

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-AR80.2

Date: 4 November 2022

Original: English

IN THE APPEALS CHAMBER

Before: Judge Joseph E. Chiondo Masanche, Presiding
Judge Burton Hall
Judge Vagn Joensen
Judge José Ricardo de Prada Solaesa
Judge Fatimata Sanou Touré

Registrar: Mr. Abubacarr M. Tambadou

Decision of: 4 November 2022

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON AN APPEAL OF A DECISION ON FÉLICIEN
KABUGA'S REPRESENTATION**

The Office of the Prosecutor:

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

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit
Ms. Françoise Mathe

Appellant:

Mr. Philippe Larochelle

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively)¹ is seized of an appeal filed on 27 September 2022 by Mr. Philippe Larochelle (“Appellant”)² against a decision issued by a trial chamber of the Mechanism in the case of *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38 (“Trial Chamber” and “Kabuga Case”, respectively) denying a request for the withdrawal of Mr. Emmanuel Altit as counsel for Mr. Félicien Kabuga.³ The Office of the Prosecutor of the Mechanism (“Prosecution”) filed a response opposing the appeal on 7 October 2022,⁴ and the Appellant filed a reply on 14 October 2022.⁵

I. BACKGROUND

2. On 2 October 2020, the Registrar of the Mechanism (“Registrar”) assigned Mr. Altit as Duty Counsel to represent Mr. Kabuga at his initial appearance and in such other matters as may be necessary until a permanent counsel is appointed or assigned.⁶ Following Mr. Kabuga’s initial appearance, on 6 January 2021 the Registrar temporarily assigned Mr. Altit as counsel to represent Mr. Kabuga at the Mechanism’s expense, while the Registry of the Mechanism (“Registry”) assessed Mr. Kabuga’s ability to remunerate counsel.⁷

3. On 21 January 2021, Mr. Altit filed a motion before the Trial Chamber requesting, pursuant to Rule 43(G) of the Rules, to be withdrawn as Mr Kabuga’s counsel based on the existence of exceptional circumstances.⁸ In support of his request, Mr. Altit submitted that Mr. Kabuga and

¹ Order Assigning an Appeal to a Bench of the Appeals Chamber, 5 October 2022. *See* Decision on Recusal and Referral of a Matter, 29 September 2022.

² Appeal of the Second Decision Related to Félicien Kabuga’s Representation, 27 September 2022 (“Appeal”).

³ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Second Decision Related to Félicien Kabuga’s Representation, 26 August 2022 (“Impugned Decision”), para. 33.

⁴ Prosecution Response to the Applicant’s Appeal of the Second Decision Related to Félicien Kabuga’s Representation, 7 October 2022 (public with confidential annex) (“Response”), paras. 1, 20.

⁵ Reply to Prosecution Response to the Applicant’s Appeal of the Second Decision Related to Félicien Kabuga’s Representation, 14 October 2022 (“Reply”). The Appeals Chamber notes that, in accordance with Rule 132(B) of the Rules of Procedure and Evidence of the Mechanism (“Rules”), an appellant may file a reply within four days of the filing of the response. Given that the Response was served on the Appellant on 12 October 2022 (*see* Reply, para. 2), the Appeals Chamber considers the Reply to be validly filed pursuant to Rule 154(A)(ii) of the Rules.

⁶ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Decision, 2 October 2020, Registry Pagination (“RP.”) 35, 34. *See* Article 16(H) of the Directive on the Assignment of Defence Counsel, MICT/5, 14 November 2012; Rules 43(C) and 64(D) of the Rules.

⁷ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision, 6 January 2021, p. 3.

⁸ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Request Pursuant to Rule 43(G) of the Rules of Procedure and Evidence, 21 January 2021 (confidential and *ex parte*) (originally filed in French; English translation filed on 25 January 2021) (“Request of 21 January 2021”), para. 2, p. 2.

members of Mr. Kabuga’s family had asked him to take instructions directly from family members and allow them access to the case file, which was contrary to his professional obligations.⁹

4. On 1 April 2021, the Trial Chamber denied Mr. Altit’s request to withdraw as counsel, finding, *inter alia*, that his refusal to take instructions from Mr. Kabuga’s family, discuss Defence strategy and share the Defence case file with them, were in line with his professional and ethical obligations, and in accordance with judicial decisions and orders rendering aspects of the case file confidential with respect to third parties and the public.¹⁰ The Trial Chamber further found that any possible breakdown between Mr. Kabuga and Mr. Altit on that basis could only be viewed as unilateral and did not justify counsel’s withdrawal.¹¹ The Trial Chamber encouraged Mr. Altit to make his best efforts to rebuild any trust that had been lost based on the misunderstanding of extant ethical obligations, and instructed the Registrar to appoint Mr. Altit as Mr. Kabuga’s counsel under the Mechanism’s legal aid scheme until further order.¹² In subsequent oral and written submissions, Mr. Kabuga repeatedly raised before the Trial Chamber his continued dissatisfaction with assigned counsel, seeking his replacement.¹³

