**UNITED NATIONS**

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-38-AR80.3

Date: 7 August 2023

Original: English

**IN THE APPEALS CHAMBER**

**Before:** **Judge Carmel Agius, Presiding**
**Judge Burton Hall**
**Judge Liu Daqun**
**Judge Aminatta Lois Runeni N'gum**
**Judge José Ricardo de Prada Solaesa**

**Registrar:** **Mr. Abubacarr M. Tambadou**

**Decision of:** **7 August 2023**

**PROSECUTOR**

**v.**

**FÉLICIEN KABUGA**

***PUBLIC***

# DECISION ON APPEALS OF FURTHER DECISION ON FÉLICIEN KABUGA'S FITNESS TO STAND TRIAL

**Office of the Prosecutor:**

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

**Counsel for Mr. Félicien Kabuga:**

Mr. Emmanuel Altit

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively)[1] is seised of the appeals filed by the Defence of Mr. Félicien Kabuga ("Defence" and "Kabuga", respectively) and the Office of the Prosecutor of the Mechanism ("Prosecution") on 23 June 2023,[2] against a decision issued by the Trial Chamber of the Mechanism ("Trial Chamber") on 6 June 2023.[3] In the Impugned Decision, the Trial Chamber, by majority, Judge El Baaj dissenting, found that Kabuga was unfit to stand trial and decided to proceed with an "alternative finding procedure".[4] The Defence and the Prosecution filed responses on 3 July 2023 and 4 July 2023, respectively.[5] The Prosecution filed a reply on 7 July 2023.[6] The Defence did not file a reply.

## I. PROCEDURAL BACKGROUND

2. Kabuga was indicted before the International Criminal Tribunal for Rwanda ("ICTR") in November 1997,[7] but remained a fugitive until his arrest in France on 16 May 2020.[8] On 26 October 2020, Kabuga was temporarily transferred to the Hague branch of the Mechanism for a detailed medical assessment.[9] Following initial orders for medical evaluations, since December 2020 the Trial Chamber has been receiving biweekly medical reports on Kabuga's health

[1] *See* Order Assigning Appeals to a Bench of the Appeals Chamber, 23 June 2023, p. 1. *See also* Decision on Urgent Defence Request, 28 June 2023 (confidential), n. 1.
[2] Appeal Against the "Further Decision on Félicien Kabuga's Fitness to Stand Trial" of 6 June 2023, 23 June 2023 (original filed in French; English translation filed on 29 June 2023) ("Defence Appeal"); Prosecution Interlocutory Appeal of Decision that Kabuga is Not Fit to Stand Trial, 23 June 2023 (confidential with confidential and *ex parte* annex; public redacted version filed on 26 June 2023) ("Prosecution Appeal"). *See Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Decision on Motions for Certification to Appeal the Further Decision on Félicien Kabuga's Fitness to Stand Trial, 16 June 2023 ("Decision of 16 June 2023"), p. 2.
[3] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Further Decision on Félicien Kabuga's Fitness to Stand Trial, 6 June 2023 ("Impugned Decision").
[4] Impugned Decision, para. 59. *See also* Impugned Decision, Dissenting Opinion of Judge Mustapha El Baaj ("Dissenting Opinion").
[5] Defence Response to the "Prosecution Interlocutory Appeal of Decision that Kabuga is Not Fit to Stand Trial" Filed on 23 June 2023, 3 July 2023 (original filed in French; English translation filed on 6 July 2023) (confidential) ("Defence Response"); Prosecution Response to Kabuga's Appeal of the Trial Chamber's 6 June 2023 Decision Ordering the Accommodation of the Alternative Finding Procedure, 4 July 2023 (public with confidential Annex A) ("Prosecution Response").
[6] Prosecution Reply to Kabuga's Response to Prosecution Interlocutory Appeal of Further Fitness Decision, 7 July 2023 (confidential) ("Prosecution Reply").
[7] *See Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997 (confidential). *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Prosecution's Second Amended Indictment, 1 March 2021 (public with public and confidential annexes); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Prosecution Motion to Amend the Indictment, 24 February 2021, para. 22.
[8] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Decision on Félicien Kabuga's Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020 ("Decision of 21 October 2020"), para. 2.
[9] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Order Scheduling an Initial Appearance, 8 November 2020, pp. 1, 2, *referring*, *inter alia*, *to* Decision of 21 October 2020, paras. 11-18.

from the Medical Officer at the United Nations Detention Unit ("UNDU") at the Hague branch of the Mechanism.[10]

3. On 22 January 2021, while the proceedings against Kabuga were still at the pre-trial phase, the Defence filed a motion before the Trial Chamber seeking, pursuant to Rule 84(A) of the Rules of Procedure and Evidence of the Mechanism ("Rules"), medical examination by independent experts to assess, *inter alia*, Kabuga's fitness to stand trial.[11] On 15 April 2021, the Trial Chamber granted, in part, the request and ordered the Registrar of the Mechanism ("Registrar" or "Registry") to appoint an independent expert gerontologist to examine Kabuga and assist in ascertaining his fitness to stand trial.[12] Subsequently, the Trial Chamber ordered further examinations of Kabuga by two independent forensic psychiatrists[13] and granted requests by the Prosecution and the Defence to appoint medical experts of their choice to examine Kabuga.[14]

4. On 13 June 2022, having considered the medical record before it, the Trial Chamber found that the Defence had not established that Kabuga was at the time unfit for trial, especially in view of accommodations that could be adopted.[15] The Trial Chamber further decided that Kabuga should remain detained at the Hague branch of the Mechanism and that his trial should commence and proceed there until otherwise decided.[16] On 12 August 2022, the Appeals Chamber, by majority, dismissed the Defence's appeal challenging the Trial Chamber's finding on Kabuga's fitness to stand trial.[17] Trial proceedings against Kabuga commenced on 29 September 2022 and, from the

[10] Impugned Decision, para. 2. *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, 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. 3.
[11] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Defence Motion Seeking an Order for an Expert Medical Assessment Pursuant to Rule 84 of the Rules of Procedure and Evidence, 22 January 2021 (confidential) (original filed in French; English translation filed on 2 February 2021), paras. 23, 47-49, p. 17.
[12] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Defence Motion Seeking an Order for Expert Medical Assessments Pursuant to Rule 84, 15 April 2021 (confidential) ("Decision of 15 April 2021"), para. 19. *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-AR80.1, Decision on an Appeal of a Decision on Félicien Kabuga's Fitness to Stand Trial, 12 August 2022 ("Decision of 12 August 2022"), para. 3.
[13] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order for Further Independent Medical Expert Evaluation, 1 December 2021 (confidential), pp. 2, 3; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Prosecution Motion for Further Fitness Evaluation and Order for Independent Expert Evaluation, 15 March 2022 (confidential) ("Decision of 15 March 2022"), paras. 25, 28. *See also* Decision of 12 August 2022, paras. 3, 6.
[14] *See* Decision of 15 March 2022, para. 28; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Defence Motion for Appointment of a Defence Medical Expert, 13 May 2022 (confidential), p. 2. *See also* Decision of 12 August 2022, paras. 7, 8.
[15] *See* Impugned Decision, para. 5; Decision of 13 June 2022, paras. 8-10, 14-17, 19, 20, 22, 25-30, 33-37, 44-57, 62.
[16] Decision of 13 June 2022, para. 62.
[17] Decision of 12 August 2022, para. 22. *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Félicien Kabuga's Motion for Certification to Appeal the Decision of 13 June 2022, 23 June 2022, p. 2.

date of their commencement until 22 December 2022, the Trial Chamber held in-court hearings for a total of 29 days.[18]

5. In compliance with a Trial Chamber's instruction, on 13 July 2022, the Registrar appointed Professor Gillian Mezey ("Dr. Mezey"), forensic psychiatrist, Professor Henry Gerard Kennedy ("Dr. Kennedy"), forensic psychiatrist, and Professor Patrick Cras ("Dr. Cras"), neurologist, as members of a panel of independent medical experts ("Experts") to periodically monitor Kabuga's health and submit, every 180 days, joint reports on Kabuga's fitness for trial.[19] On 12 December 2022, the Registrar filed the first joint monitoring report prepared by the Experts ("First Joint Monitoring Report").[20] In the report, the Experts agreed that Kabuga had, at the time of the assessment, reduced cognitive reserve with his cognitive functioning tending to fluctuate day to day, and that there was "evidence of vascular disease affecting the brain and previous cerebrovascular accidents".[21] In terms of Kabuga's capacities to participate in the proceedings and to exercise his fair trial rights, the Experts agreed that he was able to plead, to understand the nature of the charges against him, and to understand the consequence of the proceedings.[22] However, the Experts were unanimously of the view that Kabuga was not able to understand the course of the proceedings or testify.[23] Two of the Experts also opined that Kabuga did not have the capacity to instruct counsel.[24] The Experts concluded that on the days of the assessments, which were performed on 11 and 21 November 2022, Kabuga "was not fit to participate in his trial".[25] The Experts also recommended "supports" to assist Kabuga's participation in the trial proceedings, subject to an improvement in his cognitive capacities compared to when he was assessed.[26]

6. On 13 December 2022, the Trial Chamber rejected a Defence urgent request for a stay of proceedings and decided to continue hearing witness evidence.[27] The Trial Chamber instructed the

[18] Impugned Decision, para. 8.
[19] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, 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, 18 July 2022 (public with confidential annex), paras. 2-4. *See also* Decision of 13 June 2022, para. 62.
[20] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, 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, 12 December 2022 (public with confidential annex), para. 5, Annex.
[21] First Joint Monitoring Report, pp. 3-5.
[22] First Joint Monitoring Report, pp. 5, 7, 8.
[23] First Joint Monitoring Report, pp. 5-8.
[24] First Joint Monitoring Report, p. 7.
[25] First Joint Monitoring Report, p. 10.
[26] First Joint Monitoring Report, pp. 8, 9.
[27] T. 13 December 2022 p. 7 (private session); T. 14 December 2022 pp. 1-3 (private session). *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Urgent Defence Request for a Stay of Proceedings on the Grounds of Félicien Kabuga's Unfitness to Stand Trial, Established by the Panel of Experts, 13 December 2022 (confidential) (original filed in French; English translation filed on 16 December 2022), p. 2. The Trial Chamber also denied a related Defence request for certification to appeal the Trial Chamber's determination on the stay of proceedings. *See*

Registry to have the Experts re-evaluate Kabuga within 90 days of 28 November 2022, and to file a monitoring report thereafter.[28] The resumption of trial proceedings, originally scheduled for 17 January 2023, was adjourned due to reports by the UNDU Medical Officer detailing several health incidents that Kabuga had suffered in January and early February 2023.[29] Trial proceedings eventually resumed on 14 February 2023 with adjusted modalities, including reduced court schedule and Kabuga's attendance by video-conference link from the UNDU.[30]

7. On 6 March 2023, the Registrar filed the second joint monitoring report prepared by the Experts ("Second Joint Monitoring Report").[31] In the report, the Experts unanimously agreed that Kabuga's mental capacities had "deteriorated significantly" since their previous assessments and that "it is now apparent that this is a progressive process".[32] The Experts also concluded that Kabuga remained capable of expressing his will and preference in limited areas concerning his own health and well-being.[33] The Experts further agreed that Kabuga "now meets clinical criteria for dementia" and expressed their confidence that he "is not fit to participate meaningfully in his trial", even with modalities and accommodations put in place.[34]

8. On 6 March 2023, the Trial Chamber adjourned the evidentiary hearing scheduled to resume the following day and, on 8 March 2023, held a procedural hearing for the purpose of receiving submissions from the parties on the practical and procedural implications of the Second Joint Monitoring Report.[35] Following the parties' submissions, the Trial Chamber heard the testimonies

*Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Decision on Félicien Kabuga's Motion for Certification to Appeal the Oral Decision of 14 December 2022, 11 January 2023 (confidential), p. 3.
[28] T. 14 December 2022 p. 3 (private session).
[29] Impugned Decision, para. 12; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 4 January 2023 (public with confidential annex), Annex; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 11 January 2023 (public with confidential annex), Annex; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 26 January 2023 (public with confidential annex), Annex; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 8 February 2023 (public with confidential annex), Annex.
[30] *See* Impugned Decision, para. 15.
[31] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Registrar's Submission in Relation to the Oral Ruling of 14 December 2022, 6 March 2023 (confidential with confidential annex), para. 7, Annex.
[32] Second Joint Monitoring Report, Registry Pagination ("RP.") 5029.
[33] Second Joint Monitoring Report, RP. 5029.
[34] Second Joint Monitoring Report, RP. 5029.
[35] *See Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Further Order on Proceedings, 6 March 2023, p. 1; T. 8 March 2023 pp. 2-30.

of Dr. Kennedy, Dr. Mezey, and Dr. Cras between 15 and 29 March 2023[36] and, on 30 March 2023, received further oral submissions from the parties concerning Kabuga's fitness to stand trial.[37]

9. While the Trial Chamber's deliberations on Kabuga's fitness to stand trial were ongoing, on 25 April 2023, the Trial Chamber ordered the parties to file submissions concerning the consequences should Kabuga be found unfit for trial, taking into account relevant international jurisprudence and domestic practice, "in particular the possibility of proceeding with an examination of facts".[38] The Trial Chamber also specifically instructed the parties to take into account in their submissions the Guidelines from the Committee on the Rights of Persons with Disabilities interpreting Article 14 of the United Nations Convention on the Rights of Persons with Disabilities.[39] On 9 May 2023, the Prosecution and the Defence filed submissions in accordance with the Trial Chamber's order and, on 16 May 2023, both parties submitted their respective responses.[40]

