

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT

Date: 26 August 2022

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Graciela Susana Gatti Santana
Judge Elizabeth Ibanda-Nahamya

Registrar: Mr. Abubacarr M. Tambadou

Decision of: 26 August 2022

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**SECOND DECISION RELATED TO
FÉLICIEN KABUGA'S REPRESENTATION**

Office of the Prosecutor:

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

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

1. The Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively)¹ is seised of a submission filed by the Registrar on 11 July 2022 bringing to the attention of the Trial Chamber a correspondence of 5 July 2022 from Mr. Philippe Larochelle, stating that Mr. Félicien Kabuga requested that he be appointed as his lead counsel.² At the request of the Pre-Trial Judge,³ the Defence filed submissions on 21 July 2022 and 5 August 2022, and the Prosecution filed submissions on 21 July 2022.⁴ The Pre-Trial Judge exceptionally allowed Mr. Larochelle an opportunity to respond, and he filed submissions on 3 and 15 August 2022.⁵

I. BACKGROUND

2. The Registrar appointed Mr. Emmanuel Altit as Kabuga’s Duty Counsel on 2 October 2020, pursuant to Article 16(H) of the Directive on the Assignment of Defence Counsel.⁶ Mr. Altit represented Kabuga during his initial appearance on 11 November 2020 and continued to do so thereafter.⁷ On 6 January 2021, the Registrar temporarily assigned Mr. Altit as Kabuga’s counsel as of that date and for not more than 90 days pending the Registry’s ongoing assessment as to Kabuga’s ability to remunerate counsel.⁸

3. On 21 January 2021, Mr. Altit filed a motion requesting that the Registrar withdraw his assignment to represent Kabuga pursuant to Rule 43(G) of the Rules of Procedure and Evidence (“Rules”) based on the existence of exceptional circumstances, highlighting the divergent views

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

² Registrar’s Submission of Correspondence, 11 July 2022 (public, with confidential Annex), paras. 1, 2, Annex, Registry Pagation (“RP.”) 3906-3904 (“Mr. Larochelle’s Request”).

³ Order for Submissions Related to Representation, 14 July 2022, p. 1; Order for Further Submissions Related to Representation, 27 July 2022 (“Order for Submissions of 27 July 2022”), p. 1. See also Order Designating a Pre-Trial Judge, 29 October 2020, p. 1.

⁴ Prosecution Submission on Order for Submissions Related to Representation, 21 July 2022 (public, with confidential Annex) (“Prosecution Submission”); Defence Submissions in Response to Order for Submissions Related to Representation of 14 July 2022, 26 July 2022 (original French version filed on 21 July 2022; confidential) (“Defence Submission of 21 July 2022”); Defence Submissions in Response to “Order for Further Submissions Related to Representation” of 27 July 2022, 12 August 2022 (original French version filed on 5 August 2022; confidential) (“Defence Submission of 5 August 2022”).

⁵ Order for Submissions of 27 July 2022, p. 1; Second Order for Further Submissions Related to Representation, 11 August 2022, p. 1. See also Response to Prosecution and Defence Submissions Related to Mr. Kabuga’s Representation, 3 August 2022 (“Mr. Larochelle’s Submission of 3 August 2022”); Response to Defence Further Submissions Related to Mr. Kabuga’s Representation, 15 August 2022 (public, with confidential Annex A) (“Mr. Larochelle’s Submission of 15 August 2022”).

⁶ See Decision on Matters Related to Félicien Kabuga’s Representation, 1 April 2021 (“Decision of 1 April 2021”), para. 2, referring to Decision, 2 October 2020, RP. 35, 34. See also Directive on the Assignment of Defence Counsel, MICT/5, 14 November 2012.

⁷ See, e.g., Decision of 1 April 2021, para. 2, referring to Further Decision Concerning In-Person Visits Between Félicien Kabuga and His Defence Team, 30 November 2020, pp. 1-4.