5. On 11 July 2022, the Registrar filed a correspondence from the Appellant, stating that Mr. Kabuga had requested that the Appellant be appointed as his lead counsel, accompanied by a

⁹ See Request of 21 January 2021, paras. 1-6, p. 2. See also *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order for Submissions Related to Representation, 29 January 2021; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in Relation to the “Order for Submissions Related to Representation” of 29 January 2021, 8 February 2021, para. 3 (submitting that, on 1 February 2021, the Registry consulted with Mr. Kabuga, who confirmed that he wished to have counsel replaced and a new counsel assigned); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission for the Transmission of Correspondence, 19 March 2022 (confidential with confidential and *ex parte* annex), para. 1, Annex, RP. 1154, 1153. See also *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order for Submissions Related to Representation, 29 January 2021; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order for Further Submissions Related to Representation, 4 March 2021.

¹⁰ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Matters Related to Félicien Kabuga’s Representation, 1 April 2021 (“First Decision on Representation”), paras. 12, 18.

¹¹ First Decision on Representation, para. 12.

¹² First Decision on Representation, paras. 12, 18.

¹³ Impugned Decision, paras. 7, 8, 10, 11, referring, *inter alia*, to *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in Relation to the Representation of Mr. Félicien Kabuga, 23 July 2021 (confidential and *ex parte* with confidential and *ex parte* annex), para. 5, Annex, RP. 1571, *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Transcript (“T.”) 6 October 2022 pp. 8-10, T. 3 February 2022 p. 10, T. 3 February 2022 pp. 20, 21 (private session), *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission of Correspondence, 3 March 2022 (confidential with confidential annex) (“Registrar’s Submission of 3 March 2022”), para. 1, Annex, RP. 3314. See also Impugned Decision, paras. 9, 12, referring to *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in relation to the “Order for Further Independent Expert Evaluation and for Additional Information from the Registry” of 13 August 2021, 26 November 2021 (confidential with confidential annex), Annex RP. 2717, *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in Relation to the “Decision on Prosecution Motion for Further Fitness Evaluation and Order for Independent Expert Evaluation” of 15 March 2022, 21 April 2022 (confidential with confidential annex), Annex, para. 55. 32, T. 31 May 2022 pp. 86, 109 (private session), T. 1 June 2022 pp. 85, 86 (private session).

mandate in French signed by Mr. Kabuga and witnessed by his son.¹⁴ On 14 July 2022, the Pre-Trial Judge invited Mr. Altit, the Prosecution, and the Registrar to file submissions on the proposed change of Mr. Kabuga’s counsel¹⁵ and on 27 July and 11 August 2022 invited further submissions from the Appellant.¹⁶ Having received written submission from Mr. Altit,¹⁷ the Prosecution,¹⁸ and the Appellant,¹⁹ as well as oral submissions from Mr. Kabuga during the pre-trial and status conferences held jointly on 18 August 2022,²⁰ the Trial Chamber issued the Impugned Decision.

6. In the Impugned Decision, the Trial Chamber denied the request to withdraw Mr. Altit as Mr. Kabuga’s counsel.²¹ In its consideration of the matter before it, the Trial Chamber recalled its First Decision on Representation, where it had found that the breakdown in communication between Mr. Kabuga and Mr. Altit could only be viewed as unilateral and did not suffice to demonstrate exceptional circumstances warranting the withdrawal of counsel.²² In the Impugned Decision, the Trial Chamber found that Mr. Kabuga’s continued dissatisfaction following the First Decision on Representation and his renewed request to change counsel did not constitute a change in circumstances warranting the withdrawal of Mr. Altit, and that there was no evidence that counsel has not complied with his professional or ethical obligations towards Mr. Kabuga and the Mechanism.²³ Accordingly, the Trial Chamber found that there were no exceptional circumstances warranting Mr. Altit’s withdrawal or new facts that would require reconsideration of the First Decision on Representation.²⁴ Finally, the Trial Chamber also considered that withdrawing Mr. Altit and appointing the Appellant to represent Mr. Kabuga would not ensure that Mr. Kabuga

¹⁴ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission of Correspondence, 11 July 2022 (public with confidential annex) (“Registrar’s Submission of 11 July 2022”), para. 1, Annex, RP. 3906-3904.

