UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-38-T

Date: 6 June 2023

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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 Tambadou**

Decision of: **6 June 2023**

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

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

1. The Trial Chamber of the International Residual Mechanism for Criminal Tribunals ("Trial Chamber" and "Mechanism", respectively),[1] Judge El Baaj dissenting, hereby renders its further decision on whether Mr. Félicien Kabuga is fit to stand trial and the procedure it intends to follow as a consequence of its fitness determination. The Trial Chamber issues this decision publicly, consistent with prior practice in matters pertaining to Mr. Kabuga's health.[2]

I. FITNESS TO STAND TRIAL

A. Background

1. First Determination of Fitness and Commencement of Trial

2. Mr. Kabuga's health and his fitness for trial have been central issues in these proceedings from the outset. As a result, the Trial Chamber has closely monitored his health since his transfer to the Hague Branch of the Mechanism in October 2020. The Trial Chamber has received medical reports every two weeks from the Medical Officer of the United Nations Detention Unit ("UNDU"). In addition, during the pre-trial phase of the case, Mr. Kabuga was examined extensively by three independent medical experts, one Prosecution medical expert, and one Defence medical expert, who submitted reports to the Trial Chamber. This pre-trial examination process culminated in a hearing over 31 May, 1 June, and 7 June 2022, at which three of the medical experts testified and the Parties made submissions regarding Mr. Kabuga's fitness for trial. A detailed procedural history recounting Mr. Kabuga's evolving health situation, the actions taken by the Trial Chamber, and the salient aspects of each expert's conclusions can be found in the Trial Chamber's first decision on Mr. Kabuga's fitness for trial issued on 13 June 2022.[3]

3. In its first decision on fitness, the Trial Chamber placed particular weight on the reports provided and evidence given by the two independent expert forensic psychiatrists, Professors Henry Kennedy and Gillian Mezey, each of whom had conducted extensive assessments of Mr. Kabuga's mental health.[4] Professors Kennedy and Mezey agreed that Mr. Kabuga was frail and suffered from numerous, significant physical illnesses and had vascular damage to his brain.[5] They also agreed that he had reduced physiological and cognitive reserves to cope with his existing

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[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] *See* Decision on Félicien Kabuga's Fitness to Stand Trial and to Be Transferred to and Detained in Arusha, 13 June 2022 ("Decision of 13 June 2022"), para. 1; Decision on the Conduct of Trial Proceedings, 13 February 2023 ("Decision of 13 February 2023"), para. 1.

[3] Decision of 13 June 2022, paras. 2-39 and references cited therein.

[4] Decision of 13 June 2022, para. 44.

underlying conditions and any new acute illnesses, which, at times, severely inhibited his cognitive abilities.[6] In terms of the capacities relevant to the assessment of his ability to participate meaningfully in his trial, the two experts agreed that Mr. Kabuga was able to enter a plea, and to understand the nature of the charges and the consequences of the proceedings.[7]

4. The two experts disagreed, however, on the degree and scope of Mr. Kabuga's cognitive impairment and whether he had the capacity to understand the course of proceedings and details of evidence, to testify, and to instruct counsel.[8] Professor Kennedy was of the view that Mr. Kabuga's cognitive decline was limited and that he did not show the characteristics of dementia.[9] He believed that Mr. Kabuga could participate meaningfully in a trial if provided with appropriate assistance and accommodations.[10] By contrast, Professor Mezey found that Mr. Kabuga had moderate to severe dementia that was progressive in nature.[11] She considered Mr. Kabuga unfit for trial and opined that his cognitive function could be expected to decline further over time.[12]

5. In its Decision of 13 June 2022, the Trial Chamber found that both experts based their diagnoses on pertinent sources of information and that neither diagnosis was more compelling than the other.[13] The Trial Chamber held that, although Professor Mezey's view raised concerns, in light of Professor Kennedy's contrary opinion, the Defence had not demonstrated by a preponderance of the evidence that Mr. Kabuga was unfit to participate meaningfully in a trial, especially considering the accommodations that could be adopted.[14]

6. Aware that Mr. Kabuga's fitness could change over time, however, the Trial Chamber put in place a monitoring regime whereby a panel of three independent experts, including the two expert forensic psychiatrists and a neurologist, would submit a joint report on Mr. Kabuga's fitness every 180 days.[15] On 13 July 2022, following the Trial Chamber's instruction, the Registrar appointed

[5] Decision of 13 June 2022, para. 45 and references cited therein.
[6] Decision of 13 June 2022, para. 45 and references cited therein.
[7] Decision of 13 June 2022, para. 46 and references cited therein.
[8] Decision of 13 June 2022, para. 47.
[9] Decision of 13 June 2022, paras. 19, 27, 48 and references cited therein.
[10] Decision of 13 June 2022, paras. 29-32, 52 and references cited therein.
[11] Decision of 13 June 2022, paras. 15, 26, 49 and references cited therein.
[12] Decision of 13 June 2022, paras. 29-32, 49, 53 and references cited therein.
[13] Decision of 13 June 2022, paras. 50, 54.
[14] Decision of 13 June 2022, paras. 56, 62.
[15] Decision of 13 June 2022, paras. 57, 62.

Professor Kennedy, Professor Mezey, and an expert neurologist, Professor Patrick Cras ("Experts"), as members of the panel of independent experts to monitor Mr. Kabuga's health.[16]

7. The Defence appeal against the Decision of 13 June 2022 was dismissed in its entirety on 12 August 2022,[17] with Judge N'Gum partially dissenting and stating that a further report by an independent neurological expert would have been necessary for a proper assessment of whether Mr. Kabuga was fit to stand trial.[18]

8. The trial commenced on 29 September 2022. Between 29 September and 22 December 2022, the Trial Chamber sat for a total of 29 days and heard the oral evidence of 19 Prosecution witnesses. To accommodate Mr. Kabuga's health condition, and based on medical advice, the Trial Chamber limited hearings to two hours per day, three days per week, and allowed Mr. Kabuga to participate either in the courtroom or by video-conference link from the UNDU.[19] Mr. Kabuga waived his right to participate on eight of those days,[20] elected to participate by video-conference link on three occasions,[21] and attended court proceedings in person on the remaining 18 days.[22]

2. Joint Monitoring Report of 12 December 2022

9. On 12 December 2022, the Registry filed the first joint monitoring report prepared by the Experts.[23] The three Experts agreed that there was evidence of vascular disease affecting Mr. Kabuga's brain and of previous cerebrovascular accidents, and that he had significant deficits in short-term memory, complex decision making, attention and concentration, reasoning and judgment, executive functioning, and communication.[24] He also exhibited fluctuations in mood and personality change.[25] While the Experts expressed different views regarding some of Mr. Kabuga's capacities related to fitness, they agreed that he was not able to understand the course of

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[16] Registrar's Submission in Relation to the "Decision on Félicien Kabuga's Fitness to Stand Trial and to Be Transferred to and Detained in Arusha" of 13 June 2022, 18 July 2022 (public, with confidential Annex) ("Registrar Submission of 18 July 2022"), paras. 3, 4.
[17] *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 ("Appeal Decision of 12 August 2022"), para. 22.
[18] Appeal Decision of 12 August 2022, paras. 20, 22, Partially Dissenting Opinion of Judge Aminatta Lois Runeni N'Gum, paras. 1-4.
[19] *See* Transcript ("T.") 18 August 2022 pp. 5-8.
[20] The Accused waived this right on 29 and 30 September and 6, 12, 13, 18, 19, and 20 October 2022.
[21] The Accused participated remotely on 5 and 25 October and 22 November 2022.
[22] The Accused attended in person on 11 October, 8, 9, 10, 15, 16, 17, 23, and 24 November, and 1, 7, 8, 13, 14, 15, 20, 21, and 22 December 2022.
[23] Registrar's Submission in Relation to the "Decision on Félicien Kabuga's Fitness to Stand Trial and to Be Transferred to and Detained in Arusha" of 13 June 2022, 12 December 2022 (public, with confidential Annex), para. 5, Annex ("Joint Monitoring Report of 12 December 2022").
[24] Joint Monitoring Report of 12 December 2022, p. 4.
[25] Joint Monitoring Report of 12 December 2022, p. 4.

proceedings or details of the evidence and that he would be unable to testify, even with assistance.[26] The Experts concluded that it was now their view that "on the days of assessment 11th November 2022 and 21st November 2022, [Mr.] Kabuga was not fit to participate in his trial."[27] The Experts recommended a re-evaluation in three months to allow a clearer assessment of the extent to which the change in Mr. Kabuga's condition was irreversible or part of a pattern of fluctuation already observed.[28]

10. On 13 and 14 December 2022, the Trial Chamber dismissed a Defence request for an immediate stay of proceedings and instructed the Registry to have the Experts re-evaluate Mr. Kabuga within 90 days of 28 November 2022, in line with the recommendation in the Joint Monitoring Report of 12 December 2022, and to file a monitoring report thereafter.[29] The Trial Chamber noted that, although the Experts opined that Mr. Kabuga was not fit for trial on the two days of their assessments, they did not suggest that he had been unfit since 11 November or recommend a stay of the trial, but instead stated that a re-evaluation was necessary to assess whether the changes observed in his cognitive function were permanent or fluctuating.[30] The Trial Chamber also noted the Experts' suggestion that further support could be provided to Mr. Kabuga in court.[31]

11. On 22 and 29 December 2022, respectively, the Prosecution and Defence filed confidential submissions regarding the feasibility and utility of implementing the recommendations contained in the Joint Monitoring Report of 12 December 2022, with a view to determining possible arrangements for the trial to proceed until the filing of the next monitoring report.[32] In essence, the Prosecution's position was that all practicable accommodations should be made to assist

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[26] Joint Monitoring Report of 12 December 2022, pp. 5-9.
[27] Joint Monitoring Report of 12 December 2022, p. 10.
[28] Joint Monitoring Report of 12 December 2022, p. 10.
[29] The Trial Chamber dismissed the request for a stay on 13 December 2022 and provided its oral reasons for the decision on 14 December 2022. *See* T. 13 December 2022 p. 7; T. 14 December 2022 pp. 1-3. *See also* Urgent Defence Request for a Stay of Proceedings on the Grounds of Félicien Kabuga's Unfitness to Stand Trial, Established by the Panel of Experts, 16 December 2022 (original French version filed on 13 December 2022; confidential), paras. 3-12, p. 2; T. 13 December 2022 pp. 3-7; Request for Certification to Appeal the Oral Decision on the Fitness of Félicien Kabuga to Stand Trial, Issued by the Chamber on 14 December 2022, 21 December 2022 (original French version filed on 14 December 2022; confidential), paras. 29-50, p. 8; Decision on Félicien Kabuga's Motion for Certification to Appeal the Oral Decision of 14 December 2022, 11 January 2023 (confidential), pp. 1-3.
[30] T. 14 December 2022 p. 2.
[31] T. 14 December 2022 p. 2.
[32] Prosecution's Submission Pursuant to the 15 December 2022 "Order for Submissions in Relation to the Joint Monitoring Report", 22 December 2022 (confidential, with confidential Annex) ("Prosecution Submissions of 22 December 2022"); Defence Submissions in Response to the Chamber's Order of 15 December 2022, 4 January 2023 (original French version filed on 29 December 2022; confidential) ("Defence Submissions of 29 December 2022"). *See also* Order for Submissions in Relation to the Joint Monitoring Report and on Request for Access, 15 December 2022 (confidential), pp. 1, 2.

Mr. Kabuga and allow the trial to continue, in the interests of justice,[33] while the Defence reiterated its position that Mr. Kabuga was unfit and that continuing the trial would violate his fundamental rights, notwithstanding any arrangements that could be adopted.[34]

3. Resumption of Proceedings after the Judicial Recess

12. Trial proceedings were set to resume on 17 January 2023 following the end of year judicial recess.[35] However, on 4 and 11 January 2023, the UNDU Medical Officer informed the Trial Chamber that Mr. Kabuga had been diagnosed with two intercurrent illnesses, influenza and pneumonia, and that, although he showed signs of recovery, he was still experiencing significant levels of fatigue and the extent to which he would recover remained unclear.[36] In light of these medical reports, on 12 January 2023, the Trial Chamber granted a joint Defence and Prosecution request to delay resumption of the trial until 31 January 2023.[37]

13. On 26 January 2023, the UNDU Medical Officer informed the Trial Chamber that Mr. Kabuga continued to show signs of serious fatigue, noting that recovery from pneumonia could take six to twelve weeks for elderly patients. The UNDU Medical Officer recommended that, should proceedings resume, the Trial Chamber only allow Mr. Kabuga's attendance by video-conference link and limit court sessions to 90 minutes, three times per week.[38] On 30 January and 3 February 2023, the Trial Chamber ordered that trial proceedings remain adjourned in light of the latest medical reports and its consultations with the UNDU Medical Officer.[39]

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[33] Prosecution Submissions of 22 December 2022, paras. 1-3.
[34] Defence Submissions of 29 December 2022, paras. 31-51.
[35] T. 22 December 2022 p. 33.
[36] Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 4 January 2023 (public, with confidential Annex), Annex, Registry Pagination ("RP.") 4711; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 11 January 2023 (public, with confidential Annex), Annex, RP. 4734, 4733.
[37] The request was granted by the Trial Chamber by email through its Senior Legal Officer on 12 January 2023.
[38] Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 26 January 2023 (public, with confidential Annex) ("Medical Report of 26 January 2023"), Annex, RP. 4856, 4855.
[39] Order on Proceedings, 30 January 2023 ("Order of 30 January 2023"), p. 1; Further Order on Proceedings, 3 February 2023 ("Order of 3 February 2023"), p. 2. The Trial Chamber further dismissed as moot a Defence motion for reconsideration of the Order of 30 January 2023 and request for leave to reply. *See* Order of 3 February 2023, pp. 1, 2. *See also* Request for Reconsideration of the Chamber's Decision of 30 January 2023, Ordering the Resumption of Hearings on 7 February 2023 and Seeking a Suspension of Hearings while the Independent Experts Provide Their Findings on Félicien Kabuga's Fitness to Stand Trial, the Only Measure that Will Preserve Félicien Kabuga's Fundamental Rights and Health, 7 February 2023 (original French version filed on 31 January 2023; confidential), paras. 38-50, p. 8; Prosecution Response to the Defence Request for Reconsideration of the Trial Chamber Order of 30 January 2023, Pertaining to the Resumption of Trial, 2 February 2023 (confidential), paras. 1-10; Request for Leave to Reply to the "Prosecution Response to the Defence Request for Reconsideration of the Trial Chamber Order of 30 January 2023, Pertaining to the Resumption of Trial", 7 February 2023 (original French version filed on 3 February 2023; confidential), paras. 41-44, p. 6.

14. On 8 February 2023, the UNDU Medical Officer informed the Trial Chamber that Mr. Kabuga had experienced another health incident and remained in recovery, still showing signs of fatigue and without any real indication of improvement.[40]

15. On 13 February 2023, the Trial Chamber found that the latest UNDU medical reports suggested Mr. Kabuga's recovery process may have reached a *plateau* and ordered that trial proceedings resume on 14 February 2023.[41] It reduced the court schedule to 90 minutes per day twice a week, ordered that Mr. Kabuga's attendance be by video-conference link, and dismissed as premature a Defence motion to declare Mr. Kabuga unfit to stand trial or to stay the proceedings pending an expedited evaluation by the Experts.[42] Between 14 February and 2 March 2023, the Trial Chamber sat for six days, hearing oral evidence from four Prosecution witnesses.[43]

4. Joint Monitoring Report of 3 March 2023 and Hearings

16. On 6 March 2023, the Registry filed the second joint monitoring report submitted by the Experts on 3 March 2023.[44] The three Experts concluded unanimously that Mr. Kabuga's physical health and mental capacities had deteriorated significantly since their previous assessments, that he now meets the clinical criteria for dementia, and that he cannot meaningfully participate in his trial regardless of trial modalities or accommodations.[45] They noted that Mr. Kabuga remains capable of expressing his will and preference in limited areas concerning his health and well-being.[46]

17. On 6 March 2023, in view of the conclusions of the Experts, the Trial Chamber temporarily adjourned the evidentiary hearing scheduled to resume the following day.[47] On 8 March 2023, the

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[40] Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 8 February 2023 (public, with confidential Annex) ("Medical Report of 8 February 2023"), Annex, RP. 4900.
[41] *See* Decision of 13 February 2023, paras. 20, 22, 23, *referring to* Medical Report of 26 January 2023, RP. 4856, Medical Report of 8 February 2023, RP. 4900.
[42] Decision of 13 February 2023, paras. 18, 19, 21-23. *See also* Motion Seeking that 1) the Chamber Pronounce Félicien Kabuga Unfit to Stand Trial and, 2) Alternatively, an Order for a Medical Report to be Conducted by the Panel of Experts as Soon as Possible, 19 January 2023 (original French version filed on 14 January 2023; confidential), paras. 35-53, p. 8; Prosecution Response to Félicien Kabuga's Request to Be Pronounced Unfit or for an Order for an Expedited Expert Medical Report, 19 January 2023 (confidential), paras. 1-5. *See also* Request for Certification to Appeal the "Decision on the Conduct of Trial Proceedings" issued on 13 February 2023, 16 February 2023 (original French version filed on 13 February 2023; confidential, with public redacted version filed on 16 February 2023), paras. 43-58, p. 8; Prosecution Response to Request for Certification to Appeal the Decision on the Conduct of Trial Proceedings, 15 February 2023 (confidential), paras. 1, 2; Decision on Félicien Kabuga's Motion for Certification to Appeal the Decision of 13 February 2023 on Conduct of Proceedings, 23 February 2023, pp. 1-3.
[43] The Trial Chamber held hearings on 14, 15, 22, 23, and 28 February and 1 and 2 March 2023. A fifth witness, Prosecution Witness KAB041, did not complete his testimony. *See* T. 2 March 2023 p. 34.
[44] Registrar's Submission in Relation to the Oral Ruling of 14 December 2022, 6 March 2023 (confidential, with confidential Annex), para. 7, Annex ("Joint Monitoring Report of 3 March 2023").
[45] Joint Monitoring Report of 3 March 2023, RP. 5029.
[46] Joint Monitoring Report of 3 March 2023, RP. 5029.
[47] Further Order on Proceedings, 6 March 2023 ("Order of 6 March 2023"), p. 1. The Trial Chamber further dismissed as moot two motions filed by the Defence on 23 February and 2 March 2023, requesting that the hearings be suspended

Trial Chamber held a procedural hearing regarding the practical and procedural implications of the latest joint monitoring report.[48] The Trial Chamber held additional hearings from 15 to 29 March 2023 at which the Parties and the Trial Chamber examined the Experts. Professor Kennedy testified from 15 to 17 March 2023, Professor Mezey testified on 23 March 2023, and Professor Cras testified on 29 March 2023. On 30 March 2023, the Parties presented oral submissions concerning Mr. Kabuga's fitness for trial.[49]

5. Testimony of Independent Medical Experts

(a) Forensic Psychiatrist Henry Kennedy[50]

18. Professor Kennedy confirmed that, contrary to his initial assessment in April 2022, he is now firmly convinced that Mr. Kabuga has dementia and is unfit to participate meaningfully in his trial.[51] Professor Kennedy, who had examined Mr. Kabuga three times in person,[52] explained that his most recent examination revealed additional impairments in a number of Mr. Kabuga's cognitive abilities, including memory, perception, reasoning, and communicating.[53] His findings overall led him to conclude that Mr. Kabuga now meets the clinical criteria for dementia.[54] He opined that Mr. Kabuga's dementia is of a predominantly vascular nature and has resulted in a step-wise decline in cognitive functions, which is typical of this type of dementia.[55] Professor Kennedy further stated that dementia is permanent and irreversible,[56] that Mr. Kabuga's dementia

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until the Experts' next report is received. *See* Order of 6 March 2023, pp. 1, 2. *See also* Defence Submissions Following the UNDU Medical Officer's Report of 22 February 2023, 2 March 2023 (original French version filed on 23 February 2023; confidential), paras. 45-63, p. 8; Defence Request Following the Trial Chamber's Oral Decision of 2 March 2023 to Hold Three Hearings in the Week Beginning on 6 March 2023, 6 March 2023 (original French version filed on 2 March 2023; confidential), paras. 48-60, p. 8.