⁸ See Decision of 1 April 2021, para. 3, referring to Decision, 6 January 2021 (public, with confidential and *ex parte* Annex), RP. 492-478.

between Kabuga and the Defence team as to how the case should be managed, and the fact that members of Kabuga's family were asking the Defence to allow them access to the case file and take instructions directly from them.⁹ The Registry identified Mr. Peter Robinson as the proposed replacement counsel.¹⁰

4. On 19 March 2021, the Registrar filed a correspondence from Kabuga's son, dated 11 March 2021, complaining that Mr. Altit does not provide any information to the family and asking the Trial Chamber to allow the Accused to have the counsel of his choice, Mr. Robinson.¹¹

5. On 1 April 2021, the Trial Chamber denied Mr. Altit's motion to withdraw and further instructed the Registrar to appoint him as Kabuga's counsel under the Mechanism's legal aid scheme until further order.¹² The Trial Chamber considered that Mr. Altit's refusal to take instructions from Kabuga's family and share with them the Defence case file was in line with his professional and ethical obligations, and that any possible breakdown between Kabuga and his counsel on this basis could only be viewed as unilateral and not suffice as a basis for withdrawal.¹³ It recalled that the fact that the Accused has indicated that he wants to change counsel and identified a replacement counsel are not dispositive, since the right to legal assistance financed by the Mechanism does not confer the right to counsel of one's choosing,¹⁴ and that the accused's preference may be overridden if it is in the interests of justice to do so.¹⁵

6. In this regard, the Trial Chamber, noting that the case was at a sensitive stage in the pre-trial proceedings and that Mr. Altit had continued to effectively represent Kabuga, concluded that retaining him as counsel was in Kabuga's best interests as well as in the interests of a fair and

⁹ Request Pursuant to Rule 43(G) of the Rules of Procedure and Evidence, 25 January 2021 (original French version filed on 21 January 2021; confidential and *ex parte*, with confidential redacted version filed on 25 January 2021), paras. 3, 4, p. 2.

¹⁰ Registrar's Submission in Relation to the "Order for Further Submissions Related to Representation" of 4 March 2021, 10 March 2021 (confidential and *ex parte*, with confidential and *ex parte* Annex), para. 9, Annex A ("Mr. Robinson's Undertaking of 2 February 2021"), RP. 1069, 1068. *See also* Registrar's Submission in Relation to the "Order for Submissions Related to Representation" of 29 January 2021, 8 February 2021; Order for Further Submissions Related to Representation, 4 March 2021.

¹¹ Registrar's Submission for the Transmission of Correspondence, 19 March 2021 (confidential, with confidential and *ex parte* Annex), para. 1, Annex ("Correspondence of 11 March 2021"), RP. 1154, 1153.

¹² Decision of 1 April 2021, para. 18.

¹³ Decision of 1 April 2021, para. 12.

¹⁴ *See* Decision of 1 April 2021, para. 14, *referring to The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001, para. 61.

¹⁵ *See* Decision of 1 April 2021, para. 14, *referring to Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006 ("*Nahimana et al.* Decision of 23 November 2006"), para. 10 and references cited therein; *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. 22.

expeditious proceeding.¹⁶ It further encouraged Mr. Altit to make his best efforts to rebuild any trust that was lost based on the misunderstanding of extant ethical obligations.¹⁷

7. At the status conference on 1 June 2021, Kabuga did not raise the issue of his representation.¹⁸ However, on 23 July 2021, the Registrar filed a declaration purportedly from Kabuga, written in English and signed by him, stating that he withdraws his previous request for counsel assigned at the expense of the Mechanism, that he wishes to retain Mr. Robinson as his lead counsel, and that he agrees to facilitate the transfer of frozen assets to pay the counsel of his choice.¹⁹ This declaration was transmitted by Mr. Robinson and initially filed in a matter regarding frozen assets claimed by members of Kabuga's family, whom Mr. Robinson also represented at the time.²⁰ The Trial Chamber observes that a determination of Kabuga's means remains ongoing and that, other than this declaration written in English, no further mention has been made by Kabuga or on his behalf of his ability to pay for his defence.²¹

8. During the status conference of 6 October 2021, Kabuga stated that he no longer wished to be represented by Mr. Altit "because he does not share with *us* his submissions and arguments that he presents before this Trial Chamber".²² Mr. Altit responded that his team "always had productive and useful discussions with" Kabuga, "never concealed anything from him", "told him what was happening", and the Defence "are trying to do things as well as possible and to involve him as best we can".²³ Judge Bonomy concluded the status conference by indicating that he was "happy to accept Mr. Altit's reassurance that he has been and continues to endeavour to share everything with [Kabuga] that he intends to submit to the Court", that there was presently no basis to invite the Registrar to reconsider Mr. Altit's assignment, and that he would encourage Kabuga to give his "full co-operation to Maître Altit" as it was in his "interests".²⁴

¹⁶ Decision of 1 April 2021, paras. 13, 14.