¹⁵ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order for Submissions Related to Representation, 14 July 2022, p. 1.

¹⁶ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order for Further Submissions Related to Representation, 27 July 2022, p. 1; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Second Order for Further Submissions Related to Representation, 11 August 2022, p. 1.

¹⁷ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Defence Submissions in Response to Order for Submissions Related to Representation of 14 July 2022, 21 July 2022 (original filed in French; English translation filed on 26 July 2022) (confidential) (“Defence Submissions of 21 July 2022”); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Defence Submissions in Response to “Order for Further Submissions Related to Representation” of 27 July 2022, 5 August 2022 (original filed in French; English translation filed on 12 August 2022) (confidential) (“Defence Submissions of 5 August 2022”).

¹⁸ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Prosecution Submission on Order for Submissions Related to Representation, 21 July 2022 (public with confidential annex).

¹⁹ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Response to Prosecution and Defence Submissions Related to Mr. Kabuga’s Representation, 3 August 2022 (“Response Related to Representation of 3 August 2022”); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Response to Defence Further Submissions Related to Mr. Kabuga’s Representation, 15 August 2022 (public with confidential Annex A).

²⁰ Impugned Decision, para. 21, *referring to* T. 18 August 2022 p. 11.

²¹ Impugned Decision, para. 33.

²² Impugned Decision, para. 23, *referring to* First Decision on Representation, para. 12.

²³ Impugned Decision, paras. 24, 25, 28.

²⁴ Impugned Decision, para. 30.

would remain satisfied with his legal representation, for example should the Appellant refuse to share confidential information from the case file with Mr. Kabuga's family members.²⁵

7. On 5 September 2022, the Appellant sought leave to appeal the Impugned Decision and a stay of the proceedings pending the resolution of the matter of Mr. Kabuga's representation by the Appeals Chamber.²⁶ On 20 September 2022, the Trial Chamber found that, in the very specific and narrow context of the matter before it, it was appropriate and in the interest of an expeditious resolution of the matter to grant the Appellant standing to seek leave to appeal the Impugned Decision.²⁷ Consequently, the Trial Chamber certified for appeal the issue of Mr. Kabuga's representation, denying, however, the Appellant's request for a stay of proceedings.²⁸

8. The trial in the *Kabuga* Case commenced on 29 September 2022.²⁹

II. DISCUSSION

9. The Appellant submits that a decision on Mr. Kabuga's representation fell squarely within the authority of the Registrar and that the Trial Chamber abused its discretion in adjudicating the matter.³⁰ He further contends that the Trial Chamber erred in finding that there were no exceptional circumstances warranting the withdrawal of Mr. Kabuga's assigned counsel.³¹ In this regard, the Appellant claims that the Trial Chamber erroneously relied on prior jurisprudence in dismissing the withdrawal request and failed to consider that counsel was unsuccessful in rebuilding his relationship with Mr. Kabuga and regaining his trust, as instructed by the Trial Chamber in the First Decision on Representation.³² He further claims that the Trial Chamber abused its discretion in failing to consider Mr. Kabuga's "subjective" views, including his signed statements expressing dissatisfaction with counsel and attesting to counsel's breach of his professional obligations.³³ The Appellant argues that incompatibility and breakdown in communication, as well as counsel's failure

²⁵ Impugned Decision, para. 32.

²⁶ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Request for Certification to Appeal the "Second Decision Related to Félicien Kabuga's Representation" of 26 August 2022, 5 September 2022, paras. 1, 16, 18.

²⁷ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Request for Certification to Appeal the Second Decision Related to Félicien Kabuga's Representation, 20 September 2022 ("Decision Granting Certification"), p. 2.

²⁸ Decision Granting Certification, p. 3.

²⁹ See T. 29 September 2022.

³⁰ Appeal, paras. 47, 48.

³¹ Appeal, paras. 34-46.

³² Appeal, paras. 34, 35, 39-41, *referring to* Impugned Decision, paras. 23, 24.

