

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-T

Date: 29 October 2024

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Graciela Gatti Santana, President

Registrar: Mr. Abubacarr M. Tambadou

Decision of: 29 October 2024

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON FÉLICIEN KABUGA'S APPLICATION
FOR MODIFICATION OF CONDITIONS OF DETENTION**

The Office of the Prosecutor:

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

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

Government of the Kingdom of the Netherlands

I, GRACIELA GATTI SANTANA, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively);

RECALLING that Mr. Félicien Kabuga (“Kabuga”) is charged with genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, as well as persecution, extermination, and murder as crimes against humanity;¹

RECALLING that the proceedings against Kabuga were indefinitely stayed on 8 September 2023 following the affirmation of the Trial Chamber’s decision that he was not fit to stand trial and very unlikely to regain fitness in the future;²

RECALLING that, pending the resolution of the issue of his liberation on provisional release, Kabuga has remained in detention at the United Nations Detention Unit (“UNDU”) in The Hague, Kingdom of the Netherlands (“Netherlands”);³

RECALLING further that the Trial Chamber has since received regular reports from the Defence regarding its progress in trying to identify a State of provisional release,⁴ and issued confidential orders and decisions in relation to Kabuga’s requests for relief addressed to different States, but that thus far no State has accepted him onto its territory as a provisionally released accused;⁵

BEING SEISED OF an application filed confidentially by Kabuga on 25 July 2024,⁶ wherein he seeks, pursuant to Rule 67 of the Rules of Procedure and Evidence of the Mechanism (“Rules”), a modification of his conditions of detention and requests to be detained in a “safe house” in The Hague, while waiting for a State to agree to accept him within the framework of his provisional release, and to benefit from a new detention regime;⁷

¹ Prosecution’s Second Amended Indictment, 1 March 2021 (public with public and confidential Annexes).

² Decision Imposing an Indefinite Stay of Proceedings, 8 September 2023 (“Decision of 8 September 2023”), pp. 2, 5. *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 (“Decision of 7 August 2023”), paras. 48, 74-75, 79; Further Decision on Félicien Kabuga’s Fitness to Stand Trial, 6 June 2023, paras. 39, 59.

³ Decision of 8 September 2023, pp. 2, 5. *See* Decision of 7 August 2023, paras. 75-76, 79.

⁴ *See, e.g.*, Vingt-huitième rapport de situation concernant la mise en liberté provisoire de Félicien Kabuga, présenté conformément à l’ordonnance rendue par la Chambre de première instance le 25 septembre 2023, 28 October 2024 (confidential).

⁵ *See* Order for Submissions, 22 July 2024 (confidential), pp. 1-2; Decision on Defence Request for Assistance, 27 May 2024 (confidential), pp. 1-3; Decision on Defence Request for an Article 28 Order for Provisional Release, 29 February 2024 (confidential; public redacted version issued on 3 June 2024), pp. 1-6; Order for Submissions, 18 January 2024 (confidential), pp. 1-3; Order for Progress Reports in Relation to Provisional Release, 25 September 2023, pp. 1-2. *See also* Status Conference, Transcript of 24 July 2024, p. 9.

⁶ Demande de modification des conditions de détention de Félicien Kabuga, présentée en vertu de l’article 67 du Règlement de procédure et de preuve, 25 July 2024 (confidential) (English translation filed on 7 August 2024) (“Application”). All references herein are to the English translation of the Application.

⁷ Application, paras. 48, 50, 57, 64.

NOTING Kabuga's submissions that the safe house could be considered as an extension of the Mechanism premises⁸ and that the modification of his conditions of detention is justified as: (i) it would be physically and psychologically beneficial for him, as he could reside in a family environment;⁹ (ii) it would give full effect to the Trial and Appeals Chambers' decisions regarding his provisional release;¹⁰ and (iii) his continued detention at the UNDU violates his rights to liberty, dignity, and a normal family life;¹¹