¹⁷ Decision of 1 April 2021, para. 12.

¹⁸ Transcript ("T.") 1 June 2021 p. 21 (private session).

¹⁹ 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) ("Registrar Submission of 23 July 2021"), para. 5, Annex ("Correspondence of 21 July 2021"), RP. 1571.

²⁰ Registrar Submission of 23 July 2021, para. 5; *Prosecutor v. Félicien Kabuga*, Case Nos. MICT-13-38-Misc.1, MICT-13-38-Misc.2 & MICT-13-38-Misc.3, Decision on Motions Filed by Félicien Kabuga's Family for Return of Frozen Assets and Seized Property, 21 October 2021 (original French version filed on 14 October 2021), pp. 4, 5, n. 23.

²¹ *See infra* para. 27.

²² T. 6 October 2021 pp. 8-10 (emphasis added).

²³ T. 6 October 2021 pp. 15-19 (private session).

²⁴ T. 6 October 2021 p. 22.

9. The independent expert gerontologist, Professor Francesco Mattace-Raso, remarked in his report of 26 November 2021 that Kabuga considers that he has a “good lawyer” but that another one would be better.²⁵

10. At the next status conference on 3 February 2022, Kabuga raised the issue that his “Defence Counsels” do not give him “any reports regarding their activities”, that Mr. Altit is “never giving me any feedback regarding his activities”, and that he would like to have “Mr. Peter” as his counsel.²⁶ Mr. Altit responded during the same status conference that the Defence team was “fulfilling our mission as best we can in the most professional possible way”, that they had recently visited Kabuga and spoken to him two days ago, and that they “have worked with dedication and in the utmost professional way in order to defend the interest of [...] Mr. Kabuga”.²⁷ After exploring the matter further with Mr. Altit and Kabuga,²⁸ Judge Bonomy stated:

Thank you very much, Mr. Kabuga, for your observations which will be considered. The issue you have raised will be considered by me. I'll take account of what's been said, and I will indicate a view on this matter as soon as I'm in a position to do so. I should make it clear to you, at this stage, that on the face of the work done on your behalf by the legal team led by Maître Altit, your interests have been well represented. So bearing that in mind, I will look a little more deeply into the issue that you've raised and take account of the various things I've heard this afternoon and indicate my views in due course.²⁹

11. On 3 March 2022, the Registrar filed a correspondence purportedly from Kabuga, written in English and signed by him, stating again that he does not want to be represented by Mr. Altit, whom he does not trust to act in his best interest, pointing that the communication with him remains unsatisfactory and that Mr. Altit continues to refuse to communicate with his family.³⁰

12. In his report of 19 April 2022, the second independent expert forensic psychiatrist, Professor Henry Kennedy, further reported that Kabuga told him that he does not trust his lawyer.³¹ This was also noted by the medical experts during the hearings held on 31 May and 1 June 2022.³²

13. At the 11 May 2022 status conference, Judge Bonomy stated: “On the two previous occasions when we have held a Status Conference like today, and also earlier when we

²⁵ 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.

²⁶ T. 3 February 2022 p. 10.

²⁷ T. 3 February 2022 p. 11.

²⁸ T. 3 February 2022 pp. 11-21 (private session).

²⁹ T. 3 February 2022 p. 21 (private session).

³⁰ Registrar's Submission of Correspondence, 3 March 2022 (confidential, with confidential Annex), para. 1, Annex (“Correspondence of 3 March 2022”), RP. 3314.

