

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-T

Date: 16 June 2023

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Mustapha El Baaj
Judge Margaret M. deGuzman
Judge Ivo Nelson de Caires Batista Rosa, Reserve Judge

Registrar: Mr. Abubacarr M. Tambadou

Decision of: 16 June 2023

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON MOTIONS FOR CERTIFICATION TO APPEAL
THE 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
Ms. Françoise Mathe

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

RECALLING that, on 6 June 2023, the Trial Chamber, Judge El Baaj dissenting, issued a decision wherein it concluded that: (i) Mr. Félicien Kabuga is unfit to meaningfully participate in his trial and is very unlikely to regain fitness in the future; and (ii) the best way to ensure respect for his 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;²

BEING SEISED OF a motion filed by the Prosecution on 13 June 2023 requesting certification to appeal the Impugned Decision insofar as it determines that Mr. Kabuga is not fit for trial and is very unlikely to regain fitness in the future, arguing, in particular, that the Trial Chamber’s lack of unanimity on this issue underscores the necessity of certification;³

BEING FURTHER SEISED OF a motion filed by the Defence on 13 June 2023 requesting certification to appeal the Impugned Decision⁴ on the grounds that: (i) the Trial Chamber’s determination that Mr. Kabuga is unfit for trial and is very unlikely to regain fitness should result in the suspension or termination of proceedings and his release;⁵ and (ii) there is no legal basis for the alternative finding procedure ordered by the Trial Chamber and proceeding in this manner would violate Mr. Kabuga’s fundamental rights;⁶

NOTING the Prosecution and Defence submissions that the requirements for certification to appeal are met, as the issues in the Impugned Decision as to Mr. Kabuga’s fitness to stand trial and the decision to proceed with an alternative finding procedure implicate the fairness of the proceedings, and that immediate resolution by the Appeals Chamber may materially advance the proceedings;⁷

¹ See Order Assigning a Reserve Judge, 16 January 2023, pp. 1, 2. See also Order Assigning a Trial Chamber, 1 October 2020, p. 1; Order Replacing a Judge and Assigning a Reserve Judge, 26 August 2022, pp. 1, 2; Decision Under Rule 19(E), 10 January 2023, p. 1.

² Further Decision on Félicien Kabuga’s Fitness to Stand Trial, 6 June 2023 (“Impugned Decision”), paras. 36, 39, 57-59. The Trial Chamber maintained the temporary stay of the hearing of the Prosecution evidence until the expiration of the period for seeking certification to appeal or the resolution of any appeal of the Impugned Decision. See Impugned Decision, para. 59.

³ Prosecution Request for Certification to Appeal Further Decision on Félicien Kabuga’s Fitness to Stand Trial, 13 June 2023 (“Prosecution Motion”), paras. 1-4.

⁴ *Demande de certification afin que la Défense soit autorisée à interjeter appel de la « Further Decision on Félicien Kabuga’s Fitness to Stand Trial » rendue le 6 juin 2023*, 13 June 2023 (“Defence Motion”), p. 6.

⁵ Defence Motion, paras. 8, 11, 14, 15. See also Defence Motion, paras. 19, 24.

⁶ Defence Motion, paras. 9, 10, 13-15. See also Defence Motion, paras. 18, 19, 22-24.

⁷ Prosecution Motion, paras. 2, 3; Defence Motion, paras. 17-24.

NOTING that the Parties indicated that they would not file responses;⁸

CONSIDERING that, in accordance with Rule 80(B) of the Rules of Procedure and Evidence (“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 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 Appeals Chamber’s jurisprudence is unequivocal that the issue of an accused’s fitness to stand trial, absent certain circumstances, is of such importance that it may generally be regarded as an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial;¹¹

CONSIDERING that the issue of how to proceed after a finding that an accused is unfit to meaningfully participate in his trial and is very unlikely to regain fitness in the future is one that would also significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial;

CONSIDERING, therefore, that immediate resolution by the Appeals Chamber of the issues of Mr. Kabuga’s fitness to stand trial and the consequences thereof may materially advance the proceedings;

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

FOR THE FOREGOING REASONS,

GRANTS the Prosecution Motion and Defence Motion and certifies for appeal the issues of Mr. Kabuga’s fitness to stand trial and the consequences thereof.

⁸ Through emails sent on 14 June 2023 to the Trial Chamber’s Senior Legal Officer, the Parties indicated that neither intended to respond to the opposing party’s motion for certification to appeal.

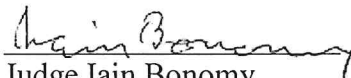
⁹ See also Decision on Félicien Kabuga’s Motion for Certification to Appeal the Decision of 13 June 2022, 23 June 2022 (“Decision of 23 June 2022”), pp. 1, 2.

¹⁰ See, e.g., Decision of 23 June 2022, p. 2.

¹¹ See, e.g., *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008, para. 34. See also Decision of 23 June 2022, p. 2.

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

Done this 16th day of June 2023,
At The Hague,
The Netherlands


Judge Iain Bony
Presiding Judge

[Seal of the Mechanism]



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