</sup> The court rejected all of Kabuga's challenges, including the request that the execution of the Arrest Warrant and Order for Transfer be dismissed because of the health situation in Tanzania and the Accused's state of health, and ordered the transfer of Kabuga to the Mechanism.<sup>12</sup> On 30 September 2020, the Criminal Division of the *Cour de cassation* upheld the lower court's findings.<sup>13</sup>

4. Parallel to Kabuga's proceedings in France, the Mechanism's Prosecutor, in May 2020, sought the amendment of the Arrest Warrant and Order for Transfer to provide for Kabuga's transfer to the Hague Branch of the Mechanism.<sup>14</sup> Judge William H. Sekule, acting in his capacity as the Duty Judge for the Arusha Branch, dismissed the request.<sup>15</sup> In so doing, he noted the general mandate that detention upon remand and proceedings in this case be done at the Arusha Branch of the Mechanism and that any variation to this mandate should be exceptional.<sup>16</sup> Ultimately, Judge Sekule found that the Prosecutor failed to sufficiently support the request.<sup>17</sup>

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<sup>10</sup> See *Loi n° 95-1 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991*, 2 January 1995; *Loi n° 96-432 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'États voisins*, 22 May 1996.

<sup>11</sup> Kabuga requested, *inter alia*, that the Investigating Chamber of the *Cour d'appel de Paris*: (i) declare the Mechanism's Arrest Warrant and Order for Transfer to be without foundation and cancel its effects; (ii) declare his detention to be arbitrary and order his immediate release; and (iii) alternatively, order an expert medical, psychological and psychiatric appraisal to be conducted to assess whether he is in a fit state of health to be transferred to Arusha and whether the health situation in Tanzania is capable of meeting his necessary medical requirements. See Case No. 2020/04110, *Avis sur la demande d'arrestation et de remise de Kabuga Félicien* of the *Cour d'appel de Paris*, Seventh Division, Fifth Investigating Chamber, 3 June 2020 ("*Cour d'appel* Decision of 3 June 2020"), pp. 3, 4.

<sup>12</sup> *Cour d'appel* Decision of 3 June 2020, pp. 11, 12. The Investigating Chamber found, in particular, that: (i) Kabuga's state of health had not been shown to be incompatible with detention, based on a prison doctor's health certificate issued on 19 May 2020; (ii) the request for an order for an expert medical report had already been dismissed and such appraisal would not provide information on the health situation in Tanzania; (iii) nothing establishes that, with regard to the request for transfer, Kabuga would be subjected to treatment endangering his health, as there is no medical contraindication militating against his detention or transfer; and (iv) the World Health Organization's report on the situation in Tanzania submitted by the Defence does not demonstrate a health risk based on precise, current and detailed evidence, that would call into question a decision for transfer. See *Cour d'appel* Decision of 3 June 2020, pp. 9, 10.

<sup>13</sup> *Arrêt n° 1802* of the *Cour de cassation*, Criminal Division, 30 September 2020 ("*Cour de cassation* Decision of 30 September 2020"). The *Cour de cassation* notably found that the Investigating Chamber had correctly justified its decision to reject the request for a dismissal of the Mechanism's Arrest Warrant and Order for Transfer based on the health situation in Tanzania and Kabuga's state of health. See *Cour de cassation* Decision of 30 September 2020, paras. 18-22.

<sup>14</sup> Urgent Motion for Amendment of Order for Transfer, 20 May 2020.

<sup>15</sup> Decision of 27 May 2020, para. 10.

<sup>16</sup> Decision of 27 May 2020, para. 6.

<sup>17</sup> Decision of 27 May 2020, paras. 7-9.