³¹ See 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.

communicated by written correspondence, you have indicated that you wish Mr. Altit to be withdrawn and that you wish to be represented by Mr. Peter Robinson. Mr. Kabuga, is there anything you would like to say on this issue today?” Kabuga responded: “There’s nothing I wish to say on this issue.”³³

14. Judge Bonomy continued: “There is just one thing on the subject of counsel that I do want to say to you, and that is that in light of investigations that are currently being conducted into the conduct of Mr. Peter Robinson, it’s not possible for me to consider him as a possible representative in court for you. It’s important we get, as soon as possible, to the stage where we hear the case. I’m entirely satisfied that you are being properly represented by your legal team, Maitre Altit and his assistants, and I urge you to co-operate as fully as you can in your own interests with them.”³⁴

15. On 11 July 2022, the Registrar filed Mr. Larochelle’s Request for appointment as lead counsel, together with a mandate written in French, signed by Kabuga and witnessed by his son.³⁵ Mr. Larochelle underlined the statements of the medical experts in the case, according to which Kabuga does not trust his counsel, and indicated that, at a meeting he had with him on 4 July 2022, Kabuga expressed his dissatisfaction with Mr. Altit’s lack of efforts to rebuild trust following the Decision of 1 April 2021 and his absence of actions to discuss the objectives of the representation.³⁶

16. In its initial submissions filed on 21 July 2021, the Defence questioned the mandate signed by Kabuga, which is written in a language the Accused does not speak well and bears the signature of his son.³⁷ It reiterated that Kabuga’s family’s attempts to take decisions in his stead and to obtain access to confidential information could have an impact on the integrity of the proceedings.³⁸ The Defence also contended that Mr. Larochelle acted unethically by trying for months to intervene in this case through some of Kabuga’s family members, before they turned to Mr. Robinson,³⁹ and by contacting Kabuga without informing the Defence, in violation of the code of conduct for lawyers.⁴⁰ Mr. Altit reiterated that the Defence has good relations with Kabuga, who regularly expresses his

³² T. 31 May 2022 pp. 86, 109 (private session); T. 1 June 2022 pp. 85, 86 (private session).

³³ T. 11 May 2022 p. 2 (private session).

³⁴ See T. 11 May 2022 pp. 3, 4 (private session). See also T. 11 May 2022 pp. 5, 6.

³⁵ Mr. Larochelle’s Request, RP. 3906-3904.

³⁶ Mr. Larochelle’s Request, RP. 3906, 3905.

³⁷ Defence Submission of 21 July 2022, para. 6.

³⁸ Defence Submission of 21 July 2022, paras. 15-19.

³⁹ Defence Submission of 21 July 2022, paras. 11-14. The Defence refers to an email dated 15 January 2021, wherein Mr. Larochelle claimed to have received a mandate from Kabuga’s son asking him to represent his father, and to a note dated 6 January 2021, wherein Mr. Larochelle indicated that he tried to file a notice with the Mechanism regarding the existence of exculpatory evidence relating to Kabuga. See Defence Submission of 21 July 2022, paras. 11, 12.

⁴⁰ Defence Submission of 21 July 2022, paras. 5, 7-10. The Defence points, in particular, to the Code of Professional Conduct for Counsel before the International Criminal Court and to the Code of Conduct of the Quebec Bar Association, of which Mr. Larochelle is a member. See Defence Submission of 21 July 2022, paras. 9, 10.

appreciation for its work during their exchanges, and added that changing counsel at this stage would necessarily delay the proceedings of possibly several years.⁴¹

17. In its submissions filed on the same day, the Prosecution stated its position that Kabuga's representation by his current counsel should be maintained, as the continuity of representation is crucial on the eve of the trial and as any change of counsel could impact the length of proceedings.⁴² The Prosecution also raised concerns regarding the influence of the family on the conduct of the case and Mr. Larochelle's possible conflict of interests.⁴³

18. In his submission filed on 3 August 2022, Mr. Larochelle responded that the Prosecution has no standing to comment on Kabuga's representation and described contentions regarding a potential conflict of interests as frivolous.⁴⁴ Mr. Larochelle further claimed that the contact he had with Kabuga was in line with Article 25 of the Code of Conduct of the Mechanism.⁴⁵ Mr. Larochelle underlined that he was initially designated upon Kabuga's arrest in France in May 2020, when Kabuga mandated his son to choose a lawyer.⁴⁶ In Mr. Larochelle's view, previous attempts to have Mr. Altit replaced do not demonstrate any intent to circumvent the Defence or the family's improper role in the proceedings,⁴⁷ and Mr. Altit's portrayal of a good relationship with Kabuga is contradicted by numerous statements.⁴⁸ Mr. Larochelle also claimed that there will be minimal delay if the current Defence team is replaced, since no start date for the trial has been established and because he will be able to rely on preparatory work done by the Defence.⁴⁹ Mr. Larochelle finally attached a second mandate signed by Kabuga on 1 August 2022, handwritten in English and witnessed by his son, stating that Kabuga is not being pressured by his family and that he wants Mr. Larochelle to represent him.⁵⁰