10. On 6 June 2023, the Trial Chamber issued the Impugned Decision, finding, by majority, that Kabuga was not fit for trial and that he was very unlikely to regain fitness in the future.[41] As a consequence of this finding and with reference to its discretion to manage the proceedings before it, the Trial Chamber considered it necessary to identify a procedure to be followed, in line with its duty to respect and ensure respect for all generally accepted human rights norms and with due regard for the purposes for which the Mechanism and its predecessor tribunals were established.[42] Having considered the options of terminating the proceedings, imposing a stay of proceedings, and conducting an "alternative finding procedure", the Trial Chamber concluded that "the best way to ensure respect for [Kabuga's] rights and to effectuate the goals of the Mechanism is to adopt an

[36] Dr. Kennedy testified on 15, 16, and 17 March 2023. *See* T. 15 March 2023 pp. 2-22; T. 16 March 2023 pp. 3-45; T. 17 March 2023 pp. 1-39. Dr. Mezey testified on 23 March 2023. *See* T. 23 March 2023 pp. 1-49. Dr. Cras testified on 29 March 2023. *See* T. 29 March 2023 pp. 1-52.
[37] *See* T. 30 March 2023 pp. 1-47.
[38] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Order for Submissions, 25 April 2023 ("Order of 25 April 2023"), pp. 1, 2.
[39] Order of 25 April 2023, p. 1. *See also* UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 24 January 2007.
[40] *See Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Prosecution Submission Concerning the Consequences of a Potential Decision that Kabuga is Unfit, 9 May 2023; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Defence Submission in Response to the Chamber's Order of 25 April 2023, 9 May 2023 (original filed in French; English translation filed on 15 May 2023); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Defence Response to the "Prosecution Submission Concerning the Consequences of a Potential Decision that Kabuga is Unfit" Filed on 9 May 2023, 16 May 2023 (original filed in French; English translation filed on 19 May 2023); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Prosecution Response to Kabuga's Submission Pursuant to the Chamber's 25 April 2023 Order, 16 May 2023. *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Decision on Defence Motion to Dismiss *In Limine* the Prosecution Submission of 9 May 2023, 25 May 2023.
[41] Impugned Decision, paras. 39, 57, 59.
[42] Impugned Decision, para. 45.

alternative finding procedure that resembles a trial as closely as possible, but without the possibility of a conviction".[43]

11. On 16 June 2023, upon requests by the Prosecution and the Defence,[44] the Trial Chamber certified for appeal the issues of "Kabuga's fitness to stand trial and the consequences thereof".[45] On appeal, the Prosecution advances two grounds of appeal, arguing that the Trial Chamber erred in law by applying an incorrect legal standard,[46] and abused its discretion in evaluating the evidence relating to Kabuga's fitness to stand trial.[47] Consequently, the Prosecution requests that the Appeals Chamber reverse the Trial Chamber's determination that Kabuga is unfit to participate meaningfully in his trial.[48] The Defence advances three grounds of appeal, alleging that the Trial Chamber erred in law in failing to order a stay of proceedings,[49] in deciding to hold an "alternative finding procedure",[50] and in failing to order Kabuga's release.[51] As a consequence, the Defence requests that the Appeals Chamber reverse the Impugned Decision, impose a stay of proceedings, and order Kabuga's release.[52] The Appeals Chamber will address the parties' contentions in turn.

## II. DISCUSSION

### A. Preliminary Matters

12. The Appeals Chamber notes that the Prosecution Response, which was due on 3 July 2023, was filed a day later.[53] On 4 July 2023, the Prosecution filed an urgent motion, requesting that the Appeals Chamber recognize the Prosecution Response as validly and timely filed.[54] The Prosecution explains that it followed the practice of the Trial Chamber whereby filings would be considered timely if submitted by 11:59 p.m. the Hague time, in view of the location of the trial.[55] According to the Prosecution, accounting for the time difference with Arusha, this resulted in the

[43] *See* Impugned Decision, paras. 46-57.
[44] *See Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Prosecution Request for Certification to Appeal Further Decision on Félicien Kabuga's Fitness to Stand Trial, 13 June 2023; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Defence Request for Certification to Appeal the "Further Decision on Félicien Kabuga's Fitness to Stand Trial" Issued on 6 June 2023, 13 June 2023 (original filed in French; English translation filed on 20 June 2023).
[45] Decision of 16 June 2023, p. 2.
[46] *See* Prosecution Appeal, paras. 2, 4-13.
[47] *See* Prosecution Appeal, paras. 2, 14-29.
[48] Prosecution Appeal, paras. 3, 31.
[49] *See* Defence Appeal, paras. 68, 71-87.
[50] *See* Defence Appeal, paras. 68, 88-104.
[51] *See* Defence Appeal, paras. 68, 105-111.
[52] Defence Appeal, para. 112.
[53] *See* Rules 132(B) and 152(A) of the Rules; Practice Direction on Requirements and Procedures for Appeals, MICT/10/Rev.1, 20 February 2019 ("Practice Direction"), para. 26. *See also* Practice Direction on Judicial Records, MICT/42, 25 May 2023, Articles 14 and 15.
[54] Prosecution Urgent Request Pursuant to Rule 154, 4 July 2023 (public with confidential Annex A) ("Prosecution Request"), para. 4.

Prosecution Response being filed half an hour after the deadline.[56] The Appeals Chamber finds that, in view of the significance of the issues on appeal and taking into account that the Defence does not oppose the Prosecution's request,[57] it is in the interests of justice to exercise its discretion and recognize the Prosecution Response as validly filed.[58]

13. In addition, on 18 July 2023, the Defence filed a motion, requesting that both parties be granted access to a Magnetic Resonance Imaging ("MRI") of Kabuga's brain, carried out in June 2023, and the related radiology report (collectively, "MRI Results"), which were referenced in a recent UNDU Medical Report.[59] The Defence contends that the existence of a new MRI that corroborates prior medical evidence on Kabuga's cognitive decline is an essential element to be considered in the context of the Prosecution Appeal, and that access to the MRI Results will enable the Defence to seek its admission as additional evidence on appeal pursuant to Rule 142(A) of the Rules.[60] The Prosecution responds that it has no objection to the Defence request for access and, in turn, requests that the parties be allowed to share the MRI Results with their respective consulting experts.[61]

14. The Appeals Chamber observes that the Trial Chamber routinely granted the Defence and the Prosecution access to medical reports concerning Kabuga's health, allowing them to share such reports with their respective consulting experts on a confidential basis.[62] In the present circumstances, the Appeals Chamber sees no reason for taking a different approach and finds it appropriate to grant the sought access on this basis.

15. The Appeals Chamber, however, does not consider it necessary to adjourn the adjudication of the Prosecution Appeal, in view of the Defence intention to seek the admission of the MRI

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[55] Prosecution Request, para. 2, *referring to* T. 18 August 2022 p. 9.
[56] Prosecution Request, para. 3, Annex A.
[57] Defence Response to the "Prosecution Urgent Request Pursuant to Rule 154" Filed on 4 July 2023, 6 July 2023 (original filed in French; English translation filed on 7 July 2023), para. 13.
[58] *See* Rule 154(A) of the Rules; Practice Direction, para. 31.
[59] Defence Request Pursuant to Rule 142 of the Rules of Procedure and Evidence, 18 July 2023 (confidential) (original filed in French; English translation filed on 20 July 2023) ("Request for Access"), paras. 7, 15, p. 3. *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 12 July 2023 (public with confidential annex), Annex ("UNDU Medical Report of 11 July 2023"); T. 17 July 2023 pp. 9, 10.
[60] Request for Access, paras. 12-15, p. 3.
[61] Prosecution Response to "*Requête de la Défense en vertu de l'Article 142 du Règlement de procédure et de preuve*", 19 July 2023 (confidential), para. 1.
[62] *See*, *e.g.*, *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Decision on the Conduct of Trial Proceedings, 13 February 2023, para. 6, n. 15; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Order for Submissions in Relation to the Joint Monitoring Report and on Request for Access, 15 December 2022 (confidential), pp. 1, 2; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Decision on Prosecution Urgent Request for Access to Medical Records, 28 February 2022 (confidential), p. 2; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Defence Requests for Access and Order for Further Disclosure, 24 February 2021, pp. 1, 4.

Results as additional evidence on appeal, pursuant to Rule 142 of the Rules. The Appeals Chamber notes that, in relation to the MRI Results, the UNDU Medical Report of 11 July 2023 states that "the scan shows both evidence of a past stroke and significant loss of brain tissue, accompanied by signs of vascular damage (small vessel disease)" and "excludes any new neurological process to explain […] Kabuga's cognitive impairment".[63] The Appeals Chamber observes that, despite the fact that the existence of the MRI Results became known to the parties only after the issuance of the Impugned Decision, information regarding Kabuga suffering from strokes, loss of brain tissue, and vascular disease is not new and was considered and discussed by the Experts.[64] The information contained in the MRI Results would therefore appear, in material aspects, cumulative of other evidence on the record that the Trial Chamber already considered in reaching its finding that Kabuga is not fit to stand trial.[65]

16. In addition, in view of the Appeals Chamber's conclusions below on the Prosecution Appeal,[66] not allowing the Defence an additional opportunity to bolster the Trial Chamber's finding that is the subject of the Prosecution Appeal will result in no prejudice to Kabuga.[67] To the contrary, the interests of justice dictate that the matter before the Appeals Chamber be resolved as expeditiously as possible and that unnecessary delays be avoided. This does not preclude the parties from raising issues in relation to the MRI Results before the Trial Chamber, in view of the outcome of the present Decision.

## B. The Prosecution Appeal

### 1. Background

17. In the Impugned Decision, the Trial Chamber, by majority, found that Kabuga was not fit for trial and that it was very unlikely he would regain fitness in the future.[68] In arriving at this conclusion, the Trial Chamber considered the extensive medical record before it, including the First

[63] UNDU Medical Report of 11 July 2023, para. 3.
[64] *See* Impugned Decision, nn. 65, 79, 124, *referring*, *inter alia*, *to* Witness Mezey, T. 23 March pp. 9-12, Witness Kennedy, T. 15 March 2023 p. 7, First Joint Monitoring Report, p. 4 (confirming that there was "evidence of vascular disease affecting the brain and previous cerebrovascular accidents, evidenced on the MRI by patchy ischemic and other age related changes to Mr. Kabuga's brain"). *See also* Decision of 13 June 2022, para. 25.
[65] *See* Impugned Decision, nn. 76, 78, 79, 124, 151, *referring*, *inter alia*, *to* Witness Kennedy, T. 15 March 2023 p. 7, Witness Mezey, T. 23 March 2023 p. 10, First Joint Monitoring Report, p. 4, Joint Statement of Dr. Kennedy and Dr. Mezey, 16 May 2022, p. 2. *See also* Decision of 13 June 2022, paras. 14, 15, 25, 35, 50, *referring*, *inter alia*, *to* Dr. Mezey's Report of 28 January 2022, pp. 19, 20, paras. 53, 56, 57, 64, Witness Mezey, T. 1 June 2022 pp. 4, 5.
[66] *See infra* para. 48.
[67] *Cf. Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-A, Decision on Jovica Stanišić's Motion for Admission of Additional Evidence, 21 December 2022, para. 15; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.1, Decision on Stanišić's Applications Under Rule 115 to Present Additional Evidence in His Response to the Prosecution's Appeal, 3 December 2004, paras. 14, 16.
[68] Impugned Decision, paras. 39, 59.

Joint Monitoring Report, the Second Joint Monitoring Report, and the testimonies of Dr. Kennedy, Dr. Mezey, and Dr. Cras.[69] The Trial Chamber found that the vast majority of the evidence before it supported the conclusion that Kabuga was unfit for trial.[70]

18. In relation to Kabuga's evolving health condition, the Trial Chamber recalled that, in its first decision on Kabuga's fitness to stand trial issued in June 2022, it had placed particular weight on the evidence of Dr. Kennedy and Dr. Mezey who, at the time, disagreed about the severity and consequences of Kabuga's cognitive impairments.[71] Emphasizing the impressive credentials and extensive relevant experience of Dr. Kennedy, Dr. Mezey, and Dr. Cras, the Trial Chamber observed that, this time, all three experts agreed that Kabuga's cognitive and physical functions have progressively and significantly deteriorated since the pre-trial stage, that he has severe dementia, and that he could not participate meaningfully in his trial, even with accommodations.[72] The Trial Chamber noted the Experts' unanimous opinion that Kabuga's condition is characterised by progressive and irreversible decline.[73]

19. The Trial Chamber particularly noted the convergence in the Experts' conclusions that Kabuga lacks four capacities crucial to meaningful participation in a trial, namely the ability to understand the course of proceedings, understand the evidence, instruct counsel, and testify.[74] In relation to the Experts' opinion that Kabuga still retains three relevant capacities, namely to enter a plea, understand the nature of the charges, and understand the consequences of the proceedings, the Trial Chamber noted the Experts' view that Kabuga's level of cognition related to these capacities remains, nevertheless, superficial.[75] Finally, the Trial Chamber emphasized that its own observations of Kabuga during the proceedings corresponded to the Experts' collective findings.[76]

2. Alleged Error in Relation to the Legal Standard for Fitness to Stand Trial

20. Under its first ground of appeal, the Prosecution submits that, in determining Kabuga's fitness to stand trial, the Trial Chamber erred in law by applying a heightened legal standard whereby counsel's role in representing Kabuga was not taken into account.[77] In particular, the Prosecution argues that, by accepting "wholesale" and without scrutiny the Experts' conclusions,