[48] *See* Order of 6 March 2023, p. 1.

[49] *See* Scheduling Order, 10 March 2023, pp. 1, 2.

[50] Professor Kennedy is an expert forensic psychiatrist based in the Republic of Ireland. He is a Clinical Professor of Forensic Psychiatry at the University of Dublin, the Executive Clinical Director of the National Forensic Mental Health Service, and the Clinical Director of the Central Mental Hospital in Dublin. He has experience giving expert evidence before national jurisdictions, as well as in numerous Habeas Corpus and judicial review proceedings concerning the Irish Mental Health Act 2001 and Criminal Law (Insanity) Act 2006. *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, 22 March 2022 (confidential, with confidential Annex), para. 2, Annex, RP. 3412-3381. *See also* Witness Kennedy, T. 31 May 2022 pp. 4, 5; T. 15 March 2023 p. 2.

[51] Witness Kennedy, T. 15 March 2023 pp. 12, 13, 20, 21. *See also* 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 ("Kennedy Report of 21 April 2022"), Opinion paras. 5, 6; Joint Monitoring Report of 12 December 2022, p. 10; Joint Monitoring Report of 3 March 2023, RP. 5029.

[52] Kennedy Report of 21 April 2022, p. 2; Joint Monitoring Report of 12 December 2022, p. 1; Joint Monitoring Report of 3 March 2023, RP. 5029.

[53] Witness Kennedy, T. 15 March 2023 pp. 12, 13. *See also* Witness Kennedy, T. 16 March 2023 p. 40.

[54] Witness Kennedy, T. 15 March 2023 pp. 12, 13; T. 16 March 2023 pp. 31, 32, 34.

[55] Witness Kennedy, T. 16 March 2023 pp. 32-34; T. 17 March 2023 pp. 14, 15.

[56] Witness Kennedy, T. 16 March 2023 p. 34.

can now be qualified as severe,[57] and that he will continue to experience physical and cognitive decline at a rate that is difficult to predict.[58]

19. Regarding the capacities required for effective participation in a trial, Professor Kennedy confirmed his view, as expressed in the Joint Monitoring Report of 12 December 2022, that Mr. Kabuga is able to enter a plea, to understand the nature of the charges, and to understand the consequences of the proceedings,[59] although his ability in this last respect has declined.[60] In addition, Professor Kennedy noted that Mr. Kabuga remains capable of expressing his will and preference in limited areas concerning his own health and well-being, including, for instance, deciding whether to attend a hearing.[61] However, Professor Kennedy stated that Mr. Kabuga is unable to understand the course of proceedings or details of the evidence.[62] He noted that Mr. Kabuga's short-term memory has further deteriorated since December 2022,[63] and that when Professors Kennedy and Cras spoke with him in February 2023, he was unable to appreciate the significance of some of the questions they asked.[64] Additionally, Mr. Kabuga is no longer able to instruct counsel due to deterioration in his frontal lobe functioning.[65] Professor Kennedy testified that Mr. Kabuga is unable to give oral evidence[66] and that his ability to give written evidence is very limited due to deficiencies in his ability to remember remote events correctly and to respond and give instructions.[67] In this regard, Professor Kennedy explained that giving instructions and evidence requires the exercise of judgement and understanding, as well as the ability to perceive the consequences of the evidence, which require higher cognitive functions.[68] Although Mr. Kabuga can, on rare occasion, access such higher cognitive functions, for instance, to make a joke, generally he is capable only of simple responses to questions and cannot appreciate the full importance of evidence.[69] When asked whether Mr. Kabuga could be malingering, Professor Kennedy stated that such deceit can never be completely ruled out, but he does not believe it is possible in this case.[70]

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[57] Witness Kennedy, T. 17 March 2023 pp. 25, 26.
[58] Witness Kennedy, T. 17 March 2023 pp. 3, 4.
[59] Witness Kennedy, T. 15 March 2023 pp. 4, 5, 8; T. 17 March 2023 pp. 11, 12. *See also* Joint Monitoring Report of 12 December 2022, pp. 5, 7, 8.
[60] Witness Kennedy, T. 15 March 2023 pp. 8, 9.
[61] Witness Kennedy, T. 15 March 2023 p. 11; T. 16 March 2023 pp. 6, 7; T. 17 March 2023 pp. 12, 13.
[62] Witness Kennedy, T. 15 March 2023 pp. 5, 6; T. 16 March 2023 pp. 21-23. *See also* Joint Monitoring Report of 12 December 2022, pp. 5-7.
[63] Witness Kennedy, T. 16 March 2023 pp. 39, 40.
[64] Witness Kennedy, T. 15 March 2023 p. 6.
[65] Witness Kennedy, T. 15 March 2023 pp. 6-8. *See also* Joint Monitoring Report of 12 December 2022, p. 7.
[66] Witness Kennedy, T. 15 March 2023 pp. 9, 10; T. 16 March 2023 pp. 41-44. *See also* Joint Monitoring Report of 12 December 2022, p. 8.
[67] Witness Kennedy, T. 16 March 2023 pp. 41-44; T. 17 March 2023 pp. 9, 10.
[68] Witness Kennedy, T. 17 March 2023 p. 10.
[69] Witness Kennedy, T. 15 March 2023 pp. 16-18; T. 16 March 2023 pp. 4, 5, 43.
[70] Witness Kennedy, T. 15 March 2023 pp. 15, 16; T. 16 March 2023 pp. 31, 32.

(b) Forensic Psychiatrist Gillian Mezey[71]

20. Professor Mezey maintained the opinion she has expressed since the outset of her involvement in this case: that Mr. Kabuga has dementia and is not fit to participate meaningfully in his trial.[72] She also considered that he is unlikely to regain fitness, regardless of treatment or intervention.[73] Professor Mezey examined Mr. Kabuga three times – in person in January 2022 and by video-conference link in November 2022 and February 2023.[74] On each occasion, she also reviewed his medical records.[75] She testified that a number of Mr. Kabuga's cognitive capacities have deteriorated progressively over that time.[76] This decline has spanned various functions, including his level of awareness and arousal, orientation, concentration, short-term and long-term memory, receptive and expressive communication, and behaviour.[77] The deterioration has been both progressive and step-wise[78] because Mr. Kabuga has Alzheimer's dementia, which is associated with the former, and vascular dementia, which is associated with the latter.[79] Professor Mezey qualified Mr. Kabuga's dementia as severe.[80] She noted that Mr. Kabuga's vascular cognitive decline has been slowed, and that his impairment has been effectively managed by medication and monitoring, but that little can be done to halt the progression of the Alzheimer's degenerative decline.[81]

21. Regarding the capacities required for effective participation in a trial, Professor Mezey confirmed her view as expressed in the Joint Monitoring Report of 12 December 2022 that

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[71] Professor Mezey is an expert forensic psychiatrist based in the United Kingdom of Great Britain and Northern Ireland. She is a Fellow of the Royal College of Psychiatry, Emeritus Professor in Forensic Psychiatry at the St. George's University of London, and Honorary Consultant in Forensic Psychiatry at Springfield Hospital. She has expertise in the assessment, treatment, and rehabilitation of mentally disordered offenders and has extensive experience giving expert evidence before national and international jurisdictions, including the United Kingdom Court of Appeal and the International Criminal Court ("ICC"). *See* Registrar's Submission in Relation to the "Order for Further Independent Medical Expert Evaluation" of 1 December 2021, 15 December 2021 (confidential, with confidential Annex), para. 2, Annex, RP. 2828-2824. *See also* Witness Mezey, T. 1 June 2022 p. 2; T. 23 March 2023 p. 2.

[72] Witness Mezey, T. 23 March 2023 pp. 14, 17, 18, 37, 38. *See also* Registrar's Submission in Relation to the "Supplemental Order on Order for Further Independent Medical Expert Evaluation" of 14 January 2022, 31 January 2022 (confidential, with confidential Annex), Annex ("Mezey Report of 31 January 2022"), paras. 58, 87.

[73] *See* Witness Mezey, T. 23 March 2023 p. 32.

[74] Mezey Report of 31 January 2022, p. 3; Joint Monitoring Report of 12 December 2022, p. 1; Joint Monitoring Report of 3 March 2023, RP. 5030, 5029. *See also* Witness Mezey, T. 23 March 2023 pp. 3, 18-20, 29.

[75] Mezey Report of 31 January 2022, p. 3; Joint Monitoring Report of 12 December 2022, p. 3; Joint Monitoring Report of 3 March 2023, RP. 5030, 5029.

[76] Witness Mezey, T. 23 March 2023 pp. 3, 4, 7, 10. *See also* Joint Monitoring Report of 3 March 2023, RP. 5029.

[77] Witness Mezey, T. 23 March 2023 pp. 3-8, 17, 18, 37, 38. *See also* Joint Monitoring Report of 3 March 2023, RP. 5029.

[78] Witness Mezey, T. 23 March 2023 pp. 7, 9, 10.

[79] Witness Mezey, T. 23 March 2023 pp. 9-12. Professor Mezey indicated that Mr. Kabuga's Alzheimer's picture was confirmed to some extent by the magnetic resonance imaging brain scan. *See* T. 23 March 2023 p. 10. Professor Mezey did not conduct a formal measure for dementia, such as a Mini Mental State Assessment, which she explained would have been difficult to conduct remotely. *See* Witness Mezey, T. 23 March 2023 pp. 12, 20, 21.

[80] Witness Mezey, T. 23 March 2023 pp. 11, 12.

[81] Witness Mezey, T. 23 March 2023 p. 11.

Mr. Kabuga has the ability to enter a plea, to understand the nature of the charges, and to understand the consequences of the proceedings.[82] However, she stressed that his understanding in regard to these capacities is superficial.[83] In addition, Professor Mezey opined that Mr. Kabuga is unable to follow court proceedings, to understand the evidence, or to testify[84] because of deficits in his ability to recall, retain, process, and weigh information.[85] Professor Mezey also confirmed her opinion that Mr. Kabuga is generally unable to instruct counsel[86] or to express any will or preference concerning a complex matter.[87] She stated that there are no accommodations that could enable him to participate effectively in a trial because his cognitive impairments are "severe, global, pervasive, and progressive".[88]

(c) Neurologist Patrick Cras[89]

22. Professor Cras agreed with Professors Kennedy and Mezey that Mr. Kabuga has dementia and is unable to participate meaningfully in a trial.[90] Professor Cras examined Mr. Kabuga on November 2022 and February 2023, conducted neurological and cognitive examinations, and reviewed relevant medical records.[91] In his opinion, Mr. Kabuga's dementia is moderately severe and possibly reflects a combination of vascular and Alzheimer's types.[92] Like the other experts, Professor Cras testified that Mr. Kabuga's mental capacities and physical health deteriorated significantly between the November 2022 and February 2023 assessments.[93]

23. Regarding the capacities required for effective participation in a trial, Professor Cras confirmed his view as expressed in the Joint Monitoring Report of 12 December 2022 that Mr. Kabuga has the abilities to enter a plea, to understand the nature of the charges, and to

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[82] Witness Mezey, T. 23 March 2023 pp. 34, 35. *See also* Joint Monitoring Report of 12 December 2022, pp. 5, 7, 8.
[83] Witness Mezey, T. 23 March 2023 pp. 34, 35.
[84] Witness Mezey, T. 23 March 2023 pp. 14, 33. *See also* Joint Monitoring Report of 12 December 2022, pp. 5-8.
[85] Witness Mezey, T. 23 March 2023 pp. 13, 14, 33, 37, 38.
[86] Witness Mezey, T. 23 March 2023 p. 39. *See also* Joint Monitoring Report of 12 December 2022, p. 7. In Professor Mezey's view, Mr. Kabuga would not be able to talk to his counsel about a witness's testimony or give his opinion about what took place in court. *See* Witness Mezey, T. 23 March 2023 p. 47.
[87] Witness Mezey, T. 23 March 2023 pp. 15, 16.
[88] Witness Mezey, T. 23 March 2023 p. 43.
[89] Professor Cras is an expert neurologist based in Belgium. He is the Chairman of the Department of Neurology of the University Hospital of Antwerp and a Professor of Neurology at the University of Antwerp, with research interests including neurodegenerative diseases and dementia, particularly Alzheimer's disease. He has experience giving expert evidence before Belgian courts in testamentary litigation, appointment of patient counsel and evaluation of nervous system damage due to neurotrauma. *See* Registrar Submission of 18 July 2022, para. 4, Annex, RP. 3980-3978. *See also* Witness Cras, T. 29 March 2023 pp. 2, 3.
[90] Joint Monitoring Report of 12 December 2022, pp. 4, 10; Joint Monitoring Report of 3 March 2023, RP. 5029.
[91] Joint Monitoring Report of 12 December 2022, pp. 1, 3; Joint Monitoring Report of 3 March 2023, RP. 5030, 5029; Witness Cras, T. 29 March 2023 pp. 3, 4, 6, 12, 15-17, 25-33.
[92] Witness Cras, T. 29 March 2023 pp. 4, 9-11, 13.
[93] Witness Cras, T. 29 March 2023 pp. 6, 24, 25. *See also* Witness Mezey, T. 23 March 2023 pp. 17, 18; Witness Kennedy, T. 15 March 2023 p. 13.

understand the consequences of the proceedings,[94] but lacks the abilities to understand the course of proceedings, to understand the details of evidence, to instruct counsel, and to testify.[95] He noted, for instance, that it would be very difficult or impossible for Mr. Kabuga to discuss arguments or reasoning related to his case with counsel, or to understand the purpose of questions asked in court.[96]

6. Submissions of the Parties

24. The Defence urges the Trial Chamber to declare Mr. Kabuga unfit to participate in his trial,[97] terminate proceedings against him, and release him immediately.[98] It emphasizes that all Experts agree Mr. Kabuga has severe dementia, an irreversible condition that renders him unable to participate effectively in his trial, regardless of any accommodations.[99]

25. The Prosecution argues that the Experts' latest assessments of Mr. Kabuga may not reflect his baseline level of cognitive capability in light of his recent physical illnesses,[100] and that the diagnosis of dementia is not entirely determinative of functional capabilities.[101] It further asserts that the Experts applied, and the Defence invoked, a higher standard than is required for fitness.[102] According to the Prosecution, the standard of "meaningful participation" does not require an accused to be capable of the kind of sophisticated analysis the Experts assumed is necessary,[103] and the Experts' concerns regarding Mr. Kabuga's inability to process vast amounts of evidence or address nuances and subtleties in the evidence address hypothetical issues that are not clearly relevant to this trial.[104]

B. Fitness of the Accused

1. Applicable Law

26. When a question arises regarding an accused's fitness to stand trial, the Trial Chamber is required to make a fitness determination.[105] In its 2008 judgement in the *Strugar* case, the Appeals

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[94] Witness Cras, T. 29 March 2023 pp. 34, 35, 42. *See also* Joint Monitoring Report of 12 December 2022, pp. 5, 7, 8.
[95] Witness Cras, T. 29 March 2023 pp. 34, 35. *See also* Joint Monitoring Report of 12 December 2022, pp. 5-8.
[96] Witness Cras, T. 29 March 2023 pp. 14, 35.
[97] *See, e.g.*, T. 30 March 2023 p. 14. *See also* T. 8 March 2023 pp. 18, 19.
[98] *See, e.g.*, T. 8 March 2023 pp. 18-22.
[99] *See, e.g.*, T. 30 March 2023 pp. 1, 2, 4, 11-13. *See also* T. 8 March 2023 pp. 15-18.
[100] *See, e.g.*, T. 30 March 2023 pp. 24-37. *See also* T. 8 March 2023 pp. 4-7.
[101] *See, e.g.*, T. 30 March 2023 p. 21.
[102] *See, e.g.*, T. 30 March 2023 pp. 20, 21, 25, 38-40, 44, 45.
[103] *See, e.g.*, T. 30 March 2023 p. 44.
[104] *See, e.g.*, T. 30 March 2023 p. 21.
[105] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"). The Trial Chamber notes that rules of other international criminal courts provide for fitness determinations. *See* Rule 135(4)

Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") stated that "the prejudice to the accused resulting from continuing the trial while he or she is unfit to stand would amount to a miscarriage of justice."[106] The ICTY Appeals Chamber set forth a non-exhaustive list of factors for trial chambers to consider in making fitness determinations.[107] This settled law has been applied whenever fitness issues have arisen before the Mechanism and its predecessor tribunals, the ICTY and the International Criminal Tribunal for Rwanda,[108] including in this case. The *Strugar* factors were applied in the Trial Chamber's Decision of 13 June 2022,[109] and provided the framework for the Experts' clinical assessments of Mr. Kabuga.[110] The Appeals Chamber confirmed the applicability of the *Strugar* test in its Decision of 12 August 2022 affirming the Trial Chamber's Decision of 13 June 2022.[111] The Trial Chamber is bound to follow this precedent.[112]

27. The Trial Chamber notes that in 2006 States adopted the Convention on the Rights of Persons with Disabilities ("CRPD" or "Convention"), which entered into force in 2008 and has been ratified by 186 States Parties.[113] Although the CRPD does not address the compatibility of fitness determinations with the rights of persons with disabilities, the CRPD Committee tasked with monitoring States Parties' implementation of, and compliance with, the Convention,[114] issued

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of the Rules of Procedure and Evidence of the ICC, adopted on 9 September 2002 and amended on 9 December 2022 ("ICC Rules"); Rule 69(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, adopted on 17 March 2017 and amended on 29 and 30 April 2020 ("KSC Rules"); Rule 74*bis*(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, adopted on 16 January 2002 and amended on 31 May 2012 ("SCSL Rules").