³³ Appeal, paras. 28, 37, 53-58, *referring to* Impugned Decision, paras. 24, 25, 28.

to inform Mr. Kabuga of the charges against him and to consult and take instructions from him, constitute exceptional circumstances warranting the withdrawal of counsel.³⁴

10. The Appellant further submits that the Trial Chamber erroneously concluded that, irrespective of Mr. Kabuga's indigency status, he had no right to counsel of his own choosing and argues that the Trial Chamber failed to appreciate that Mr. Kabuga's reliance on the Mechanism's legal aid system is due solely to the delay in the Registry's assessment of Mr. Kabuga's ability to remunerate counsel.³⁵ The Appellant also argues that the Trial Chamber erred in law by focusing entirely on expediting the proceedings, at the expense of their fairness, and claims that it was not the Trial Chamber's role to assert Mr. Kabuga's right to an expeditious trial on his behalf.³⁶ In this regard, the Appellant points out that none of Mr. Kabuga's requests to have his counsel replaced were designed to delay the proceedings³⁷ and that the notion of a potential request for the Appellant's replacement, should he be appointed to represent Mr. Kabuga, is hypothetical and speculative.³⁸ Finally, the Appellant claims that the Trial Chamber abused its discretion in refusing to stay the proceedings pending the resolution of the matter by the Appeals Chamber.³⁹ As a remedy, the Appellant requests a stay of the proceedings and a reversal of the Impugned Decision.⁴⁰

11. The Prosecution responds that the Appellant's argument, raised for the first time on appeal, that the Trial Chamber lacked jurisdiction over the matter of Mr. Kabuga's representation is without merit.⁴¹ The Prosecution further submits that the Trial Chamber correctly found that there were no exceptional circumstances warranting the replacement of counsel, did not disregard statements made by Mr. Kabuga that were part of the record before it,⁴² and took into account – and afforded proper weight to – relevant factors in exercising its discretion under Rule 43(G) of the Rules, including Mr. Kabuga's right to a fair and expeditious trial.⁴³ According to the Prosecution, the Trial Chamber also correctly relied on prior jurisprudence concerning the accused's right of counsel funded by the Mechanism.⁴⁴ The Prosecution adds that the Trial Chamber considered and correctly

³⁴ Appeal, paras. 3, 36-38, 40, 56. *See also* Appeal, paras. 4-20.

³⁵ Appeal, paras. 29-33, 42-46, *referring to* Impugned Decision, para. 27.

³⁶ Appeal, paras. 23-25, *referring to* Impugned Decision, para. 29.

³⁷ Appeal, paras. 26, 27.

³⁸ Appeal, para. 52.

³⁹ Appeal, paras. 49-51.

⁴⁰ Appeal, paras. 51, 59.

⁴¹ Response, paras. 16-19.

⁴² Response, paras. 6-11.

⁴³ Response, paras. 2-5.

⁴⁴ Response, paras. 12-15.

rejected the allegations of professional misconduct against Mr. Kabuga’s counsel, which were levelled by the Appellant and subsequently repeated by him in public forums.⁴⁵

12. The Appellant replies that the Prosecution’s submissions are unsupported and fail to properly address his arguments on appeal.⁴⁶ The Appellant maintains that the quality of legal representation, in contrast to its procedural effectiveness, may only be “subjectively assessed” by Mr. Kabuga himself, and rejects the Prosecution’s argument that the Trial Chamber correctly considered the possible dissatisfaction of Mr. Kabuga or his family members with the Appellant, should he be appointed to represent Mr. Kabuga.⁴⁷

13. As a preliminary matter, the Appeals Chamber will examine whether it is properly seised of the Appeal. The Appeals Chamber notes that the Appellant has neither been appointed nor assigned by the Registrar to represent Mr. Kabuga in any proceedings before the Mechanism,⁴⁸ is not a party to the *Kabuga Case*,⁴⁹ and has no standing in these circumstances on his own right to submit the Appeal.⁵⁰ Nevertheless, the Appeals Chamber recalls that an appeal from a non-party to proceedings before the Mechanism may be considered where, in the circumstances of the particular case, doing so would serve the interests of justice.⁵¹ Factors previously taken into account in determining whether the consideration of an appeal by a non-party serves the interests of justice include whether: (i) the interests of the non-party and the accused align; (ii) the appeal would infringe the accused’s interests; (iii) there was danger of unfairness to the Prosecution; and (iv) the Prosecution opposed consideration of the appeal.⁵²

⁴⁵ Response, para. 8, Annex.

⁴⁶ Reply, paras. 3-23.

⁴⁷ Reply, paras. 4, 9. *See also* Reply, paras. 3, 5-8.

⁴⁸ *See* Registrar’s Submission of 11 July 2022, para. 2.

⁴⁹ *See* Decision Granting Certification, p. 2. *See also* Rule 2(A) of the Rules, defining a “Party” as the “Prosecutor or the Defence”.

