

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT

Date: 1 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

Decision of:

1 April 2021

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON MATTERS RELATED TO
FÉLICIEN KABUGA'S REPRESENTATION**

Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

1. The Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively)¹ is seised of Defence motions related to the assignment, withdrawal, and remuneration of Mr. Emmanuel Altit, Mr. Félicien Kabuga’s assigned counsel under the Mechanism’s legal aid scheme. Given the overlapping nature of the litigation, the Trial Chamber has decided to adjudicate the motions collectively.

I. BACKGROUND

2. The facts relating to the arrest of Kabuga on 16 May 2020 and his transfer into the custody of the Mechanism on 26 October 2020 are set out in detail in prior decisions and need not be detailed here.² Importantly, however, the Registrar appointed Mr. Altit as Kabuga’s Duty Counsel on 2 October 2020, pursuant to Article 16(H) of the Directive on the Assignment of Defence Counsel,³ and Mr. Altit represented him during his initial appearance on 11 November 2020⁴ and continued to do so thereafter.⁵

3. On 3 January 2021, Mr. Altit requested an order for the Registrar, pursuant to Article 11 of the Directive, to assign him as Counsel for Kabuga as of 12 November 2020.⁶ On 6 January 2021, the Registrar temporarily assigned Mr. Altit as Counsel to represent Kabuga as of 6 January 2021 and for not more than 90 days pending the Registry’s ongoing assessment as to Kabuga’s ability to remunerate counsel.⁷ On 8 January 2021, Mr. Altit filed a further submission reaffirming his request to be appointed under Article 11 of the Directive as of 12 November 2020,⁸ to which the Registrar responded with a submission filed on 13 January 2021.⁹

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

² See, e.g., Preliminary Order Regarding Medical Examination of Félicien Kabuga, 29 October 2020, p. 1; Order Scheduling an Initial Appearance, 8 November 2020, pp. 1, 2.

³ See Decision, 2 October 2020, Registry pagination (“RP.”) 35, 34. See also Directive on the Assignment of Defence Counsel, MICT/5, 14 November 2012 (“Directive”).

⁴ Transcript 11 November 2020 p. 2.

⁵ See, e.g., Further Decision Concerning In-Person Visits Between Félicien Kabuga and His Defence Team, 30 November 2020, pp. 1-4.

⁶ Request from Defence for Félicien Kabuga to Benefit from Provisions under Article 11 of the “Directive on the Assignment of Defence Counsel” to Ensure Fairness of the Proceedings, 8 January 2021 (original French version filed on 3 January 2021; confidential, with confidential annexes A to E) (“Motion on Assignment”), p. 10.

⁷ See Decision, 6 January 2021 (public, with confidential and *ex parte* Annex) (“Registrar’s Decision of 6 January 2021”), RP. 492-478.

⁸ Notice that the Defence Maintains the Requests from its Submission of 3 January 2021 Transmitted to the Pre-Trial Judge in view of the Registrar’s “Decision” of 6 January 2021 Concerning Legal Aid, 14 January 2021 (original French version filed on 8 January 2021; confidential and *ex parte*), paras. 4-21. In particular, Mr. Altit argues that the Registrar improperly imputed responsibility to the Defence for the time taken to decide on granting legal aid and deprived the Defence of any remuneration for the work done between 12 November 2020 and 6 January 2021, thereby impacting on the fairness of the proceedings.