[69] Impugned Decision, paras. 9, 12-14, 16, 18-23, 30-35. *See also* Impugned Decision, paras. 3, 4.
[70] Impugned Decision, para. 30.
[71] Impugned Decision, paras. 3-5, 30.
[72] Impugned Decision, para. 30.
[73] Impugned Decision, para. 31.
[74] Impugned Decision, para. 31.
[75] Impugned Decision, para. 34
[76] Impugned Decision, para. 38.
[77] *See* Prosecution Appeal, paras. 2, 4-9, 30.

the Trial Chamber applied a standard whereby Kabuga is erroneously required to have a very high level of cognitive functioning.[78] In support of its submission, the Prosecution asserts that the Trial Chamber made no reference to counsel's role in representing Kabuga and, instead, emphasized the complexity of the legal and factual issues involved and the volume of the evidence.[79] According to the Prosecution, had the Trial Chamber applied the correct legal standard, it would have assessed the medical evidence underlying the Experts' conclusions in light of Kabuga's status as an accused "duly represented by counsel".[80] In the view of the Prosecution, the record contains ample evidence showing that Kabuga remains able to exercise a range of capacities, particularly with the assistance of accommodations from within his Defence team.[81]

21. The Prosecution further submits that the Trial Chamber erred in failing to apply the factors relevant to establishing Kabuga's fitness to stand trial in a way that would give full effect to human rights norms, including the Convention on the Rights of Persons with Disabilities, which require every possible accommodation for an accused in cognitive decline to enable their participation in legal proceedings.[82] In this regard, the Prosecution asserts that the Trial Chamber made no mention of any accommodations to facilitate Kabuga's meaningful participation at trial, for example, by having his counsel simplify matters and therefore limit the burden placed upon Kabuga.[83]

22. The Defence responds that the Trial Chamber correctly applied the legal standard, scrupulously compiled a list of the specific rights that Kabuga must be able to exercise in order to be considered fit to stand trial, and properly considered whether he possessed the cognitive faculties necessary to exercise each of these rights.[84] According to the Defence, the Prosecution's arguments lack merit as Kabuga is not fit to participate in the proceedings by even the lowest standard of fitness to stand trial.[85] The Defence further argues that the Prosecution's submission regarding counsel's role disregards the Experts' conclusion that Kabuga suffers from severe cognitive decline and that no accommodation would be sufficient to compensate for it.[86]

23. The Appeals Chamber recalls that the applicable standard for determining whether an accused is fit to stand trial is that of meaningful participation, which allows the accused to exercise

[78] Prosecution Appeal, paras. 5, 6, 8, *referring*, *inter alia*, *to* Dissenting Opinion, paras. 5, 14; Prosecution Reply, paras. 2, 3.
[79] Prosecution Appeal, para. 6, *referring to* Impugned Decision, n. 144.
[80] *See* Prosecution Appeal, paras. 7, 9.
[81] Prosecution Appeal, para. 9, *referring*, *inter alia*, *to* Dissenting Opinion, para. 16.
[82] *See* Prosecution Appeal, paras. 2, 10-13 and references cited therein.
[83] Prosecution Appeal, para. 13.
[84] Defence Response, paras. 26, 28.
[85] Defence Response, para. 28.
[86] Defence Response, para. 29.

his fair trial rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the proceedings.[87] The non-exhaustive list of capacities to be evaluated when assessing an accused's fitness to stand trial include the ability to: (i) plead; (ii) understand the nature of the charges; (iii) understand the course of the proceedings; (iv) understand the details of the evidence; (v) instruct counsel; (vi) understand the consequences of the proceedings; and (vii) testify.[88] What is therefore required for an accused to be deemed fit to stand trial is an overall capacity allowing for a meaningful participation in the trial, provided that he is duly represented by counsel.[89] The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber correctly articulated the applicable legal standard.[90]

24. The Appeals Chamber further recalls that an accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer.[91] Processing the wealth of complex information, inherent in international criminal proceedings, is the role of defence counsel in order to advise their clients.[92] Indeed, the standard of fitness to stand trial indicates that "a defendant may sometimes require assistance to participate in the proceedings".[93]

25. At the outset, the Appeals Chamber finds no merit in the Prosecution's submission that the Trial Chamber failed to scrutinize the expert evidence and, as a result, erroneously applied a heightened legal standard in assessing Kabuga's fitness to stand trial. In the Impugned Decision, the Trial Chamber thoroughly set out the history of Kabuga's health conditions, including by reference to the twice monthly medical reports submitted by the UNDU Medical Officer, meticulously outlined the Experts' findings contained in the First and Second Joint Monitoring Reports, and recounted in detail the Experts' testimonies.[94] The Trial Chamber also explicitly considered the

[87] Decision of 12 August 2022, para. 11; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR73.1, Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 4 March 2016 ("*Hadžić* Decision of 4 March 2016"), para. 7; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"), para. 55.
[88] Decision of 12 August 2022, para. 12 and references cited therein.
[89] Decision of 12 August 2022, para. 12, *referring to Strugar* Appeal Judgement, para. 60.
[90] Impugned Decision, paras. 26, 28.
[91] *Strugar* Appeal Judgement, para. 60.
[92] *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Public Redacted Version of the "Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings" Filed on 30 April 2018, 8 June 2018 ("*Mladić* Decision of 8 June 2018"), p. 3; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013 ("*Popović et al.* Decision of 16 January 2013"), para. 22; *Strugar* Appeal Judgement, para. 60 (wherein the Appeals Chamber of the ICTY held that "[e]ven persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in cases of such complex legal and factual nature as those brought before the Tribunal").
[93] *Popović et al.* Decision of 16 January 2013, para. 22.
[94] Impugned Decision, paras. 2-4, 9, 12, 14, 16, 18-23 and references cited therein. *See also* Impugned Decision, paras. 30-38.

Prosecution's argument that the Experts applied a higher standard than required for fitness to stand trial.[95] In reaching its conclusion, the Trial Chamber discussed in detail the medical evidence in relation to each capacity relevant to its assessment of Kabuga's fitness to stand trial.[96] While the Trial Chamber cited excerpts of the Experts' evidence on the degree to which Kabuga possessed the relevant capacities,[97] it expressly noted the Experts' conclusion that the level of Kabuga's cognitive function was limited to expressing his "will and preference" in areas related to his health and well-being, and that this limited ability to communicate does not enable Kabuga to participate meaningfully in his trial, as such participation would require a higher level of cognitive functioning than he possesses.[98] The Trial Chamber also considered that Kabuga lacked a functioning memory and an ability to process and express views about information that he could retain.[99]

26. Contrary to the Prosecution's assertion, the Appeals Chamber does not consider that the Trial Chamber expected Kabuga to have the capacity to understand complex information and legal concepts, or to process voluminous evidence. Rather, the Trial Chamber's observation on the complexity of the proceedings was made in the context of addressing the Prosecution's claim that the "essentials of this trial are simple and straightforward":

> […] the Trial Chamber does not agree with the Prosecution contention that the essentials of this trial are simple and straightforward or that it involves a 'known body of evidence and a limited number of issues in genuine contention'. […] On the contrary, the factual and legal issues arising from the number and nature of the counts in the Indictment, including allegations of genocide, conspiracy to commit genocide, persecution and extermination as crimes against humanity, and murder, as well as allegations that Mr. Kabuga aided and abetted crimes committed by the *Interahamwe* and that he was a member of a joint criminal enterprise are not only substantial, but also involve a geographic scope that spans across different areas and locations in Kigali-Ville, Kigali-Rural, Kibuye, and Gisenyi prefectures and acts and conduct from as early as 1992. […] The case further involves a significant volume of evidence, including the oral and written evidence of 103 witnesses, hundreds of audio-tapes of *Radio Television Libre des Mille Collines,* and thousands of pages of written transcriptions of those tapes and prior transcripts and statements of the witnesses.[100]

27. When read in context, the Trial Chamber's observation directly relates to its conclusion that "at a minimum, a functioning memory, including the ability to retain information over a period of time, as well as the ability to process and express a view about that information" were required.[101] Nothing in the Trial Chamber's observations, which are also directly relevant to its assessment of

[95] Impugned Decision, para. 25, *referring to* T. 30 March 2023 pp. 20, 21, 25, 38-40, 44, 45.
[96] Impugned Decision, paras. 30-35.
[97] Impugned Decision, paras. 30-35.
[98] Impugned Decision, para. 35, *referring to* Witness Kennedy, T. 15 March 2023 p. 11, T. 16 March 2023 pp. 6, 7, T. 17 March 2023 pp. 12, 13, Witness Mezey, T. 23 March 2023 pp. 15, 16, 36, Witness Cras, T. 29 March 2023 pp. 13, 14.
[99] Impugned Decision, para. 36.
[100] Impugned Decision, n. 144.
[101] Impugned Decision, para. 36.

the extent to which Kabuga could communicate with and instruct counsel, suggests that it applied an incorrect legal standard.

28. Similarly unpersuasive is the Prosecution's assertion that, in assessing Kabuga's fitness to stand trial, the Trial Chamber failed to consider counsel's role in representing Kabuga. In the Impugned Decision, the Trial Chamber specifically noted the Experts' agreement that Kabuga lacked the crucial capacity to instruct counsel.[102] In this regard, the Trial Chamber considered expert evidence that Kabuga was no longer able to follow a regular conversation at a normal pace or be engaged in a rational conversation with any substance or coherence,[103] could follow proceedings or understand evidence only at the most superficial level,[104] and was unable to understand the reasoning behind questions asked in court.[105] The Trial Chamber also noted evidence that the Experts struggled to elicit even very simple pieces of information from him.[106] On this basis, the Trial Chamber concluded that Kabuga was incapable of instructing counsel.[107] The Appeals Chamber recalls that an accused's ability to meaningfully participate in trial is contingent on whether he or she possesses the mental capacity to communicate, and thus consult, with counsel.[108] Indeed, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has expressly acknowledged that an accused's capacity to instruct counsel is among a non-exhaustive list of rights "essential for determination of an accused's fitness to stand trial".[109] In view of the Trial Chamber's detailed considerations, the Prosecution fails to show that the Trial Chamber applied an incorrect legal standard by failing to account for the role of counsel in the context of a represented accused.

29. The Appeals Chamber also dismisses, as unsubstantiated, the Prosecution's submission that the Trial Chamber erred in failing to consider human rights norms requiring accommodations for accused in cognitive decline. The Appeals Chamber recalls that, according to binding jurisprudence, an accused's fitness should turn on whether his or her capacities, "viewed overall

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[102] Impugned Decision, para. 31, *referring*, *inter alia*, *to* First Joint Monitoring Report, p. 8, Second Joint Monitoring Report, RP. 5029, Witness Kennedy, T. 15 March 2023 p. 6, Witness Mezey, T. 23 March 2023 p. 39, Witness Cras, T. 29 March 2023 pp. 34, 35.
[103] Impugned Decision, para. 32, *referring to* Witness Kennedy, T. 15 March 2023 p. 16, T. 16 March 2023 p. 22, Witness Mezey, T. 23 March 2023 pp. 3, 4, 13, 14, Witness Cras, T. 29 March 2023 p. 49.
[104] Impugned Decision, para. 33, *referring to* Witness Kennedy, T. 16 March 2023 p. 42, T. 17 March 2023 pp. 10, 13, 36-38, Witness Mezey, T. 23 March 2023 pp. 4, 14, 33, 37, 38.
[105] Impugned Decision, para. 33, *referring to* Witness Cras, T. 29 March 2023 pp. 14 (where Dr. Cras stated that "given the state of [Kabuga's] dementia, I would think it would be very difficult to almost impossible to set up a sort of a reasoning and argumentation together with his counsel"), 35, 49.
[106] Impugned Decision, para. 32, *referring to* Witness Mezey, T. 23 March 2023 pp. 43, 44.
[107] Impugned Decision, para. 33.
[108] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 13 December 2010 Decision on Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition, 16 May 2011 ("*Popović et al*. Decision of 16 May 2011"), para. 11. *See also Popović et al*. Decision of 16 May 2011, para. 14.

and in a reasonable and common sense manner, are at such a level that it is possible for him or her to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights".[110] Having recalled the previously instituted trial modalities and accommodations to facilitate Kabuga's meaningful participation in the trial,[111] the Trial Chamber expressly considered in the Impugned Decision the Experts' unanimous conclusion that Kabuga's physical health and mental capacities had deteriorated significantly since their previous assessments, and that he could not meaningfully participate in his trial regardless of trial modalities or accommodations.[112] The Trial Chamber's considerations reflect adherence to binding jurisprudence and are not inconsistent with the human rights norms to which the Prosecution points on appeal. The Prosecution also fails to demonstrate that, based on the unequivocal expert medical evidence before it, the Trial Chamber was unreasonable in finding that no accommodations could facilitate Kabuga's meaningful participation.

30. Finally, to the extent that the Prosecution argues that the Trial Chamber's evaluation of the medical evidence was unreasonable, the Appeals Chamber recalls that it is for the Trial Chamber to accept or reject, in whole or in part, the contribution of an expert witness.[113] Just as with any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of expert reports and testimony.[114] The Prosecution's cursory submission that evidence on the record indicates that Kabuga could exercise "a range of capacities, particularly with the assistance of accommodations from within his Defence team"[115] is inapposite, and merely shows disagreement with the Trial Chamber's assessment of the evidence before it, without demonstrating a discernible error.