⁵⁰ *Cf. Prosecutor v. Rasim Delić*, Case No. IT-04-83-R.1, Decision on Defence Motion for Review, 17 December 2013 (“*Delić Decision of 17 December 2013*”), p. 2; *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-A, Decision on Submissions by the Defence Team of Hormisdas Nsengimana, 19 April 2010, paras. 2, 5, 6; *Alfred Musema-Uwimana v. The Prosecutor*, Case No. ICTR-96-13-R, Decision on Motion for Reconsideration of Decision on Request for Assignment of Counsel of 27 February 2009, signed on 23 April 2009, filed on 27 April 2009, pp. 3, 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-Misc.1, Decision on “Assigned Counsel Appeal Against the ‘Decision on Submission of Former Court-Assigned Counsel’ Filed on 6 April 2006 and Confidential Annex 1”, 12 May 2006, para. 2. *See also* *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (“*Milošević Decision of 20 January 2004*”), para. 4.

⁵¹ *In the Case Against Petar Jojić and Vjerica Radeta*, Case No. MICT-17-111-R90-AR14.1, Decision on Republic of Serbia’s Appeal Against the Decision Re-Examining the Referral of a Case, 24 February 2020 (“*Jojić and Radeta Decision of 24 February 2020*”), para. 8, *referring to* *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-AR80.1, Decision on Appeals of the Decision in Relation to Material Seized from Dick Prudence Munyeshuli, 19 August 2019 (“*Turinabo et al. Decision of 19 August 2019*”), para. 30.

⁵² *Jojić and Radeta Decision of 24 February 2020*, para. 8; *Turinabo et al. Decision of 19 August 2019*, para. 30; *Milošević Decision of 20 January 2004*, para. 5.

14. Given that Mr. Kabuga was pursuing a change in his legal representation before the Trial Chamber by seeking to replace his assigned counsel with the Appellant,⁵³ the Appeals Chamber considers that there is an alignment of interests between Mr. Kabuga and the Appellant and that deciding on the appeal would not prejudice Mr. Kabuga's interests. Furthermore, there is no danger of unfairness to the Prosecution, given that the latter had an opportunity to respond and did not object before the Appeals Chamber to the Appellant's standing to bring the Appeal. The Appeals Chamber also notes that the Trial Chamber granted the Appellant standing to seek certification to appeal the Impugned Decision and authorized him, on an exceptional basis, to pursue an interlocutory appeal in accordance with Rule 80(B) of the Rules.⁵⁴ In the circumstances of the present case, the Appeals Chamber finds that the above factors weight in favour of considering the Appeal in the interests of justice and is satisfied that it is properly seized of the matter before it.

15. Turning to the merits of the Appeal, the Appeals Chamber recalls that, under Rule 43(G) of the Rules, in exceptional circumstances, at the request of the accused or his counsel, a trial chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings. The Appellant's argument, raised for the first time on appeal, that the Trial Chamber exceeded its jurisdiction or abused its discretion in adjudicating the matter of Mr. Kabuga's representation is, therefore, manifestly without merit.⁵⁵

16. The Appeals Chamber further recalls that a trial chamber's decision regarding the assignment of counsel is discretionary.⁵⁶ 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.⁵⁷ 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

⁵³ See Impugned Decision, para. 21, referring to T. 18 August 2022 p. 11. See also *supra* para. 4, n. 13.

⁵⁴ Decision Granting Certification, pp. 2, 3 (wherein the Trial Chamber specifically considered "the centrality of the right to counsel to a fair trial, Mr. Kabuga's inability to seek certification or to pursue an appeal of the Impugned Decision on his own and his expressed preference to be represented by Mr. Larochelle, Mr. Larochelle's existing familiarity with the relevant issues, and the importance of having this matter conclusively and swiftly resolved at the early stages of the trial" (internal references omitted)).

⁵⁵ See Appeal, paras. 47, 48; Reply, paras. 18, 19.

⁵⁶ See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No.2) on Assignment of Counsel, 8 December 2006, para. 16; *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 Defense Counsel, 1 November 2004 ("*Milošević* Decision of 1 November 2004"), para. 9.

⁵⁷ *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. 11; *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Judgement, 8 June 2021 (public redacted), para. 63.

the trial chamber's discretion.⁵⁸ The Appeals Chamber will also consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching the decision.⁵⁹

17. The Appeals Chamber is not satisfied that the Appellant has demonstrated a discernible error in the Trial Chamber's finding that there were no exceptional circumstances warranting the withdrawal of Mr. Kabuga's counsel. It is well established in the jurisprudence that an accused's refusal to cooperate with counsel does not constitute an exceptional circumstance warranting the withdrawal of assigned counsel.⁶⁰ The Trial Chamber correctly recalled in this regard that an accused does not have the right to unilaterally destroy the trust between himself and his counsel, or claim a breakdown in communication through unilateral actions, in the hope that such actions will result in the withdrawal of his assigned counsel.⁶¹ These legal principles are well settled and the Appellant's argument that the factual circumstances in the present case differ from those in prior cases in which these principles were applied is inapposite.⁶² The Appeals Chamber, therefore, finds no merit in the Appellant's submission that the Trial Chamber incorrectly interpreted the governing law in this regard.⁶³