⁹ Registrar’s Submission Regarding the Defence Filings of 3 and 8 January 2021, 13 January 2021 (confidential and *ex parte*), paras. 5-8. The Registrar reiterates that the burden of proof is on the applicant for legal aid, that any inquiry into

4. Subsequently, on 21 January 2021, Mr. Altit filed a motion requesting that the Trial Chamber order the Registrar to withdraw his assignment to represent Kabuga pursuant to Rule 43(G) of the Rules of Procedure and Evidence (“Rules”) based on the existence of exceptional circumstances (“Motion to Withdraw”).¹⁰ In support of this request, the Motion to Withdraw highlights the divergent views between Kabuga and the Defence team as to how the case should be managed.¹¹ It follows from the Motion to Withdraw that Kabuga and his family are asking Mr. Altit to take instructions directly from members of Kabuga’s family and allow them access to the case file.¹² Mr. Altit submits that, in his view, only Kabuga should give him instructions and that sharing information with Kabuga’s family may eliminate any privilege afforded to attorney-client communications as well as violate judicially ordered confidentiality measures in place.¹³

5. On 29 January 2021, the Pre-Trial Judge¹⁴ issued an order seeking submissions from the Registrar following additional consultations with Kabuga, as appropriate, on the following issues: (i) does Kabuga wish to have Mr. Altit replaced; (ii) has suitable alternative counsel been identified, either by Kabuga and/or the Registry, bearing in mind the requirements for assignment of counsel under the Rules and the Directive; and (iii) could assignment of new counsel occur immediately upon any order withdrawing Mr. Altit’s assignment.¹⁵ The Order of 29 January 2021 also indicated that, as counsel assigned under the Mechanism’s legal aid program, Mr. Altit continues to serve as Kabuga’s counsel unless and until his representation is terminated or withdrawn *and* replacement counsel has been assigned by the Registrar and that Mr. Altit has appropriately continued to represent Kabuga and indicated his willingness to continue to do so in conformity with his professional responsibility while this matter is before the Trial Chamber.¹⁶

6. The Registrar filed responsive submissions on 8 February 2021 confirming that Kabuga wished to have Mr. Altit replaced, that he has identified a replacement counsel, and that this counsel meets the relevant requirements for assignment and is immediately available.¹⁷

the means of the Accused requires the cooperation of the Defence, and that the request for Counsel to be assigned with retroactive effect would have no impact upon remuneration, which is based on a lump sum approach.

¹⁰ Request Pursuant to Rule 43(G) of the Rules of Procedure and Evidence, 25 January 2021 (original French version filed on 21 January 2021; confidential and *ex parte*, with confidential redacted version filed on 25 January 2021), p. 2.

¹¹ Motion to Withdraw, para. 3.

¹² Motion to Withdraw, para. 4.

¹³ Motion to Withdraw, para. 5.

¹⁴ Order Assigning a Pre-Trial Judge, 29 October 2020, p. 1.

¹⁵ Order for Submissions Related to Representation, 29 January 2021 (“Order of 29 January 2021”), p. 2.

¹⁶ Order of 29 January 2021, p. 1.

¹⁷ Registrar’s Submission in Relation to the “Order for Submissions Related to Representation” of 29 January 2021, 8 February 2021 (“Registrar’s Submission of 8 February 2021”), para. 3.

7. On 4 March 2021, the Pre-Trial Judge requested further submissions concerning the Motion to Withdraw and asked the Registrar to, *inter alia*, identify the proposed replacement counsel for Kabuga and discuss whether this counsel is presently prepared to uphold his or her professional and ethical obligations in light of the specific circumstances underlying what appears on the face of the motion to be the cause of the unilateral breakdown between Kabuga and his assigned Counsel.¹⁸

8. The Registrar filed further submissions on 10 March 2021 identifying Mr. Peter Robinson as the replacement counsel referred to in the Registrar's Submission of 8 February 2021.¹⁹ The Registrar's submission indicates that the Motion to Withdraw raises several issues that, if a counsel acted as instructed by Kabuga and his family, this situation would contravene Articles 8(B)(iii), 8(C), 9(A), 13(A), and 35 of the Code of Professional Conduct.²⁰ The submission further contends that Mr. Robinson has signed an undertaking to represent Kabuga that obliges him to, at all times, comply with the Statute and Rules, the Rules of Detention, the Code of Professional Conduct, and any other applicable law as well as maintain the confidentiality of all material entrusted to him, prohibiting disclosure of such information and materials unless expressly authorized by the Mechanism.²¹ The Registrar submits that there is no information which suggests that Mr. Robinson would not abide by his professional and ethical obligations as set out in the undertaking in light of the specific circumstances of this case.²²