19. In its reply filed on 5 August 2022, the Defence raised, *inter alia*, concerns with respect to the mandates signed by Kabuga, which are both signed by Kabuga's son and written in languages

⁴¹ Defence Submission of 21 July 2022, paras. 20, 21.

⁴² Prosecution Submission, paras. 3, 4, 5 [bis].

⁴³ Prosecution Submission, para. 5, Annex, RP. 4008.

⁴⁴ Mr. Larochelle's Submission of 3 August 2022, paras. 3, 4.

⁴⁵ Mr. Larochelle's Submission of 3 August 2022, para. 10, *referring to* Code of Professional Conduct for Defence Counsel Appearing before the Mechanism and Other Defence Team Members, MICT/6/Rev.1, 14 May 2021 ("Code of Conduct"), Article 25(A).

⁴⁶ Mr. Larochelle's Submission of 3 August 2022, paras. 14, 15, 25, Annex D, RP. 4126-4120.

⁴⁷ Mr. Larochelle's Submission of 3 August 2022, paras. 13, 14. Mr. Larochelle insists that the notice which he tried to file with the Mechanism regarding exculpatory evidence was an example of his commitment to safeguard Kabuga's interests. *See* Mr. Larochelle's Submission of 3 August 2022, paras. 16, 17, 25, Annex E, RP. 4118-4110.

⁴⁸ Mr. Larochelle's Submission of 3 August 2022, paras. 19-23.

⁴⁹ Mr. Larochelle's Submission of 3 August 2022, paras. 24-28.

⁵⁰ Mr. Larochelle's Submission of 3 August 2022, para. 22, Annex F, RP. 4108.

that the Accused does not know or speak well, which might be indicative of pressure.⁵¹ The Defence also takes issue with Mr. Larochelle's assertion that he will be quickly ready for trial based on the Defence's file, arguing that he knows nothing of the work that has been done and downplays the difficulties inherent in communicating with Kabuga.⁵² The Defence finally points to Mr. Larochelle's conflict of interests in representing other members of Kabuga's family and notes his silence on the reason why the family wishes to replace Mr. Altit, namely his refusal to allow them access to confidential and sensitive material.⁵³

20. In a further submission filed on 15 August 2022, Mr. Larochelle reiterated, *inter alia*, that Kabuga's desire to replace Mr. Altit does not stem from family pressure but from lack of trust, and that the purported conflicts of interest are without basis.⁵⁴ He clarified that Kabuga's mandates were translated and therefore witnessed by his son.⁵⁵ Mr. Larochelle further suggested that Mr. Altit is exploiting Kabuga's vulnerabilities to deny him the right to counsel of his choosing.⁵⁶

21. At the pre-trial and status conferences held jointly on 18 August 2022, where the Trial Chamber ordered the trial to commence on 29 September 2022,⁵⁷ Kabuga stated his wish to change counsel to Mr. Larochelle.⁵⁸

II. DISCUSSION

22. Rule 43(G) of the Rules provides that under exceptional circumstances, at the request of the accused or his counsel, a Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.⁵⁹ It follows from binding jurisprudence that exceptional circumstances normally do not exist where the counsel acts in accordance with his or her professional and ethical responsibilities and that mere divergence of Defence strategy cannot objectively justify a loss of trust in the counsel's abilities or commitment to the case warranting withdrawal.⁶⁰ In particular, the Appeals Chamber of the International Criminal Tribunal for Rwanda has held:

⁵¹ Defence Submission of 5 August 2022, paras. 12-15.

⁵² Defence Submission of 5 August 2022, paras. 19-21.

⁵³ Defence Submission of 5 August 2022, paras. 16-18, 23.