18. With respect to the Appellant's contention that the Trial Chamber erroneously failed to consider Mr. Kabuga's "subjective views",⁶⁴ the Appeals Chamber recalls that a trial chamber, which has an organic familiarity with the conduct of the parties and the practical demands of the case,⁶⁵ is entitled to assess whether there are any reasonable grounds for an accused's assertion of a breakdown in trust between him and counsel.⁶⁶ In the Impugned Decision, the Trial Chamber, observed that counsel has effectively represented Mr. Kabuga throughout the pre-trial stage of the

⁵⁸ Decision of 12 August 2022, para. 11; *In the Matter of François-Xavier Nzuwonemeye et al.*, Case No. MICT-22-124, Decision on Motions to Appeal Decision of 8 March 2022, for Reconsideration of Decision of 15 March 2022, and to Appear as *Amicus Curiae*, 27 May 2022, para. 17.

⁵⁹ *See, e.g., Turinabo et al.* Decision of 19 August 2019, para. 24; *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-AR68.1, Public Redacted Version of the "Decision on Prosecution Appeal Against Decision Granting Marie Rose Fatuma Provisional Release" Issued on 16 May 2019, 6 June 2019, para. 5, and references cited therein.

⁶⁰ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of The President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Counsel, 23 November 2006 ("*Nahimana* Decision of 23 November 2006"), para. 13; *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, 7 November 2003 ("*Blagojević* Decision of 7 November 2003"), para. 31.

⁶¹ Impugned Decision, para. 22, referring to *Nahimana* Decision of 23 November 2006, para. 13. *See also Blagojević* Decision of 7 November 2003, para. 51.

⁶² *See* Appeal, paras. 39-41; Reply, paras. 17-20.

⁶³ *See* Appeal, paras. 39-41.

⁶⁴ *See* Appeal, paras. 28, 53-55.

⁶⁵ *See, e.g., 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. 7; *Milošević* Decision of 1 November 2004, para. 9.

⁶⁶ *See Blagojević* Decision of 7 November 2003, para. 49.

proceedings and has complied with the workplan.⁶⁷ In addition the Trial Chamber considered that counsel and his team, who owe a duty of candour to the Mechanism, have attested in oral and written submissions to having a good relationship with Mr. Kabuga and to regularly discussing the case and sharing material with him.⁶⁸ The Trial Chamber concluded that “there is no objective evidence on the record demonstrating that [counsel] has not complied with his professional or ethical obligations towards [Mr.] Kabuga and the Mechanism.”⁶⁹

19. Contrary to the Appellant’s submission, the Trial Chamber did not fail to consider Mr. Kabuga’s views in reaching the above finding. In the Impugned Decision, the Trial Chamber explicitly noted Mr. Kabuga’s statements during the status conferences on 6 October 2021 and 3 February 2022, as well as his statement during the status conference and pre-trial conference held on 18 August 2022, that he did not wish to be represented by his assigned counsel on the basis that counsel did not keep him sufficiently informed.⁷⁰ The Trial Chamber also expressly referred to Mr. Kabuga’s signed statement in English, dated 18 February 2022, that he did not wish to be represented by his assigned counsel due to his and his family’s lack of trust in counsel and counsel’s refusal to communicate with Mr. Kabuga’s children.⁷¹ The Trial Chamber also took into account Mr. Kabuga’s signed statements in French, dated 16 June 2022, and in English, dated 1 August 2022, both witnessed by his son, that he wished to be represented by the Appellant.⁷²

20. Having considered the record before it, the Trial Chamber explicitly recognised that Mr. Kabuga appeared to remain unsatisfied with his representation, despite the Trial Chamber’s earlier encouragement to counsel to make his best efforts to rebuild any trust that was lost between him and Mr. Kabuga.⁷³ However, on the basis of the entire record before it and its own observations, the Trial Chamber concluded that the claims of persistent breakdown appear to result from Mr. Kabuga’s perception of a lack of communication rather than from any specifically identified action or failure on the part of his assigned counsel.⁷⁴ Accordingly, the Appeals Chamber finds no merit in the Appellant’s submissions that the Trial Chamber failed to give weight or

⁶⁷ Impugned Decision, para. 28. *See also* First Decision on Representation, para. 13.

