

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-T

Date: 8 September 2023

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Mustapha El Baaj
Judge Margaret M. deGuzman

Registrar: Mr. Abubacarr M. Tambaou

Decision of: 8 September 2023

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION IMPOSING AN INDEFINITE STAY
OF PROCEEDINGS**

Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Rashid S. Rashid
Mr. Rupert Elderkin

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit
Ms. Françoise Mathe

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

RECALLING that, on 6 June 2023, the Trial Chamber: (i) found, Judge El Baaj dissenting, that Mr. Félicien Kabuga is not fit for trial and that he is very unlikely to regain fitness in the future; (ii) maintained the temporary stay of proceedings pending the resolution of any appeal of this conclusion; and (iii) maintained a medical monitoring regime by a panel of independent experts;²

NOTING that, on 7 August 2023, the Appeals Chamber affirmed the determination that Mr. Kabuga is not fit to stand trial and is very unlikely to regain fitness in the future and, in view of the Trial Chamber’s organic familiarity with the case and the medical monitoring regime, remanded the matter to the Trial Chamber with the instruction to impose an indefinite stay of proceedings and determine the modalities thereof as well as expeditiously address the issue of Mr. Kabuga’s detention and consider appropriate modalities and conditions for his release;³

RECALLING that, on 18 August 2023, the Trial Chamber considered that, in determining the modalities of the indefinite stay of proceedings and expeditiously considering the issue of Mr. Kabuga’s release as instructed by the Appeals Chamber, it would benefit from an in-person hearing on these issues after the filing of the next medical monitoring report to be submitted by the panel of independent experts;⁴

NOTING the medical monitoring report filed by the panel of independent experts on 31 August 2023, in which the experts maintained their view that Mr. Kabuga lacks four capacities necessary for meaningful participation in a trial and that, on the balance of probabilities, his mental capacities will not improve to the extent that he could be fit for trial;⁵

NOTING that, on 6 September 2023, the Trial Chamber heard oral submissions from the Parties in relation to the key issues identified in the Appeal Decision of 7 August 2023 and on matters that

¹ See Order on Composition of Trial Chamber, 15 August 2023, p. 2. See also Order Assigning a Trial Chamber, 1 October 2020, p. 1; Order Replacing a Judge and Assigning a Reserve Judge, 26 August 2022, pp. 1, 2; Decision Under Rule 19(E), 10 January 2023, p. 1; Order Assigning a Reserve Judge, 16 January 2023, pp. 1, 2.

² Further Decision on Félicien Kabuga’s Fitness to Stand Trial, 6 June 2023 (“Decision of 6 June 2023”), paras. 39, 59.

³ See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-AR80.3, Decision on Appeals of Further Decision on Félicien Kabuga’s Fitness to Stand Trial, 7 August 2023 (“Appeal Decision of 7 August 2023”), paras. 48, 74-76, 79. See also Decision on Motions for Certification to Appeal the Further Decision on Félicien Kabuga’s Fitness to Stand Trial, 16 June 2023, p. 2; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-AR80.3, Order Assigning Appeals to a Bench of the Appeals Chamber, 23 June 2023, pp. 1, 2 and references cited therein.

⁴ Order Scheduling a Hearing, 18 August 2023, pp. 1, 2.

⁵ Registrar’s Submission in Relation to the “Decision on Félicien Kabuga’s Fitness to Stand Trial and to Be Transferred to and Detained in Arusha” of 13 June 2022 and the “Further Decision on Félicien Kabuga’s Fitness to Stand Trial” of 6 June 2023, 31 August 2023 (confidential, with confidential Annex), para. 6, Annex (“Joint Monitoring Report of 31 August 2023”).

were pending at the moment Mr. Kabuga was determined to be unfit for trial and ongoing proceedings were suspended;⁶

CONSIDERING that, while the Trial Chamber expeditiously considers the issue of Mr. Kabuga's provisional release pursuant to Rule 68 of the Rules of Procedure and Evidence,⁷ it is appropriate to give effect now to the instruction identified in the Appeal Decision of 7 August 2023 and to order an indefinite stay of proceedings in this case;

NOTING that, during the indefinite stay of the proceedings, Mr. Kabuga shall remain in detention at the United Nations Detention Unit ("UNDU") in accordance with Rules 59, 67, and 68(A),⁸ where he is closely monitored and well cared for,⁹ pending the resolution of the issue of his provisional release;

CONSIDERING FURTHER that, during the indefinite stay of proceedings, the medical monitoring regime by the panel of independent experts that was put in place in the Decision of 13 June 2022,¹⁰ as well as the medical reports received every two weeks from the Medical Officer of the UNDU,¹¹ shall remain in effect, and the Trial Chamber will continue to convene status conferences every 120 days pursuant to Rule 69 until Mr. Kabuga is released from the UNDU;¹²

NOTING, however, that, in relation to the medical reports received every two weeks, the Trial Chamber will consult with the Medical Officer of the UNDU regarding the current reporting regime

⁶ See Transcript ("T.") 6 September 2023 pp. 1-3.