9. In addition to the litigation concerning assignment and withdrawal, on 17 February 2021, the Defence filed a request for an order to the Registrar to pay the Defence as soon as possible for the amount due for the representation from 12 November 2020 to 11 February 2021 as part of the "phase two" of the pre-trial stage.²³ The Registrar responded seeking dismissal of the request on

¹⁸ Order for Further Submissions Related to Representation, 4 March 2021, p. 2.

¹⁹ Registrar's Submission in Relation to the "Order for Further Submissions Related to Representation" of 4 March 2021, 10 March 2021 (confidential and *ex parte*, with confidential and *ex parte* Annex) ("Registrar's Submission of 10 March 2021"), para. 9.

²⁰ Registrar's Submission of 10 March 2021, paras. 6-8. *See also* Code of Professional Conduct for Defence Counsel Appearing before the Mechanism, MICT/6, 14 November 2012 ("Code of Professional Conduct").

²¹ Registrar's Submission of 10 March 2021, paras. 9, 10. *See also* Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Mechanism or Otherwise Detained on the Authority of the Mechanism, adopted on 5 November 2018 ("Rules of Detention").

²² Registrar's Submission of 10 March 2021, para. 11.

²³ Request for Remuneration of the Defence Team for Work Completed During Phase Two of the Pre-Trial Stage, in accordance with Legal Aid Policy, 24 February 2021 (original French version filed on 17 February 2021; confidential and *ex parte*, with confidential and *ex parte* annexes A and B) ("Motion on Remuneration"), p. 8. The Defence argues, in particular, that: (i) the Registrar's Decision of 6 January 2021 *ipso facto* acknowledged that the Defence was being paid under legal aid; (ii) the fact that the Registry is waiting for a final decision on the future representation of Kabuga does not change the fact that he has effectively been represented between November 2020 and January 2021 by his Counsel – who was responsible for the case and had to continue to represent Kabuga's interests in the proceedings until replaced; and (iii) the work of the Defence team entails remuneration under the legal aid policy as a lump sum covering the 90 days that correspond to "phase two" of the pre-trial stage, which began on the day after the initial appearance hearing. *See* Motion on Remuneration, paras. 16, 24, 25.

24 February 2021, arguing that the motion is inadmissible before the Trial Chamber and instead must be submitted to the President as required under the Directive.²⁴

10. The Trial Chamber assesses the Motion to Withdraw as a threshold matter, as the decision related to it impacts the linked disputes arising in the Motion on Appointment and Motion on Remuneration.

II. DISCUSSION

11. Rule 43(G) of the Rules provides that under exceptional circumstances, at the request of the accused or his counsel, a Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.²⁵ It follows from binding jurisprudence that exceptional circumstances normally do not exist where the counsel acts in accordance with his or her professional and ethical responsibilities and that mere divergence of Defence strategy cannot justify a loss of trust in the counsel's abilities or commitment to the case warranting withdrawal.²⁶

12. The Trial Chamber finds that the Motion to Withdraw fails to demonstrate the existence of exceptional circumstances justifying an order for the Registrar to withdraw Mr. Altit and his Defence team. Mr. Altit's present refusal to take instructions from Kabuga's family, discuss Defence strategy with them, and share the Defence case file is in line with his professional and ethical obligations,²⁷ as well as judicial decisions and orders rendering aspects of the case file

²⁴ Registrar's Submission in Relation to the "*Requête afin que l'équipe de Défense soit rémunérée pour le travail qu'elle a accompli pendant l'étape 2 de la phase préalable au procès, conformément à la politique d'aide juridiction[n]nelle*" of 17 February 2021, 24 February 2021 (confidential and *ex parte*), paras. 2-4.