⁵⁴ Mr. Larochelle's Submission of 15 August 2022, paras. 3-8, Annex, RP. 4234.

⁵⁵ Mr. Larochelle's Submission of 15 August 2022, para. 2.

⁵⁶ Mr. Larochelle's Submission of 15 August 2022, para. 10.

⁵⁷ T. 18 August 2022 p. 11.

⁵⁸ T. 18 August 2022 p. 11.

⁵⁹ See also Decision of 1 April 2021, para. 11.

⁶⁰ See Decision of 1 April 2021, para. 11, referring to *Nahimana et al.* Decision of 23 November 2006, para. 13; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević* Appeal Judgement"), paras. 14, 20, 21; *Blagojević* Decision of 7 November 2003, paras. 25-31, 33, 49-51.

[A]n accused's refusal to cooperate with his lawyers does not constitute an exceptional circumstance warranting the [...] withdrawal of assigned counsel. More precisely, an accused does not have the right to unilaterally destroy the trust between himself and his counsel, or to claim a breakdown in communication through unilateral actions, in the hope that such actions will result in the withdrawal of his counsel [...].⁶¹

23. The Trial Chamber recalls its Decision of 1 April 2021, wherein it found that the breakdown of communication between Kabuga and Mr. Altit, which apparently resulted from a misunderstanding of extant ethical obligations regarding the involvement of Kabuga's family in the Defence strategy, could only be viewed as unilateral and did not suffice to demonstrate exceptional circumstances warranting the withdrawal of Mr. Altit and his Defence team.⁶²

24. That Kabuga appears to remain unsatisfied with his representation since the Decision of 1 April 2021 and has renewed his request to change counsel⁶³ does not constitute a changed circumstance warranting Mr. Altit's withdrawal. There simply is no objective evidence on the record demonstrating that Mr. Altit has not complied with his professional or ethical obligations towards Kabuga and the Mechanism.

25. The Trial Chamber considers, in particular, that the claims of a persistent breakdown and resulting complaints regarding the Accused's involvement in the preparation of his defence seem to result from Kabuga's perception of a lack of communication rather than from any specifically identified action or failure on the part of his assigned counsel. Mr. Altit and his Defence team, who owe a duty of candour toward the Mechanism,⁶⁴ have attested to having a good direct relationship with their client and to regularly discussing the case and sharing material with him.⁶⁵ No specific evidence to the contrary has been presented.

26. In this regard, the Trial Chamber emphasizes that an accused benefitting from the Mechanism's legal aid regime, as Kabuga currently is, does not have the right to change counsel based on the unilateral actions of the accused that result in a breakdown of communication and trust. The Trial Chamber notes that similar problems between an accused and counsel persisted throughout the trial of Mr. Vidoje Blagojević before the International Criminal Tribunal for the

⁶¹ *Nahimana et al.* Decision of 23 November 2006, para. 13 (internal citations omitted).

⁶² Decision of 1 April 2021, para. 12.

⁶³ See, e.g., T. 6 October 2021 pp. 8-10; T. 3 February 2022 p. 10; Correspondence of 3 March 2022, RP. 3314; Mr. Larochelle's Request, RP. 3904; Mr. Larochelle's Submission of 3 August 2022, Annex F, RP. 4108; T. 18 August 2022 p. 11. The Trial Chamber notes that Kabuga has not raised the issue of his representation at the status conferences of 1 June 2021 and 11 May 2022. See T. 1 June 2001 p. 21 (private session); T. 11 May 2022 pp. 2-5 (private session).

⁶⁴ Code of Conduct, Article 18.

⁶⁵ See, e.g., T. 6 October 2021 pp. 15-19 (private session); T. 3 February 2022 pp. 11-21 (private session); Defence Submission of 21 July 2022, para. 20; Defence Submission of 5 August 2022, para. 22.

former Yugoslavia (“ICTY”). The matter was raised as the first point of appeal from the trial judgement. In that instance, the ICTY Appeals Chamber stated:

20. In addition, Blagojević seeks to reopen the issues considered and decided in the interlocutory appeal by arguing that the Appeals Chamber and Trial Chamber failed to appreciate that the breakdown of his relationship with his counsel would last throughout the trial and prevent him from playing any meaningful role in his defence. However, Blagojević’s submissions before trial clearly indicated that he considered the breakdown irreparable. Nonetheless, Blagojević correctly notes that both the Appeals Chamber and Trial Chamber expressed measured optimism that the situation between him and his counsel would improve. This view resulted from the determination that there was no objective basis for Blagojević to be dissatisfied with his counsel’s performance. Blagojević has not called this conclusion into question. More importantly, however, Blagojević’s argument on this point fails to address the key aspect of the Appeals Chamber’s earlier holding. In dismissing Blagojević’s interlocutory appeal, the Appeals Chamber stated:

In circumstances such as this, where an Appellant unjustifiably resists legal representation from assigned Counsel, Counsel’s professional obligations to continue to represent the accused remain. The Appeals Chamber is satisfied that Counsel in this case is committed to representing the Appellant, and that the Appellant will receive a fair trial with the assistance of his assigned Counsel. In dismissing the Appellant’s appeal, the Appeals Chamber wishes to make it clear to the Appellant that he has now exhausted all avenues available to him to voice his objections that he has not been accorded that to which he has no justifiable reason to demand. The Tribunal will not entertain a demand by an Appellant for that to be granted to him to which he has established no legal entitlement.

21. Blagojević’s own submissions under the present ground of appeal reflect that the continued breakdown during the trial and the resulting complaints about the conduct of his defence also resulted from his unilateral refusal to communicate with his counsel, rather than from any action on the part of his counsel and Defence team. The Trial Chamber’s decision on Blagojević’s request to testify is exemplary of Mr. Karnavas’s continued willingness to meet with and assist him and of Blagojević’s unilateral resistance to any cooperation. The Appeals Chamber considers that an appellant cannot premise a request for a new trial on a claim of a total breakdown in communication in circumstances where the appellant unjustifiably refused to cooperate with his or her assigned counsel throughout the trial proceedings.⁶⁶

27. The Trial Chamber reiterates that the right to legal assistance financed by the Mechanism does not confer the right to counsel of one’s choosing and that the accused’s preference may be overridden if it is in the interests of justice to do so.⁶⁷ The Registry investigations as to Kabuga’s means to pay for his representation have not concluded nor is there any indication that his ability to finance his Defence instead of relying on the Mechanism’s legal aid scheme is imminent. However, should Kabuga be able to pay for his representation, this alone would not necessarily lead to allowing replacement of Mr. Altit.⁶⁸

28. Furthermore, these proceedings remain at a critical stage, where continuity of representation is key to expeditiously commencing trial on 29 September 2022, with the presentation of the

⁶⁶ *Blagojević Appeal Judgement*, paras. 20, 21 (internal citations omitted).

⁶⁷ Decision of 1 April 2021, para. 14.

⁶⁸ 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, para. 19 (“When the fairness of the trial which is one of the fundamental rights of the accused also provided for in Article 21 of the Statute, is at stake (as it is suggested to be the case here) the accused’s choice might be overridden regardless of whether the case is

Prosecution evidence expected to start on 5 October 2022.⁶⁹ As previously recognized in the Decision of 1 April 2021,⁷⁰ the Trial Chamber is satisfied that Mr. Altit has effectively represented Kabuga throughout the pre-trial stage and complied with the workplan. There is no objective evidence of him failing in his obligations to his client.

29. Furthermore, any change in Kabuga's representation at this stage would likely generate a delay of several months. The Trial Chamber cannot accept on its face the claims from Mr. Larochelle as to his readiness to represent Kabuga and his ability to quickly familiarize himself with the case to avoid lengthy delay to the start of trial.⁷¹ Mr. Larochelle does not have access to the confidential filings in this case, the Prosecution's disclosure of potential evidence and other relevant material, or the case file maintained by the Defence team. He would only be in a position to accurately assess the time needed to prepare for trial after having reviewed it. Accordingly, there is every likelihood that once that happens the limited delay that Mr. Larochelle envisions will be more significant. Given Kabuga's age and fragile health, the time required for Mr. Larochelle to familiarize himself with the case would likely frustrate the fair and expeditious continuation of the case. In sum, the Trial Chamber remains of the view that granting the request to change counsel would have the consequence of causing delay in the proceedings.