[106] *Strugar* Appeal Judgement, para. 34.

[107] *Strugar* Appeal Judgement, paras. 55, 56. *See also Strugar* Appeal Judgement, paras. 41-43.

[108] *See Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Public Redacted Version of the "Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings" filed on 30 April 2018, 8 June 2018, p. 3; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Public Redacted Version of 24 March 2016 Decision on Remand on the Continuation of Proceedings, 5 April 2016 ("*Hadžić* Decision of 24 March 2016"), paras. 13-19; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013, para. 21; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Remand Regarding Continuation of Trial, 10 September 2009, para. 18. *See also Strugar* Appeal Judgement, para. 45.

[109] Decision of 13 June 2022, paras. 40-43.

[110] *See, e.g.*, Order for Further Independent Medical Expert Evaluation, 1 December 2021 (confidential); Joint Monitoring Report of 12 December 2022; Joint Monitoring Report of 3 March 2023.

[111] Appeal Decision of 12 August 2022, paras. 11, 12.

[112] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010, para. 24, *referring to Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 113. *See also Aleksovski* Appeal Judgement, paras. 92-111.

[113] *See* United Nations General Assembly, Res. No. A/RES/61/106, 13 December 2006, Annex I, Convention on the Rights of Persons with Disabilities; United Nations Treaty Collection, Chapter IV, Human Rights, 15 – Convention on the Rights of Persons with Disabilities.

[114] *See* Articles 34-37, 40(1) of the CRPD. During its sessions, the Committee on the CRPD ("CRPD Committee") considers reports of States Parties, addresses its concerns and recommendations to the relevant State Party in the form of concluding observations, and issues general comments elaborating on the meaning of the CRPD provisions. *See* Articles 36(1), 36(2), 36(5), 38, 39 of the CRPD.

Guidelines in 2015 stating that declarations of unfitness to stand trial are contrary to the rights set forth in the CRPD "since they deprive the person of his or her right to due process and safeguards that are applicable to every defendant."[115] While such Guidelines may be helpful to States Parties as they seek to implement the Convention, they do not provide a basis for the Trial Chamber to depart from binding precedent requiring a fitness determination.[116] Rather, the Trial Chamber's task is to apply the *Strugar* factors while giving full effect to all relevant human rights norms, including those set forth in the CRPD.

28. The *Strugar* test requires the Trial Chamber to determine whether, based on a preponderance of the evidence, the accused is capable of "meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings".[117] The non-exhaustive list of capacities to be evaluated in assessing an accused's fitness to stand trial includes the abilities to: (i) plead; (ii) understand the nature of the charges; (iii) understand the course of the proceedings; (iv) understand the details of the evidence; (v) instruct counsel; (vi) understand the consequences of the proceedings; and (vii) testify.[118] Determining fitness for trial requires an assessment of the accused's overall capacity to participate meaningfully in the trial, provided that he or she is duly represented by counsel.[119]

29. A medical diagnosis, such as that of dementia, is not itself dispositive evidence of unfitness.[120] Rather, a trial chamber must determine whether the effects of the accused's condition render him or her unable to participate effectively in the trial or to understand the essentials of the proceedings, taking account of all relevant capacities.[121]

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[115] CRPD Committee, Doc. No. A/72/55, Report of the Committee on the Rights of Persons with Disabilities, Thirteenth, Fourteenth, Fifteenth, Sixteenth Session ("CRPD Report of 2016"), para. 37, Annex, "Guidelines on the Right to Liberty and Security of Persons with Disabilities", adopted by the Committee at its fourteenth session ("CRPD Guidelines on Article 14"), paras. 2, 16 and references cited therein.

[116] The CRPD Guidelines on Article 14, which are not binding on CRPD States Parties, are based on the CRPD Committee's individual complaints process jurisprudence. *See* CRPD Report of 2016, para. 37. A review of the cases before the CRPD Committee reveals that the facts and process provided for in each were very different from the circumstances in this case and that each involved significant breaches of human rights norms. *See generally* CRPD Committee, Doc. No. CRPD/C/16/D/7/2012, *Marlon James Noble v. Australia*, 10 October 2016; CRPD Committee, Doc. No. CRPD/C/22/D/32/2015, *Arturo Medina Vela v. Mexico*, 15 October 2019; CRPD Committee, Doc. No. CRPD/C/22/D/18/2013, *Manuway (Kerry) Doolan v. Australia*, 17 October 2019; CRPD Committee, Doc. No. CRPD/C/22/D/17/2013, *Christopher Leo v. Australia*, 18 October 2019.

[117] Appeal Decision of 12 August 2022, para. 11, *referring to Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR73.1, Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 4 March 2016 ("*Hadžić* Decision of 4 March 2016"), para. 7; *Strugar* Appeal Judgement, para. 55.

[118] Appeal Decision of 12 August 2022, para. 12, *referring to Strugar* Appeal Judgement, paras. 41, 55.

[119] Appeal Decision of 12 August 2022, para. 12, *referring to Strugar* Appeal Judgement, para. 60.

[120] *See* Decision of 13 June 2022, para. 51, *referring to, inter alia, Strugar* Appeal Judgement, para. 61.

[121] *See* Decision of 13 June 2022, paras. 40, 51, *referring to, inter alia, Strugar* Appeal Judgement, paras. 55, 61.

2. Discussion

30. When the Trial Chamber ruled in June 2022 that the Defence had not met its burden to demonstrate Mr. Kabuga's lack of fitness for trial, the key evidence before it came from two independent forensic psychiatrists, Professors Kennedy and Mezey. As discussed above, these experts disagreed about the severity and consequences of Mr. Kabuga's cognitive impairments, with Professor Mezey considering that he could not participate in a trial under any circumstances, and Professor Kennedy concluding that he could do so with accommodations.[122] Now, a year and two further assessments later, these experts and Professor Cras, each of whom has impressive credentials and extensive relevant experience,[123] agree that: (i) Mr. Kabuga's cognitive and physical functions have progressively and significantly deteriorated since the pre-trial stage; (ii) he has severe dementia; and (iii) he cannot participate meaningfully in his trial, even with accommodations.[124] The vast majority of the evidence before the Trial Chamber, therefore, supports the conclusion that Mr. Kabuga is unfit for trial.

31. The Experts agree that Mr. Kabuga lacks four capacities crucial to meaningful participation in a trial: the ability to understand the course of proceedings, understand the evidence, instruct counsel, and testify.[125] According to the Experts, Mr. Kabuga's dementia has caused cognitive decline producing deficits in his short-term memory, attention and concentration skills, reasoning and judgment abilities, and executive functioning.[126] He experiences episodic confusion and his capacities to engage in expressive and receptive communication are limited.[127] His mood fluctuates and he exhibits personality change.[128] In the unanimous opinion of the Experts, these consequences of dementia deprive Mr. Kabuga of the capabilities necessary for meaningful participation in a

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[122] *See supra* para. 4.
[123] *See supra* nn. 50, 71, 89.
[124] Joint Monitoring Report of 12 December 2022, pp. 4, 10; Joint Monitoring Report of 3 March 2023, RP. 5029; Witness Kennedy, T. 15 March 2023 pp. 12, 13, 20, 21; T. 16 March 2023 pp. 31-34; T. 17 March 2023 pp. 14, 15, 25, 26; Witness Mezey, T. 23 March 2023 pp. 3, 4, 7, 10-12, 43; Witness Cras, T. 29 March 2023 pp. 6, 9-11, 13.
[125] Joint Monitoring Report of 12 December 2022, pp. 5-8; Joint Monitoring Report of 3 March 2023, RP. 5029; Witness Kennedy, T. 15 March 2023 pp. 5-7, 9, 10; Witness Mezey, T. 23 March 2023 pp. 14, 33, 39; Witness Cras, T. 29 March 2023 pp. 34, 35.
[126] Joint Monitoring Report of 12 December 2022, p. 4; Witness Kennedy, T. 15 March 2023 pp. 12, 13; Witness Mezey, T. 23 March 2023 pp. 3, 4, 37, 38. *See also* Witness Cras, T. 29 March 2023 pp. 7, 8, 14.
[127] Joint Monitoring Report of 12 December 2022, p. 4; Joint Monitoring Report of 3 March 2023, RP. 5029; Witness Kennedy, T. 15 March 2023 pp. 12, 13; T. 16 March 2023 p. 30; Witness Mezey, T. 23 March 2023 pp. 4, 37, 38. *See also* Witness Cras, T. 29 March 2023 p. 42.
[128] Joint Monitoring Report of 12 December 2022, p. 4; Witness Kennedy, T. 16 March 2023 pp. 13, 14, 30; Witness Mezey, T. 23 March 2023 pp. 5, 6, 8. *See also* Witness Cras, T. 29 March 2023 pp. 7, 8.

trial.[129] Moreover, he will not recover these capacities because his condition is characterized by progressive and irreversible decline.[130]

32. Notably, the Experts' most recent assessment revealed that Mr. Kabuga is no longer able to follow regular conversation at a normal pace, and that his levels of awareness and attention have diminished.[131] For instance, Professor Kennedy indicated that he could not engage Mr. Kabuga in a rational conversation with any sustained coherence.[132] The Experts struggled to elicit even very simple pieces of information from Mr. Kabuga.[133]

33. Consequently, the Experts agree that Mr. Kabuga cannot follow proceedings or understand evidence, except at the most superficial level. Professor Kennedy underlined that Mr. Kabuga's higher cognitive functions have declined[134] such that he cannot grasp the complexities, nuances, or implications of evidence;[135] and Professor Mezey noted that his ability to retain, process, and weigh complex information, or express views about it, is "non-existent because of the severe level of his cognitive impairment."[136] Professor Cras likewise explained that Mr. Kabuga's dementia has rendered him unable to understand the reasoning underlying the questions asked in court.[137] Mr. Kabuga is, therefore, also incapable of instructing counsel or testifying.

34. Notwithstanding these deficiencies, the Experts agree that Mr. Kabuga retains three relevant capacities: to enter a plea, understand the nature of the charges, and understand the consequences of the proceedings.[138] However, they also agree that Mr. Kabuga's level of cognition related to these capacities is superficial. For instance, Professor Mezey testified that, although Mr. Kabuga

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[129] Joint Monitoring Report of 12 December 2022, pp. 5-8, 10; Joint Monitoring Report of 3 March 2023, RP. 5029. *See also* Witness Mezey, T. 23 March 2023 p. 14.
[130] Witness Kennedy, T. 15 March 2023 pp. 9, 10; T. 16 March 2023 pp. 33, 34; T. 17 March 2023 pp. 13, 14; Witness Mezey, T. 23 March 2023 p. 11; Witness Cras, T. 29 March 2023 p. 13.
[131] Witness Kennedy, T. 16 March 2023 p. 22; Witness Mezey, T. 23 March 2023 pp. 3, 4, 13, 14; Witness Cras, T. 29 March 2023 p. 49.
[132] Witness Kennedy, T. 15 March 2023 p. 16.
[133] Witness Mezey, T. 23 March 2023 pp. 43, 44.
[134] Witness Kennedy, T. 17 March 2023 p. 10 (indicating that "to respond and give instructions normally requires the exercise of judgement, understanding, perceiving the consequences of evidence, and it is that function, that higher function, which now appears to be declining. So he could give simple responses but perhaps not appreciate the full importance of the evidence at this point").
[135] Witness Kennedy, T. 16 March 2023 p. 42; T. 17 March 2023 pp. 13, 36-38.
[136] Witness Mezey, T. 23 March 2023 pp. 14 (indicating that, while it is possible to have a conversation with Mr. Kabuga, he may not always provide "answers that reflect reality"), 33. Professor Mezey noted during her recent assessments that Mr. Kabuga's receptive communication abilities are now so damaged that he is unable to understand communications, words, or complex phrases unless they are broken down into very simple components. *See* Witness Mezey, T. 23 March 2023 pp. 37, 38. Professor Mezey further observed that Mr. Kabuga seemed very stilted and constricted in terms of vocabulary and expression. *See* Witness Mezey, T. 23 March 2023 p. 4.
[137] Witness Cras, T. 29 March 2023 pp. 14, 35, 49 (indicating that, during recent interviews, Mr. Kabuga very often "had to be reminded of why [the Experts] were asking a question").

understands the meaning of genocide and knows that a finding of guilt would entail serious penalties, he is unable to answer further questions about the charges.[139] Professor Kennedy also observed that Mr. Kabuga is incapable of subtle, consequential reasoning.[140] For instance, although he expressed a preference for the trial to end, he also indicated that if it does he would like to remain in his current residence, *i.e.* in the UNDU.[141]

35. The Experts further acknowledged that Mr. Kabuga remains able to express his "will and preference," in areas related to his health and well-being.[142] However, they emphasized that this limited ability to communicate does not enable Mr. Kabuga to participate meaningfully in his trial as such participation would require a higher level of cognitive function than he possesses.[143]

36. The Trial Chamber agrees with the Experts that participation in a complex proceeding, such as the present trial,[144] requires, at a minimum, a functioning memory, including the ability to retain information over a period of time, as well as the ability to process and express a view about that information.[145] Because Mr. Kabuga lacks these capacities, and for all of the other reasons explained above, the Trial Chamber finds Mr. Kabuga is no longer capable of meaningful participation in his trial.

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[138] Joint Monitoring Report of 12 December 2022, pp. 5, 7, 8; Witness Kennedy, T. 15 March 2023 pp. 4, 5, 8; T. 17 March 2023 pp. 11, 12; Witness Mezey, T. 23 March 2023 pp. 34, 35; Witness Cras, T. 29 March 2023 pp. 34, 35, 42.

[139] Witness Mezey, T. 23 March 2023 pp. 34, 35, 39 (indicating that "it is very difficult to engage Mr. Kabuga in a deeper exploration of the extent to which, should he be convicted, he will understand what the consequences would be for him").

[140] Witness Kennedy, T. 15 March 2023 p. 8.

[141] Witness Cras, T. 29 March 2023 pp. 43, 44. *See also* Witness Kennedy, T. 15 March 2023 p. 16; T. 16 March 2023 p. 7; T. 17 March 2023 p. 11.

[142] Witness Kennedy, T. 15 March 2023 p. 11; T. 16 March 2023 pp. 6, 7; T. 17 March 2023 pp. 12, 13; Witness Mezey, T. 23 March 2023 pp. 15, 16, 36; Witness Cras, T. 29 March 2023 pp. 13, 14.

[143] Joint Monitoring Report of 3 March 2023, RP. 5029; Witness Kennedy, T. 16 March 2023 pp. 41-44 (indicating that "[t]here remains the possibility that Mr. Kabuga may be able to express a will and preference [...] and so that his voice can be heard, but not [...] with sufficient capacity"); T. 17 March 2023 pp. 20 (indicating that "the will and preference that he would communicate arise from his long-standing personality and beliefs"), 34, 35; Witness Mezey, T. 23 March 2023 pp. 15, 16, 37, 38. *See also* Witness Cras, T. 29 March 2023 pp. 14, 42, 49.

[144] In this respect, the Trial Chamber does not agree with the Prosecution contention that the essentials of this trial are simple and straightforward or that it involves a "known body of evidence and a limited number of issues in genuine contention". *See* T. 30 March 2023 pp. 40-46. On the contrary, the factual and legal issues arising from the number and nature of the counts in the Indictment, including allegations of genocide, conspiracy to commit genocide, persecution and extermination as crimes against humanity, and murder, as well as allegations that Mr. Kabuga aided and abetted crimes committed by the *Interahamwe* and that he was a member of a joint criminal enterprise are not only substantial, but also involve a geographic scope that spans across different areas and locations in Kigali-Ville, Kigali-Rural, Kibuye, and Gisenyi prefectures and acts and conduct from as early as 1992. *See* Prosecution's Second Amended Indictment, 1 March 2021 (public, with public and confidential annexes). *See also* T. 29 September 2022 p. 3. The case further involves a significant volume of evidence, including the oral and written evidence of 103 witnesses, hundreds of audio-tapes of *Radio Télévision Libre des Mille Collines*, and thousands of pages of written transcriptions of those tapes and prior transcripts and statements of the witnesses.

[145] *Cf.* Witness Mezey, T. 23 March 2023 p. 37.

37. In reaching this decision, the Trial Chamber is mindful that Mr. Kabuga was in recovery from intercurrent illnesses when last examined by the Experts, and that this circumstance may have had some minor effect on their examinations. However, the Experts took account of this circumstance and the Trial Chamber accepts their unanimous view that it did not materially affect their conclusions regarding Mr. Kabuga's inability to participate meaningfully in a trial.[146] It also accepts their view that Mr. Kabuga's fatigue and partial lack of cooperation during the most recent examinations do not undermine their conclusions, which do not rely solely on the examinations, but also, importantly, on information contained in medical records and obtained from staff who care for Mr. Kabuga.[147] Such records and clinical information reveal, for instance, a significant decline in Mr. Kabuga's ability to care for himself.[148] The Trial Chamber further accepts the Experts' view that, considering the nature of Mr. Kabuga's illness, malingering is unlikely.[149]

38. Additionally, Professor Mezey's decision to interview Mr. Kabuga remotely on two occasions to maximize efficiency does not undermine the value of her opinion because she had previously examined him extensively in person and was aware that her colleagues from the panel of experts were examining him in person.[150] The Trial Chamber is also mindful that the Joint Monitoring Report of 3 March 2023, which completes and affirms the Experts' assessment made three months earlier, should be read in conjunction with other reports of Professors Kennedy and Mezey and with the Joint Monitoring Report of 12 December 2022.[151] Finally, nothing in the Trial

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[146] Witness Kennedy, T. 15 March 2023 pp. 12 (indicating that "[o]n balance [...] the evidence of deterioration in his everyday ability to care for himself and to manage certain aspects of his person has deteriorated in a way that is objective and has been continuous and [that] is more than can be accounted for by the recent intercurrent illnesses"), 16; T. 16 March 2023 pp. 14, 15, 36; T. 17 March 2023 pp. 23 (stating that it was "very improbable" that lingering effects from recent illnesses could have affected his analysis of the situation), 28, 32, 33; Witness Mezey, T. 23 March 2023 p. 32 (indicating that she had "confidence in [her] clinical assessment" that her findings on the day of the assessment represent Mr. Kabuga "as about as good as he is going to get" and that she did not think "that [Mr. Kabuga's] performance, his functioning was affected or disadvantaged in any way by an underlying physical health condition"); Witness Cras, T. 29 March 2023 pp. 39, 48 (indicating that, although an additional examination "might contribute to [their] understanding of [Mr. Kabuga's] cognitive abilities", it is "unlikely" that it would lead him or the other experts to change their advice). Professor Mezey excluded that Mr. Kabuga was in a state of delirium due to his recent intercurrent illnesses, which would correspond to a very acute state of confusion. *See* Witness Mezey, T. 23 March 2023 pp. 27-29, 31, 32. Professor Kennedy also did not believe, based on medical records, that there had been an episode of delirium following Mr. Kabuga's recent intercurrent illnesses. *See* Witness Kennedy, T. 16 March 2023 pp. 35, 36; T. 17 March 2023 p. 33.