⁶⁸ Impugned Decision, para. 25, *referring to* Article 18 of Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism and Other Defence Team Members (MICT/6/Rev.1), 14 May 2021, T. 6 October 2021 pp. 15-19 (private session), T. 3 February 2022 pp. 11-21 (private session), Defence Submissions of 21 July 2022, para. 20, Defence Submissions of 5 August 2022, para. 22.

⁶⁹ Impugned Decision, para. 24.

⁷⁰ Impugned Decision, paras. 8, 10, 21, 24, *referring to* T. 6 October 2021, pp. 8-10, T. 3. February 2022 p. 10, T. 18 August 2022 p. 11.

⁷¹ Impugned Decision, paras. 11, 24, *referring to* Registrar’s Submission of 3 March 2022, RP. 3314.

⁷² Impugned Decision, paras. 15, 18, 24, *referring to* Registrar’s Submission of 11 July 2022, RP. 3904, Response Related to Representation of 3 August 2022, Annex F, RP. 4108.

⁷³ Impugned Decision, para. 24; First Decision on Representation, para. 12.

⁷⁴ Impugned Decision, para. 25.

sufficient weight to Mr. Kabuga's statements or to take into account counsel's purportedly failed efforts to rebuild his relationship with Mr. Kabuga.⁷⁵ In this regard, the Appellant's exclusive reliance on Mr. Kabuga's "subjective point of view" is insufficient to demonstrate an error in the Trial Chamber's conclusion.⁷⁶ The Appeals Chamber is, therefore, satisfied that it was reasonably open to the Trial Chamber to find that the breakdown in communication between Mr. Kabuga and his counsel remained unilateral and that there was no objective evidence on the record of counsel failing in his obligations to his client.⁷⁷

21. With respect to the Appellant's contention of an error in relation to Mr. Kabuga's right to choose counsel,⁷⁸ the Appeals Chamber recalls that, under Article 19(4) of the Statute of the Mechanism ("Statute"), an accused is entitled to legal assistance of his own choosing. However, this guarantee is not without limits.⁷⁹ As the Trial Chamber correctly noted, regardless of whether the accused is able to fund his Defence or has counsel assigned at the expense of the Mechanism, the accused's choice of counsel may be overridden when the fairness of the trial is at stake.⁸⁰ The Appellant, therefore, fails to show an error by the Trial Chamber in this regard. In addition, and contrary to the Appellant's assertion, the Trial Chamber expressly took into account that the Registrar's assessment of Mr. Kabuga's ability to remunerate counsel was still ongoing.⁸¹

22. The Appeals Chamber further rejects the Appellant's assertion that, in the Impugned Decision, the Trial Chamber was exclusively concerned with the trial being expeditious, at the expense of being fair.⁸² Pursuant to Article 18(1) of the Statute, a trial chamber has the duty to ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules and with full respect for the rights of the accused. Contrary to the Appellant's submission, a trial chamber has the duty to be proactive in ensuring that the accused is tried without undue delay, regardless of whether the accused himself asserts that right.⁸³ Mindful of its duty in this regard, the Trial Chamber considered that a change in Mr. Kabuga's counsel would likely generate

⁷⁵ See Appeal, paras. 35, 53, 54.

⁷⁶ See Appeal, paras. 28, 57, 58; Reply, para. 4. Cf. *Blagojević* Decision of 7 November 2003, paras. 33, 49.

⁷⁷ See Impugned Decision, paras. 23-25, 28.

⁷⁸ See Appeal, paras. 29-33, 42-46.

⁷⁹ See *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on request for Appointment of Counsel, 24 November 2004 ("Prlić et al. Decision of 24 November 2004"), para. 19 and references cited therein. See also *Nahimana* Decision of 23 November 2006, para. 10.

⁸⁰ Impugned Decision, para. 27. See *Prlić et al.* Decision of 24 November 2004, para. 19; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004 ("*Mejakić et al.* Decision of 6 October 2004"), para. 8; *Blagojević* Decision of 7 November 2003, para. 22.

⁸¹ See Impugned Decision, paras. 7, 27.

⁸² See Appeal, paras. 23-25.

⁸³ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015, para. 346, referring to *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014, para. 100.

a delay of several months, and correctly took into account that the time needed for the Appellant to familiarize himself with the case, in the event that counsel is withdrawn, would likely frustrate both the fair and expeditious continuation of the proceedings.⁸⁴ The Appellant's submission that Mr. Kabuga's request to have counsel replaced was not designed to delay the proceedings falls short of demonstrating an error in the Trial Chamber's conclusion that there were no exceptional circumstances warranting the withdrawal of counsel.