NOTING the response filed confidentially by the Office of the Prosecutor of the Mechanism on 5 August 2024, arguing that the Application should be denied as Kabuga: (i) uses an improper procedure to prolong his stay in the Netherlands, rather than pursuing more viable options for his provisional release;¹² (ii) relies on inapposite decisions issued by the International Criminal Court ("ICC") to submit that the safe house could be viewed as an extension of the Mechanism premises;¹³ and (iii) fails to demonstrate exceptional circumstances imperatively demanding his detention at a location other than the UNDU;¹⁴

RECALLING the order issued on 7 August 2024, in which I invited the Government of the Netherlands to provide, within 21 days of service of the order, written submissions on the possible modification of the conditions of detention as proposed by Kabuga;¹⁵

NOTING the submissions filed confidentially by the Government of the Netherlands on 27 August 2024, indicating that: (i) the UNDU is the designated detention facility for the Mechanism, no other detention facilities are provided by the host State, and therefore Kabuga cannot be detained elsewhere in the Netherlands;¹⁶ (ii) the Government of the Netherlands is under no legal obligation to provide any other detention facilities and is not in a position to support the Application;¹⁷ and (iii) Kabuga cannot be released on the territory of the Netherlands and no access,

⁸ Application, paras. 20, 58.

⁹ Application, paras. 40-41, 54, 61.

¹⁰ Application, paras. 32-34, 52.

¹¹ Application, paras. 35-36, 43-44, 48, 51, 53.

¹² Prosecution Response to Kabuga Motion for Modification of Conditions of Detention, 5 August 2024 (confidential) ("Response"), paras. 1-3, 9.

¹³ Response, paras. 8-9.

¹⁴ Response, paras. 1-3, 9.

¹⁵ Order for Submissions, 7 August 2024, p. 2.

¹⁶ *Note Verbale* from the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Protocol and Host Country Affairs Department, DPG-BZ2405048, 27 August 2024 (confidential) ("Submissions"), Registry Pagination ("RP") 6654-6653. *See* 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 ("Headquarters Agreement").

¹⁷ Submissions, RP 6654-6653.

entry, or stay will be granted or can be presumed, as Kabuga has no legal title that allows him to stay in the Netherlands under any circumstances;¹⁸

NOTING the motion seeking leave to make observations in relation to the Submissions and the observations filed confidentially by Kabuga on 10 September 2024,¹⁹ wherein he: (i) reiterates the arguments presented in the Application;²⁰ and (ii) contends that, by refusing him to be detained in a safe house in The Hague, the Government of the Netherlands violates his most fundamental rights and obstructs the proper functioning of the Mechanism;²¹

RECALLING that, as President, I supervise the conditions of detention of detainees under the authority of the Mechanism at the UNDU;²²

RECALLING that Rule 67 of the Rules states, in relevant part, that upon being transferred to the relevant branch of the Mechanism, the accused shall be detained in facilities provided by the host State, or by another State, and that the President may, on the application of a Party, request modification of the conditions of detention of an accused;

RECALLING that: (i) Rule 67 of the Rules – unlike Rule 68 of the Rules which deals with provisional release – “is not [...] employed to safeguard the liberty interests of the Accused”, but “permits the President to modify the conditions of detention to meet specific needs of the Accused”;²³ (ii) “the presumption – based on consideration of costs to the International Tribunal, costs to The Netherlands, safety of the Accused, and the desire to maintain standard conditions of detention for indictees – is for detainees to be held at the [UNDU]”;²⁴ and (iii) this presumption “is only overcome in exceptional circumstances”,²⁵ such as security concerns²⁶ or medical reasons,²⁷ which imperatively demand detention at a location other than the UNDU;

¹⁸ Submissions, RP 6653.

¹⁹ In the absence of any objections, I have granted Kabuga’s request to submit the observations and consider them as validly filed. *See* Demande d’autorisation de présenter des observations à la suite du dépôt, le 27 août 2024, de la note verbale émanant du ministère des Affaires étrangères du Royaume des Pays-Bas qui porte sur la demande de la Défense de modification des conditions de détention de Félicien Kabuga, 10 September 2024 (confidential) (English translation filed on 3 October 2024) (“Motion”). All references herein are to the English translation of the Motion.

²⁰ Motion, Annex, paras. 11-17.