## II. SUBMISSIONS

5. Kabuga submits that his transfer to the Arusha Branch of the Mechanism would violate his fundamental rights and would be contrary to the interests of justice.<sup>18</sup> He argues that his transfer poses considerable risks to his health and safety due to his advanced age and numerous medical conditions that require comprehensive, multi-disciplinary and intensive care<sup>19</sup> and stresses, in particular, the risks associated with air travel.<sup>20</sup> Kabuga's claims about his medical conditions rely on a report prepared by a medical expert commissioned by his Defence in late September 2020 and submitted on 1 October 2020,<sup>21</sup> and on a medical certificate issued by the same Defence medical expert on 14 October 2020.<sup>22</sup> Kabuga requests that I transfer him to The Hague Branch of the Mechanism and appoint independent medical experts to carry out the necessary examinations and answer questions regarding his health and ability to travel.<sup>23</sup>

6. Kabuga further argues that his particular circumstances are exacerbated by the COVID-19 global pandemic.<sup>24</sup> He contends that he would not be safe or adequately cared for in Arusha because the Government of Tanzania has: (i) refused to cooperate with international health organizations; (ii) stopped giving official reports on COVID-19 cases since early May; and (iii) indicated that COVID-19 is no longer present in Tanzania despite credible claims and uncontested circumstances undermining this position.<sup>25</sup>

7. Kabuga also asserts that, because his family lives in Europe, his transfer to Arusha would violate his right to family life as reflected in Article 12 of the Universal Declaration of Human Rights and several regional human rights treaties.<sup>26</sup>

8. The Prosecution supports Kabuga's transfer to the Hague Branch of the Mechanism, at least initially, and argues that an independent medical examination should be conducted to determine if

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<sup>18</sup> Motion, paras. 17, 41, 42. Kabuga asserts that he has standing to file the Motion, even though he is not yet in the Mechanism's custody. *See* Motion, paras. 11-15.

<sup>19</sup> Motion, paras. 18-23, 41, 42.

<sup>20</sup> Motion, para. 22; Defence Submission, paras. 14, 15 17, Annex A, Registry pagination ("RP.") 2/105 BIS-1/105 BIS.

<sup>21</sup> Motion, paras. 18-22, Annex A, RP. 14/61 BIS-1/61 BIS; Defence Submission, paras. 20-23.

<sup>22</sup> Defence Submission, paras. 14, 15, Annex A, RP. 2/105 BIS-1/105 BIS.

<sup>23</sup> Defence Submission, paras. 16, 17, 24-29. Kabuga submits, in this regard, that the medical evaluations should not be conducted by the doctors from the medical centers at the detention facilities who are not specialists but by experts appointed from a list submitted by the parties. *See* Defence Submission, paras. 29-31.

<sup>24</sup> Motion, paras. 24-35, 41.

<sup>25</sup> Motion, paras. 25-33. Kabuga contends that the appropriate international organizations should be questioned on this matter. *See* Defence Submission, para. 34.

<sup>26</sup> Motion, paras. 36-40. Kabuga relies on case law from the European Court of Human Rights for the proposition that detained persons do not lose their right to family life and that detaining an individual so far away from his or her family so that visits are made very difficult or even impossible may in some circumstances amount to interference with that right. *See* Motion, para. 38 and references cited therein.

his state of health would be compatible with transfer to and detention at the Arusha Branch of the Mechanism.<sup>27</sup> It submits that the COVID-19 pandemic is an additional reason for an independent medical examination prior to an intercontinental flight.<sup>28</sup> However, the Prosecution disputes that Kabuga's right to family life would be violated by his transfer to the Arusha Branch of the Mechanism in view of regulations allowing visits and communication with detainees there.<sup>29</sup>

9. The Registrar equally supports Kabuga's temporary transfer to the Hague Branch of the Mechanism to allow the Mechanism to review Kabuga's medical file and conduct its own assessment as to his fitness to travel to Arusha.<sup>30</sup> The Registry, notwithstanding repeated requests, has not yet received Kabuga's medical file from the French authorities,<sup>31</sup> and the Medical Officers at both branches have concluded that neither is able to come to a fully informed or balanced conclusion as to, *inter alia*, Kabuga's fitness to travel to Arusha based on the medical report commissioned by the Defence.<sup>32</sup> The Registrar notes that the Medical Officer at the Arusha Branch recommends that Kabuga be transferred to the Hague Branch to allow for an informed conclusion regarding Kabuga's fitness to travel to Arusha.<sup>33</sup>