### 3. Alleged Error in Evaluating Evidence Relating to Kabuga's Fitness

31. Under its second ground of appeal, the Prosecution submits that the Trial Chamber abused its discretion in evaluating the probative value of medical evidence relevant to Kabuga's fitness to stand trial,[116] and in failing to consider Kabuga's lack of cooperation when finding that he had

[109] *Strugar* Appeal Judgement, paras. 41, 55.
[110] *Mladić* Decision of 8 June 2018, pp. 2, 3; *Popović et al*. Decision of 16 January 2013, para. 21; *Strugar* Appeal Judgement, para. 55. *See supra* para. 23.
[111] *See*, *e.g*., Impugned Decision, paras. 8, 15.
[112] Impugned Decision, paras. 16, 21, 30, *referring to* First Joint Monitoring Report, pp. 4, 10, Second Joint Monitoring Report, RP. 5029, Witness Kennedy, T. 15 March 2023 pp. 12, 13, 20, 21, T. 16 March 2023 pp. 31-34, T. 17 March 2023 pp. 14, 15, 25, 26, Witness Mezey, T. 23 March 2023 pp. 3, 4, 7, 10-12, 43, Witness Cras, T. 29 March 2023 pp. 6, 9-11, 13.
[113] Decision of 12 August 2022, para. 16 and references cited therein.
[114] Decision of 12 August 2022, para. 16 and references cited therein.
[115] *See* Prosecution Appeal, para. 9.
[116] *See* Prosecution Appeal, paras. 2, 14-24.

discharged his burden of proof that he was unfit to stand trial.[117] The Defence responds that there is no merit to the Prosecution's arguments and that its appeal should be dismissed in its entirety.[118]

(a) Alleged Error in Evaluating the Probative Value of Expert Medical Evidence

32. The Prosecution submits that the Trial Chamber committed a discernible error in relying decisively on the Experts' examinations of Kabuga, conducted in February 2023, and on the resulting Second Joint Monitoring Report, notwithstanding "fundamental flaws" that rendered them unreliable.[119] Specifically, the Prosecution argues that: (i) the Experts' examinations, which formed the basis of the Second Joint Monitoring Report, were conducted for an hour or "much less" at a time when Kabuga was suffering from three serious intercurrent illnesses;[120] and (ii) Dr. Mezey conducted her examinations of Kabuga over video instead of in person.[121] The Prosecution also argues that the Second Joint Monitoring Report reflects that the Experts failed to consider "multiple key medical reports regarding Kabuga's health situation" and that the Experts formed their opinions about Kabuga's cognitive capabilities whilst uninformed about the extent and severity of his illnesses as documented in the UNDU Medical Reports.[122] The Prosecution contends that the Impugned Decision does not demonstrate a "critical evaluation" of the Second Joint Monitoring Report or "note the paucity of sources for the [E]xperts' cursory and unsubstantiated conclusions".[123] In the Prosecution's view, no reasonable trial chamber could have considered the Experts' opinions, formed under such circumstances, to be determinative of Kabuga's actual cognitive capacities.[124]

33. The Defence responds that the Prosecution fails to demonstrate an error in the Trial Chamber's assessment of the Experts' evidence.[125] The Defence contends that the Trial Chamber explicitly considered factors that could have impacted the accuracy of the Experts' diagnosis,[126] and that any suggestion that the Second Joint Monitoring Report stands in isolation is inaccurate, given that the report was the culmination of a lengthy evaluation process that began in November 2020.[127] The Defence further contends that the Experts' observations show that it is the damage to Kabuga's

[117] *See* Prosecution Appeal, paras. 2, 14, 23, 25-29.
[118] *See* Defence Response, p. 8. *See also* Defence Response, paras. 30-36.
[119] Prosecution Appeal, paras. 14-24.
[120] Prosecution Appeal, paras. 16-20.
[121] Prosecution Appeal, paras. 21, 22. The Appeals Chamber addresses the Prosecution's submission in relation to Kabuga's alleged lack of cooperation (*see* Prosecution Appeal, para. 23) in Section II.B.3.(b) below.
[122] Prosecution Appeal, paras. 17-19, 24.
[123] Prosecution Appeal, paras. 14, 24, 29.
[124] Prosecution Appeal, para. 19.
[125] Defence Response, para. 32.
[126] Defence Response, paras. 30-33.
[127] *See* Defence Response, paras. 1-20.

brain that has led to his physical and mental incapacity and not any intercurrent illnesses.[128] The Defence asserts, in this regard, that Kabuga's MRI scan results and the respective Experts' opinions suggest, *inter alia*, that there are specific areas of his brain that have been effectively destroyed, which is clear evidence of changes normally associated with Alzheimer's disease, and that there is a damage to the brain consistent with dementia.[129]

34. The Prosecution replies that the sources relied upon by the Defence concern the period when Kabuga was found fit to stand trial and that the subsequent medical reports, up to his intercurrent illnesses in the winter of 2022, do not reflect a consistent picture of decline.[130] The Prosecution adds that Kabuga exaggerates claims about his "acute difficulties in understanding", which are not consistent with the record, and that the Defence's heavy reliance on the MRI scans is misplaced as the Experts cautioned that brain scans are not determinative of functional capabilities.[131]

35. The Appeals Chamber recalls that a trial chamber's decision with respect to the evaluation of expert evidence is discretionary.[132] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[133] The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of governing law or on a patently incorrect conclusion of fact, or because it was so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[134]

36. With respect to the Prosecution's contention that the Trial Chamber erred in relying on the Experts' examinations of Kabuga, the Appeals Chamber notes that the Trial Chamber explicitly considered that Kabuga was in recovery from intercurrent illnesses when examined by the Experts and that this might have had some minor effect on their examinations.[135] However, the Trial Chamber accepted the Experts' unanimous view, expressed in their testimony following the Second Joint Monitoring Report, that the intercurrent illnesses did not materially affect their conclusions

[128] Defence Response, para. 20.
[129] *See* Defence Response, paras. 11-19. *See also* Defence Response, paras. 35, 36.
[130] Prosecution Reply, para. 4.
[131] Prosecution Reply, paras. 5, 6, *referring to* Defence Response, para. 6.
[132] Decision of 12 August 2022, para. 11 and references cited therein.
[133] *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. 15-96-A, Judgement, 31 May 2023 (public redacted) ("*Stanišić and Simatović* Appeal Judgement"), paras. 288, 592; Decision of 12 August 2022, para. 11 and references cited therein.
[134] *See Stanišić and Simatović* Appeal Judgement, para. 581; Decision of 12 August 2022, para. 11 and references cited therein.
[135] Impugned Decision, para. 37.

regarding Kabuga's inability to participate meaningfully in the trial.[136] In accepting the Experts' opinion on this matter, the Trial Chamber referenced portions of Dr. Kennedy's testimony that Kabuga's ability "to care for himself and to manage certain aspects of his person had deteriorated in a way that is objective and […] continuous and is more than can be accounted for by the recent intercurrent illnesses",[137] and that it was "very improbable" that lingering effects from the recent illnesses could have affected his analysis of the situation.[138] It further noted that Dr. Mezey did not think that Kabuga's functioning was affected or disadvantaged in any way by an underlying physical condition.[139]

37. While the Prosecution highlights that Dr. Kennedy and Dr. Cras considered that an additional examination, conducted when Kabuga is not suffering or recovering from serious intercurrent illness, might contribute to understanding Kabuga's cognitive capabilities and secure the determination of Kabuga's baseline cognitive abilities,[140] all three Experts considered it unlikely that such an examination would change their conclusion.[141] In addition, Dr. Mezey stated that, given that Kabuga experiences regular physical health crises and is "in a chronically low level", it would be very difficult to find Kabuga "at a point when he hasn't just recently recovered from a physical illness or isn't about to develop another physical health condition".[142] The Trial Chamber also accepted conclusive evidence that Kabuga's cognitive and physical functions have progressively and severely deteriorated and that he suffers from severe dementia, which is progressive and irreversible.[143] Considering the Trial Chamber's discretion in evaluating expert evidence, including to accept or reject, in whole or in part, and to assess the reliability and probative value of such evidence,[144] the Appeals Chamber finds that the Prosecution has failed to demonstrate that, in evaluating the evidence before it, the Trial Chamber committed a discernible error.

38. To the extent that the Prosecution alleges that the length of the examinations further compounded the unreliability of the Experts' conclusions,[145] the Appeals Chamber finds the

[136] Impugned Decision, para. 37, n. 146, *referring to* Witness Kennedy, T. 15 March 2023 pp. 12, 16, T. 16 March 2023 pp. 14, 15, 35, 36, T. 17 March 2023 pp. 23, 28, 32, 33, Witness Mezey, T. 23 March 2023 pp. 27-29, 31, 32, Witness Cras, T. 29 March 2023 pp. 39, 48.
[137] Impugned Decision, n. 146, *referring*, *inter alia*, *to* Witness Kennedy, T. 15 March 2023 p. 12.
[138] Impugned Decision, n. 146, *referring*, *inter alia*, *to* Witness Kennedy, T. 17 March 2023 p. 23.
[139] Impugned Decision, n. 146, *referring*, *inter alia*, *to* Witness Mezey, T. 23 March 2023 p. 32.
[140] Prosecution Appeal, para. 19, n. 75, *referring to* Witness Cras T. 29 March 2023 pp. 38, 39, Witness Kennedy, T. 16 March 2023 pp. 25, 26.
[141] Impugned Decision, n. 146, *referring, inter alia*, *to* Witness Cras, T. 29 March 2023 p. 48, Witness Kennedy, T. 17 March 2023 p. 22, Witness Mezey, T. 23 March 2023 p. 32.
[142] Impugned Decision, n. 146, *referring to* Witness Mezey, T. 23 March 2023 p. 32.
[143] Impugned Decision, paras. 30, 31, 33, *referring*, *inter alia*, *to* Witness Kennedy, T. 16 March 2023 p. 34, Witness Mezey, T. 23 March 2023 pp. 11, 12, Witness Cras, T. 29 March 2023 p. 13.
[144] Decision of 12 August 2022, para. 15 and references cited therein.
[145] Prosecution Appeal, para. 17.

Prosecution's submission to be speculative. Significantly, the Trial Chamber was appraised of Dr. Kennedy's statement, after his first interview with Kabuga, that Kabuga was "able to engage for progressively less time" due to "complains of fatigue", which "is in keeping with a clinical picture whereby he cognitively fatigues quite quickly on effort, on cognitive effort, on mental effort".[146] The Prosecution fails to substantiate its submission that the length of the medical examinations had an impact on their quality or undermines the reliability of the Experts' conclusions.

39. The Appeals Chamber also finds unpersuasive the Prosecution's contention that the Trial Chamber erred in relying on Dr. Mezey's conclusion, given that she interviewed Kabuga by video in both November 2022 and February 2023. The Appeals Chamber observes that the Trial Chamber expressly noted Dr. Mezey's impressive credentials and extensive experience as an expert forensic psychiatrist, in particular her expertise in the assessment, treatment, and rehabilitation of mentally disordered offenders.[147] Cognizant of Dr. Mezey's expertise and taking into account that she had previously examined Kabuga extensively in person and was aware of the other experts' examining him in person, the Trial Chamber found that the remote nature of Dr. Mezey's interview of Kabuga did not undermine the value of her expert opinion.[148] In reaching this conclusion, the Trial Chamber also explicitly noted that the Second Joint Monitoring Report completed and affirmed the Experts' assessments made three months earlier, and considered that it should be read in conjunction with the First Joint Monitoring Report and previous reports by Dr. Kennedy and Dr. Mezey.[149]

40. In addition, the Appeals Chamber considers insufficient the Prosecution's reliance on isolated portions of Dr. Kennedy's and Dr. Cras's testimonies, commenting on the advantages of an "in-person" over a remote assessment,[150] to demonstrate an error in the Trial Chamber's evaluation of the evidence before it. While Dr. Mezey did not conduct a "Mini Mental State Examination" during the remote examination as pointed by the Prosecution,[151] the record before the Trial Chamber indicated that Dr. Mezey had conducted such a test to measure possible cognitive decline during her first examination of Kabuga, and viewed the test as "not particularly useful […] to measure progression" or necessary to be repeated "unless the clinical findings were very different

[146] *See* Impugned Decision, n. 147, *referring*, *inter alia*, *to* Witness Kennedy T. 15 March 2023 pp. 14, 15.
[147] *See* Impugned Decision, para. 30, n. 71.
[148] Impugned Decision, para. 38.
[149] Impugned Decision, para. 38. *See also* Impugned Decision, para. 30; Second Joint Monitoring Report, RP. 5030; Witness Kennedy, T. 16 March 2023 p. 31 (affirming that the Experts' diagnosis of dementia was based on the personal examination of Kabuga by Dr. Kennedy and Dr. Cras, reports from the UNDU Medical Officer, interviews with people who would care for Kabuga on a daily basis and "earlier knowledge and assessment to discern a pattern over time"); Witness Cras, T. 29 March 2023 p. 6 (indicating that Kabuga's deterioration is a progressive process).
[150] Prosecution Appeal, para. 21, n. 79, *referring*, *inter alia*, *to* Witness Cras, T. 29 March 2023 pp. 44, 45, Witness Kennedy, T. 16 March 2023 pp. 8, 9.
[151] Prosecution Appeal, para. 21, n. 81, *referring to* Witness Mezey, T. 23 March 2023 pp. 12, 19, 20.

from what was found on the first occasion".[152] In any event, irrespective of the different modalities of the Experts' examinations of Kabuga, their conclusions regarding Kabuga's capacities converged.[153] In view of the Trial Chamber's detailed discussion of the record before it, the Appeals Chamber dismisses the Prosecution's claim that the Trial Chamber erred in failing to find that Dr. Mezey's remote interview of Kabuga undermined the value of her conclusions.