⁷ See T. 6 September 2023 p. 19. Release prior to acquittal or termination of a case is only expressly contemplated in the Statute and Rules through provisional release under Rule 68.

⁸ Mr. Kabuga was arrested based on an international arrest warrant issued by the Mechanism on 29 April 2013, as amended by a decision of 21 October 2020 directing his transfer to the Hague branch, rather than the Arusha branch. See Warrant of Arrest and Order for Transfer Addressed to All States, 29 April 2013, pp. 1-3; Decision on Félicien Kabuga's Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020, paras. 2, 18. This arrest warrant is predicated on the confirmation of the amended indictment filed before the International Criminal Tribunal for Rwanda on 13 April 2011, which was further amended on 1 March 2021 pursuant to an order of the Trial Chamber. 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; Decision on Prosecution Motion to Amend the Indictment, 24 February 2021, para. 22; Prosecution's Second Amended Indictment, 1 March 2021 (public, with confidential Annex). The Rules mandate detention on remand once an accused is arrested and transferred to a relevant branch except on an order of a Chamber. See Rules 59, 67, and 68(A).

⁹ Joint Monitoring Report of 31 August 2023, Registry Pagination 5835, 5834. See also T. 6 September 2023 p. 2.

¹⁰ See Decision on Félicien Kabuga's Fitness to Stand Trial and to Be Transferred to and Detained in Arusha, 13 June 2022 ("Decision of 13 June 2022"), para. 62.

¹¹ See Order Following Initial Appearance, 25 November 2020, p. 3; T. 8 March 2023 pp. 5-11. See also Decision of 6 June 2023, para. 2.

¹² See also T. 6 September 2023 pp. 13, 14.

and, should any changes be recommended and following consultation with the Parties, a further order will be issued;¹³

NOTING FURTHER that the Prosecution requests that its expert be granted access to the Joint Monitoring Report of 31 August 2023 and to all future medical monitoring reports, which the Defence opposes, and that the Defence requests that its experts be granted access to such reports;¹⁴

CONSIDERING that the Trial Chamber has routinely granted requests of the Parties to share medical reports with their respective medical experts on a confidential basis, and that the Defence has not identified a sufficient basis that justifies taking a different approach at this time;¹⁵

FINDING, therefore, that the Parties may share the Joint Monitoring Report of 31 August 2023 with their respective experts on a confidential basis, as well as future medical monitoring reports, subject to any specific challenges a party may raise;

NOTING that, during the oral hearing of 6 September 2023, the Trial Chamber sought the views of the Parties in relation to motions that were pending at the time of the issuance of the Appeal Decision of 7 August 2023 – namely the joint motion for a site visit motion,¹⁶ the Prosecution’s Rule 110 motion¹⁷ and a Prosecution bar table motion¹⁸ – as well as any further submissions in connection with an outstanding confidential subpoena to a Prosecution witness¹⁹ and in relation to the Prosecution motion to release Witness KAB041 from his solemn declaration, which was filed on 8 August 2023;²⁰

CONSIDERING that the Parties primarily agree on how the aforementioned motions and Subpoena should be addressed at this stage and that it is appropriate to proceed accordingly;²¹

¹³ See also T. 6 September 2023 pp. 18, 19.

¹⁴ T. 6 September 2023 pp. 9-13.

¹⁵ See T. 6 September 2023 p. 13. See also Appeal Decision of 7 August 2023, para. 14, n. 62.

¹⁶ Joint Submission on Trial Calendar and Site Visit, 24 November 2022 (“Joint Site Visit Motion”). See also Joint Submission on Joint Proposal for Site Visit, 22 December 2022 (public, with confidential Annex); Further Submissions on the Joint Proposal for Site Visit, 20 April 2023 (public, with confidential Annex).

¹⁷ Prosecution Sixth Motion for the Admission of Evidence Pursuant to Rule 110: Kaiser Rizvi and Mathias Ruzindana, 3 May 2023 (“Rule 110 Motion”).

¹⁸ Prosecution First Motion for Admission of Documents from the Bar Table and for Judicial Notice of Authenticity, 26 May 2023 (public, with confidential Annexes A to C) (“Bar Table Motion”).