10. In response to my Order for Submissions, the Registrar further provides the following information: (i) the conditions of detention at the United Nations Detention Unit ("UNDU") in The Hague and the UNDF in Arusha (collectively, "Detention Facilities") comply with the highest international standards for the treatment of detainees and both Detention Facilities benefit from well-equipped medical facilities;<sup>34</sup> (ii) both UNDF and UNDU detainees have access to a number of hospitals and to certain medical services in or around Arusha and The Hague,<sup>35</sup> including for treating the effects of COVID-19 in elderly patients with underlying health problems;<sup>36</sup> and (iii) the prevalence of COVID-19 in Arusha and in The Hague is difficult to compare, in the absence of

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<sup>27</sup> Prosecution Response, paras. 1, 3, 4, 6. I further note that the Prosecution does not dispute that Kabuga has standing to bring the Motion.

<sup>28</sup> Prosecution Response, para. 5.

<sup>29</sup> Prosecution Response, n. 3.

<sup>30</sup> Registrar Submission of 8 October 2020, para. 16; Registrar Submission of 16 October 2020, paras. 31, 32.

<sup>31</sup> Registrar Submission of 8 October 2020, para. 14; Registrar Submission of 16 October 2020, para. 30.

<sup>32</sup> Registrar Submission of 8 October 2020, para. 15; Registrar Submission of 16 October 2020, paras. 14, 29, 32.

<sup>33</sup> Registrar Submission of 8 October 2020, para. 15.

<sup>34</sup> Registrar Submission of 16 October 2020, paras. 4-10. The Registrar specifies that, in the context of the global COVID-19 pandemic, a number of preventative measures and protocols have been implemented at both Detention Facilities. *See* Registrar Submission of 16 October 2020, paras. 11-13. *See also* Registrar Submission of 16 October 2020, paras. 33, 34.

<sup>35</sup> Registrar Submission of 16 October 2020, paras. 15-19.

<sup>36</sup> Registrar Submission of 16 October 2020, paras. 23-28.



quantitative data in Tanzania, but it is well established that it is high and increasing in the Netherlands.<sup>37</sup>

### III. DISCUSSION

11. Article 18(1) of the Statute and Rule 55 of the Rules of Procedure and Evidence (“Rules”) mandate judges conducting a case to ensure it is fair and expeditious and in conformity with the Rules and to issue such orders, warrants, and transfer orders as may be necessary for the preparation or conduct of the trial. This decision addresses a single narrow issue: whether the Arrest Warrant and Order of Transfer should be amended to allow for Kabuga’s temporary transfer to The Hague for further medical assessment. All other issues raised by Kabuga, including the duration of any transfer and specific specialists to be consulted, are premature. Although the present issue is narrow, it is weighty. As Judge Sekule observed, the Mechanism’s Statute and Rules envision that individuals indicted by the ICTR be transferred and tried at the Arusha Branch of the Mechanism.<sup>38</sup>

12. Nonetheless, the Rules do provide for the detention of an accused person outside of the Host State of the relevant branch in exceptional circumstances and allow a Trial Chamber to sit away from the relevant branch if it is in the interests of justice.<sup>39</sup> This occurred on occasion throughout the history of the ICTR where certain limited portions of proceedings were conducted at the International Criminal Tribunal for the former Yugoslavia requiring the temporary detention of an ICTR accused at the UNDU in The Hague.<sup>40</sup> In addition, though his initial appearance and guilty plea took place in Arusha, Michel Bagaragaza was exceptionally detained at the UNDU for large portions of his trial proceedings for security reasons owing to his cooperation with the Prosecution.<sup>41</sup>

13. I am mindful that Judge Sekule determined that the Prosecution’s application was unsupported and premature, but, in view of recent developments, there has been a significant shift in the nature and degree of information related to the risks associated with transferring Kabuga to Arusha on a long-haul flight.