²¹ Motion, Annex, paras. 18-42.

²² *See, e.g., Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Decision on Motion to Report Government of Turkey to United Nations Security Council and for Modification of Conditions of Detention, 22 March 2017 (“Decision of 22 March 2017”), p. 3; *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55, Decision on Request for Status Conference, 1 April 2016, p. 1.

²³ *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Order of the President on the Renewed Defence Motion Concerning Conditions of Detention During Trial, 24 January 2005 (“Order of 24 January 2005”), para. 17.

²⁴ Order of 24 January 2005, para. 17.

²⁵ Decision of 22 March 2017, p. 3; Order of 24 January 2005, para. 17.

²⁶ *See, e.g., Prosecutor v. Matthieu Ndirumpatse*, Case No. ICTR-98-44-T, Decision on Matthieu Ndirumpatse’s Motion to Vary his Conditions of Detention, 24 June 2010 (“Decision of 24 June 2010”), para. 2; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Matthieu Ndirumpatse’s Motion to Vary his

CONSIDERING that Article 37(1) of the Headquarters Agreement provides that the host State shall cooperate with the Mechanism to facilitate the detention of persons and to allow the Mechanism to perform its functions within its detention centre;

CONSIDERING that the UNDU is the designated detention facility for the Mechanism in this respect;

CONSIDERING that Kabuga's reliance on ICC decisions to submit that the safe house could be viewed as an extension of the Mechanism premises is inapposite, since the Headquarters Agreement does not provide for the housing or detention of an accused outside of the UNDU and given that the Government of the Netherlands has clearly stated that no additional detention facilities are provided by the host State and that Kabuga cannot be detained anywhere other than the UNDU;²⁸

NOTING that Kabuga has previously expressed his satisfaction with the arrangements made for his medical and other care at the UNDU and the prison hospital, which according to the medical experts is being exercised to a "high standard";²⁹

CONSIDERING that Kabuga requires an extraordinary level of care for all of his activities for daily living,³⁰ and that he does not demonstrate that modifying his conditions of detention would improve his situation or that his required care regime could realistically be provided if he were relocated to the safe house;

CONSIDERING that family support, whether physical or psychological, as submitted by Kabuga does not, as such, amount to exceptional circumstances which imperatively demand detention at a location other than the UNDU;

CONSIDERING further that Kabuga's remaining contentions pertain to the issue of his liberation on provisional release, which is pending before the Trial Chamber, and that it is not within my purview to address them;

Conditions of Detention, 3 March 2009 ("Decision of 3 March 2009"), para. 9; *Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-I, Order for Special Detention Measures, 13 August 2005, para. 3.

²⁷ See, e.g., Decision of 24 June 2010, para. 2; Decision of 3 March 2009, para. 9.

²⁸ Submissions, RP 6654-6653.

²⁹ See Status Conference, Transcript of 13 December 2023, p. 19; Status Conference, Transcript of 6 September 2023, p. 2; Transcript of 17 March 2023, pp. 24-25 (Henry Kennedy). See also Transcript of 23 March 2023, p. 40 (Gillian Mezey); Transcript of 17 March 2023, pp. 30-31.

³⁰ See Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020 and the "Order Amending the Medical Reporting Regime" of 25 September 2023, 17 October 2024 (public with confidential Annex), Annex, RP 6745.

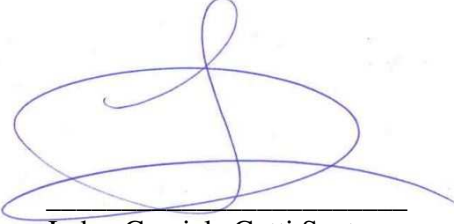
FINDING therefore that, in the present circumstances, Kabuga fails to demonstrate that his current conditions of detention imperatively demand detention at a location other than the UNDU and that, as a consequence, it is appropriate to deny the Application;

FOR THE FOREGOING REASONS,

HEREBY DENY the Application.

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

Done this 29th day of October 2024,
At Arusha,
Tanzania.



Judge Graciela Gatti Santana
President

[Seal of the Mechanism]



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