41. The Appeals Chamber further finds no merit in the Prosecution's contention that the Second Joint Monitoring Report reflects that the Experts failed to consider multiple key medical reports and were unaware of the seriousness of Kabuga's physical illnesses.[154] While the Second Joint Monitoring Report does not mention Kabuga's intercurrent illnesses, it nevertheless reflects that the Experts read and considered numerous reports by the UNDU Medical Officer, which documented Kabuga's contemporaneous medical situation.[155] The Second Joint Monitoring Report also reflects that, during their assessment, Dr. Kennedy and Dr. Cras interviewed prison nursing staff, reviewed Kabuga's electronic health records, and spoke to the treating UNDU Medical Officer.[156] Importantly, in their testimonies before the Trial Chamber following the filing of the Second Joint Monitoring Report, the Experts expressly commented on Kabuga's intercurrent illnesses, stating that such illnesses did not materially affect their conclusions regarding Kabuga's inability to participate meaningfully in the trial.[157]

42. Finally, concerning the Prosecution's general contention that the Trial Chamber failed to critically evaluate the Second Joint Monitoring Report, the Appeals Chamber recalls that it is for a trial chamber to assess the reliability and probative value of the expert evidence before it.[158] In reaching its conclusion on Kabuga's fitness to stand trial, the majority of the Trial Chamber extensively discussed various aspects of the Experts' evaluation of Kabuga's cognitive capacities.[159] The Trial Chamber, by majority, considered that the key evidence before it came from the three Experts, "each of whom has impressive credentials and extensive relevant experience".[160] Having outlined the evidence and the points of agreement reached by the Experts, including in the

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[152] Witness Mezey, T. 23 March 2023 p. 21; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar's Submission in Relation to the "Supplemental Order on Order for Further Independent Medical Expert Evaluation" of 14 January 2022, 31 January 2022 (confidential with confidential annex) ("Dr. Mezey's Report of 28 January 2022"), Annex, pp. 3, 9.
[153] *See* Impugned Decision, paras. 30-35.
[154] *See* Prosecution Appeal, paras. 16, 17, 24.
[155] Second Joint Monitoring Report, RP. 5030, 5029. *See* UNDU Medical Report of 25 January 2023, paras. 2, 3; UNDU Medical Report of 8 February 2023, paras. 2, 5; UNDU Medical Report of 21 February 2023, paras. 2, 3, 6.
[156] Second Joint Monitoring Report, RP. 5029. *See also* Witness Kennedy, T. 15 March 2023 p. 14, T. 16 March 2023 pp. 11-15, 31.
[157] *See supra* para. 36.
[158] *See supra* paras. 30, 37.
[159] *See* Impugned Decision, paras. 30-38 and references cited therein. *See also* Impugned Decision, paras. 9, 16, 18-23.

Second Joint Monitoring Report, and having extensively discussed the Experts' conclusions,[161] the Trial Chamber was satisfied that the vast majority of the evidence before it supported the conclusion that Kabuga was unfit for trial.[162] The Trial Chamber also noted that nothing in its own observations of Kabuga during the proceedings was contrary to the collective findings of the Experts.[163] Notably, in reaching this conclusion, the Trial Chamber was mindful of the issues to which the Prosecution points on appeal – such as those related to Kabuga's intercurrent illnesses and remote examinations by Dr. Mezey.[164] Accordingly, the Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber committed a discernible error in evaluating the evidence before it.

(b) Alleged Failure to Account for Kabuga's Lack of Cooperation

43. The Prosecution submits that the Trial Chamber erred in not giving any, or sufficient, weight to Kabuga's long-term lack of cooperation in the context of the medical assessments.[165] In particular, the Prosecution submits that the Trial Chamber failed to account for Kabuga's uncooperative behaviour in accepting that malingering was unlikely and in concluding that Kabuga had discharged his burden of proving unfitness.[166] In this regard, the Prosecution contends that the accuracy of the clinical assessment was undermined by Kabuga's persistent refusal to wear prescribed hearing aids during medical examinations, repeated refusal to participate in or complete formal screening tests for dementia, and failure to provide all medical information relevant to the assessment of his fitness.[167] The Prosecution submits that previous medical assessments of Kabuga show that some of his answers were atypical for dementia, suggesting he was not being forthright, that gaps in his memory may be explained by his desire to protect family members,[168] and that the lack of cooperation might indicate will or the intent of not being evaluated properly.[169] According to the Prosecution, since the medical diagnosis for dementia is based on the totality of clinical observations, Kabuga's lack of cooperation rendered the overall assessment less reliable.[170]

[160] Impugned Decision, para. 30.
[161] *See* Impugned Decision, paras. 18-23, 30-35, 38.
[162] Impugned Decision, para. 30.
[163] Impugned Decision, para. 38.
[164] Impugned Decision, paras. 37, 38.
[165] Prosecution Appeal, para. 25.
[166] Prosecution Appeal, paras. 2, 3, 25, 28, 29.
[167] Prosecution Appeal, para. 26. *See also* Prosecution Reply, n. 11.
[168] Prosecution Appeal, paras. 27, 29.
[169] Prosecution Appeal, para. 28.
[170] Prosecution Appeal, para. 29.

44. In response, the Defence objects to the Prosecution's contention that Kabuga's alleged lack of cooperation undermined the Trial Chambers' assessment.[171] The Defence asserts that Kabuga met with and answered questions from seven different experts over a period of three years, and that his interactions with the UNDU Medical Officers form the basis of numerous medical reports.[172] According to the Defence, if Kabuga was unable to answer questions or complete tests, it was due to his dementia caused by the physical damage to his brain.[173]

45. At the outset, the Appeals Chamber considers that the Prosecution's reliance on jurisprudence from another case - to show that an accused's lack of cooperation renders an assessment of competency to stand trial impossible - is inapposite as it concerns distinguishable factual circumstances.[174] The Appeals Chamber notes that, in reaching its decision on Kabuga's lack of fitness to stand trial, the Trial Chamber thoroughly considered the record before it and accepted the Experts' view that Kabuga's fatigue and partial lack of cooperation during the examinations did not undermine the Experts' conclusions.[175] The Trial Chamber also specifically noted the Experts' opinion attributing any alleged "lack of cooperation" to the deterioration of Kabuga's brain function,[176] and that the Experts' conclusions on Kabuga's fitness did "not rely solely on the examinations, but also […] on information contained in the medical records and obtained from staff who care for Kabuga".[177] The Trial Chamber considered that such records and clinical information revealed a significant decline in Kabuga's ability to care for himself, which was another indication of decline in cognitive functions.[178] The Trial Chamber further considered evidence that Kabuga experiences episodic confusion, his capacities to engage in expressive and receptive communication are limited,[179] and that the Experts struggled to elicit even very simple pieces of information from Kabuga.[180] In view of the Trial Chamber's detailed discussion of the record before it, the Prosecution does not demonstrate that the Trial Chamber committed a discernible error by failing to accord sufficient weight to Kabuga's partial lack of cooperation.

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[171] Defence Response, para. 34.
[172] Defence Response, para. 34.
[173] Defence Response, para. 34.
[174] Prosecution Appeal, n. 91, *referring*, *inter alia*, *to Prosecutor v. Milorad Trbić*, Case No. IT-05-88/1-PT, Order in Regard to the Preparation for Trial, 21 March 2007 (confidential), pp. 2, 4.
[175] Impugned Decision, para. 37, n. 147.
[176] Impugned Decision, para. 37, n. 147, *referring*, *inter alia*, *to* Witness Kennedy, T. 15 March 2023 p. 14, Witness Kennedy, T. 16 March 2023 p. 14 (private session), Witness Mezey, T. 23 March 2023 pp. 5-7 (private session), Witness Cras, T. 29 March 2023 pp. 7, 8 (private session), 27, 28, 33.
[177] Impugned Decision, para. 37, n. 147, *referring*, *inter alia*, *to* Witness Kennedy, T. 15 March 2023 pp. 13-16.
[178] Impugned Decision, para. 37, n. 148, *referring*, *inter alia*, *to* Witness Kennedy, T. 17 March 2023 p. 17.
[179] Impugned Decision, para. 31, n. 127, *referring*, *inter alia*, *to* First Joint Monitoring Report, p. 4; Second Joint Monitoring Report, RP. 5029.
[180] Impugned Decision, para. 32, n. 133, *referring to* Witness Mezey, T. 23 March 2023 pp. 43, 44.

46. The Appeals Chamber further considers unsubstantiated the Prosecution's submission that the Trial Chamber failed to account for Kabuga's uncooperative behavior in accepting the Experts' conclusion that malingering was unlikely. The Trial Chamber noted the Experts' unanimous opinion that Kabuga suffers from "severe dementia".[181] While a medical diagnosis alone does not suffice to assess an accused's competency to stand trial,[182] the Appeals Chamber sees no error in the Trial Chamber's reliance on Kabuga's diagnosis in accepting the testimony of Dr. Kennedy and Dr. Cras that simulating or malingering is "quite rare to non-existent" in dementia.[183]

47. Finally, while in the Impugned Decision the Trial Chamber did not explicitly discuss some of the specific factors outlined by the Prosecution on appeal, such as Kabuga's refusal to wear hearing aids, to participate in screening tests, and to provide medical information, the Appeals Chamber recalls that a trial chamber need not refer to every single piece of evidence on the record or articulate every step of its reasoning.[184] The Appeals Chamber observes that the Prosecution refers to evidence, which in fact suggests that Kabuga's medical assessment on several occasions was "difficult" in light of his serious hearing loss,[185] that, on one occasion in early 2022, Kabuga did not want to do a memory test,[186] and that Kabuga's claim of fatigue during the examinations conducted in 2021 were not supported by medical evidence.[187] The Prosecution also points out that, on one occasion in February 2022, Kabuga expressed reluctance for the release of a medical report, and claims that Kabuga's medical records, predating his arrest and transfer to the Mechanism in October 2020, were never shared with the Experts.[188] The Appeals Chamber considers that the Prosecution's selective reliance on the record merely demonstrates its disagreement with the Trial Chamber's assessment[189] and is insufficient to demonstrate that the Trial Chamber committed a discernible error, particularly in light of the extensive medical evidence considered by the Experts

[181] Impugned Decision, para. 30.
[182] Decision of 12 August 2022, para. 20 and references cited therein.
[183] Impugned Decision, para. 37, n. 149, *referring to* Witness Kennedy, T. 15 March 2023 pp. 15, 16, T. 16 March 2023 pp. 31, 32, Witness Cras, T. 29 March 2023 pp. 28, 45, 46.
[184] *Stanišić and Simatović* Appeal Judgement, paras. 246, 312 and references cited therein.
[185] *See*, *e.g.*, Prosecution Appeal, para. 26, n. 95, *referring to* Witness Cras, T. 29 March 2023 pp. 17, 18.
[186] Prosecution Appeal, para. 26, n. 96, *referring to* Witness Kennedy, T. 31 May 2022 p. 11.
[187] Prosecution Appeal, para. 26, n. 97.
[188] Prosecution Appeal, para. 26, n. 99.
[189] *Compare*, *e.g.*, Prosecution Appeal, para. 26, n. 99 (*referring to* UNDU Medical Report of 16 February 2022 (confidential), p. 1) *with* UNDU Medical Report of 4 January 2023 (confidential), RP. 4711, para. 2. *See also* Dr. Mezey's Report of 28 January 2022, pp. 6, 14, 16, paras. 16, 17; First Joint Monitoring Report, p. 4; Witness Kennedy, T. 15 March 2023 pp. 5 (stating that "[Kabuga] did not complete many of the tasks we asked him to take part in but those that he did complete for us were completed inaccurately in various ways, indicative of lack of ability"), 16, 17, T. 16 March 2023 p. 29, T. 17 March 2023 p. 16; Witness Mezey, 23 March 2023 pp. 12, 19, 21; Witness Cras, T. 29 March 2023 pp. 4, 12, 29, 30, 46 (wherein he stated that: "Some of the tests that we used and that a neuropsychologist has used do not depend on verbal interactions. So even if it's a challenge, we are still convinced that we could do most of the assessment thoroughly […]."); UNDU Medical Report of 16 November 2022; UNDU Medical Report of 30 November 2022; UNDU Medical Report of 14 December 2022; UNDU Medical Report of 11 January 2023; UNDU Medical Report of 8 February 2023.

in forming their opinions and the Trial Chamber's broad discretion in weighing and assessing the evidence before it.[190]

#### 4. Conclusion

48. As found above, the Prosecution has failed to demonstrate that the Trial Chamber erred in law by applying an incorrect legal standard when determining that Kabuga is not fit to stand trial. The Prosecution also has not demonstrated that the Trial Chamber abused its discretion in evaluating the evidence relating to Kabuga's fitness to stand trial. Accordingly, the Prosecution Appeal is dismissed.

### C. The Defence Appeal

#### 1. Background

49. In the Impugned Decision, the Trial Chamber considered that the Statute and the Rules of the Mechanism and its predecessor tribunals were silent on the applicable procedure following a finding that an accused is not fit to stand trial, and that there was similarly no Appeals Chamber jurisprudence directing how to proceed in such circumstances.[191] Relying on its discretion to manage the proceedings before it, the Trial Chamber considered it to be its obligation "to identify a procedure, in line with its duty to respect and ensure respect for all generally accepted human rights norms, especially the rights of the accused as set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the [Convention on the Rights of Persons with Disabilities]", and with due regard to the "purposes for which the Mechanism and its predecessor tribunals were established, including contributing to the restoration and maintenance of peace and security".[192] In this regard, the Trial Chamber considered three options following its finding that Kabuga was not fit to stand trial: (i) terminating the proceedings; (ii) staying the proceedings; or (iii) conducting an "alternative finding procedure".[193]

50. In relation to the first option, the Trial Chamber considered that terminating the proceedings would not be appropriate in light of the importance of "addressing the crimes against humanity and genocide charges against [Kabuga] to the victims and survivors of those crimes, and to the international community as a whole".[194] In relation to the possibility of staying the proceedings, the

[190] *See Stanišić and Simatović* Appeal Judgement, paras. 121, 122, 142, 173, 387 and references cited therein.
[191] Impugned Decision, paras. 40, 45.
[192] Impugned Decision, para. 45 and references cited therein.
[193] Impugned Decision, para. 46.
[194] Impugned Decision, para. 47.