²⁵ Rule 43(G) of the Rules confers the authority to withdraw a counsel's assignment on the Trial Chamber while the Directive provides a parallel authority with the Registrar, who may, in the interests of justice or exceptional circumstances, withdraw the assignment of counsel at the request of, *inter alia*, counsel. See Directive, Article 21(A).

²⁶ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006 ("*Nahimana et al.* Decision of 23 November 2006"), para. 13 ("[A]n accused's refusal to cooperate with his lawyers does not constitute an exceptional circumstance warranting the [...] withdrawal of assigned counsel. More precisely, an accused does not have the right to unilaterally destroy the trust between himself and his counsel, or to claim a breakdown in communication through unilateral actions, in the hope that such actions will result in the withdrawal of his counsel [...]. A lack of trust in counsel based on disagreements in approach to one's defence strategy is distinguishable from a lack of trust due to a breach by counsel in fulfilling his professional and ethical responsibilities in the course of representation. Thus, a divergence of opinion as to the defence strategy cannot in itself justify that there is a loss of trust in the counsel's abilities or commitment to the case.") (internal citations omitted). See also *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007, paras. 14, 20, 21; *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, 7 November 2003 ("*Blagojević* Decision of 7 November 2003"), paras. 25-31, 33, 49-51 (upholding that alleged claims of lack of trust must be objectively established and that "an accused does not have the right to unilaterally destroy the trust between himself and his counsel").

²⁷ See, e.g., Code of Professional Conduct, Articles 8(B)(iii) and 13(A).

confidential with respect to third parties and the public. Kabuga's family members have no standing in this proceeding and, should they seek to assert it, the Mechanism's legal aid scheme does not allow counsel assigned by the Mechanism for an accused to act on the family's behalf as well.²⁸ Any possible breakdown between Kabuga and Mr. Altit on this basis can only at this stage be viewed as unilateral and does not normally suffice as a basis for withdrawal. Mr. Altit is encouraged, based on this decision, to make his best efforts to rebuild any trust that was lost based on the misunderstanding of these extant ethical obligations.

13. Furthermore, this case is at a sensitive stage in the pre-trial proceedings where continuity in representation is paramount to the fair and expeditious continuation of the case. As observed previously, Mr. Altit has continued to effectively represent Kabuga notwithstanding the issues surrounding the litigation related to Mr. Altit's remuneration, appointment, and possible withdrawal.²⁹ The briefing for Defence preliminary motions under Rule 79 of the Rules is ongoing.³⁰ Mr. Altit has submitted filings for the appointment of independent medical experts to evaluate Kabuga's fitness for trial,³¹ an issue that is complex and evolving.³² Mr. Altit has also filed a request for access to confidential information in related cases to facilitate pre-trial investigations and Defence preparations.³³

14. That Kabuga has indicated that he wants to change counsel and has identified a qualified replacement counsel are not dispositive. The right to legal assistance financed by the Mechanism does not confer the right to counsel of one's choosing³⁴ and, while some weight is accorded to the

²⁸ Cf. *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion for Continuation of the Appellate Proceedings, 29 June 2010, p. 2 (considering that a family member does not qualify as a party to any proceedings before the International Criminal Tribunal for the former Yugoslavia and that he cannot be represented by counsel assigned to the deceased appellant).

²⁹ See, e.g., Order of 29 January 2021, p. 1.

³⁰ See *Requête déposée par la Défense sur la base de l'Article 79 du Règlement de procédure et de preuve*, 29 March 2021.

³¹ See 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 5 February 2021).

³² See, e.g., Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 17 March 2021 (public, with confidential Annex), Annex, RP. 1142, 1141; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 31 March 2021 (public, with confidential Annex), Annex, RP. 1194, 1193. Indeed, Mr. Altit has made issues surrounding Kabuga's health and the medical reporting presently in place a central component of recent submissions before the Trial Chamber in relation to the status conference conducted by way of written procedure. See 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), paras. 12-33.

