

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT

Date: 20 September 2022

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Elizabeth Ibanda-Nahamya
Judge Mustapha El Baaj
Judge Margaret deGuzman, Reserve Judge

Registrar: Mr. Abubacarr Tambaou

Decision of: 20 September 2022

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON REQUEST FOR CERTIFICATION TO
APPEAL THE 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

THE TRIAL CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively) seized of this case;¹

RECALLING the decision of 26 August 2022, wherein the Trial Chamber denied the request, submitted by Mr. Philippe Larochelle, to withdraw and replace Mr. Emmanuel Altit as Mr. Félicien Kabuga’s counsel, on the basis, *inter alia*, that: (i) the right to legal assistance financed by the Mechanism does not confer the right to counsel of one’s choosing and the removal of counsel is not appropriate based on an accused’s actions leading to unilateral breakdown or a perceived lack of trust; (ii) there is no objective evidence on the record demonstrating that Mr. Altit has not complied with his professional or ethical obligations towards Kabuga; and (iii) any change in Kabuga’s representation at this critical stage of the proceedings would likely generate delay and frustrate the fair and expeditious continuation of the case;²

BEING SEISED OF a motion filed by Mr. Larochelle on 5 September 2022, requesting certification to appeal the Impugned Decision and a stay of the proceedings pending the resolution of the matter of Kabuga’s representation by the Appeals Chamber;³

NOTING Mr. Larochelle’s submissions that the Trial Chamber erred in disregarding Kabuga’s statements expressing dissatisfaction with Mr. Altit and that the requirements for certification under Rule 80(B) of the Rules of Procedure and Evidence (“Rules”) are met as: (i) the matter of the representation of a vulnerable accused, who has been denied the opportunity to change counsel, is fundamental and affects by its very nature the fair conduct of the proceedings; (ii) the Impugned Decision affects the outcome of the trial because Kabuga is being forced to start his trial with a lawyer whom he does not trust, compromising his right to prepare his defence; and (iii) an immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings;⁴

NOTING the response filed by the Prosecution on 9 September 2022, wherein the Prosecution opposes the Motion and submits that: (i) Mr. Larochelle is not a “Party” in the sense of Rule 80(B)

¹ Order Replacing a Judge and Assigning a Reserve Judge, 26 August 2022, pp. 1, 2. *See also* Order Assigning a Trial Chamber, 1 October 2020, p. 1.

² Second Decision Related to Félicien Kabuga’s Representation, 26 August 2022 (“Impugned Decision”), paras. 23-33.

³ Request for Certification to Appeal the “Second Decision Related to Félicien Kabuga’s Representation” of 26 August 2022, 5 September 2022 (“Motion”), paras. 1, 16, 18.

⁴ Motion, paras. 2-15, 17.

of the Rules and lacks standing to request certification to appeal the Impugned Decision; and (ii) the Motion fails to meet the cumulative requirements for certification;⁵

CONSIDERING that, while Mr. Larochelle is not a party to these proceedings, he was exceptionally allowed to make submissions before the Trial Chamber on Kabuga's representation;⁶

CONSIDERING the centrality of the right to counsel to a fair trial,⁷ 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,⁸ 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;

FINDING that, in this very specific and narrow context, it is appropriate and in the interest of an expeditious resolution of this matter to allow Mr. Larochelle to request certification to appeal the Impugned Decision;

CONSIDERING that, in accordance with Rule 80(B) of the Rules, certification to appeal may be granted if a decision involves an issue: (i) that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial; and (ii) for which an immediate resolution by the Appeals Chamber may materially advance the proceedings;⁹

CONSIDERING that, while nothing in the Motion persuades the Trial Chamber that its decision to maintain Mr. Altit was in error, certification is not determined on the merits or correctness of the appeal against the impugned decision but on whether the moving party has demonstrated that the cumulative requirements set forth in Rule 80(B) of the Rules are met;¹⁰

CONSIDERING that the matter of Kabuga's representation and the interpretation by the Trial Chamber of the right of an accused to choose counsel are issues that may affect the fair and expeditious conduct of the proceedings, and that an immediate resolution by the Appeals Chamber of the issue of Kabuga's representation may materially advance the proceedings by bringing this

⁵ Prosecution Response to Request for Certification to Appeal the "Second Decision Related to Félicien Kabuga's Representation" of 26 August 2022, 9 September 2022, paras. 1-4.

⁶ See Order for Further Submissions Related to Representation, 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; Response to Defence Further Submissions Related to Mr. Kabuga's Representation, 15 August 2022 (public, with confidential Annex A).

⁷ See Article 19(4)(d) of the Statute.

⁸ Transcript 18 August 2022 p. 11.

⁹ See also Decision on Prosecution Motion for Reconsideration or Certification to Appeal the Decision of 30 November 2020, 11 January 2021 ("Decision of 11 January 2021"), para. 6 and reference cited therein.

¹⁰ See, e.g., Decision of 11 January 2021, paras. 6, 16 and references cited therein.

issue to a close and avoid any unnecessary litigation pertaining to representation during the course of the trial;

FINDING that the cumulative requirements under Rule 80(B) of the Rules have been met;

NOTING that Mr. Larochelle also requests a stay of proceedings pending the prospective interlocutory appeal;¹¹

CONSIDERING that the potential grounds in the Motion do not demonstrate a substantial likelihood of success on appeal in view of the current circumstance and controlling jurisprudence;

CONSIDERING that Kabuga will not be prejudiced by the continuation of proceedings as the Trial Chamber remains convinced that Mr. Altit is diligently representing Kabuga's interests and considers that an appeal decision is likely to be issued in the early stages of trial;

FINDING that, in light of the above and in view of Kabuga's fragile health, it is in the interest of justice to swiftly conduct this trial – set to begin on 29 September 2022 – while the interlocutory appeal is pending;

FOR THE FOREGOING REASONS,

AUTHORIZES, exceptionally, Mr. Larochelle to request certification to appeal the Impugned Decision and to pursue an interlocutory appeal;

CERTIFIES for appeal the issue of Kabuga's representation;

INSTRUCTS that the present Decision be served on Mr. Larochelle;


DENIES the request for a stay of proceedings; and

INFORMS the parties that proceedings shall continue while the interlocutory appeal of Kabuga's representation is pending.

¹¹ Motion, paras. 16, 18.

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

Done this 20th day of September 2022,
At Arusha,
Tanzania


Judge Iain Bony
Presiding Judge

[Seal of the Mechanism]



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