[147] Witness Kennedy, T. 15 March 2023 pp. 13-16; T. 16 March 2023 pp. 12-14, 19, 27; T. 17 March 2023 pp. 17, 18; Witness Mezey, T. 23 March 2023 pp. 5-7, 18, 19; Witness Cras, T. 29 March 2023 pp. 5, 6, 8, 27, 33, 39, 46. *See also* Joint Monitoring Report of 12 December 2022, pp. 1, 3; Joint Monitoring Report of 3 March 2023, RP. 5030, 5029.

[148] Witness Kennedy, T. 15 March 2023 p. 12; T. 17 March 2023 pp. 17, 18; Witness Mezey, T. 23 March 2023 pp. 5-8; Witness Cras, T. 29 March 2023 p. 9. *See also* Joint Monitoring Report of 3 March 2023, RP. 5029.

[149] Witness Kennedy, T. 15 March 2023 pp. 15, 16 (indicating that he did not think on balance that malingering is possible in the present case); T. 16 March 2023 pp. 31, 32; Witness Cras, T. 29 March 2023 pp. 28, 45, 46 (indicating that simulating or malingering is "quite rare to non-existent" in dementia).

[150] Witness Mezey, T. 23 March 2023 pp. 19, 20.

[151] Joint Monitoring Report of 3 March 2023, RP. 5030. *See also generally* Mezey Report of 31 January 2022; Kennedy Report of 21 April 2022; Registrar's Submission in Relation to the "Order Instructing the Independent Medical Experts to Prepare a Joint Statement" of 16 May 2022, 25 May 2022 (confidential, with confidential Annex), Annex.

Chamber's own observations of Mr. Kabuga during these proceedings runs counter to the collective findings of the panel of Experts.

3. Conclusion

39. For these reasons, the Trial Chamber, Judge El Baaj dissenting, finds that Mr. Kabuga is not fit for trial and is very unlikely to regain fitness in the future.

II. PROCEDURE AFTER A FINDING OF UNFITNESS

40. While the law concerning determinations of fitness is settled,[152] no binding precedent establishes a procedure for trial chambers to follow after findings of unfitness. Accordingly, pursuant to its obligations under Articles 18 and 19 of the Statute of the Mechanism ("Statute") to ensure that proceedings are fair and expeditious and that Mr. Kabuga's rights are respected, the Trial Chamber examines the consequences for this case of its determination that Mr. Kabuga is unfit for trial.

A. Submissions

41. On 25 April 2023, the Trial Chamber ordered the Parties to file submissions concerning the consequences of a Trial Chamber decision that Mr. Kabuga is unfit for trial.[153] In particular, the Parties were requested to take into account relevant international jurisprudence and domestic practice, including the possibility of an "examination of facts", and the CRPD Guidelines on Article 14.[154] On 9 May 2023, the Prosecution and the Defence filed submissions pursuant to the Order of 25 April 2023[155] and, on 16 May 2023, both Parties filed their respective responses.[156]

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[152] *See supra* paras. 26-29.
[153] Order for Submissions, 25 April 2023 ("Order of 25 April 2023"), pp. 1, 2.
[154] Order of 25 April 2023, p. 1.
[155] Prosecution Submission Concerning the Consequences of a Potential Decision that Kabuga is Unfit, 9 May 2023 ("Prosecution Submission of 9 May 2023"); Defence Submission in Response to the Chamber's Order of 25 April 2023, 15 May 2023 (original French version filed on 9 May 2023) ("Defence Submission of 9 May 2023").
[156] Prosecution Response to Kabuga's Submission Pursuant to the Chamber's 25 April 2023 Order, 16 May 2023 ("Prosecution Response of 16 May 2023"); Defence Response to the "Prosecution Submission Concerning the Consequences of a Potential Decision that Kabuga is Unfit" Filed on 9 May 2023, 19 May 2023 (original French version filed on 16 May 2023) ("Defence Response of 16 May 2023"). On 25 May 2023, the Trial Chamber dismissed a Defence request to reject *in limine* the Prosecution Submission of 9 May 2023 because it exceeded the word limit set out in the Practice Direction on Lengths of Briefs and Motions. *See* Decision on Defence Motion to Dismiss *In Limine* the Prosecution Submission of 9 May 2023, 25 May 2023, pp. 1, 2. *See also* Motion to Dismiss *In Limine* the "Prosecution Submission Concerning the Consequences of a Potential Decision that Kabuga is Unfit" filed on 9 May 2023, 18 May 2023 (original French version filed on 10 May 2023); Prosecution Response to Kabuga's Motion to Reject Prosecution's Submission Concerning the Consequences of a Potential Decision that Kabuga is Unfit, 11 May 2023.

42. The Prosecution submits that the Trial Chamber should continue to hear the remainder of the evidence by way of an "examination of facts" procedure, which would give effect to the core principles of the CRPD,[157] respect Mr. Kabuga's fair trial rights, and "do justice for the international community, victims, and the accused".[158] It contends that an examination of facts is consistent with the Mechanism's legal framework and that the Trial Chamber has the inherent power, pursuant to Articles 18 and 19 of the Statute, to determine that such a procedure is appropriate,[159] especially since it affords Mr. Kabuga an opportunity to defend against the charges and be acquitted, instead of remaining indefinitely in custody and subject to the Mechanism's ongoing jurisdiction over him.[160] The Prosecution argues that the proceedings should closely resemble a criminal trial, following the same procedures and ensuring the same procedural rights and safeguards to the extent possible in light of Mr. Kabuga's capacity,[161] while also proposing modalities that could be implemented in this case.[162] In the alternative, the Prosecution submits that the proceedings should be stayed and that Mr. Kabuga should remain in custody and subject to a regular medical reporting regime.[163]

43. The Defence submits that the proceedings should be terminated[164] or stayed[165] and Mr. Kabuga released.[166] In the Defence view, proceeding with an examination of facts has no legal basis as it is not supported by the CRPD, Statute or Rules of Procedure and Evidence of the Mechanism ("Rules"), jurisprudence or practice of any international criminal tribunal and, as such, would amount to an abuse of discretionary power and violate the principle of legality.[167] More specifically, the Defence argues that an examination of facts would violate Mr. Kabuga's

[157] Prosecution Submission of 9 May 2023, paras. 1, 2, 8-15, 18, 19, 26. The Prosecution contends that the Mechanism is bound to respect generally accepted human rights norms and has a responsibility to give full effect to the rights encapsulated in the CRPD. *See* Prosecution Submission of 9 May 2023, paras. 8, 9.
[158] Prosecution Submission of 9 May 2023, paras. 2, 16, 17. *See also* T. 8 March 2023 pp. 9, 10.
[159] Prosecution Submission of 9 May 2023, paras. 22-24.
[160] Prosecution Submission of 9 May 2023, paras. 2, 7, 17, 18. The Prosecution states that depriving a person of legal capacity on the basis of mental capacity by declaring him or her unfit for trial and precluding any opportunity to offer a defence is contrary to Articles 12, 13, and 14 of the CRPD. *See* Prosecution Submission of 9 May 2023, paras. 11-15, 18.
[161] Prosecution Submission of 9 May 2023, paras. 18-20. The Prosecution argues that, pursuant to the CRPD, accused with disabilities should not receive differential treatment and that all necessary accommodations shall be made to enable their participation. *See* Prosecution Submission of 9 May 2023, paras. 11-15.
[162] Prosecution Submission of 9 May 2023, para. 21.
[163] Prosecution Submission of 9 May 2023, paras. 4, 6. With or without an examination of facts procedure, the Prosecution states that, should Mr. Kabuga regain fitness, his trial should resume, unless the process has already resulted in an acquittal. *See* Prosecution Submission of 9 May 2023, paras. 4, 6, 7, 25, 26. *See also* T. 8 March 2023 p. 9.
[164] *See, e.g.*, T. 8 March 2023 p. 18.
[165] *See, e.g.*, Defence Submission of 9 May 2023, paras. 11, 13.
[166] Defence Submission of 9 May 2023, paras. 11, 13, 29-31; T. 8 March 2023 p. 18. The Defence submits that it will, in cooperation with the Registry, enter into discussions with various States in order to implement any decision on release. *See* Defence Submission of 9 May 2023, para. 31. *See also* T. 8 March 2023 pp. 18, 27-29.
[167] Defence Submission of 9 May 2023, paras. 12-23. *See also* T. 8 March 2023 p. 19; T. 30 March 2023 pp. 15, 16.

fundamental rights, because the Defence would be unable to obtain relevant information from him or challenge the Prosecution's evidence.[168] It further asserts that detention after a declaration of unfitness violates Article 14 of the CRPD and the CRPD Guidelines on Article 14.[169] In the event that the Trial Chamber decides to proceed, the Defence believes that a further medical examination should be undertaken by the Experts to determine the extent of Mr. Kabuga's participation based on his current capacities.[170]

44. The Prosecution responds that there is no legal basis for unconditional release following a finding of unfitness,[171] and the best way for Mr. Kabuga to achieve release is through such an examination of facts procedure,[172] which would provide him with the opportunity to be acquitted.[173] The Prosecution adds that, while the Defence request for a medical examination to determine the circumstances of Mr. Kabuga's participation in an examination of facts should be denied, ongoing medical monitoring is critical to allow the Trial Chamber to assess any change in Mr. Kabuga's fitness.[174] In its response, the Defence reiterates that the Trial Chamber does not have the discretionary power to proceed with an examination of facts,[175] which would also violate Mr. Kabuga's fundamental rights.[176] The Defence further argues that an examination of facts procedure is not a practice sufficiently well recognized or established to be considered a general principle of law or an international custom,[177] and that any continued detention of Mr. Kabuga is unjustified.[178]

B. Discussion

45. Neither the Mechanism's Statute and Rules, nor those of its predecessor tribunals, address fitness determinations or the procedures to be followed upon findings of unfitness. Moreover, while there is no Appeals Chamber jurisprudence dictating such a procedure, the Appeals Chamber has

[168] Defence Submission of 9 May 2023, para. 24. *See also* T. 8 March 2023 pp. 25-27; T. 30 March 2023 p. 16.
[169] Defence Submission of 9 May 2023, paras. 18, 19.
[170] Defence Submission of 9 May 2023, para. 28.
[171] Prosecution Response of 16 May 2023, paras. 1-10, 16. The Prosecution underlines that the decisions relied on by the Defence from the Extraordinary Chambers in the Courts of Cambodia ("ECCC") were reversed by decisions from the ECCC Supreme Court Chamber. *See* Prosecution Response of 16 May 2023, paras. 6-8.
[172] *See* Prosecution Response of 16 May 2023, paras. 2, 9, 11.
[173] Prosecution Response of 16 May 2023, paras. 2, 11. The Prosecution submits that the only way for Mr. Kabuga to be released at this stage is pursuant to provisional release. *See* Prosecution Response of 16 May 2023, paras. 2, 11.
[174] Prosecution Response of 16 May 2023, para. 15.
[175] Defence Response of 16 May 2023, paras. 23-32.
[176] Defence Response of 16 May 2023, paras. 4-9.
[177] Defence Response of 16 May 2023, paras. 10-22.
[178] Defence Response of 16 May 2023, paras. 5, 33-37.

consistently held that trial chambers enjoy discretion to manage the proceedings before them.[179] The Trial Chamber's obligation is to identify a procedure in line with its duty to respect and ensure respect for all generally accepted human rights norms,[180] especially the rights of the accused as set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the CRPD. It must also have regard to the purposes for which the Mechanism and its predecessor tribunals were established, including contributing to the restoration and maintenance of peace and to reconciliation.[181]

46. To that end, the Trial Chamber has considered international and State practice regarding procedures after findings of unfitness and has identified three options: (1) terminating proceedings; (2) staying proceedings and maintaining jurisdiction; and (3) conducting an alternative finding procedure.[182]

1. Termination of Proceedings

47. The Defence urges the Trial Chamber to terminate the proceedings and release Mr. Kabuga.[183] Findings of unfitness can result in termination of criminal proceedings in some jurisdictions; however, such termination is often accompanied by action under mental health statutes, including civil commitment.[184] Such civil procedures are unavailable to international

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[179] *See Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Judgement, 8 June 2021 (public redacted), paras. 63, 84 and references cited therein; *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Judgement, 20 March 2019 (public redacted), para. 72 and references cited therein.

[180] *See, e.g.*, *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, 13 September 2007, paras. 25, 26; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, paras. 45-49. *See also* Articles 18, 19 of the Statute and Rule 105(B) of the Rules.

[181] *See* United Nations Security Council, Res. No. S/RES/1966 (2010), 22 December 2010, p. 1, *referring to* United Nations Security Council, Res. No. S/RES/827 (1993), 25 May 1993; United Nations Security Council, Res. No. S/RES/955 (1994), 8 November 1994. *See also The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015, n. 943, *referring to Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 206; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009, paras. 46, 49, 52; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, 3 June 2005, para. 42; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, para. 25.

[182] The Trial Chamber notes that a fourth option for addressing issues related to disabled accused in some States, such as Portugal, is to conduct a full trial and take the consequences of the disability into account at sentencing. However, this option does not exist in systems that conduct a fitness determination. *See, e.g.*, Portugal, *Código Penal* (Law No. 48/95), Articles 105(1), 106(1), *Código Procesal Penal* (Law No. 78/87), Article 334. *See also Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004 ("*Strugar* Decision of 26 May 2004"), para. 39; ECCC, Case No. 002/19-09-2007-ECCC-TC/SC(16), Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, 14 December 2012 ("*Ieng Thirith* Decision of 14 December 2012"), paras. 41-51.

[183] *See supra* para. 43.

[184] *See, e.g.*, Serbia, *Zakonik o Krivičnom Postupku* (as amended in 2019), Article 416; Sierra Leone, Criminal Procedure Act 2015, Article 73-80; Chile, *Código Procesal Penal* (Law No. 19696), Article 465. The United States Supreme Court has suggested that termination of proceedings, which is not specifically envisaged in the law at the federal level, may be an available option depending on the circumstances of the case; this option is envisaged in the

criminal institutions. Moreover, as the Supreme Court Chamber of the ECCC stated in rejecting this option in the *Ieng Thirith* case, even in States that permit termination upon findings of unfitness, this result is exceptional, especially in cases involving serious crimes.[185] Not surprisingly, therefore, no international criminal court or tribunal has terminated proceedings after a finding of unfitness.[186] The Trial Chamber finds that terminating proceedings against Mr. Kabuga based on his unfitness would be inappropriate because of the importance of addressing the crimes against humanity and genocide charges against him to the victims and survivors of those crimes, and to the international community as a whole.

2. Stay of Proceedings

48. In cases before international courts involving unfit accused, courts have generally stayed the proceedings, maintaining jurisdiction in case the accused regained fitness.[187] International courts that have adopted rules concerning proceedings after determinations of unfitness uniformly require

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legislation of a numbers of states, where courts are afforded the discretionary power to terminate proceedings against accused who face little prospect of ever being tried. *See* United States, Supreme Court, *Theon Jackson v. Indiana*, 406 U.S. 715, 7 June 1972, pp. 738, 740. *See also*, *e.g.*, United States, *Alaska*, Alaska Statutes, Title 12, Code of Criminal Procedure, Section AS.12.47.110, *Massachusetts*, General Laws, Part I, Title XVII, Chapter 123, Section 16, *Ohio*, Ohio Revised Code, Section 2945.39; *Ieng Thirith* Decision of 14 December 2012, paras. 44, 50, 51 and references cited therein; *Strugar* Decision of 26 May 2004, para. 39.

[185] *Ieng Thirith* Decision of 14 December 2012, para. 52.

[186] In the *Hadžić* case, the ICTY Appeals Chamber suggested that termination was an option in ordering the Trial Chamber to reassess whether Goran Hadžić was fit for trial and, if so, to assess all reasonably available modalities for continuing the trial under the proportionality principle and to consider whether to continue or terminate the proceedings. *See Hadžić* Decision of 4 March 2016, para. 31. On remand, the Trial Chamber found Hadžić unfit for trial but did not terminate proceedings, instead ordering an indefinite stay. The Trial Chamber rejected a later request to terminate proceedings, even though the request was supported by both parties. *See Hadžić* Decision of 24 March 2016, paras. 30, 31; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Motion for Formal Termination of the Proceedings, 17 June 2016, paras. 6, 9, 14; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Requests for Certification to Appeal Decision on Prosecution Motion for Formal Termination of the Proceedings, 6 July 2016, p. 2; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Order Terminating the Proceedings, 22 July 2016, p. 1. *Cf. also Prosecutor v. Djordje Djukić*, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996 ("*Djukić* Decision of 24 April 1996"), pp. 3, 5.