³³ See 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).

³⁴ See *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001, para. 61 ("The right to choose counsel applies only to those accused who can financially bear the costs of counsel. In this connection the Appeals Chamber recalls its findings in *Kambanda*: 'The Appeals Chamber refers [...] to the reasoning of Trial Chamber I in the *Ntakirutimana* case and concludes, in the light of a textual and systematic interpretation of the

accused's preference, this may be overridden if it is in the interests of justice to do so.³⁵ Right now, it is in the interests of justice to do so. In this context, withdrawing the assignment of Mr. Altit now would be contrary to Kabuga's interests as well as to the interests of a fair and expeditious proceeding. The Trial Chamber will continue to follow this situation, and it will revisit this issue if indeed it is necessary and appropriate to ensure Kabuga's best interests. At this stage, however, in the Trial Chamber's view, retaining Mr. Altit is in Kabuga's best interests.

15. Moreover, Rule 46 of the Rules provides that a Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a Counsel to represent the interests of the accused. Bearing the specific circumstances of this case, as well as the fact that Mr. Altit's temporary assignment is set to expire in the midst of considerable and fundamental litigation at the pre-trial stage of this case, the Trial Chamber finds that it is in the interests of justice to order the Registrar to assign Mr. Altit as Kabuga's counsel under the Mechanism's legal aid scheme until further order. As noted above, the decision may be revisited based on new information or circumstances that warrant it and in order to prevent injustice and is without prejudice to any future determination that Kabuga has the means to pay for this representation.

16. This decision necessarily impacts related litigation concerning Mr. Altit's appointment as well as his remuneration request, which themselves are inextricably linked and are focused on obtaining compensation for the work Mr. Altit and his legal team have engaged in on Kabuga's behalf since his appointment as duty counsel. In this respect, the Trial Chamber observes that it follows from the Mechanism's Remuneration Policy that, if a counsel assigned for the initial appearance continues to represent the accused beyond the plea, then "phase two" of the payment of the costs related to representation commences from the day after the plea is entered.³⁶

17. Mr. Altit has indeed continued to represent Kabuga since the plea, and he and his team should be compensated for the work they have done, subject to their compliance with the relevant policies and regulations regarding remuneration within the Mechanism's legal aid scheme. However, in view of the decisions taken above, the fundamental change in circumstances from the initial filing of the Motion on Assignment and the Motion on Remuneration has rendered them

provisions of the Statute and the Rules, read in conjunction with the right to choose one's counsel relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel."").

³⁵ Cf. *Nahimana et al.* Decision of 23 November 2006, para. 10 and references cited therein; *Blagojević* Decision of 7 November 2003, para. 22.

³⁶ See Remuneration Policy for Persons Representing Indigent Accused in Pre-Trial Proceedings before the International Residual Mechanism for Criminal Tribunals, adopted on 22 March 2016 and revised on 4 January 2019, para. 23.

moot. The new circumstances demand renewed communication between Mr. Altit and the Registry to ensure that the Defence is appropriately compensated for the work that has been done. The Trial Chamber will continue to monitor this situation, and, if a solution is not found, then recourse may be made through the appropriate channels, including the Trial Chamber if the circumstances allow it.

III. DISPOSITION

18. In light of the foregoing, the Trial Chamber:

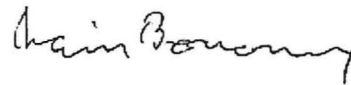
DENIES the Motion to Withdraw;

INSTRUCTS the Registrar to appoint Mr. Altit as Kabuga's counsel under the Mechanism's legal aid scheme until further order; and

DISMISSES the Motion on Assignment and the Motion on Remuneration without prejudice.

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

Done this 1st day of April 2021,
At Arusha,
Tanzania



Judge Iain Bonomy
Presiding Judge

[Seal of the Mechanism]



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