30. In light of the foregoing, the Trial Chamber considers that the request to change counsel has not demonstrated the existence of exceptional circumstances warranting Mr. Altit's withdrawal or presented new facts that would warrant reconsideration of the Decision of 1 April 2021. Rather, the submissions before the Trial Chamber essentially request it to depart from controlling appellate jurisprudence that removal of Defence counsel assigned under the legal aid scheme is not appropriate based on an accused's actions that lead to unilateral breakdown with counsel and/or a perceived lack of trust between a counsel and his client.⁷²

31. Furthermore, the Trial Chamber observes that, in both instances, the lawyers who have been presented as alternatives to Mr. Altit were first given mandates supported by Kabuga's family. Specifically, Mr. Larochelle was put forth as an attorney to act on behalf of Kabuga⁷³ until the

concerned with the appointment of counsel paid by the accused. As rightly stated in the Impugned Decision, one of the limits to the accused's choice is the existence of a conflict of interests affecting his counsel.").

⁶⁹ T. 18 August 2022 p. 11.

⁷⁰ Decision of 1 April 2021, para. 13.

⁷¹ Mr. Larochelle's Request, paras. 24-28.

⁷² Cf. *Blagojević* Appeal Judgement, paras. 17-21; *Blagojević* Decision of 7 November 2003, paras. 25-31, 33, 49-51.

⁷³ See Mr. Larochelle's Submission of 3 August 2022, Annex D, RP. 4120. See also, e.g., Defence Submission of 21 July 2022, para. 11.

family subsequently withdrew this mandate in favour of Mr. Robinson.⁷⁴ Mr. Robinson has since withdrawn his representation of Kabuga's family, after having filed *ex facie* fraudulent documents on behalf of certain members of Kabuga's family in a proceeding before the Mechanism.⁷⁵ Mr. Robinson and those members of Kabuga's family are now the subject of an on-going contempt investigation.⁷⁶ Mr. Larochelle has since re-emerged as the preferred counsel to represent Kabuga and his family.⁷⁷

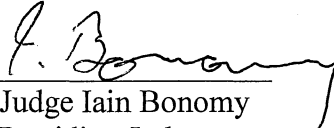
32. However, the Trial Chamber considers that, in this particular context, withdrawing Mr. Altit and appointing Mr. Larochelle does not ensure that Kabuga (or his family) will remain satisfied with the latter's representation of him, for example should he refuse to share confidential elements of the case file with Kabuga's family members. In such circumstances, the Trial Chamber may be faced with a request for the replacement of Mr. Larochelle after his appointment.

III. DISPOSITION

33. In light of the foregoing, the Trial Chamber **DENIES** the request to withdraw Mr. Altit as Kabuga's counsel.

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

Done this 26th day of August 2022,
At The Hague,
The Netherlands


Judge Iain Bonomy
Presiding Judge

[Seal of the Mechanism]

⁷⁴ See Correspondence of 11 March 2021, RP. 1153. See also, e.g., Mr. Robinson's Undertaking of 2 February 2021, RP. 1069, 1068; Correspondence of 21 July 2021, RP. 1571; Defence Submission of 21 July 2022, paras. 13, 14.

⁷⁵ See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Decision on Second Motion Filed by Félicien Kabuga's Family for Return of Frozen Assets and Seized Property, 10 March 2022 (original French version filed on 21 February 2022), pp. 1-4. See also *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Second Motion for Order Concerning Frozen Bank Accounts, 3 January 2022 (public, with public annexes A to D and confidential Annex E); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Withdrawal of Second Motion for Order Concerning Frozen Bank Accounts, 21 January 2022.

⁷⁶ See *Prosecutor v. Félicien Kabuga*, Case Nos. MICT-13-38-Misc.1 & MICT-13-38-R90.1, Order Assigning a Single Judge to Consider a Matter Pursuant to Rule 90(C), 9 March 2022, p. 1; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-R90.1, Order Directing the Registrar to Appoint an *Amicus Curiae* to Investigate Pursuant to Rule 90(C)(ii), 19 April 2022, pp. 1-3.

⁷⁷ See Mr. Larochelle's Request, RP. 3904; Mr. Larochelle's Submission of 3 August 2022, para. 22, Annex F, RP. 4108. See also Prosecution Submission, Annex, RP. 4008.



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