[187] *See*, *e.g.*, *Hadžić* Decision of 24 March 2016, paras. 29-31; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Consolidated Decision on the Continuation of Proceedings, 26 October 2015, para. 66 and references cited therein; *Ieng Thirith* Decision of 14 December 2012, paras. 46-48; Special Panels for Serious Crimes, Democratic Republic of East Timor, Dili District Court, *Deputy General Prosecutor for Serious Crimes v. Joseph Nahak*, Case No. 01A/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005 ("*Nahak* Decision of 1 March 2005"), paras. 151, 155, 156, 164, p. 54. *Cf. also Ieng Thirith* Decision of 14 December 2012, paras. 46, 47, 53, 54, p. 45 and references cited therein; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgement, 30 May 2013 ("*Stanišić and Simatović* Trial Judgement"), paras. 2434-2438; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Judgement and Sentence, 2 February 2012 ("*Karemera et al.* Trial Judgement"), para. 38; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, 24 June 2011 ("*Nyiramasuhuko et al.* Trial Judgement"), paras. 6536, 6542; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ngirumpatse, 19 June 2009, para. 7, *referring to The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of Trial, 3 March 2009, paras. 6, 27; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, paras. 19-22; *Strugar* Decision of 26 May 2004, para. 39; *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997 ("*Erdemović* Appeal Judgement"), para. 5; *Djukić* Decision of 24 April 1996, p. 3.

such stays.[188] During stays based on unfitness, accused are often held in custody and, if they are released, they are subject to restrictive regimes, including monitoring to determine continued unfitness.[189]

49. Cases in which international courts have stayed proceedings based on unfitness have virtually all involved accused persons who had a realistic prospect of regaining fitness.[190] This case is different. The Experts have determined that Mr. Kabuga's dementia is progressive and irreversible; he has no realistic chance of regaining fitness.[191] The only other international case with an accused in a similar situation is that of Ieng Thirith at the ECCC.[192] Although the court opted for a stay and monitoring regime in that case, it does not appear that either party argued for an alternative procedure.[193] Here, the Prosecution argues that an alternative procedure is a superior way of respecting Mr. Kabuga's rights and effectuating the goals for which the Mechanism was established.[194] The Trial Chamber agrees.

50. Staying proceedings indefinitely when an accused is very unlikely to regain fitness deprives that accused of an opportunity to establish his or her innocence of the charged offences. This is particularly troubling in cases involving serious charges such as those brought against Mr. Kabuga of genocide and crimes against humanity. Due principally to risks of arbitrary detention, the CRPD Committee has urged States Parties to provide disabled accused with procedures that are as close as possible to those generally afforded to an accused.[195] Although the CRPD Committee's preferred solution of rejecting fitness determinations altogether is not available to the Trial Chamber for the reasons explained above,[196] the Trial Chamber considers that respect for Mr. Kabuga's rights

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[188] *See* Rule 135(4) of the ICC Rules; Rule 69(2) of the KSC Rules; Rule 74*bis*(C) of the SCSL Rules. *See also* ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, Decision on Mr Al Hassan's Ongoing Fitness to Stand Trial, 10 May 2021, para. 69; ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15, Decision on the Fitness of Laurent Gbagbo to Stand Trial, 27 November 2015, para. 33 and reference cited therein.

[189] *See Ieng Thirith* Decision of 14 December 2012, paras. 54-81, pp. 45, 46; ECCC, Case No. 002/19-09-2007-ECCC-TC/SC(09), Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, para. 29, pp. 24, 25; *Nahak* Decision of 1 March 2005, paras. 4, 162, p. 54. *Cf. also Karemera et al.* Trial Judgement, para. 38; *Djukić* Decision of 24 April 1996, p. 4.

[190] *See, e.g., Stanišić and Simatović* Trial Judgement, paras. 2434-2438; *Nyiramasuhuko et al.* Trial Judgement, paras. 6536, 6542; *Karemera et al.* Trial Judgement, para. 38; *Nahak* Decision of 1 March 2005, paras. 158, 164; *Erdemović* Appeal Judgement, para. 5.

[191] *See supra* para. 31, n. 130 and references cited therein.

[192] *See Ieng Thirith* Decision of 14 December 2012, paras. 16, 17.

[193] *See Ieng Thirith* Decision of 14 December 2012, paras. 21-27.

[194] *See supra* para. 42.

[195] Articles 12(2), 12(3), 13 of the CRPD. *See also, e.g.*, CRPD Committee, Doc. No. A/76/55, Report of the Committee on the Rights of Persons with Disabilities, Twenty-First, Twenty-Second, Twenty-Third Session, Annex, paras. 22-27 and references cited therein; CRPD Report of 2016, paras. 33-36; CRPD Committee, General Comment No. 1 (2014) on Article 12: Equal Recognition Before the Law, 19 May 2014, paras. 7, 8, 38.

[196] *See supra* para. 27.

supports adopting an alternative procedure rather than staying the proceedings without providing him any opportunity for exoneration and unconditional release.

51. Additionally, staying proceedings in this case is not the best way to effectuate the goals of the Mechanism, including combating impunity and contributing to the restoration and maintenance of peace in Rwanda.[197] Such a stay would leave victims and survivors without any findings in relation to allegations of conduct attributed to Mr. Kabuga. Finally, the Trial Chamber notes that Mr. Kabuga's decision to evade justice for more than two decades resulted in the present situation, making it particularly unfair to privilege his preference for termination or stay of proceedings over the needs of victims and survivors. There is a strong public interest in the conduct of proceedings against persons accused of serious international crimes.

C. Alternative Finding Procedures

52. Many of the States that conduct fitness determinations also provide for further procedure if an accused is found unfit for trial. Such procedures are most common in Commonwealth jurisdictions where fitness findings originated,[198] but can also be found outside the Commonwealth.[199] They have labels such as "trial of the facts", "examination of facts", and "special hearings", to differentiate them from full trials.[200]

53. Proceedings after findings of unfitness take various forms, but the common feature that distinguishes them from full trials is that they cannot result in conviction. Jurisdictions that engage in fitness determinations take the view that convicting an accused who cannot meaningfully participate in his or her trial is a violation of his or her rights.[201] However, they also consider that

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[197] *See supra* n. 181.

[198] *See, e.g.*, England and Wales, Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, Section 4A; Scotland, Criminal Procedure (Scotland) Act 1995, Sections 54(1)(b), 55; New Zealand, Criminal Procedure (Mentally Impaired Persons) Act 2003, Sections 10-13; South Africa, Act No. 4 of 2017: Criminal Procedure Amendment Act, 2017, Section 77(6)(a); Australia, Crimes Act (Commonwealth) 1914, Part IB, Division 6, Section 20B, *Capital Territory*, Crimes Act 1900, Sections 315C, 316, *New South Wales*, Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No. 12, Division 3, Section 54, *Northern Territory*, Criminal Code Act 1983, Part IIA, Division 4, Sections 43R(3), 43V, *South Australia*, Criminal Law Consolidation Act 1935, Part 8A, Division 3, Section 269M(B), *Tasmania*, Criminal Justice (Mental Impairment) Act 1999, Section 15, *Victoria*, Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Section 15. *See also Ieng Thirith* Decision of 14 December 2012, para. 49, n. 149.

[199] *See, e.g.*, Guatemala, *Codigo Procesal Penal* (Decree No. 51-92), Articles 484, 485; United States, *New Mexico*, New Mexico Statutes, Chapter 31, Article 9, Section 31-9-1.5.

[200] *See supra* nn. 198, 199.

[201] *See, e.g.*, Law Commission of England and Wales, Unfitness to Plead: A Consultation Paper (Consultation Paper No. 197), 2010 ("Law Commission of England and Wales Consultation Paper (2010)"), paras. 1.11-1.13, 2.31, 6.4, 6.92; Victorian Law Reform Commission, Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, June 2014 ("Victorian Law Commission Report (2014)"), paras. 3.2, 3.31, 3.32.

continued detention of an unfit accused is sometimes necessary to protect the accused and the public.[202]

54. States that engage in alternative procedures upon determinations of unfitness often limit the court's inquiry to the *actus reus* of the crime.[203] This is expressed in the label "examination of facts." However, limiting alternative procedures to findings regarding *actus reus* has proven problematic for crimes and modes of participation that do not lend themselves readily to a division of the conduct and fault elements.[204] Relatedly, this practice has resulted in restrictions on available defenses, limiting the accused's ability to establish their innocence.[205] Other States seek to ensure that alternative finding proceedings resemble trials as closely as possible by examining whether the accused committed the offence charged, including both *actus reus* and *mens rea*.[206] Indeed, in some of the jurisdictions that limit alternative procedures to findings of fact, reform efforts have suggested adopting a more holistic approach. For instance, the Law Commission of England and Wales has recommended a new procedure, which it calls an "alternative finding procedure," that would require proof of both *actus reus* and *mens rea*.[207] This commission asserts that a procedure that more fully resembles a trial would ensure greater fairness to an unfit accused.[208]

55. States that adopt alternative procedures upon findings of unfitness differ in terms of their approaches to the presence of the accused. Generally, the accused is allowed to be present during such proceedings, including to give evidence,[209] although the court may proceed in his or her

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[202] *See, e.g.*, Law Commission of England and Wales, Unfitness to Plead, Vol. I: Report (Law Com No. 364), 12 January 2016 ("Law Commission of England and Wales Report (2016)"), paras. 5.2, 5.3, 5.20; Law Commission of England and Wales Consultation Paper (2010), para. 6.6.

[203] *See, e.g.*, England and Wales, Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, Sections 4A(2), 4A(3); Australia, *Capital Territory*, Crimes Act 1900, Section 317(1), *South Australia*, Criminal Law Consolidation Act 1935, Part 8A, Division 3, Section 269M(B). *See also* Law Commission of England and Wales Report (2016), para. 5.9; Law Commission of England and Wales Consultation Paper (2010), paras. 6.58-6.69.

[204] *See, e.g.*, Law Commission of England and Wales Report (2016), paras. 5.10-5.13, 5.28-5.35; Law Commission of England and Wales Consultation Paper (2010), paras. 6.7, 6.11-6.29, 6.36-6.41, 6.70, 6.71.

[205] *See, e.g.*, Law Commission of England and Wales Report (2016), paras. 5.14-5.18, 5.36; Law Commission of England and Wales Consultation Paper (2010), paras. 6.30-6.35.

[206] *See, e.g.*, Australia, *New South Wales*, Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No. 12, Division 3, Sections 54, 56(1), *Northern Territory*, Criminal Code Act 1983, Part IIA, Division 4, Sections 43V(1), 43V(2), 43W(1), *Victoria*, Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Sections 15, 16(1); Scotland, Criminal Procedure (Scotland) Act 1995, Section 55(1)(b); Guatemala, *Codigo Procesal Penal* (Decree No. 51-92), Article 484. *See also* Law Commission of England and Wales Consultation Paper (2010), paras. 6.75-6.83, 6.117, 6.127. The Victorian Law Reform Commission affirmed, consistent with the existing law in Victoria, that, absent a defence of mental impairment, all elements of the offence must be proven. *See* Victorian Law Commission Report (2014), para. 7.153, pp. 253, 254.

[207] *See* Law Commission of England and Wales Report (2016), paras. 5.85, 5.86, 10.39; Law Commission of England and Wales Consultation Paper (2010), paras. 1.34, 6.138-6.140.

[208] *See* Law Commission of England and Wales Consultation Paper (2010), paras. 6.54, 6.138.

[209] *See* Scotland, Criminal Procedure (Scotland) Act 1995, Section 55(5); Australia, *New South Wales*, Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No. 12, Division 3, Sections 56(1), 56(2), 56(7), *Northern Territory*, Criminal Code Act 1983, Part IIA, Division 4, Sections 43W(1), 43W(2)(e), *Tasmania*, Criminal Justice (Mental Impairment) Act 1999, Sections 16(1), 16(3)(d), Guatemala, *Codigo Procesal Penal* (Decree No. 51-92),

absence when appropriate.[210] In line with its view that alternative proceedings should resemble trials as closely as possible, the Law Commission of England and Wales recommends supporting the participation of unfit accused persons to the greatest extent feasible, including permitting them to give evidence, should their abilities allow.[211]

56. Alternative finding proceedings generally follow the rules of evidence as applicable to trials as nearly as possible,[212] although jurisdictions differ regarding the required burden of proof. In some States, decisions of "non-acquittal" may be entered only if the court makes relevant findings beyond reasonable doubt,[213] while in others such decisions are made based on the lower balance of probabilities standard.[214]

D. Conclusion

57. For the foregoing reasons, the Trial Chamber, Judge El Baaj dissenting, considers that, because Mr. Kabuga is very unlikely to regain fitness, 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. The Prosecution will retain the burden to prove both the *actus reus* and *mens rea* of each charge beyond a reasonable doubt. Many of the charges against Mr. Kabuga hinge on his mental state. To limit the alternative procedure to a finding of facts would deny Mr. Kabuga significant lines of defence and

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Article 485. *See also* Australia, *Capital Territory*, Crimes Act 1900, Section 316(1), *Victoria*, Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Section 16(1). *See also* Law Commission of England and Wales Consultation Paper (2010), para. 6.115.

[210] *See* Scotland, Criminal Procedure (Scotland) Act 1995, Section 55(5); New Zealand, Criminal Procedure (Mentally Impaired Persons) Act of 2003, Section 15; Australia, *New South Wales*, Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No. 12, Division 3, Section 56(8); Guatemala, *Codigo Procesal Penal* (Decree No. 51-92), Article 485.

[211] *See* Law Commission of England and Wales Report (2016), paras. 5.162, 5.163. *See also* Law Commission of England and Wales Consultation Paper (2010), para. 2.30; Victorian Law Commission Report (2014), paras. 9.4, 9.24, 9.25, 9.28-9.32.

[212] *See, e.g.*, Scotland, Criminal Procedure (Scotland) Act 1995, Section 55(6); Australia, *Northern Territory*, Criminal Code Act 1983, Part IIA, Division 4, Section 43W(2)(d), *Victoria*, Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Section 16(2)(d).

[213] *See, e.g.*, Scotland, Criminal Procedure (Scotland) Act 1995, Section 55(1)(a); England and Wales, Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, Section 4A(2); Australia, *Capital Territory*, Crimes Act 1900, Sections 316(9)(c), 317(1), *Northern Territory*, Criminal Code Act 1983, Part IIA, Division 4, Section 43V(2), *South Australia*, Criminal Law Consolidation Act 1935, Part 8A, Division 3, Section 269M(B), *Tasmania*, Criminal Justice (Mental Impairment) Act 1999, Section 16(1), *Victoria*, Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Section 17(2). *See also* Law Commission of England and Wales Report (2016), paras. 1.59, 5.7.

[214] *See, e.g.*, South Africa, Act No. 4 of 2017: Criminal Procedure Amendment Act, 2017, Section 77(6)(a); New Zealand, Criminal Procedure (Mentally Impaired Persons) Act 2003, Sections 10(2), 11(2), 12(2). *See also* Law Commission of England and Wales Consultation Paper (2010), paras. 6.112-6.120.

opportunities for acquittal. Moreover, the Prosecution has agreed that it should be required to prove *mens rea*, as well as *actus reus*, and to do so beyond a reasonable doubt.[215]

58. Mr. Kabuga's lack of fitness to participate effectively in the trial, along with the fact that the proceedings will not result in conviction, make his attendance unnecessary, and he will, therefore, not be required to attend. Nonetheless, just as the Trial Chamber made its best efforts to ensure Mr. Kabuga's effective participation in trial when he was fit by adopting tailored modalities, it will seek to facilitate his participation in the alternative finding proceedings to the extent he is able and is reasonably practicable. In the absence of the ability on the part of the Accused to participate effectively in the trial, it is not appropriate to limit the Trial Chamber's sitting hours to the extent that has been done to date.[216] The Trial Chamber's obligation to conduct proceedings fairly and expeditiously with a view to the evidence being presented and a verdict returned thereon within a reasonable time, and thereby avoid unnecessary detention of the Accused, requires that the Trial Chamber sit more frequently. The Trial Chamber will consult the Parties regarding modalities of the proceedings in due course prior to resuming the evidentiary hearings.

[215] Prosecution Submission of 9 May 2023, paras. 21(e), 21(f).
[216] *See supra* paras. 8, 15 and references cited therein.

III. DISPOSITION

59. In light of the foregoing, the Trial Chamber:

FINDS, Judge El Baaj dissenting, that Mr. Félicien Kabuga is unfit to participate meaningfully in his trial and is very unlikely to regain fitness in the future;

DECIDES, Judge El Baaj dissenting, that it will proceed with an alternative finding procedure as set forth above;

MAINTAINS 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 this Decision; and

MAINTAINS the medical monitoring regime by the panel of independent experts put in place in the Decision of 13 June 2022, with the next report being due 180 days from the report filed on 6 March 2023.

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

Judge Mustapha El Baaj appends a dissenting opinion.

Done this 6th day of June 2023,
At The Hague,
The Netherlands

Judge Iain Bonomy
Presiding Judge

[Seal of the Mechanism]

DISSENTING OPINION OF JUDGE MUSTAPHA EL BAAJ

1. After considering the applicable law, the medical evidence on the record, and the written and oral submissions of the parties, as well as observing Mr. Kabuga's demeanour in court since 29 September 2022, I respectfully disagree with the finding from the Majority that Mr. Kabuga is unfit to stand trial.[1]

2. I note that the Majority relied on the applicable legal standard regarding fitness to stand trial before the Mechanism as stated by the Appeals Chamber in its Decision of 12 August 2022 in the present case,[2] referring in particular to the *Strugar* Appeal Judgement delivered by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY").[3] I actually agree with the Trial Chamber's reasoning that its task is "to apply the *Strugar* standards while giving full effect to all relevant human rights norms, including those set forth in the [Convention on the Rights of Persons with Disabilities]".[4]

3. Nevertheless, for the reasons set forth below, I disagree with the evidentiary assessment undertaken by the Majority, and consider that Kabuga has not demonstrated his unfitness to stand trial (A). My assessment on the facts is further supported by the evolution of the legal standard of fitness to stand trial in international human rights law (B). I finally disagree with the decision of the Majority to proceed on the basis of an alternative finding procedure rather than continuing with the trial (C).

A. Evidentiary assessment

4. I cannot share the position of the Majority in relation to its assessment of the evidence to conclude that Kabuga is unfit to stand trial. I am of the view that the legal standard, as set out by the Majority,[5] has not been applied correctly to the facts of this case, for the reasons set forth below.

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[1] *See* Further Decision on Félicien Kabuga's Fitness to Stand Trial, 6 June 2023 ("Majority Decision"), paras. 30-39, 59.

[2] Majority Decision, paras. 26, 28, *referring to 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 ("*Kabuga* Appeal Decision of 12 August 2022"), paras. 11, 12. *See also* Majority Decision, para. 29; Decision on Félicien Kabuga's Fitness to Stand Trial and to be Transferred to and Detained in Arusha, 13 June 2022, paras. 40-43.

[3] Majority Decision, paras. 26, 28, 29, *referring to Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"), paras. 41, 55, 56, 60, 61.

[4] Majority Decision, para. 27.