¹⁹ Decision on Prosecution Motion to Subpoena Witness KAB069 and to Hear His Testimony by Video-Conference and in Closed Session, 11 April 2023 (confidential) (“Subpoena”), p. 5.

²⁰ Prosecution Motion to Release Witness KAB041 from the Solemn Declaration, 8 August 2023 (“Motion with respect to Witness KAB041”). The examination-in-chief of Witness KAB041 commenced on 2 March 2023, but he did not complete his testimony. See T. 2 March 2023 p. 34. See also T. 8 March 2023 pp. 2, 8, 22, 30.

²¹ See T. 6 September 2023 pp. 3-9.

FINDING, therefore, that: (i) the Joint Site Visit Motion and the Rule 110 Motion and Bar Table Motion are dismissed without prejudice; (ii) the Prosecution's Motion with respect to Witness KAB041 is granted in so far as the Trial Chamber declares his testimony complete, subject to the witness being recalled if and when the trial resumes; and (iii) the Trial Chamber will vacate the confidential Subpoena in a separate decision;

FINDING FURTHER that, during the indefinite stay of the proceedings, the Trial Chamber will no longer consider motions of an evidentiary nature that relate to the charges against Mr. Kabuga;²²

NOTING that, during the oral hearing of 6 September 2023, the Defence indicated that it had commenced implementing measures in specific prospective States into which Mr. Kabuga may seek to be provisionally released to ensure that he would be adequately cared for,²³ and it requested that the Trial Chamber issue an order for the Registry to fully cooperate with the Defence in order to assist them with applications to the national domestic authorities identified during the hearing;²⁴

NOTING the submission from the Registry that any assistance provided by the Registry to the Defence in relation to assisting in their efforts to establish the necessary conditions for release to national jurisdictions can only take place as a result of a decision from the Trial Chamber;²⁵

CONSIDERING that, under the present circumstances and bearing in mind the importance of Mr. Kabuga's liberty interests, the most expeditious manner to address the issue of Mr. Kabuga's release consistent with the Appeal Decision of 7 August 2023 is to provide support for the Defence's efforts to secure Mr. Kabuga's provisional release into the States it has already identified and to other States that the Defence may identify in the future;²⁶

CONSIDERING FURTHER that, in order to give full effect to the Appeal Decision of 7 August 2023, the Trial Chamber may seek submissions as to the appropriateness of any State to which Mr. Kabuga may be provisionally released;

FINDING that it is necessary to order the Registry to engage with the Defence and use its good offices to provide all possible support in facilitating contact and communication between the

²² See also *Prosecutor v. Momir Talić*, Case No. IT-99-36/1-T, Decision on Motions, 26 November 2002, p. 4 (wherein the trial chamber stated that it was not prepared to accept any other motions not related to the issue whether to continue or re-start the case).

²³ See T. 6 September 2023 pp. 24-32.

²⁴ See T. 6 September 2023 pp. 25-29. See also T. 6 September 2023 p. 38.

²⁵ See T. 6 September 2023 p. 40.

²⁶ See T. 6 September 2023 p. 31 (wherein the Defence stated that, if it is not possible for Mr. Kabuga to be provisionally released in the States it has already identified, it will suggest other possibilities to the Trial Chamber).

Defence and the appropriate authorities of any national jurisdictions in which Mr. Kabuga seeks provisional release;

FOR THE FOREGOING REASONS,

HEREBY STAYS the present proceedings indefinitely;

ORDERS that, during the indefinite stay of proceedings, Mr. Kabuga shall remain in detention at the UNDU, pending the resolution of the issue of his provisional release;

MAINTAINS the medical monitoring regime by the panel of independent experts, with the next report being due 180 days from the report filed on 31 August 2023, as well as the medical monitoring regime from the Medical Officer of the UNDU, and that status conferences will continue every 120 days pursuant to Rule 69 until Mr. Kabuga is released from the UNDU;

AUTHORIZES the Parties to share the Joint Monitoring Report of 31 August 2023 and all future medical monitoring reports on a confidential basis with their respective experts;

DISMISSES the Joint Site Visit Motion and the Prosecution's Rule 110 Motion and Bar Table Motion without prejudice;

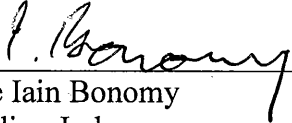
GRANTS the Prosecution's Motion with respect to Witness KAB041 in so far as the Trial Chamber declares his testimony complete, subject to the witness being recalled if and when the trial resumes;

ORDERS the Registry to engage with the Defence and use its good offices to provide all possible support in facilitating contact and communication between the Defence and the appropriate authorities of any national jurisdictions in which Mr. Kabuga seeks provisional release; and

REMAINS seized of the issue of Mr. Kabuga's provisional release.