Trial Chamber noted that, in cases before international courts involving unfit accused, courts have generally stayed the proceedings, maintaining jurisdiction in the event the accused regained fitness.[195] In deciding, however, that a stay of proceedings was not appropriate in the present case, the Trial Chamber considered that, with the exception of one case before the Extraordinary Chambers in the Courts of Cambodia, cases in which international courts have stayed proceedings "have virtually all involved accused persons who had a realistic prospect of regaining fitness".[196] The Trial Chamber further considered that staying proceedings indefinitely, while an accused is very unlikely to regain fitness, "deprives that accused of an opportunity to establish his or her innocence of the charged offences" and to be unconditionally released.[197] The Trial Chamber also took into consideration the goals of the Mechanism, including combating impunity and contributing to the restoration and maintenance of peace in Rwanda, the strong public interest, including the interest of victims and survivors, and the fact that, until the date of his arrest, Kabuga had evaded justice for over two decades.[198]

51. Having found that neither terminating nor imposing a stay of proceedings were appropriate ways to proceed in the circumstances,[199] the Trial Chamber, by majority, determined that "the best way to ensure respect for [Kabuga's] rights and to effectuate the goals of the Mechanism is to adopt an alternative finding procedure that resembles a trial as closely as possible, but without the possibility of a conviction".[200] In delineating the parameters of this procedure, the Trial Chamber held that the Prosecution would still bear the burden of proving beyond reasonable doubt "both the *actus reus* and *mens rea* of each charge"[201] and that the Trial Chamber "will seek to facilitate [Kabuga's] participation in the alternative finding proceedings to the extend he is able and is reasonably practicable".[202] The Trial Chamber noted, however, that, Kabuga's lack of fitness to participate effectively in the trial and the fact that the proceedings will not result in a conviction make his attendance "unnecessary" and that Kabuga "will, therefore, not be required to attend".[203]

52. In adopting an "alternative finding procedure", the majority of the Trial Chamber relied on similar procedures being held in England and Wales, Scotland, New Zealand, South Africa, Australia, Guatemala, and the state of New Mexico in the United States of America.[204] The Trial

[195] Impugned Decision, para. 48, n. 187.
[196] Impugned Decision, para. 49.
[197] Impugned Decision, para. 50.
[198] Impugned Decision, para. 51.
[199] Impugned Decision, paras. 47, 51.
[200] Impugned Decision, para. 57.
[201] Impugned Decision, para. 57.
[202] Impugned Decision, para. 58.
[203] Impugned Decision, para. 58.
[204] Impugned Decision, para. 52, nn. 198, 199.

Chamber noted that a common feature of these procedures that distinguished them from full trials was that they could not result in a conviction, as such an outcome would violate the rights of an accused found unfit,[205] and that these jurisdictions considered the "continued detention of an unfit accused […] sometimes necessary to protect the accused and the public".[206] The Trial Chamber observed that such procedures generally differed in relation to the burden of proof and whether proof of both *actus reus* and *mens rea* was required,[207] and in relation to the presence of the accused.[208] Notwithstanding, the Trial Chamber noted that the Law Commission of England and Wales had recommended a new procedure, which it called an "alternative finding procedure", that would require proof of both *actus reus* and *mens rea*, and that the Commission had also recommended supporting the participation of an unfit accused to the greatest extent feasible.[209]

53. As noted above, the Defence advances three grounds of appeal, arguing that the Trial Chamber erred in law in failing to order a stay of proceedings, in deciding to hold an "alternative finding procedure", and in failing to order Kabuga's release.[210] Given that the second ground of the Defence Appeal relates to an issue that is central to the Impugned Decision, the Appeals Chamber considers it appropriate to address it first.

### 2. Alleged Error in Adopting an "Alternative Finding Procedure"

54. The Defence contends that the Trial Chamber erred in law in determining that it had the discretion to conduct an "alternative finding procedure",[211] which constitutes a novel procedure with no legal basis.[212] In relation to the Trial Chamber's discretionary power, the Defence argues that neither the Statute nor the Rules provide for the procedure adopted by the Trial Chamber, which, in itself, is a breach of Articles 18 and 19 of the Statute, given that Kabuga is unable to exercise his fundamental rights due to his lack of fitness to stand trial.[213] According to the Defence, the purposes cited by the Trial Chamber for the establishment of the Mechanism and its predecessor tribunals similarly do not justify the adoption of a new procedure, which fails to meet the requirements for a fair trial.[214] The Defence further argues that, in view of the limited number of national jurisdictions that provide for a procedure similar to the one adopted by the Trial Chamber,

[205] Impugned Decision, para. 53.
[206] Impugned Decision, para. 53.
[207] Impugned Decision, paras. 54, 56.
[208] Impugned Decision, para. 55.
[209] Impugned Decision, paras. 54, 55.
[210] *See supra* para. 11.
[211] Defence Appeal, paras. 68, 88-95, *referring*, *inter alia*, *to* Impugned Decision, paras. 40, 45.
[212] Defence Appeal, paras. 62, 68, 69, 97-104.
[213] Defence Appeal, paras. 63, 93-95, *citing* Dissenting Opinion, para. 32. *See also* Defence Appeal, para. 100.
[214] Defence Appeal, paras. 65, 70, 96, *referring to* Impugned Decision, para. 45.

such procedure is neither supported by a general principle of law nor has a basis in international custom.[215] The Defence claims that the procedure also infringes the principles of legality and equality before the law,[216] and is counter to the rationale underpinning the "[United Nations] guidelines on persons with disabilities".[217]

55. The Prosecution responds that, in view of the absence of an established procedure prescribing the consequences of an unfitness finding, the Trial Chamber reasonably identified a procedure in light of its broad discretion to manage the proceedings.[218] Referring to the inherent authority of the ICTY and the ICTR to prosecute allegations of contempt and to exercise jurisdiction over joint criminal enterprise liability, none of which were explicitly mentioned in their statutes and/or their rules of procedure and evidence, the Prosecution argues that the Mechanism has inherent power to issue such rulings as necessary to exercise its express jurisdiction.[219] According to the Prosecution, unlike staying the proceedings, which would keep Kabuga in limbo and unable to exercise his right to defend himself against the charges, the "alternative finding procedure" would give effect to the Mechanism's jurisdiction to prosecute Kabuga in a manner that prioritizes his rights.[220] In this regard, the Prosecution claims that the Trial Chamber correctly took into account the rights and fairness principles enshrined in Articles 18 and 19 of the Statute, and appropriately resolved the ambiguity in the Statute in accordance with its object and purpose.[221]

56. The Prosecution further asserts that the Trial Chamber was not required to base its approach on customary international law or on a general principle of international law, and that it correctly acknowledged that it had the duty to give effect to all relevant human rights norms, including those set out in the Convention on the Rights of Persons with Disabilities.[222] The Prosecution argues that the "alternative finding procedure" is fully consistent with the protections afforded to accused persons by the International Covenant on Civil and Political Rights and the European Convention on Human Rights, and constitutes a reasonable accommodation mandated by the Mechanism's obligation to respect internationally recognized human rights norms.[223] The Prosecution further points out that, under the Convention on the Rights of Persons with Disabilities, persons with disabilities must enjoy legal capacity and access to justice on an equal basis as those without

[215] Defence Appeal, paras. 62, 97-99, *citing* Dissenting Opinion, para. 35.
[216] Defence Appeal, paras. 62, 102, 103, *citing* Dissenting Opinion, para. 33.
[217] Defence Appeal, para. 101.
[218] Prosecution Response, paras. 10-13.
[219] Prosecution Response, paras. 12, 13.
[220] Prosecution Response, para. 14.
[221] Prosecution Response, paras. 15, 16.
[222] Prosecution Response, para. 17.
[223] Prosecution Response, para. 17.

disability and that, while national approaches may vary, the Trial Chamber correctly referred to a non-exhaustive list of national examples.[224]

57. The Appeals Chamber will first address the Defence argument that the Trial Chamber erred in law in finding that it had the discretion to conduct an "alternative finding procedure". To succeed on appeal, the Defence needs to demonstrate that the Trial Chamber committed a specific error of law that invalidates the Impugned Decision.[225]

58. At the outset, the Appeals Chamber recalls that, in principle, trial chambers enjoy considerable discretion in relation to the management of proceedings before them.[226] Such discretion is exercised in a plethora of circumstances, for instance, in relation to the joinder of cases, the scheduling of trials, the admission and evaluation of evidence, in deciding points of practice and procedure, including in assignment of counsel, in determining whether an accused should be granted provisional release, and in imposing a sentence.[227] The unprecedented nature of a procedure, which is neither expressly allowed for nor specifically prohibited in the Statute or the Rules, does not *per se* indicate that such procedure falls outside a trial chamber's discretionary power.[228]

59. In the present case, relying on its discretion to manage the proceedings before it, the Trial Chamber decided to adopt "an alternative finding procedure that resembles a trial as closely as

[224] *See* Prosecution Response, paras. 17-22.
[225] *See Prosecutor v. Maximilien Turinabo et al.*, Case Nos. MICT-18-116-PT & MICT-18-116-AR79.1, Decision on Prosecution Appeal Against Decision on Challenges to Jurisdiction, 28 June 2019, para. 5; *Prosecutor v. François-Xavier Nzuwonemeye*, Case No. MICT-13-43, Decision on the Appeal of the Single Judge's Decision of 22 October 2018, 17 April 2019, para. 12; *Prosecutor v. Radovan Karadžić*, Case Nos. IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III-Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 10; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para. 7.
[226] *See*, *e.g.*, *Stanišić and Simatović* Appeal Judgement, para. 295; *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Judgement, 8 June 2021 (public redacted) ("*Mladić* Appeal Judgement"), para. 107; *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Judgement, 20 March 2019 (public redacted) ("*Karadžić* Appeal Judgement"), para. 72.
[227] *See*, *e.g.*, *Stanišić and Simatović* Appeal Judgement, paras. 288, 320*; Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-AR80.2, Decision on an Appeal of a Decision on Félicien Kabuga's Representation, 4 November 2022, para. 16; *Mladić* Appeal Judgement, paras. 84, 539; *Karadžić* Appeal Judgement, para. 198; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014, para. 29; *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 3.
[228] *Cf. Stanišić and Simatović* Appeal Judgement, paras. 583, 592; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013, para. 47; The *Prosecutor v. Arséne Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Decision on "Appeal of Accused Arséne Shalom Ntahobali Against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997", 27 October 2006, para. 12.

possible".[229] The Trial Chamber explained that, in the course of this procedure: (i) Kabuga's attendance would be unnecessary due to his lack of fitness to participate effectively in the trial coupled with the fact that the procedure will not result in a conviction;[230] and (ii) the Prosecution would retain the burden to prove beyond reasonable doubt both the *actus reus* and *mens rea* elements of each charge against Kabuga.[231] The Appeals Chamber considers that, although seemingly procedural in nature, the essential elements of the "alternative finding procedure", as defined by the Trial Chamber, impact Kabuga's substantive rights "in the sense of there being a legitimate expectation to be tried in a certain way in order to achieve the fundamental objective of a fair trial".[232] The Appeals Chamber therefore considers that whether the Trial Chamber is vested with discretion to conduct such an "alternative finding procedure" in lieu of a trial is ultimately a question of statutory interpretation.[233]

60. The Appeals Chamber recalls that the Statute is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of its object and purpose.[234] Turning first to the terms of the Statute, the Appeals Chamber notes that, pursuant to Article 1(2) of the Statute, the Mechanism has the power to prosecute the persons indicted by the ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered by Article 1(1) of the Statute. In articulating the stages of the proceedings, Article 18(1) of the Statute requires a trial chamber to ensure that the "trial" is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused. Article 19 of the Statute, which in setting out the rights of the accused tracks Article 14 of the International Covenant on Civil and Political Rights,[235] provides that the accused shall be

[229] Impugned Decision, paras. 45, 57.
[230] Impugned Decision, para. 58.
[231] Impugned Decision, para. 57.
[232] *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A15bis, Decision in the Matter of Proceedings Under Rule 15*bis*(D), 24 September 2003, para. 12.
[233] *See Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 98 (wherein, in discussing a question not expressly provided in its statute, the Appeals Chamber of the ICTY held that "[r]eferences to the law and practice in various countries and in international institutions are not necessarily determinative of the question as to the applicable law" and that "[u]ltimately, that question must be answered by an examination of the [ICTY] Statute and Rules, and a construction of them which gives due weight to the principles of interpretation (good faith, textuality, contextuality, and theology) set out in the 1969 Vienna Convention on the Law of Treaties").
[234] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015 ("*Nyiramasuhuko et al.* Appeal Judgement"), para. 2137, *referring to* Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, Vol. 1155, p. 331. *See also Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, paras. 67, 68; *Aleksovski* Appeal Judgement, para. 98; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 282.
[235] *See Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (original filed in French, English translation filed on 16 May 2008) ("*Nahimana et al.* Appeal Judgement"), para. 96 (concerning equivalent Article 20 of the ICTR Statute); *Slobodan Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel,

presumed innocent until proven guilty, and shall be entitled to minimum guarantees, including to be "tried" in his or her presence and to defend himself or herself in person or through legal assistance of his or her own choosing. Pursuant to Article 21 of the Statute, at the conclusion of the trial, the Trial Chamber shall pronounce a judgement and impose a sentence on an accused who has been convicted. Under Articles 23 and 24 of the Statute, the right to appeal and to seek review of judgement is afforded only to a convicted person and, in certain circumstances, to the Prosecution. Finally, the Statute provides for the principle of *non bis in idem*, whereby no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the Statute, for which he or she has already been "tried" by the Mechanism.[236]

61. The Appeals Chamber considers that a proper construction of the Statute, in accordance with the ordinary meaning to be given to the terms in their context, provides for the conduct of trials, without the possibility of conducting procedures that merely resemble trials in lieu of such trials.[237] This interpretation is also consistent with the object and purpose of the Statute as envisaged in United Nations Security Council Resolution 1966, in which the United Nations Security Council reaffirmed the need for the establishment of the Mechanism to carry out a number of essential functions of the ICTR, including "the *trial* of fugitives who are among the most senior leaders suspected of being most responsible for crimes".[238]

62. The Appeals Chamber further recalls that the Statute and the Rules of the Mechanism reflect normative continuity with the statutes and rules of procedure and evidence of the ICTR and the ICTY.[239] In establishing the ICTR and adopting its statute, the United Nations Security Council appears to have intended to give the ICTR jurisdiction to prosecute persons responsible for serious violation of international humanitarian law through the conduct of trials.[240] Hence, the representative of the French delegation noted that individuals "must be brought to *trial* and judged".[241] The Appeals Chamber observes that the Secretary-General's Report of 13 February

1 November 2004 ("*Milošević* Decision of 1 November 2004"), para. 11 (concerning equivalent Article 21 of the Statute of the ICTY).