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<sup>37</sup> Registrar Submission of 16 October 2020, paras. 20-22.

<sup>38</sup> See Article 3 of the Statute; Rules 57(E) and (G), 59(A), 64(A), and 67 of the Rules. See also Decision of 27 May 2020, para. 5 and references cited therein.

<sup>39</sup> See Rules 4 and 67 of the Rules.

<sup>40</sup> Decision of 27 May 2020, n. 15 (referring to appeals proceedings in the *Kamuhanda* and *Musema* cases).

<sup>41</sup> See *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-I, Order for Special Detention Measures, 13 August 2005, pp. 2, 3; *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-S, Sentencing Judgement, 17 November 2009, paras. 3, 7, 11.

14. The key questions at this stage relate to risks associated with inter-continental travel to Arusha and the Registry's inability to accurately assess Kabuga's medical condition at present. In relation to the first question, I note that transit from France to Tanzania would involve a journey of more than 11 hours of flight time including passage through three airports. Transit directly to The Hague is far simpler and more direct, involving several hours by road or an hour in the air. With the second question in mind, the Registrar and the medical staff at both branches require more information to make an informed assessment as to Kabuga's ability to travel and to be effectively cared for in Arusha and recommend his transfer to the Hague Branch of the Mechanism for a medical assessment.<sup>42</sup>

15. The undeniable implication of the submissions by the Registrar on the available medical material is that transfer to the Hague Branch of the Mechanism will pose far less risk to Kabuga than transfer to Arusha. The Registrar has made clear that neither he nor his medical officers are in a position to provide an informed assessment of Kabuga's medical condition or its compatibility with transfer to the Arusha Branch. A clear measure of deference must be accorded to this considered position. Accordingly, in view of the Registrar's position, I consider that there are exceptional circumstances and that it would be in the interests of justice to modify the Arrest Warrant and Order for Transfer and to order that Kabuga be transferred temporarily to the UNDU at the Hague Branch of the Mechanism for a detailed medical assessment.

16. This decision and current COVID-19 pandemic related protocols may have practical implications on the initial appearance in view of the need for Kabuga to quarantine for ten days on arrival and to undergo preliminary medical assessments.<sup>43</sup> As a result, this extraordinary situation could impact the date for the initial appearance until this process is completed. The Trial Chamber in close consultation with the Registrar and the parties will set the date and modalities for the initial appearance at the appropriate time following Kabuga's transfer into the custody of the Mechanism.

17. Finally, I consider it premature to order the exact modalities of any medical examinations to be conducted on Kabuga to determine whether and under what circumstances he may be safely transferred to the Arusha Branch of the Mechanism for trial. This is best left, in the first instance, to the sound discretion of the Registry's medical staff. The present submissions received on these points from Kabuga are dismissed.

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<sup>42</sup> See, e.g., Registrar Submission of 8 October 2020, paras. 15, 16; Registrar Submission of 16 October 2020, paras. 14,

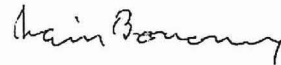
#### IV. DISPOSITION

18. For the foregoing reasons, I **HEREBY**:

- (i) **AMEND** the Arrest Warrant and Order for Transfer;
- (ii) **ORDER** that Kabuga be transferred to the UNDU at the Hague Branch of the Mechanism; and
- (iii) **INVITE** the President to modify Kabuga's conditions of detention to allow for his detention there.

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

Done this 21st day of October 2020,  
At Arusha,  
Tanzania



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Judge Iain Bonomy  
Single Judge

[Seal of the Mechanism]

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29, 31, 32.

<sup>43</sup> See, e.g., Registrar Submission of 16 October 2020, para. 13.





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