[5] Majority Decision, paras. 26, 28, 29.

1. The absence of legal demonstration of Kabuga's unfitness to stand trial from the Defence

5. It is my view that the Defence failed to make a legal demonstration of Kabuga's unfitness to stand trial. I recall that "[i]t is the accused, claiming to be unfit to stand trial, who bears the burden of so proving by a preponderance of the evidence".[6] The ICTY Appeals Chamber further stated that "medical diagnoses alone, no matter how numerous, do not suffice to assess a person's competency to stand trial".[7] In this regard, the ICTY Appeals Chamber emphasized that:

> "fitness or competence to stand trial is a matter which, although undoubtedly connected with the physical and mental condition of an accused person, is not confined to establishing whether a given disorder is present [...] but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him".[8]

6. It is my view that the Defence only relied upon the *factual* elements before the Trial Chamber – the medical assessments – to argue that Kabuga was unfit for the trial, where it should have made a *legal* demonstration of such unfitness, on the basis of the applicable standard. In other words, the Defence listed the medical conclusions from the three Independent Medical Experts ("Experts"), including on the criteria listed by the jurisprudence,[9] and requested that the Trial Chamber simply confirm such medical conclusions to find Kabuga unfit to stand trial, without making further submissions demonstrating Kabuga's inability to exercise effectively his rights in the proceedings against him. In particular, the Defence argued that:

> "For the experts, it's clear. For those who want to face up to reality, it's clear. There's no arguing about it. And that is why *we* [...] *ask you to acknowledge that Mr. Kabuga is scientifically unfit to stand trial*, and consequently, we ask you to terminate proceedings immediately and release Félicien Kabuga immediately."[10]

It is also particularly obvious when the Defence, in its oral submissions, concluded:

> "[T]his is why there is no other option but to declare Félicien Kabuga unfit. It is obvious. *This is what the experts are saying and this is what is illustrated in all the different reports of the medical officer* of the detention center as well. This is the only possible rational decision [...]."[11]

7. On the contrary, the Trial Chamber is tasked with making a *judicial determination* on the fitness of the accused to stand trial, based on the applicable legal standard, which requires to determine whether Kabuga is able to exercise effectively his rights in the proceedings against him,

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[6] *Kabuga* Appeal Decision of 12 August 2022, para. 11, *referring to Strugar* Appeal Judgement, para. 56.
[7] *Strugar* Appeal Judgement, para. 61.
[8] *Strugar* Appeal Judgement, para. 41, *referring to Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision re Strugar Motion to Terminate Proceedings, 26 May 2004 ("*Strugar* Decision of 26 May 2004"), para. 35. *See also Strugar* Appeal Judgement, para. 55.
[9] *See, e.g.*, Defence Submissions, Transcript ("T."). 30 March 2023 (unofficial transcript) pp. 1-12.
[10] T. 8 March 2023 p. 18. *See also* T. 8 March 2023 pp. 20, 21 (emphasis added).
[11] Defence Submissions, T. 30 March 2023 (unofficial transcript) p. 14 (emphasis added).

rather than merely make its own the Experts' conclusions. I am therefore not convinced that Kabuga made the legal demonstration that he is unfit to stand trial.

2. The flaws in the February 2023 medical examination and in the Joint Monitoring Report of 3 March 2023

8. I am of the view that the Majority should not have relied on the Joint Monitoring Report of 3 March 2023.[12] I consider that the Majority should have set it aside and requested a new medical examination of Kabuga, for the following reasons.

9. The Appeals Chamber recalled that it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.[13] Further, "[w]hen assessing an expert report, a Trial Chamber generally evaluates whether it contains sufficient information as to the sources used in support of its conclusions and whether those conclusions were drawn independently and impartially".[14] It is my opinion that the Joint Monitoring Report of 3 March 2023 of the Experts does not contain sufficient information to support its conclusions. The report is a two-and-a-half-pages document, half of it being dedicated to an overview of the sources of the report.[15] In this regard, it also seems that three of the fortnight medical reports from the Medical Officer of the United Nations Detention Unit ("UNDU") were not considered at the time of the medical assessments of Kabuga.[16] Moreover, there is no explanation nor references supporting Professor Mezey's diagnosis of Kabuga.[17] Likewise, the seven points of agreement do not contain any supporting reference enabling the Trial Chamber to understand the rationale behind these conclusions.[18] I therefore consider that the Joint Monitoring Report of 3 March 2023 is not satisfactory and should not have been relied upon by the Majority to come to its conclusion that Kabuga is unfit to stand trial.

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[12] *See* Majority Decision, paras. 30, 31, 35, 37, 38. *See also* Majority Decision, paras. 16, 18, 20, 22; Registrar's Submission in Relation to the Oral Ruling of 14 December 2022, 6 March 2023 (confidential, with confidential Annex), para. 7, Annex ("Joint Monitoring Report of 3 March 2023"), Registry Pagination ("RP.") 5030-5028.
[13] *Kabuga* Appeal Decision of 12 August 2022, para. 16.
[14] *Strugar* Appeal Judgement, para. 58.
[15] Joint Monitoring Report of 3 March 2023, RP. 5030, 5029 (*see* the section "basis of the report" and the presentation of the interviews conducted by the Experts in February 2023).
[16] *See* Joint Monitoring Report of 3 March 2023, RP. 5030, 5029, *referring to* the medical reports of the UNDU Medical Officer dated 11 and 30 November 2022, 25 January 2023, 8 and 21 February 2023, but omitting the reports filed on 14 December 2022, 4 and 11 January 2023. *See* Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 14 December 2022 (public, with confidential Annex), Annex, RP. 4656, 4655; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 4 January 2023 (public, with confidential Annex), Annex, RP. 4711; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 11 January 2023 (public, with confidential Annex), Annex, RP. 4734, 4733. *See also* Witness Kennedy, T. 16 March 2023 p. 12; Witness Mezey, T. 23 March 2023 p. 29.
[17] *See* Joint Monitoring Report of 3 March 2023, RP. 5029 (second paragraph under the heading "Professor Mezey").
[18] *See* Joint Monitoring Report of 3 March 2023, RP. 5029, 5028.

10. Further, I am of the opinion that the medical assessments of Kabuga's health done by the Experts in February 2023 also contain a number of flaws that the Experts themselves acknowledged. Notably, the difficulties encountered by the Experts to conduct proper medical examinations of Kabuga include: (i) the fact that only a very superficial examination was conducted, notably limited in duration;[19] (ii) the absence of a new MRI examination to determine whether the clinical findings are supported by radiological findings;[20] (iii) the impact of an assessment conducted by way of video-conference in comparison with an in-person one;[21] (iv) Kabuga's hearing problems and his refusal to wear his hearing aid;[22] (v) Kabuga's fatigue and fatigability;[23] (vi) the severe intercurrent illnesses he suffered in January and February 2023;[24]

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[19] *See, e.g.*, Witness Kennedy, T. 16 March 2023 pp. 24, 25 (agreeing that "caution also appl[ies] to the assessments done in February" and raising the issue of "the limitations of those [earlier] assessments"); T. 17 March 2023 pp. 16, 17 (testifying that the "description of the limited ability to carry out a full neuropsychological assessment is as I have been describing. So it's not a full and satisfactory assessment. It's performed within the limits of what Mr. Kabuga can do or will do"); Witness Cras, T. 29 March 2023 pp. 5, 6 (holding that the "examination on 17 February was quite short", and that they "tried to do a few cognitive tests, but it was actually very difficult because of the fatigability of Mr. Kabuga"), 15-17 (stating that the "neurological exam" was "very superficial"), 29 (explaining that "malingering in general is difficult to detect if you only have a superficial and short examination of a person. It can be done if you have the opportunity to do a more lengthy examination, but that was not possible with Mr. Kabuga"), 32 (stating that Kabuga "did a very short exam. It probably lasted 30 seconds"), 39 (testifying that "[t]he first time that was an examination that lasted for about an hour. The second time, it was much less. I'm sure that if we saw him for an additional examination, it might contribute to our understanding of his cognitive abilities"). *See also* Witness Mezey, T. 23 March 2023 pp. 18-20 (stating that she "did not speak to anybody at the [United Nations Detention Unit]", except for the translator, that she "felt that a one-hour remote assessment was appropriate" notably as she "felt that her brief was slightly more limited", and that she did not complete a Mini Mental State Examination).

[20] *See, e.g.*, Witness Mezey, T. 23 March 2023 pp. 10, 11 (noting that Kabuga "has not had a repeat MRI, which could be helpful just to show whether the clinical findings are supported [...] by the radiological findings").

[21] *See, e.g.*, Witness Kennedy, T. 16 March 2023 pp. 8, 9 (stating that "there are many advantages to doing an in-person assessment"); Witness Mezey, T. 23 March 2023 p. 20 (explaining that "[i]t's very difficult to do a Mini Mental State Examination remotely"); Witness Cras, T. 29 March 2023 pp. 44, 45 (testifying that "an examination through video-conference is clearly of lesser quality and also less detail. [...] [I]t's very important to look at the habits of somebody, to see how he's reacting. Nonverbal communication is quite important in our medical assessments").

[22] *See, e.g.*, Witness Cras, T. 29 March 2023 pp. 17, 18 (stating that, during their examinations in November 2022 and February 2023, Professor Kennedy and himself "had to repeat many of the questions. [...] [I]t is probably due to – some parts due to his hearing problems [...]", and that Kabuga "refuses to wear his hearings aid, so it made the exam more difficult" on both occasions), 48 (repeating that "he's not hearing very well, so sometimes questions had to be repeated over and over again").

[23] *See, e.g.*, Witness Cras, T. 29 March 2023 pp. 5, 6 (explaining that he "tried to do a few cognitive tests, but it was actually very difficult because of the fatigability of Mr. Kabuga"), 25 (stating that "his fatigability was much more pronounced during [their] second examination than during the first"), 26 (notably agreeing that fatigue plays a role in Kabuga's responses or his responsiveness or understanding of the instructions), 27 ("assum[ing] that fatigability might influence the way he responded or the way he was attentive or not attentive during [their] examination"), 33 (stating that he "remember[ed] his increased fatigability").

[24] *See, e.g.*, Witness Mezey, T. 23 March 2023 pp. 30 (stating that "[y]ou would expect cognitive deterioration during those periods of acute illnesses"), 31 (explaining that she "wasn't aware of the gastrointestinal problems he's experienced after" her examination and, while stating that "it's unlikely that [this] would have affected [her] findings", she "can't rule it out"); Witness Cras, T. 29 March 2023 pp. 13 (testifying that "in a person of his age, there are many factors that might influence for a short while or for a longer time the cognitive abilities and intercurrent illnesses, such as influenza, pneumonia. A urinary tract infection might influence his cognitive abilities to a great extent, and he might recover from that or he might not recover"), 28 (stating that "during a re-convalescence phase of an infection, somebody might be less cooperative, less motivated, and also show less cognitive abilities"). *See also* Witness Kennedy, T. 17 March 2023 p. 28 (on the possibility that additional information in relation to Kabuga's intercurrent illnesses or infections in February 2023 may change his views about whether Kabuga's general physical state affected the impression he gave).

(vii) his lack of cooperation or motivation;[25] (viii) the language barrier, difficulties with an interpreter, and cultural differences;[26] and (ix) Kabuga's level of education.[27]

11. I am therefore not satisfied with the medical examinations of Kabuga undertaken in February 2023 which I consider to be superficial and incomplete. In my opinion, these medical examinations are insufficient to support the conclusion that Kabuga is not fit to stand trial. I also explained the reasons why I believe the Joint Monitoring Report of 3 March 2023 should be set aside. Considering the importance of the question of fitness to stand trial and its consequences, not only for Kabuga but also for the victims of the 1994 Rwandan genocide and the interest of justice, I am of the view, as were some of the Experts,[28] that a complete medical assessment of Kabuga should be undertaken in circumstances where he is not recovering for intercurrent illnesses, and that such assessment is required in order to understand the precise extent of Kabuga's capacities.

3. Kabuga's *overall* capacity allowing for a meaningful participation in his trial

12. Furthermore, while the Majority enunciated the applicable standard set out in the jurisprudence, I disagree with the way it applied this standard in practice. In particular, the standard for determining whether an accused is fit to stand trial is that of "meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate

[25] *See, e.g.*, Witness Cras, T. 29 March 2023 pp. 16, 17 (explaining that they "did not completely do the MOCA because it was not possible because of lack of cooperation"), 25 (stating that "[t]he cooperation of Mr. Kabuga during [their] second exchange was much less"), 26 (noting that "[o]n the Friday, 11 November, he was much more cooperative than [...] on 17 February"), 27, 28 (explaining that "[l]ack of motivation might influence" a neurological exam), 32, 33 (stating notably that Kabuga's refusal to "carry on" with the interview is "mainly a lack of cooperation at that particular time", and that the cognitive aspect of a neurological exam "requires more cooperation of the patient", and affirming that Kabuga's lack of cooperation in February "was, in part, due to the circumstances of the presence of a different interpreter").

[26] *See, e.g.*, Witness Kennedy, T. 15 February 2023 p. 17 (recounting that Kabuga "made two other really very helpful, pertinent remarks when he pointed out to Professor Cras and [Professor Kennedy] that some of [their] questions were culturally incorrect"); T. 16 March 2023 p. 5 (accepting that Kabuga may have made a comment to "make [him] feel [at] ease or [as a] mere recognition that [Witness Kennedy] is not from his culture and wouldn't have known about that particular cultural taboo"); Witness Cras, T. 29 March 2023 pp. 16 (stating that the Montreal Cognitive Examination was not carried out "in his native language, but [...] through an interpreter, which [...] creates problems"), 25 (noting that Kabuga "seemed to be more comfortable with the interpreter that was present during the first examination"), 33 (recounting that he "remembered his increased fatigability and lack of cooperation, which was, in part, due to the circumstance and the presence of a different interpreter"), 46 (stating that "language barriers [...] is a big challenge"), 47 (explaining that he is "not familiar with Rwandan culture", and providing an example where the interpreter provided cultural background to Kabuga's answer in that "people in Rwanda, elderly people, do not reside with their relatives when they have to be cared for" [which] "was a clear indication of the fact that [they] had assumptions that were not acceptable in Rwanda").

[27] *See, e.g.*, Witness Cras, T. 29 March 2023 p. 16 (agreeing that the level of education has an impact on the performance of a patient in the Montreal Cognitive Examination, and testifying that, from his understanding, "Kabuga's level of education is quite limited").

[28] *See* Witness Kennedy, T. 16 March 2023 p. 25; Witness Cras, T. 29 March 2023 p. 39. *See also* Witness Kennedy, T. 17 March 2023 pp. 22, 23.

effectively in his trial, and has an understanding of the essentials of the proceedings".[29] In other words, as the ICTY Appeals Chamber pointed out, "an accused's fitness to stand trial should turn on whether his capacities, 'viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights'".[30] Additionally, the ICTY Appeals Chamber clarified that processing the wealth of complex information inherent in international criminal proceedings is the role of the defence counsel, in order to advise their clients.[31] The legal standard also provides for a non-exhaustive list of capacities to be evaluated when assessing an accused's fitness to stand trial.[32]

13. In my opinion, these capacities are not independent from each other, but are interrelated and correlated. Indeed, without understanding the nature of the charges, an accused cannot enter a plea. Similarly, if the accused does not understand the consequences of the trial, he cannot participate in the proceedings, in the sense that he cannot testify or comment on the evidence. The determination of the fitness to stand trial is not a mere addition of the capacities an accused has, or does not have.[33] On the contrary, I consider that the relevant standard requires an assessment of an "*overall* capacity allowing for a meaningful participation in the trial, provided that he is duly represented by counsel".[34] On the basis of the evidence before the Trial Chamber, it is my opinion that Kabuga meets such criteria and I am therefore in disagreement with the Majority's reasoning that the fact that Kabuga may not have a high level of functioning of some of these capacities renders him unfit to stand trial.[35]

14. In this regard, I note that the Majority relied on Professor Mezey's assessment of Kabuga's "ability to retain, process, and weigh complex information, or express views about it" to support its finding that Kabuga lacks some capacities.[36] The Majority also emphasized the Experts' views that his "limited ability to communicate does not enable Mr. Kabuga to participate meaningfully in his

[29] Majority Decision, para. 28, *referring to Kabuga* Appeal Decision of 12 August 2022, para. 11; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR73.1, Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 4 March 2016, para. 7; *Strugar* Appeal Judgement, para. 55.
[30] *Strugar* Appeal Judgement, para. 55, *referring to Strugar* Decision of 26 May 2004, para. 37.
[31] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013, para. 22. *See also Strugar* Appeal Judgement, para. 60 (wherein the Appeals Chamber stated that "[e]ven persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable assistance, especially in cases of such complex legal and factual nature as those brought before the Tribunal").
[32] *Strugar* Appeal Judgement, paras. 41, 55.
[33] *Contra, see* Majority Decision, paras. 31-34, wherein the Majority summarises the Experts' conclusions that Kabuga lacks four capacities, but retains three. *See also* Majority Decision, paras. 35, 35.
[34] *Kabuga* Appeal Decision of 12 August 2022, para. 12 (emphasis added), *referring to Strugar* Appeal Judgement, para. 60.
[35] *See* Majority Decision, paras. 31-36.

trial as such participation would require a *higher level of cognitive function* than he possesses".[37] Moreover, the Majority "agrees with the Experts that participation in a complex proceeding, such as the present trial, requires, at a minimum, a functioning memory, including the ability to retain information over a period of time, as well as the ability to process and express a view about that information".[38] I am of the view that the Majority actually required a very high level of cognitive functioning, that does not necessarily correspond to the requirements set out in the *Strugar* Appeals Judgement. I wish to recall that the Dili District Court's Special Panels for Serious Crimes ("SPSC") specified that "a court need not determine whether the individual operates at the highest level of functioning. Rather, the test is whether the defendant satisfied certain minimum requirements".[39] Additionally, some common law jurisdictions explicitly recognize that insanity or amnesia alone is not enough to conclude that a person is unfit to stand trial.[40] Furthermore, as it was clearly stated in the case of *R. v. Walls*:

> "We consider that, save in clear cases, a court must rigorously examine evidence of psychiatrists adduced before them and then subject that evidence to careful analysis against the [...] criteria [...]. Save in cases where the unfitness is clear, *the fact that psychiatrists agree is not enough*, as this case demonstrates; a court would be failing in its duty to both the public and a defendant if it did not rigorously examine the evidence and reach its own conclusion."[41]

I therefore respectfully disagree with the approach from the Majority to make the Experts' assessment, should it be unanimous, its own, and to directly draw from the medical evidence, without scrutinizing it, the conclusion that Kabuga is unfit to stand trial.[42] I consider that, in light of the fair trial rights of the Accused as well as the interest of justice, an in-depth assessment of the entirety of the evidence, on the basis of the *Strugar* standard, should have been undertaken and be reflected in the motivation of the decision.