[236] *See* Article 7(1) of the Statute.

[237] *See* Impugned Decision, para. 57 (wherein the Trial Chamber decided to adopt "an alternative finding procedure that resembles a trial as closely as possible").

[238] United Nations Security Council, Resolution 1966 (2010), U.N. Doc. S/RES/1966(2010), 22 December 2010 ("UNSC Resolution 1966 (2010)"), p. 1 (emphasis added).

[239] *Augustin Ngirabatware v. The Prosecutor*, Case No. MICT-12-29-A, Judgement, 18 December 2014 ("*Ngirabatware* Appeal Judgement"), para. 6, *referring to Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 ("*Munyarugarama* Decision of 5 October 2012"), para. 5.

[240] *See* United Nations Security Council Resolution 955 (1994), U.N. Doc. S/RES/955(1994), 8 November 1994 ("UNSC Resolution 955 (1994)"), pp. 1-3.

[241] United Nations Security Council 49th Year 3453rd Meeting, UN Doc. S/PV.3453, 8 November 1994, p. 3 (address of Mr. Mérimée) (emphasis added).

1995 similarly refers to the ICTR mandate to hold "trial proceedings".[242] In his report, the Secretary-General further emphasized that the establishment of the ICTR at a time when the ICTY was already in existence, dictated a "unity of legal approach".[243] Notably, the Secretary-General's Report of 3 May 1993 concerning the establishment of the ICTY and the adoption of its statute sets out detailed views on the stages of the proceedings and the related guarantees for the accused's fair trial rights by reference to "pre-trial proceedings, *trial* and post-trial proceedings".[244]

63. The Appeals Chamber echoes the Trial Chamber's emphasis on the purpose for which the ICTR was established, which includes contributing to the process of national reconciliation in Rwanda and to the restoration and maintenance of peace.[245] Indeed, the United Nations Security Council unequivocally expressed its conviction in this regard when adopting the Statute of the ICTR ("ICTR Statute"), which is also reflected in the statements of various delegates at the meeting, who supported the establishment of the *ad hoc* tribunal as an instrument of national reconciliation.[246] Notwithstanding, a holistic reading of the relevant United Nations Security Council resolutions concerning the establishment of the ICTR and the Mechanism reflects that the framers intended to effect these goals through combating impunity by way of creating tribunals that would investigate, prosecute, and conduct proceedings, for the "sole purpose" of holding individuals criminally accountable for serious violations of international humanitarian law.[247] It is pertinent to recall in this regard that the fundamental mandate of the Mechanism to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law.[248]

64. The Appeals Chamber further recalls that it is bound to interpret the Statute and the Rules of the Mechanism in a manner consistent with the jurisprudence of the ICTR and the ICTY.[249] Mindful of its obligation in this regard, the Appeals Chamber observes that the elements of the "alternative finding procedure", as defined by the Trial Chamber, appear to circumvent certain statutory guarantees afforded to all accused appearing before the Mechanism. In particular, the Trial

[242] Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1944), U.N. Doc S/1995/134, 13 February 1995 ("UN Secretary-General's Report of 13 February 1995"), paras. 36, 42.
[243] UN Secretary-General's Report of 13 February 1995, para. 9.
[244] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc S/25704, 3 May 1993 ("Secretary-General's Report of 3 May 1993"), paras. 16, 99-107 (emphasis added).
[245] *See* Impugned Decision, paras. 45, 51. *See also* UNSC Resolution 955 (1994), p. 1; UNSC Resolution 1966 (2010), p. 1.
[246] *See* UNSC Resolution 1966 (2010), p. 1. *See also*, *e.g.*, UN Doc. S/PV.3453 (8 November 1994), pp. 6, 8, 10, 12.
[247] UNSC Resolution 1966 (2010), p. 1; UNSC Resolution 955 (1994), pp. 1, 2. *See also* United Nations Security Council Resolution 827 (1993), U.N. Doc. S/RES/827(1993), pp. 1, 2.
[248] *See Aleksovski* Appeal Judgement, para. 113 (ii).

Chamber's conclusion that Kabuga's attendance would be unnecessary in the course of the "alternative finding procedure" appears incompatible with the plain reading of Article 19(4)(d) of the Statute, which provides accused appearing before the Mechanism with the right to be tried in their presence. Binding jurisprudence has interpreted this statutory guarantee to mean that an accused has the right to be physically present at trial.[250] The Appeals Chamber has emphasized that the accused's right to be tried in his or her presence is an "indispensable cornerstone of justice" and that the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial.[251]

65. The Appeals Chamber is cognizant that the right of an accused to be present at trial is not absolute as it may be waived or forfeited by the accused or otherwise restricted based on substantial trial disruptions on the part of an accused that are unintentional in nature.[252] However, in assessing a particular limitation on the right of an accused to be physically present, trial chambers are required to take into account the proportionality principle, pursuant to which any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.[253] The Appeals Chamber considers that, under the Mechanism's legal framework, this assessment can be made only in relation to an accused who is fit to stand trial.[254] For to continue a trial against an unfit accused is to deny him or her the statutory guarantee to be tried in his or her presence.[255] Indeed, the Appeals Chamber of the ICTY and the ICTR has cautioned against holding proceedings in the absence of an accused falling under

[249] *Ngirabatware* Appeal Judgement, para. 6; *Munyarugarama* Decision of 5 October 2012, para. 6.
[250] *See Hadžić* Decision of 4 March 2016, para. 8; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008 ("*Stanišić and Simatović* Decision of 16 May 2008"), para. 6; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 ("*Zigiranyirazo* Decision of 30 October 2006"), paras. 11-13.
[251] *Zigiranyirazo* Decision of 30 October 2006, paras. 8, 11, *referring to Milošević* Decision of 1 November 2004, paras. 11, 13.
[252] *Hadžić* Decision of 4 March 2016, para. 8; *Stanišić and Simatović* Decision of 16 May 2008, paras. 6, 15; *Zigiranyirazo* Decision of 30 October 2006, para. 14. The Appeals Chamber notes that the right of an accused who is fit to stand trial to be present can be restricted on the basis of substantial trial disruptions, which need not be intentional. *See Milošević* Decision of 1 November 2004, para. 14, n. 42 (wherein the Appeals Chamber of the ICTY considered the assignment of counsel to an accused who was considered fit to stand trial but "whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigors of trial work").
[253] *See Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Decision on the Scheduling of the Appeal Hearing and a Status Conference, 17 July 2020, para. 15; *Hadžić* Decision of 4 March 2016, para. 8; *Stanišić and Simatović* Decision of 16 May 2008, para. 6; *Zigiranyirazo* Decision of 30 October 2006, para. 14.
[254] *See Hadžić* Decision of 4 March 2016, para. 31 (wherein the Appeals Chamber of the ICTY invited the trial chamber to "reassess, based on the available and updated medical records, whether Hadžić is fit for trial, and *if it finds this to be the case*", it ordered the trial chamber to "assess all reasonably available modalities for continuing the trial under the proportionality principle" (emphasis added)).
[255] *See Zigiranyirazo* Decision of 30 October 2006, para. 11 (wherein the Appeal Chamber of the ICTR held that the physical presence of an accused before the ICTR "as a general rule, is one of the most basic and common precepts of a fair criminal trial").

the primary jurisdiction of the *ad hoc* tribunals, unless the accused has waived his or her right to be present.[256] Combined with the inability of an unfit accused to instruct counsel,[257] the jurisprudence is clear that the prejudice to an accused resulting from continuing the trial, while he or she is unfit to stand, would amount to a miscarriage of justice.[258]

66. The Appeals Chamber further notes that, under the "alternative finding procedure", the Prosecution would be required to prove beyond reasonable doubt both the *actus reus* and *mens rea* of the charged crimes without, however, the possibility of Kabuga being convicted.[259] The Appeals Chamber recalls that, under Rule 104 of the Rules, upon completion of the presentation of the parties' cases, a trial chamber must deliberate and decide separately on each charge contained in the indictment on whether it is satisfied that guilt has been proven beyond reasonable doubt, and shall impose a sentence in respect of each finding of guilt if it finds the accused guilty on one or more of the charges. As the Appeals Chamber has previously held, the textual and contextual interpretation of the Rules supports the principle that once a charge is proven beyond a reasonable doubt, a finding of guilt follows.[260] The jurisprudence is clear that "a trial chamber is bound to enter convictions for all distinct crimes which have been proven in order to fully reflect the criminality of the convicted person".[261] The "alternative finding procedure", as delineated by the Trial Chamber, appears incompatible with this requirement. In addition, while the difference between a trial resulting in a conviction and proceedings in which all elements of the offence are proven but no conviction entered may appear marginal on its face, the second scenario essentially runs counter to

[256] *See Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on the Outcome of the Proceedings, 29 June 2010, n. 19; *Nahimana et al.* Appeal Judgement, paras. 96-109 and references cited therein; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Decision of 29 October 1997"), para. 59.

[257] *See Popović et al.* Decision of 16 May 2011, para. 11; *Zigiranyirazo* Decision of 30 October 2006, para. 21 (wherein the Appeals Chamber of the ICTR held that the attempts of the trial chamber in that case "to give full respect to both the right to counsel and the principle of equality of arms do not compensate for the failure to accord the accused what is a separate and distinct minimum guarantee: the right to be present at his own trial"). Moreover, it is in circumstances where an accused's refusal to communicate or instruct counsel frustrates the fair and expeditious trial that "[w]hat is required of counsel is that they act in what they perceive to be the best interests of the Accused" and that this "is […] all that can be reasonably expected of counsel in such circumstances". *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 45.

[258] *Strugar* Appeal Judgement, para. 34 (wherein the Appeals Chamber of the ICTY considered that the issue of an accused's fitness to stand trial is of such importance that the immediate resolution by the Appeals Chamber of any question of fitness would appear to be essential as "the prejudice to the accused resulting from continuing the trial while he or she is unfit to stand trial would amount to a miscarriage of justice").

[259] Impugned Decision, para. 57.

[260] *See Prosecutor v. Marie Rose Fatuma et al.*, Case No. MICT-18-116-A, Judgement, 29 June 2022, para. 93.