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

Done this 8th day of September 2023,
At The Hague,
The Netherlands



Judge Iain Bonomy
Presiding Judge

[Seal of the Mechanism]



I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

To/ À :	IRMCT Registry/ <i>Greffe du MIFRTP</i>	<input checked="" type="checkbox"/> Arusha/ <i>Arusha</i>	<input type="checkbox"/> The Hague/ <i>La Haye</i>
From/ De :	<input type="checkbox"/> President / <i>Président</i>	<input checked="" type="checkbox"/> Chambers / <i>Chambre</i>	<input type="checkbox"/> Prosecution/ <i>Bureau du Procureur</i>
	<input type="checkbox"/> Registrar / <i>Greffier</i>	<input type="checkbox"/> Other/ <i>Autre</i>	<input type="checkbox"/> Defence / <i>Défense</i>
Case Name/ Affaire :	Prosecutor v. Félicien Kabuga	Case Number/ Affaire n° :	MICT-13-38-T
Date Created/ Daté du :	8 September 2023	Date transmitted/ Transmis le :	8 September 2023
		No. of Pages/ Nombre de pages :	6
Original Language / Langue de l'original :	<input checked="" type="checkbox"/> English/ <i>Anglais</i>	<input type="checkbox"/> French/ <i>Français</i>	<input type="checkbox"/> Kinyarwanda / <i>B/C/S</i>
			<input type="checkbox"/> Other/Autre (specify/préciser) :
Title of Document/ Titre du document :	Decision Imposing an Indefinite Stay of Proceedings		
Classification Level/ Catégories de classification :	<input checked="" type="checkbox"/> Unclassified/ <i>Non classifié</i>	<input type="checkbox"/> Ex Parte Defence excluded/ <i>Défense exclue</i>	<input type="checkbox"/> Ex Parte Prosecution excluded/ <i>Bureau du Procureur exclu</i>
	<input type="checkbox"/> Confidential/ <i>Confidentiel</i>	<input type="checkbox"/> Ex Parte R86(H) applicant excluded/ <i>Art. 86 H) requérant exclu</i>	<input type="checkbox"/> Ex Parte Amicus Curiae excluded/ <i>Amicus curiae exclu</i>
	<input type="checkbox"/> Strictly Confidential/ <i>Strictement confidentiel</i>	<input type="checkbox"/> Ex Parte other exclusion/ <i>autre(s) partie(s) exclue(s)</i> (specify/préciser) :	
Document type/ Type de document :			
<input type="checkbox"/> Motion/ <i>Requête</i>	<input type="checkbox"/> Judgement/ <i>Jugement/Arrêt</i>	<input type="checkbox"/> Book of Authorities/ <i>Recueil de sources</i>	<input type="checkbox"/> Warrant/ <i>Mandat</i>
<input checked="" type="checkbox"/> Decision/ <i>Décision</i>	<input type="checkbox"/> Submission from parties/ <i>Écritures déposées par des parties</i>	<input type="checkbox"/> Affidavit/ <i>Déclaration sous serment</i>	<input type="checkbox"/> Notice of Appeal/ <i>Acte d'appel</i>
<input type="checkbox"/> Order/ <i>Ordonnance</i>	<input type="checkbox"/> Submission from non-parties/ <i>Écritures déposées par des tiers</i>	<input type="checkbox"/> Indictment/ <i>Acte d'accusation</i>	

II - TRANSLATION STATUS ON THE FILING DATE/ ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT

<input type="checkbox"/> Translation not required/ <i>La traduction n'est pas requise</i>
<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and requests the Registry to translate/ <i>La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction :</i> (Word version of the document is attached/ <i>La version Word est jointe</i>)
<input type="checkbox"/> English/ <i>Anglais</i> <input checked="" type="checkbox"/> French/ <i>Français</i> <input checked="" type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/Autre(specify/préciser) :
<input type="checkbox"/> Filing Party hereby submits both the original and the translated version for filing, as follows/ <i>La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :</i>
Original/ Original en <input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda / <i>B/C/S</i> <input type="checkbox"/> Other/Autre (specify/préciser) :
Translation/ Traduction en <input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda / <i>B/C/S</i> <input type="checkbox"/> Other/Autre (specify/préciser) :
<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s)/ <i>La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :</i>
<input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/Autre (specify/préciser) :

Send completed transmission sheet to/ *Veuillez soumettre cette fiche dûment remplie à :*

JudicialFilingsArusha@un.org OR/ *OU* JudicialFilingsHague@un.org

Rev: August 2019/ *Rév. : Août 2019*