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[36] *See* Majority Decision, para. 33.
[37] *See* Majority Decision, para. 35 (emphasis added).
[38] *See* Majority Decision, para. 36 (reference omitted). I note that the Majority relied on Professor Mezey's testimony and her understanding of the type and extent of memory required to participate in these proceedings, adding further criteria not set out in the *Strugar* Appeals Judgement. *See* Majority Decision, n. 145.
[39] SPSC, *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, Case No. 01A/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, para. 121.
[40] *See Strugar* Appeal Judgement, para. 52 and references cited therein. The mere fact that an accused may not be capable of acting in his best interests during his trial is not sufficient to warrant a finding that he or she is unfit to stand trial. *See Strugar* Appeal Judgement, para. 52 and references cited therein. Similarly, the fact that the accused suffers from a serious mental disorder will not of itself mean that he cannot understand and follow the trial proceedings. *See* R. Mackay, "The Development of Unfitness to Plead in English Law", *in* R. Mackay and W. Brookbanks (eds.), *Fitness to Plead – International and Comparative Perspectives*, Oxford University Press (2018) ("R. Mackay, "The Development of Unfitness to Plead in English Law"), p. 13.
[41] R. Mackay, "The Development of Unfitness to Plead in English Law", p. 25, *referring to R. v. Walls*, [2011] EWCA Crim 443, para. 38 (emphasis added).
[42] *See* Majority Decision, paras. 33, 36, 37 (wherein the Majority notably "agrees with the [e]xperts" and "accepts the [e]xperts' view[s]"). *See also supra*, para. 7.

15. I also cannot agree with the assertion that Kabuga will not recover the capacities he lacks because his condition is characterized by progressive and irreversible decline, and that he has no realistic change of regaining fitness.[43] First, I wish to recall that Professor Kennedy explained in this regard that an improvement "[will] always [be] possible if the diagnosis [of dementia] is not correct", and that such error in the diagnosis is always possible.[44] Second, I note that the reports from the Medical Officer of the UNDU actually mention fluctuations in Kabuga's condition, engagement or performances, notably in his communication.[45] In my opinion, these elements contradict any definite conclusion that any improvement is impossible.

16. Further, in my view, the Experts' testimonies before the Trial Chamber actually confirm that Kabuga retains a number of capacities, including the ability to: (i) plead;[46] (ii) understand the nature of the charges;[47] (iii) partially follow the proceedings;[48] (iv) understand the details of the evidence, through scaffolded, abbreviated and thematically organised information, presented in advance,[49] and respond to the evidence read over to him by a language assistant and a member of his legal

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[43] *See* Majority Decision, paras. 31, 49.

[44] *See* Witness Kennedy, T. 17 March 2023 p. 26 (wherein he also stated that "[his] personal experience is of cases with which [he] was involved indirectly in which a dementia was an incorrect diagnosis for a more severe depressive illness and that proved treatable. The other possibility, which one always has to be aware of, is the possibility of fabrication. One has to repeatedly say the diagnosis of dementia may always be proven to be incorrect. One cannot completely rule that out").

[45] Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 20 April 2023 (public, with confidential Annex), Annex, RP. 5245; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 4 May 2023 (public, with confidential Annex), Annex, RP. 5331; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 18 May 2023 (public, with confidential Annex), Annex, RP. 5545.

[46] Witness Kennedy, T. 15 March 2023 p. 4 (affirming that Kabuga was fit to plead in December and that it remains the case now); T. 17 March 2023 p. 11 (stating that Kabuga "understands [...] the consequences of the pleas available, and he is able to communicate his plea"); Witness Mezey, T. 23 March 2023 pp. 34 (testifying that Kabuga "is able to plead", and that "[h]e states that he is not guilty that he didn't do it"), 35 (explaining that "[h]e is able to say he believes he is not guilty, he is innocent"); Witness Cras, T. 29 March 2023 pp. 34, 35.

[47] Witness Kennedy, T. 15 March 2023 pp. 4, 5 (affirming that Kabuga was able to understand the nature of the charges, in December, and that it remains the case); T. 17 March 2023 pp. 11 (stating that Kabuga "understands the meaning of the charges"), 12 (explaining that "at the time when he entered his plea, he was able to fully understand and appreciate [the charges]. At the moment, I think he would still be able to do that"); Witness Mezey, T. 23 March 2023 pp. 34 (stating that "[h]e understands that he is being charged. [...] When he was told about the charges, he understood what was being said [...] For example, when I asked him what genocide means, he said it means exterminating people. [...] And there is still that understanding in a fairly superficial way, but there is an understanding"), 35 (considering that "he is able to understand that these are serious crimes [...]"), 39 (noting that Kabuga "understands that the charges he faces are very serious"); Witness Cras, T. 29 March 2023 p. 42 (stating that "[he is] sure that he has an understanding of the accusations").

[48] Witness Kennedy, T. 17 March 2023 p. 13 (testifying that he "believe[s] he has the ability to partially follow proceedings"). Professor Mezey also implied that Kabuga could be able to partially participate. *See* Witness Mezey, T. 23 March 2023 pp. 38 (stating that Kabuga is "unable to *fully* participate" (emphasis added)), 47 (testifying that "he can participate in terms of witnessing what is going on"), 48 (explaining that "he would attend solely in terms of witnessing what [is] going on but not *fully* participating" (emphasis added)).

[49] Witness Kennedy, T. 16 March 2023 pp. 22, 23 (stating that "presenting scaffolded and chunked information [...] abbreviated, cut to the minimum, thematically related so that it's easy to follow [...], presented [...] in advance, with plenty of time to think about it, hear it, retain it, review it, that is a form of following evidence or of understanding the proceedings").

team;[50] (v) explain to his counsel his own version of the events;[51] (vi) understand the consequences of the proceedings;[52] (vii) understand what is said in the courtroom,[53] and more generally, understand a question and provide simple responses, limited to one step;[54] (viii) remember remote events and retain biographical memory;[55] (ix) have good-humored repartee and pertinent remarks;[56] (x) defend his own interests in stating that he would rather the trial not to proceed;[57] (xi) understand the role of a lawyer;[58] (xii) express his will and preference, make his voice heard and communicate

[50] Witness Kennedy, T. 17 March 2023 pp. 9 (believing that if "the evidence was to be read over to him by a language assistant, perhaps, and a member of his legal team, he could then respond to the evidence. He could respond currently in the most straightforward of ways, saying "that is correct" or "that is not correct")", 10 (affirming that "it is possible that he could respond", and that "he could give simple responses").

[51] Witness Kennedy, T. 17 March 2023 p. 24 (agreeing that Kabuga "is able to explain to his own lawyer his version of the events").

[52] Witness Kennedy, T. 17 March 2023 p. 12 (stating that he "believe[s] that Mr. Kabuga understands the consequences [...] of a finding of guilty and the consequences of a finding of not guilty. If found not guilty, he understands that he would be released. [...] On the other hand, he also understands that if found guilty, he would be detained for a very long time and would suffer damage to his reputation"); Witness Mezey, T. 23 March 2023 pp. 35 (testifying that "he is able to understand that these are serious crimes that will warrant serious penalties, if he is found guilty"), 39 (affirming that Kabuga "understands that the charges he faces are very serious and that, in principle they would have very serious consequences [...]. So, in theory, he does understand that if somebody is convicted of these serious crimes, the consequences will be serious, what they could be"); Witness Cras, T. 29 March 2023 p. 49 (stating that Kabuga "understands what a trial is and what an accusation is and what the consequences of a sentence would be").

[53] Witness Cras, T. 29 March 2023 p. 48 (confirming that Kabuga is "absolutely" able to follow what is said in the courtroom).

[54] Witness Kennedy, T. 15 March 2023 pp. 16 (recounting that "there were times when his responses to our questions actually were not only rational but aware [...] although, on this occasion limited to one-sentence replies"), 17 (stating that Kabuga "was able to make helpful contributions, question and response, but limited always to one step. Never two steps"); Witness Cras, T. 29 March 2023 pp. 24 (explaining that there "was actually a question and a "yes" or "no" answer"), 48, 49 (stating that "his answers are usually very short" but that Kabuga is "still able to understand and respond).

[55] Witness Cras, T. 29 March 2023 p. 31 (noting that Mr. Kabuga was able to give an "adequate answer" when asked about the native animals in Rwanda, which demonstrates a "very simple biographical memory", and that "biographical memory, during the course of dementia, is partially conserved"). *See also* Witness Kennedy, T. 17 March 2023 p. 10 (stating that memory for remote events is preserved until quite late in the process, and that while Kabuga's memory for remote events seemed to be "impaired" when he first saw him, which is "very unusual", since then, Kabuga's memory has become "more typical"); Witness Cras, T. 29 March 2023 pp. 41 (stating that "biographical memory is often conserved" during the course of dementia, including items related to "family, business, other meaningful events that happened during a person's life"), 50 (explaining that "remembrance of events and biographical memory in general [...] would depend on when it happened. More recent events tend to fade away much more rapidly than more distant events, and also events in childhood or events that have a particular emotional meaning for a person, like, for example, marriage, birth of children, and things like that, might be remembered much easier than other events").

[56] Witness Kennedy, T. 15 March 2023 pp. 16 (stating that Kabuga was "capable [...] of good-humoured repartee"), 17 (explaining that Kabuga provided a "witty response"). *See also* Witness Cras, T. 29 March 2023 pp. 18 (explaining that the conversation being in Kinyarwanda it was difficult to appreciate the joke about two rings and two wives, but acknowledging that understanding or appreciating humour would be considered a high order functioning), 30, 31 (also acknowledging that the fact that Kabuga reportedly "seem[ed] to understand the humour in a request of the test administrator" could be considered a "high order function").

[57] Witness Kennedy, T. 15 March 2023 p. 16 (stating that "Mr. Kabuga is very clear now in expressing a preference that the trial would not proceed"); T. 17 March 2023 p. 10, 11 (recounting that "Mr. Kabuga has consistently said he would rather the trial did not happen"); Witness Cras, T. 29 March 2023 pp. 19 (recalling that when asked "whether he would like the trial to proceed, [...] the answer was no"), 20 (confirming that Kabuga expressed a preference that the trial would not proceed), 43 (stating that "when he was asked whether he wanted the trial to continue, he said no"). On the question of the relevance of a discussion Kabuga reportedly had in relation to a property ownership matter, *see* Witness Cras, T. 29 March 2023 pp. 36-38.

[58] Witness Cras, T. 29 March 2023 p. 42 (stating that Kabuga "understands what a lawyer is, what the role of a lawyer is").

that to his lawyer,[59] including decide whether he wants to be present in court or not;[60] (xiii) be aware of his surrounding and the persons involved, including family members and medical doctors;[61] and (xiv) speak and/or understand languages other than his mother tongue.[62] In this regard, I am also not convinced by the Majority's motivation which, I believe, mainly focus on the Experts' views related to Kabuga's lack of capacities, or limitations thereof.[63] In particular, I am not convinced by the assertion that the Experts "agree that Mr. Kabuga's level of cognition related to [the three relevant capacities he retains] is superficial".[64] In this regard, Professor Kennedy actually testified that, in his opinion, Kabuga would still be able now to fully understand and appreciate the charges, as it was the case in April 2022.[65] I am therefore of the view that it would have been necessary to undertake a complete assessment of all the existing and/or limited capacities Kabuga has, in order to make a determination on his overall capacity allowing for his meaningful

[59] Witness Kennedy, T. 15 March 2023 p. 11 (testifying that Kabuga is "capable of expressing his will and preference and communicating that to his legal advisers"); T. 16 March 2023 pp. 41-44 (explaining that "[g]iven time, given considerable assistance, [he] believe[s] that Mr. Kabuga could express his will and preference. [...] It is a way of his voice being heard other than a fully capacitous instruction", and that "[t]here remains the possibility that Mr. Kabuga may be able to express a will and preference, that is always the case, and so that his voice can be heard"); T. 17 March 2023 pp. 19, 20 (affirming that Kabuga is "able to express his will and preference"), 34, 35 (explaining that "expressing a will and preference is not necessarily with full capacity"); Witness Mezey, T. 23 March 2023 p. 15 (agreeing that he is able to express his preference in terms of his basic fundamental needs); Witness Cras, T. 29 March 2023 pp. 42, 43 (stating that "if able to communicate with his lawyer and indicate a preference for a certain lawyer, [he is] sure that [Kabuga] is able to make those choice"), 49 (stating that whether Kabuga is able to communicate with his lawyer about the case depends "to a great extent on what type of handling of information and reasoning is behind this"). For further explanations on the extent of the expression of will and preference, *see also* Witness Kennedy, T. 15 March 2023 p. 21; T. 17 March 2023 pp. 34, 35; Witness Cras, T. 29 March 2023 pp. 13, 14.

[60] Witness Kennedy, T. 16 March 2023 pp. 6, 7 (recounting that Kabuga stated that "[y]ou ask me if I want my trial to continue. No. I'm very sick. I wouldn't like my trial to continue"); T. 17 March 2023 pp. 12, 13 (confirming that Kabuga's ability to decide whether he would like to be present at a hearing is "an expression of his will and preference"); Witness Mezey, T. 23 March 2023 pp. 36, 37 (stating that "[i]t maybe on a Monday he wants to participate, he has the capacity to decide and choose to participate, but later that week he [...] lacks capacity. Of course, he could change his mind as well. [...] But, in principle, it is possible that he could have capacity to decide to participate"); Witness Cras, T. 29 March 2023 pp. 19, 20 (recounting that to "Professor Kennedy's request, whether he would like the trial to proceed, [...] the answer was no", without recollecting further Kabuga's responses).

[61] Witness Cras, T. 29 March 2023 pp. 8, 9 (stating that, in February, Kabuga "didn't remember [their] names, but he was well aware of why [the experts] were there. Also, he was aware of the different persons that were in the room, like the interpreter, the United Nations Detention Unit medical staff, so there's absolutely no doubt that there is an awareness of the surroundings and of the persons involved"), 43 (explaining that "[he is] quite sure [Kabuga] understands who his family members are, that he knows the role of a medical doctor, and that he can indicate preferences for his healthcare").

[62] Witness Kennedy, T. 16 March 2023 pp. 10, 11 (explaining that, in relation to Kabuga's use of English in February 2023, "[i]t is of great significance because one of the points that was important to me in the early phases of assessing Mr. Kabuga was his ability to learn new information. And there was some evidence, particularly when I first saw him, that he had recently learned words in Dutch. Now, the ability to learn new material and use it in that way is not compatible with dementia of significance. The extent to which he does or does not know English is interesting. In general, the information I've had is that he has never really been able to use English, so it's interesting recently that he produces some words of English. However, what I don't know is whether he has always had a few words of English, whether he's just choosing to use that now or not. I don't know whether that's learned or long-standing"); Witness Cras, T. 29 March 2023 p. 37 (testifying that he "didn't know [Kabuga] spoke Kiswahili. [He] thought [...] his native tongue was Kinyarwanda, and that he, at some point [...], denied to understand French, while in many instances, when [they] exchange a few words in French, he did seem to understand").

[63] *See* Majority Decision, paras. 30-36.

[64] *See* Majority Decision, para. 34.

[65] *See* Witness Kennedy, T. 17 March 2023 p. 12.

participation in the trial. As demonstrated, I am of the view that the evidence before the Trial Chamber actually demonstrates that Kabuga meets such standard.

17. Moreover, my assessment of Kabuga's overall capacity to participate meaningfully in his trial also relies on my own observations of Kabuga's demeanor in court since 29 September 2022. In this respect, I note that Kabuga has decided on several occasions to waive his right to attend hearings,[66] while a litigation was ongoing in relation to a request for the withdrawal of Emmanuel Altit as his counsel.[67] After this litigation was definitely settled by the Appeals Chamber,[68] Kabuga systematically decided to attend hearings, either in person or by video-conference link. He never again waived his right to be present, nor consented that the proceedings continue in his absence and in the presence of his Counsel only. This constitutes, in my opinion, an indication of Kabuga's capacity to understand the course of the proceedings.

18. In relation to Kabuga's capacity to instruct his counsel, during the hearing of 16 March 2023, Maître Altit confirmed that "[i]t is very clear that Mr. Kabuga wants to attend to [Pr. Kennedy's] examination, and he does not wish us to waive his right to be present".[69] This constitutes in my opinion the demonstration of an existing communication between Kabuga and his Counsel on legal aspects of the trial, and a capacity from the former to instruct the latter.[70] Moreover, the trial is at a stage where the Prosecution has presented approximately half of the witnesses it intends to call to testify in court, and the Defence case should be starting shortly thereafter.[71] I consider that, in the past two and a half years since Kabuga's transfer to The Hague in October 2020 and the subsequent assignment of Maître Altit as his counsel,[72] up to this day where the Majority finds him unfit to stand trial, Kabuga's Counsel must have explored defence strategies with him. I consider this to mitigate a potential current limitation in Kabuga's ability to instruct

[66] *See* T. 29 September 2022 p. 1; T. 30 September 2022 p. 1; T. 6 October 2022 p. 1; T. 12 October 2022 p. 1; T. 13 October 2022 p. 1; T. 18 October 2022 p. 1; T. 19 October 2022 p. 1. *See also* Witness Kennedy, T. 17 March 2023 pp. 12, 13.
[67] *See Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-AR80.2, Appeal of the Second Decision Related to Félicien Kabuga's Representation, 27 September 2022, paras. 23-59; Decision on Request for Certification to Appeal the Second Decision Related to Félicien Kabuga's Representation, 20 September 2022, p. 3; Second Decision Related to Félicien Kabuga's Representation, 26 August 2022, paras. 22-33.
[68] *See Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-AR80.2, Decision on an Appeal of a Decision on Félicien Kabuga's Representation, 4 November 2022, paras. 25, 26.
[69] *See* T. 16 March 2023 p. 44.
[70] *See also* Witness Kennedy, T. 17 March 2023 pp. 12, 13.
[71] *See* Rules 70(M), 82, 121 of the Rules of Procedure and Evidence ("Rules"). *See also* Prosecution Submission Concerning the Consequences of a Potential Decision that Kabuga is Unfit, 9 May 2023 ("Prosecution Submission"), n. 52 (wherein the Prosecution states that only 18,5 hours remain for the Prosecution's direct examination of witnesses).
[72] *See* Decision on Félicien Kabuga's Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020, para. 18; Initial Appearance, T. 11 November 2020 pp. 3, 4.