[261] *See Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Judgement, 29 November 2017, para. 399; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015, para. 538; *Jean Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, para. 261. *See also Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor*, Case No. ICTR-98-44-A, Judgement, 29 September 2014, para. 711, *referring*, *inter alia*, *to Strugar* Appeal Judgement, para. 324, *citing Stakić* Appeal Judgement, para. 358.

the prohibition of holding trials *in absentia*.[262] The Appeals Chamber recalls that trials *in absentia* were intentionally excluded from the statutory framework of the Mechanism and its predecessor tribunals.[263]

67. The incompatibility of the "alternative finding procedure" with the existing Mechanism's legal framework is also highlighted by the potential consequence that, if Kabuga were to be found responsible for the charged crimes but not convicted, he would be precluded from challenging such finding on appeal or from seeking a review. Significantly, under Articles 23 and 24 of the Statute, such remedies are afforded only to convicted persons and the Prosecution. It is uncertain in these circumstances how, under the "alternative finding procedure", the accused's right to an effective remedy would be ensured.[264] Kabuga could also be denied the full protection afforded by the *non bis in idem* principle enshrined in Article 7 of the Statute, which has been interpreted by the ICTR Appeals Chamber "to protect a person who has been finally convicted or acquitted from being tried for the same offence again".[265]

68. In view of the above considerations, the Appeals Chamber finds that neither the Statute nor the jurisprudence of the Mechanism and its predecessor tribunals allow for the conduct of an "alternative finding procedure", as defined by the Trial Chamber, in lieu of a trial. The Appeals Chamber notes the Trial Chamber's considerations that the Committee on the Rights of Persons with Disabilities has urged States, which are parties to the Convention, to provide disabled accused with procedures that are as close as possible to those generally afforded to an accused,[266] and that the legislation of some domestic jurisdictions provides for procedures akin to trial in the event an accused is found unfit.[267] Notably, it is apparent from the Trial Chamber's reliance on a selected number of States that procedures akin to trials have been expressly and specifically legislated for in each respective jurisdiction.[268] The Appeals Chamber observes that treaty provisions and state

[262] *See supra* paras. 64, 65.
[263] *See* Secretary-General's Report of 3 May 1993, para. 101 (stating that "[t]here is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence" (internal reference omitted)).
[264] *See* Article 14(5) of the International Covenant on Civil and Political Rights. *See also* Articles 13 and 14 of the Convention on the Rights of Persons with Disabilities.
[265] *See The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009, para. 16, *referring to* Article 14(7) of the International Covenant on Civil and Political Rights.
[266] Impugned Decision, para. 50, *referring*, *inter alia*, *to* Articles 12(2), 12(3), and 13 of the Convention on the Rights of Persons with Disabilities, Report of the Committee on the Rights of Persons with Disabilities, A/76/55, 2021, paras. 23, 26 (wherein the Committee recommended that States parties take all legal, administrative and judicial measures necessary to eliminate all restrictions on the effective participation of persons with disabilities in all stages of the judicial process).
[267] Impugned Decision, paras. 52-56 and references cited therein.
[268] *See* Impugned Decision, paras. 52, 54, nn. 198, 203, 206 and references cited therein.

legislative practice, while of significance, are not necessarily determinative of the scope of the Mechanism's jurisdiction. It is the Statute, as the constitutive instrument of the Mechanism, that defines the scope and limits of its mandate and can only be amended or derogated by means of a United Nations Security Council resolution.[269]

69. The Appeals Chamber is further not persuaded by the Prosecution's argument that the "alternative finding procedure" falls within the Mechanism's inherent powers to issue such rulings as necessary to exercise its express jurisdiction.[270] As recalled above, the Statute, as the constitutive instrument of the Mechanism, defines the scope and limits of the Mechanism's substantive jurisdiction as set out in Articles 1 to 7 of the ICTR Statute.[271] As with the statutes of its predecessor tribunals, the Appeals Chamber recognizes that the Statute of the Mechanism "is not and does not purport to be […] a meticulously detailed code providing explicitly for every possible scenario and every solution, thereto" and that it sets out in general terms the jurisdictional framework within which the Mechanism has been mandated to operate.[272] Included in this framework is the inherent jurisdiction to ensure that its exercise of judicial functions is safeguarded.[273] In this regard, it has been indeed recognized that judges are not limited strictly and narrowly to the text of the Rules in carrying out their mandate and have the inherent authority to render orders that are reasonably related to the task before them and that derives automatically from the exercise of the judicial function.[274]

70. The Appeals Chamber notes that, in support of its submission, the Prosecution points to the authority of the Mechanism's predecessor tribunals in adjudicating joint criminal enterprise liability and allegations of contempt, despite the fact that the two notions were not expressly prescribed in their respective statutes and/or rules of procedure and evidence.[275] The Appeals Chamber recalls,

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[269] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009 ("*Karadžić* Decision 12 October 2009"), paras. 34-36 (concerning the statute of the ICTY).
[270] *See* Prosecution Response, para. 12.
[271] Article 1(1) of the Statute. *See also Karadžić* Decision 12 October 2009, para. 34.
[272] *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Milutinović et al.* Decision of 21 May 2003"), para. 18.
[273] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Nobilo* Contempt Appeal Judgement"), para. 30.
[274] *See Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule *11bis* Referral, 1 September 2005 ("*Stanković* Decision of 1 September 2005"), para. 51, nn. 97, 98 (stating that the ICTY's inherent authority includes, for instance, the power to examine its own jurisdiction, to admit evidence on appeal even if it was available at trial in cases where its exclusion would lead to a miscarriage of justice, and to hold persons in contempt to ensure the fairness of the proceedings and to provide for the proper administration of justice), *referring to Nobilo* Contempt Appeal Judgement, para. 30, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 14.
[275] *See* Prosecution Response, para. 12.

however, that the authority to exercise jurisdiction over joint criminal enterprise liability falls within the ICTR's substantive jurisdiction, prescribed under Article 6(1) of the ICTR Statute, to hold individuals criminally responsible for "committing" crimes referred to in Articles 2 to 4 of the ICTR Statute.[276] As for the authority to exercise jurisdiction over allegations of contempt, the Appeals Chamber recalls that the inherent jurisdiction of the *ad hoc* tribunals in this respect is derived from their judicial function to ensure that the exercise of jurisdiction, which was expressly given to them by their respective statutes, was not frustrated and that their basic judicial functions were safeguarded.[277]

71. As explained above, the Statute does not expressly give the Mechanism jurisdiction to conduct proceedings other than trial, appellate, and review proceedings.[278] In accordance with the principle *ubi lex voluit dixit*, had the drafters of the Statute intended to vest the Mechanism with the power to conduct proceedings similar to trials, they would have expressly provided for it. The Appeals Chamber considers that, in the case of an international criminal tribunal, this is not a power that can be regarded as inherent to its function.[279]

72. In view of the above considerations, the Appeals Chamber finds that, in adopting the "alternative finding procedure", the Trial Chamber exercised discretion that was not conferred upon it by the Mechanism's statutory framework, which constitutes an error of law, invalidating the Impugned Decision. In view of this conclusion, the Appeals Chamber does not find it necessary to address the remaining arguments under the Defence Appeal. The Appeals Chamber will now turn to consider how best to remedy the identified error, in the context of the circumstances of the present case.

### 3. Remedy

73. The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber considered that respect for Kabuga's rights supported adopting an "alternative finding procedure" rather than

[276] *See Milutinović et al*. Decision of 21 May 2003, paras. 18-20 (concerning equivalent Article 7(1) of the Statute of the ICTY). *See also The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004, paras. 461, 462, 468 (wherein the Appeals Chamber of the ICTR noted that: "while joint criminal enterprise liability is firmly established in the jurisprudence of the ICTY this is only the second ICTR case in which the Appeals Chamber has been called upon to address this issue. Given the fact that both the ICTY and the ICTR have mirror articles identifying the modes of liability by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute."); *Tadić* Appeal Judgement, paras. 186-194, 226.
[277] *See Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, paras. 13, 18.
[278] *See* Articles 18, 23, and 24 of the Statute.
[279] *Cf. Blaškić* Decision of 29 October 1997, para. 25 (concerning the power of the ICTY to issue subpoenas to States, which is not expressly provided in its statute).

staying the proceedings.[280] As the Appeals Chamber has found above, adopting an "alternative finding procedure" was not within the remit of the Trial Chamber and, therefore, such procedure does not constitute a viable alternative to staying the proceedings in the present case. The Appeals Chamber further observes that the Impugned Decision did not explicitly address cases before the Mechanism's predecessor tribunal in which, following an explicit or *de facto* finding that the accused was not fit to stand trial and had no realistic prospect of recovery, trial proceedings were stayed for an indefinite period of time and the accused was allowed to remain on provisional release under certain conditions.[281] While the Appeals Chamber is cognizant that trial chambers' determinations are not binding on other trial chambers or on the Appeals Chamber,[282] such practice may inform a decision on how to proceed in the present case.

74. Having upheld the Trial Chamber's finding that Kabuga is not fit to stand trial and that it is very unlikely he would regain fitness in the future,[283] the Appeals Chamber considers that the most appropriate way to proceed in the circumstances of the present case is to remand the matter to the Trial Chamber with an instruction to impose an indefinite stay of proceedings. Imposing an indefinite stay of proceedings is consistent with prior practice and strikes the appropriate balance between upholding the statutory guarantees afforded to all accused before the Mechanism and ensuring that an accused, who is allegedly responsible for some of the most egregious crimes and who has evaded justice for over two decades, remains under the Mechanism's jurisdiction.

75. In deciding to remand the matter to the Trial Chamber, the Appeals Chamber is cognizant of the Trial Chambers' organic familiarity with the case and of the medical monitoring regime that the Trial Chamber has put in place in view of Kabuga's health condition. The Trial Chamber is, therefore, best placed to determine the modalities of a stay of proceedings and to expeditiously address the issue of Kabuga's release in view of such stay. The Appeals Chamber notes in this regard that the evidentiary hearings in the present case have been temporarily stayed since

[280] Impugned Decision, para. 50.
[281] *See* Impugned Decision, para. 49 (wherein the Trial Chamber held that "[t]he only other international case with an accused in a similar situation is that of Ieng Thirith at the [Extraordinary Chambers in the Courts of Cambodia)]"). *Cf. Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Public Redacted Version of 24 March 2016 Decision on Remand on the Continuation of Proceedings, 5 April 2016, paras. 4, 28-31; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR65.1, Decision on Urgent Interlocutory Appeal from Decision Denying Provisional Release, 13 April 2015 (public with confidential annex), para. 23; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Motion for Formal Termination of the Proceedings, 17 June 2016; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Order Terminating the Proceedings, 22 July 2016, p. 1; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002, paras. 32, 42, p. 13; *Prosecutor v. Momir Talić*, Case No. IT-99-36/1-T, Decision on Motions, 26 November 2002, pp. 3, 4; *Prosecutor v. Momir Talić*, Case No. IT-99-36/1-T, Decision Regarding Fitness of the Accused to Stand Trial, 29 April 2003 (confidential), pp. 2, 3; *Prosecutor v. Momir Talić*, Case No. IT-99-36/1-T, Order Terminating Proceedings Against Momir Talić, 12 June 2003, p. 1.
[282] *See Mladić* Appeal Judgement, para. 243 and references cited therein.

6 March 2023[284] and that Kabuga remains in detention after having been confirmed unfit to stand trial. It is therefore imperative that, in imposing an indefinite stay of proceedings, the Trial Chamber give priority consideration to the issue of Kabuga's release under conditions that are most appropriate in the circumstances.

76. While the Appeals Chamber acknowledges that, as pointed out by the Prosecution, identifying a State that will accept Kabuga on its territory may present obstacles,[285] such a consideration may not be the basis for Kabuga's continuous detention on remand, pursuant to an order of the Mechanism. The Trial Chamber is, therefore, invited to expeditiously consider the appropriate modalities and conditions for his release.

### D. Concluding Remarks

77. The Appeals Chamber recalls that the ICTR was established as a measure contributing to the process of national reconciliation in Rwanda and to the restoration and maintenance of peace.[286] Appeals Chamber jurisprudence also reflects that there is indeed strong public interest to conduct proceedings against persons accused of serious international crimes, including genocide and crimes against humanity.[287] Notwithstanding, the Appeals Chamber is mindful that the essential interests of the international community to prosecute individuals charged with serious violations of international humanitarian law must be balanced with the fundamental rights of the accused.[288] This balance must be achieved within the scope of the Mechanism's mandate.

78. The Appeals Chamber is cognizant that victims and survivors of the crimes that Kabuga is charged with have waited long to see justice delivered, and that the inability to complete the trial proceedings in this case, due to Kabuga's lack of fitness to stand trial, must be disappointing. However, justice can be delivered only by holding trials that are fair and conducted with full respect for the rights of the accused set out in the Statute. This is a fundamental feature of the legal framework of the Mechanism and its predecessor tribunals, which is vital to the credibility and endurance of their legacy. In arriving at its decision, the Appeals Chamber has been guided by its

[283] *See supra* para. 48.
[284] *See* Impugned Decision, paras. 17, 59.
[285] *See* Prosecution Response, para. 35.
[286] *See* UNSC Resolution 1966 (2010), Preamble; UNSC Resolution 955 (1994), p. 1.
[287] *See Karadžić* Decision of 12 October 2009, paras. 49, 52; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 ("*Nikolić* Decision of 5 June 2003"), para. 25.
[288] *See Nyiramasuhuko et al.* Appeal Judgement, n. 943; *Karadžić* Decision of 12 October 2009, para. 46; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 206; *Nikolić* Decision of 5 June 2003, paras. 26, 30.

duty to ensure that decisions are based solely on justice and law.[289] It is axiomatic that justice must be done and must be seen to be done.[290]

## III. DISPOSITION

79. For the foregoing reasons, the Appeals Chamber,

**GRANTS** the Prosecution Request and recognizes the Prosecution Response as validly filed;

**GRANTS** the Request for Access and **ALLOWS** the parties to share the MRI Results with their consulting experts on a strictly confidential basis;

**DENIES** the Prosecution Appeal in its entirety;

**GRANTS** the Defence Appeal, in part;

**QUASHES** the Impugned Decision;

**REMANDS** the matter to the Trial Chamber with an instruction to impose an indefinite stay of proceedings and expeditiously address the issue of Kabuga's detention on remand, consistent with the present Decision; and

**DISMISSES** the remainder of the Defence Appeal.

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

Done this 7th day of August 2023
At Arusha,
Tanzania

Judge Carmel Agius
Presiding Judge

**[Seal of the Mechanism]**

[289] *See Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para. 51; *Jean Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (original filed in French, English translation filed on 7 April 2000), para. 34.
[290] *Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 8 June 1998, para. 32.

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- ☐ Motion/ *Requête*
- ☒ Decision/ *Décision*
- ☐ Order/ *Ordonnance*
- ☐ Judgement/ *Jugement/Arrêt*
- ☐ Submission from parties/ *Écritures déposées par des parties*
- ☐ Submission from non-parties/ *Écritures déposées par des tiers*
- ☐ Book of Authorities/ *Recueil de sources*
- ☐ Affidavit/ *Déclaration sous serment*
- ☐ Indictment/ *Acte d'accusation*
- ☐ Warrant/ *Mandat*
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