23. In addition, cognizant of its duty to ensure the fairness of the proceedings, in the Impugned Decision the Trial Chamber thoroughly considered the record before it in addressing the allegations that counsel was not fulfilling his professional obligations towards Mr. Kabuga. In particular, the Trial Chamber noted Mr. Kabuga's statement during the status conference on 6 October 2021 that he no longer wished to be represented by counsel because the latter did not share his submissions prior to presenting them before the Trial Chamber,⁸⁵ as well as the assurances provided by counsel in response that his team "always had productive and useful discussions" with Mr. Kabuga and "never concealed anything from him".⁸⁶ The Trial Chamber further noted that, in response to similar concerns raised by Mr. Kabuga at the status conference on 3 February 2022, counsel stated that the Defence team was fulfilling its mission "in the most professional possible way" and had recently visited and spoken to Mr. Kabuga.⁸⁷ As stated in the Impugned Decision, on both occasions as well as during the status conference on 11 May 2022, the Pre-Trial Judge explored the matter further until he was satisfied that Mr. Kabuga was being properly represented by counsel.⁸⁸ In view of the Trial Chamber's detailed assessment of the record before it, the Appeals Chamber finds that, in denying the request to withdraw counsel, the Trial Chamber exercised its discretion consistently with Articles 18 and 19 of the Statute, which require trial chambers to ensure that trials are both fair and expeditious.

24. The Appeals Chamber also finds no discernible error in the Trial Chamber's consideration of a potential future request for the Appellant's replacement, should he be appointed to represent Mr. Kabuga and refuses to share confidential information with Mr. Kabuga's family members.⁸⁹ The Trial Chamber's consideration of this factor reflects its legitimate concern with ensuring the integrity of the judicial process and countering the risk of severe disruption to the trial due to

⁸⁴ Impugned Decision, para. 29. *See, e.g., Nahimana* Decision of 23 November 2006, para. 16; *Blagojević* Decision of 7 November 2003, para. 50.

⁸⁵ Impugned Decision, para. 8, *referring to* T. 6 October 2021 pp. 9, 10.

⁸⁶ Impugned Decision, para. 8, *referring to* T. 6 October 2021 pp. 15-19 (private session).

⁸⁷ Impugned Decision, para. 10, *referring to* T. 3 February 2022 p. 11 (private session).

⁸⁸ Impugned Decision, paras. 8, 10, 14, *referring to* T. 6 October 2021 p. 22, T. 3 February 2022 p. 21 (private session), T. 11 May 2022 pp. 3, 4 (private session).

⁸⁹ Impugned Decision, para. 32.

unauthorized involvement of third parties.⁹⁰ The Appeals Chamber considers that the Trial Chamber's concern in this regard was well-founded, given the history of prior requests for members of Mr. Kabuga's family to have access to the case file and be directly involved in Mr. Kabuga's Defence.⁹¹ The Appeals Chamber emphasises in this regard that family members have no standing to make a claim on behalf of a defendant in any proceedings before the Mechanism.⁹² Accordingly, the Appellant fails to demonstrate that in the Impugned Decision the Trial Chamber gave weight to an extraneous or irrelevant consideration.⁹³

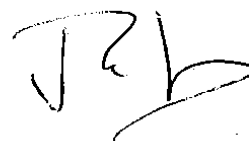
25. In view of the above considerations, the Appeals Chamber finds no error in the Trial Chamber's decision to deny the Appellant's request for withdrawal of Mr. Altit as Mr. Kabuga's assigned counsel. Given that the Appellant has failed to demonstrate any error in the Impugned Decision, the Appeals Chamber finds it unnecessary to address his argument that the Trial Chamber abused its discretion in denying the request to stay the proceedings, pending the outcome of the appeal.

III. DISPOSITION

26. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** the Appeal in its entirety.

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

Done this 4th day of November 2022
At Arusha,
Tanzania



Judge Joseph E. Chiondo Masanche
Presiding Judge

[Seal of the Mechanism]

⁹⁰ See, e.g., *Prlić et al.* Decision of 24 November 2004, para. 21 (wherein the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") held that problems relating to the accused's defence would affect the conduct of the case, which the trial chamber has the duty to regulate in accordance with the requirement set forth in Article 20 of the ICTY Statute).

⁹¹ See Impugned Decision, paras. 3-5, 31.

⁹² See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.2, Decision on Appeal of Decision on Motion for Order Concerning Frozen Assets, 10 January 2022, para. 13. See also *Delić* Decision of 17 December 2013, p. 2; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion for Continuation of the Appellate Proceedings, 29 June 2010, p. 2.

⁹³ Cf. *Mejakić et al.* Decision of 6 October 2004, para. 15.



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