Counsel, if any. Additionally, the Prosecution stated that it was prepared to waive its right to cross-examine Kabuga, to accommodate his ability to testify.[73]

19. I am of the view that the question of Kabuga's fitness to stand trial was already settled by the Appeals Chamber, which followed from the Trial Chamber's initial determination that was based on extensive reports of Professors Mezey and Kennedy in early 2022. While the medical diagnosis may have subsequently evolved in relation to the existence of dementia, the assessment regarding Kabuga's capacities to participate in his trial has not changed in any substantial manner. Bearing in mind the intercurrent illnesses he suffered from early 2023 as well as the normal reality of gradual aging, I consider that a thorough reading of the Experts' latest medical reports casts doubt on the actual degree of Kabuga's capacities, and fails to challenge in a definitive manner their first reports, which constituted the basis for the Trial Chamber's finding in 2022 that Kabuga had not demonstrated his unfitness to stand trial, and, as stated above, was upheld by the Appeals Chamber. In conclusion, I am of the view that the Defence has not demonstrated at this stage, by a preponderance of evidence, that Kabuga is unfit to stand trial, and, for the foregoing reasons, I respectfully disagree with the Majority. On the contrary, I am convinced that Kabuga retains a number of capacities which allow him to reach the standard of "*overall* capacity allowing for a meaningful participation in the trial, provided that he is duly represented by Counsel", assisted by a language assistant, and benefits from appropriate accommodations, in order to give full effect to his right to a fair trial.

20. I further consider that my assessment of the facts of the case in light of the applicable standard is also supported by an evolution in international law of the doctrine of fitness to stand trial.

B. The evolution of the legal standard of fitness to stand trial

21. In recent years, there has been a change of paradigm in the doctrine of fitness to stand trial in international law around the concept of legal capacity. While the focus used to be on the question of the existence of the defendant's ability to meaningfully participate in the proceedings, the new concept reinforces the ability of the defendant to participate in the trial, as limited as such ability may be. I therefore consider that such evolution in international human rights law on the rights of persons with disabilities is extremely relevant to the important assessment of Kabuga's fitness to stand trial, and that such approach, giving full effect to the rights of an accused with an impairment,

[73] *See* T. 7 June 2022 pp. 44, 45.

may be implemented by the Trial Chamber as provided for by the Statute of the Mechanism ("Statute") and the Rules.

1. The right of persons with disabilities to legal capacity

22. I am of the view that my assessment of the facts, and my conclusion that Kabuga should not be declared unfit to stand trial on the basis of his impairments, considering in particular that the Experts are unanimous that he is still able to express his will and preference,[74] is further supported by recent developments in international human rights law. Such approach originates from the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") adopted by 186 states,[75] and its interpretation by the United Nations Committee on the Rights of Persons with Disabilities ("CRPD Committee"). Several articles of the CRPD are relevant to the question of fitness to stand trial, in particular articles 12 (equal recognition before the law),[76] 13 (access to

[74] Witness Kennedy, T. 15 March 2023 p. 11; T. 16 March 2023 pp. 5-7, 41-44; T. 17 March 2023 pp. 12, 13, 19, 20; Witness Mezey, T. 23 March 2023 p. 15; Witness Cras, T. 29 March 2023 pp. 13, 14, 19, 20, 42, 43. *See also supra*, nn. 59, 60.

[75] The Convention the Rights of Persons with Disabilities was adopted on 13 December 2006 by Resolution A/RES/61/106 of the General Assembly of the United Nations, and entered into force on 3 May 2008. *See* United Nations Treaty Collection, Chapter IV Human Rights, 15. Convention on the Rights of Persons with Disabilities, accessible at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en.

[76] Article 12 of the CRPD – Equal recognition before the law: 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

justice),[77] and 14 (liberty and security of persons),[78] which should be read in conjunction with article 5 (equality and non-discrimination).[79]

23. Without repeating the dispositions of the Convention, it is clear, notably from the General Comment No. 1 related to article 12 of the CRPD, that legal capacity, defined as the ability to hold rights and duties and to exercise these rights and duties,[80] is an inherent right accorded to all people, including persons with disabilities.[81] The CRPD Committee criticized the national approaches where a person's disability and/or decision-making skills are taken as legitimate grounds to deny his or her legal capacity and lower his or her status before the law.[82] It concluded that "[a]rticle 12 does not permit such discriminatory denial of legal capacity, but rather, requires that support be provided in the exercise of legal capacity".[83] Moreover, the CRPD Committee acknowledged that article 12 is closely linked to article 14 of the CRPD, since the denial of the legal capacity of persons with disabilities *and* their detention in institutions against their will constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.[84] From the CRPD

[77] Article 13 of the CRPD – Access to justice: 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

[78] Article 14 of the CRPD - Liberty and security of the person: 1. States Parties shall ensure that persons with disabilities, on an equal basis with others: a. Enjoy the right to liberty and security of person; b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. 2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

[79] Article 5 of the CRPD - Equality and non-discrimination: 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention. *See also* CRPD Committee, General Comment No. 1 (2014) – Article 12: Equal recognition before the law (CRPD/C/GC/1) ("General Comment No. 1"), paras. 32-34; CRPD Committee, General Comment No. 6 (2018) – on Equality and Non-Discrimination (CRPD/C/GC/6) ("General Comment No. 6"), paras. 47-55.

[80] General Comment No. 1, para. 13.

[81] General Comment No. 1, para. 14.

[82] *See* General Comment No. 1, para. 9 (wherein the CRPD Committee reaffirmed that the existence of an impairment must never be grounds for denying legal capacity or any of the rights provided for in article 12).

[83] General Comment No. 1, para. 15. The obligation to provide persons with disabilities access to such support in the exercise of their legal capacities is enshrined in articles 12(3) and 13 of the CRPD. *See* General Comment No. 1, paras. 16-19, 38.

[84] General Comment No. 1, para. 40 (emphasis added); Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities, adopted during the CRPD Committee's 14th session, held in September 2015 ("Guidelines on article 14 CRPD"), para. 8. *See also* CRPD Committee, Concluding Observations on the Combined Second and Third Periodic Reports of Australia, 15 October 2019 (CRPD/C/AUS/CO/2-3) ("Concluding Observations on Australia of 15 October 2019"), paras. 25(f) (wherein the Committee is concerned by the "[a]bsence of [...] data on the number of persons unfit to plead who are committed to custody in prison and other facilities"), 25(g); CRPD Committee,

Committee's perspective, a decision of unfitness to stand trial, based for instance on a mental impairment, and in combination with the continuous detention of the accused, would therefore be in violation of articles 12 and 14 of the CRPD.[85]

24. The central question partially remains as to whether a declaration of unfitness to stand trial, *in itself*, and by depriving an accused with an impairment from a trial and a verdict, would constitute an infringement of his or her right to enjoy legal capacity on an equal basis with others, as guaranteed by article 12 of the CRPD. While several interpretations on the implications of the CRPD on the doctrine of unfitness to stand trial may exist,[86] I am of the view that a declaration of unfitness *in itself*, when the accused still has the ability to express his will and preference, amounts to denying to a discernible person his or her humanity, in reducing him or her as a mere object in the room. In this regard, I note the approach taken in ordinary medical practice and ethics, as explained by Professor Kennedy:

> "["In ordinary practice, from a medical point of view, when there are residual capacities, one always makes sure that the person's voice is heard. And I've referred to this a number of times. In medicine, things are not black and white. They are shades on a spectrum. And this is why the decision about how impaired is sufficiently impaired to be unfit, for instance, or unable to make some other specific question is always ultimately a social decision or a legal decision. From the medical point of view, when there are some residual capacities, when a personality is still discernible, one must respect it and listen to it and, insofar as is practical, accommodate it."[87]

25. I consider that a declaration of unfitness in these circumstances constitutes a breach of article 12 of the CRPD, because it deprives the accused from his or her legal capacity and the protection of his or her rights by the legal system. As affirmed by the United Nations Office of the High Commissioner for Human Rights ("OHCHR"), such deprivation of one's legal capacity "promotes further violations of the right to a fair trial, including the presumption of innocence, the right to be heard in person, the right to contest witnesses and the right to offer evidence, among other procedural safeguards of due process of law".[88] This interpretation is consistent with the

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Concluding Observations on the Initial Report of New Zealand, 31 October 2014 (CRPD/C/NZL/CO/1), para. 33 (wherein the Committee "is concerned that the criminal justice system in New Zealand includes conditions in which a person with disabilities can be declared "unfit to stand trial" and on that basis can be deprived of liberty. The system does not recognize that a person with disabilities should only be deprived of liberty when found guilty of a crime, after criminal procedure has been followed, with all the safeguards and guarantees applicable to everyone").

[85] Consequently, in light of the CRPD, any continued detention of an unfit accused should not be possible, even if allegedly justified to protect the accused or the public. *See* Majority Decision, para. 53, n. 198.

[86] *See* A. Arstein-Kerslake, P. Gooding, L. Andrews and B. McSherry, *Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities*, Human Rights Law Review (2017), vol. 17/3 ("Arstein-Kerslake *et al.*, *Human Rights and Unfitness to Plead*"), pp. 408-416.

[87] Witness Kennedy, T. 17 March 2023 pp. 29, 30. *See also* Witness Kennedy, T. 17 March 2023 p. 20.

[88] *See* United Nations Human Rights Council, Right to Access to Justice Under Article 13 of the Convention on the Rights of Persons with Disabilities – Report of the Office of the United Nations High Commissioner for Human Rights, 27 December 2017 (A/HRC/37/25) ("OHCHR Report"), para. 64. Because such declaration of unfitness is based on an impairment or disability, it also contravenes the prohibition of any type of discrimination on the basis of disability as enshrined in article 5 of the CRPD.

CRPD Committee calls to "remove those declarations [of unfitness to stand trial] from the criminal justice system[s]",[89] further echoed by the OHCHR.[90]

26. The CRPD Committee further considered that "[p]ersons with disabilities who have committed a crime should be tried under the ordinary criminal procedure, on an equal basis with others and with the same guarantees, although with specific procedural adjustments to ensure their equal participation in the criminal justice system".[91] Persons with disabilities must indeed be provided with appropriate measures, accommodations and safeguards to ensure that their rights to legal capacity and to effective access to justice are respected, as enshrined in articles 12(2), 12(3) and 13(1) of the CRPD,[92] and as affirmed by the Working Group on Arbitrary Detention[93] and the OHCHR.[94]

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[89] Guidelines on article 14 CRPD, para. 16. *See also, e. g.*, CRPD Committee, Concluding Observations on the Combined Second and Third Periodic Reports of Hungary, 20 May 2022 (CRPD/C/HUN/CO/2-3), paras. 25(a) (wherein the Committee recommends the State party to "[a]bolish all provisions allowing restrictions on the legal capacity of persons with disabilities on the basis of impairment"), 25(b); CRPD Committee, Concluding Observations on the Combined Second and Third Periodic Reports of Mexico, 20 April 2022 (CRPD/C/MEX/CO/2-3), para. 36(b) (wherein the Committee recommends the State party to "[re]view all federal and state legislation with a view to eliminating all restrictions of rights as a result of a declaration of legal incompetence or on the grounds of a person's disability"); Concluding Observations on Australia of 15 October 2019, para. 26(c) (wherein the Committee recommends the State party to "[b]ring all state, territory and federal legislation, including criminal laws and policies, in compliance with the Convention to ensure due process guarantees for all persons with disabilities and ensure a review of the legal situation of persons whose equal recognition before the law is restricted and who have been declared unfit to stand trial"); CRPD Committee, Concluding Observations on the Initial Report of Republic of Korea, 29 October 2014 (CRPD/C/KOR/CO/1), para. 28 (wherein the CRPD Committee "[r]ecommends that the declaration of unfitness to stand trial be removed from the criminal justice system in order to allow due process for persons with disabilities on an equal basis with others"); CRPD Committee, Concluding Observations on the Initial Report of Republic of Ecuador, 27 October 2014 (CRPD/C/ECU/CO/1), para. 29(c) (wherein the CRPD Committee recommends the State party to "[r]efrain from declaring persons with disabilities unfit to stand trial when they are accused of an offence so that they are entitled to due process, on an equal basis with others, and that the general guarantees of criminal law and procedure are observed").

[90] OHCHR Report, paras. 34, 35.

[91] CRPD Committee, Concluding Observations on the Initial Report of Belgium, 28 October 2014 (CRPD/C/BEL/CO/1), para. 28. *See also, e. g.*, CRPD Committee, Concluding Observations on the Combined Second and Third Periodic Reports of Ecuador, 21 October 2019 (CRPD/C/ECU/CO/2-3), para. 30 (wherein it is stated that "[t]he Committee also recommends that the State party establish a rigorous oversight mechanism for [...] monitoring [...] measures to ensure that persons with disabilities can exercise their legal capacity on an equal footing with others"); Concluding Observations on Australia of 15 October 2019, paras. 24(a) (wherein the Committee recommends the State party to "[r]epeal any laws and policies and end practices or customs that have the purpose or effect of denying or diminishing the recognition of any person with disabilities as a person before the law), 25(c) (wherein the Committee is concerned about "[t]he fact that legislation still views persons with disabilities as being unfit to plead"), 26(b) (wherein the Committee recommends the State party to "[d]evelop nationally consistent disability justice plans across governments to ensure that persons with disabilities, particularly those whose reasonable and procedural accommodations are not adequately met, are supported in accessing the same legal protections and redress as the rest of the community"), 26(c) (wherein the Committee further recommends the State party to "[b]ring all state, territory and federal legislation, including criminal laws and policies, in compliance with the Convention to ensure due process guarantees for all persons with disabilities and ensure a review of the legal situation of persons whose equal recognition before the law is restricted and who have been declared unfit to stand trial").

[92] The CRPD Committee further stressed that "[a] key difference between the reasonable accommodation obligation under article 5 of the Convention and the support that must be provided for persons with disabilities exercising their legal capacity under article 12 (3) is that there is no limit on the obligation under article 12 (3). The fact that support to exercise capacity may impose a disproportionate or undue burden does not limit the requirement to provide it." *See*

27. This evolution in international human rights law, initiated by the CRPD Committee and echoed by other UN human rights bodies, supports further my opinion that declaring Kabuga unfit to stand trial, while he still has a number of capacities and remains a discernable person, is not appropriate as it would *de facto* deprive him from his legal capacity. I am of the view that appropriate support and accommodations are necessary to assist Kabuga in exercising his legal capacity and ensuring that his fair trial rights are guaranteed. I note that a number of such accommodations, including the assistance of a language assistant or the modifications of the sitting schedule are already in place, and suggest that other measures could still be explored,[95] in order to facilitate Kabuga's meaningful participation to these proceedings to the greatest extent possible.[96]

2. The Trial Chamber's powers to ensure the fairness of the trial

28. In addition, I consider that the role of the Trial Chamber in these proceedings and its powers as recognized by the Statute and the Rules enables it to ensure the fairness of the trial and the respect of Kabuga's rights.

29. I first wish to highlight that there are disparities in the legal standards applicable in national jurisdictions on the question of fitness to stand trial, which reflect the differences between the common-law adversarial and the civil-law inquisitorial systems. The common-law adversarial system entails a contest between two parties, prosecution and defence, where it is thus more important for the accused to actively participate in their own defence. In opposition, the civil-law inquisitorial system is a judicial inquiry intended to establish the true facts, and it is assumed that the court-driven fact-finding can reduce the risk of injustice, therefore giving less weight to the participation of the accused.[97] In civil-law jurisdictions, the judge has a central role in the criminal proceedings, ensuring notably that the trial is fair and the rights of the accused are protected. This rationale supports the fact that the criminal procedures of some civil-law jurisdictions include provisions allowing for the continuation of full trial proceedings, despite the accused suffering from

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General Comment No. 6, para. 48. *See also* International Principles and Guidelines on Access to Justice for Persons with Disabilities, August 2020, accessible at: https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf.

[93] United Nations Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention - United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court. 6 July 2015 (A/HRC/30/37), para. 107(b): "[p]ersons with psychosocial disabilities are to be given the opportunity to stand trial promptly, with support and accommodations as may be needed, rather than declaring such persons incompetent".

[94] OHCHR Report, para. 63.

[95] *See, e. g.*, Witness Kennedy, T. 17 March 2023 pp. 9, 10.

[96] I wish to emphasize that the Prosecution's first submission is that the "Mechanism should continue to accommodate Kabuga's needs in order to ensure that his trial can continue". *See* Prosecution Submission, para. 1.

[97] *See* Arstein-Kerslake *et al.*, *Human Rights and Unfitness to Plead*, p. 402.

impairments; in such cases, the mental state of the accused may then only become relevant at the sentencing stage.[98]

30. To turn back to the Mechanism, it is well established that its criminal procedure, as the successor of the ICTY and International Criminal Tribunal for Rwanda ("ICTR"), blends elements of both civil law and common law systems.[99] The Rules "are neither a mere reflection of the 'common-law' accusatorial system or the 'civil-law' inquisitorial system, nor are their origins predominantly in only one system; rather, the Rules are a hybrid of the two systems, having as their primary purpose 'to promote a fair and expeditious trial'".[100] Moreover, Article 18 of the Statute provides that "[t]he [...] Trial Chambers conducting a trial shall ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses".[101] Additionally, it is clear in the jurisprudence that trial chambers enjoy considerable discretion in relation to the management of trial proceedings before them.[102] The Trial Chamber therefore has extensive powers to take all measures necessary to ensure the fairness of the proceedings and to guarantee the fair trial rights of Kabuga, as enshrined in Article 19 of the Statute.

C. My position in relation to the alternative finding procedure

31. In relation to the decision of the Majority that the Trial Chamber will proceed with an alternative finding procedure,[103] I wish to highlight that the procedure proposed by the Majority is based on a vague and ambiguous concept. While determining that it "adopt[s] an alternative finding procedure that resembles a trial as closely as possible",[104] the Majority does not provide the outline, the content, nor the consequences of such a procedure on the fundamental rights and the detention

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[98] In relation to Portugal, *see* Penal Code, articles 105(1), 106(1); Court of Appeal of Évora, Case No. 3/20.9GBPTG-B.E1, Appeal Judgement, 22 March 2022. In relation to Sweden and Denmark, *see* Arstein-Kerslake *et al.*, *Human Rights and Unfitness to Plead*, p. 402; CRPD Committee, Concluding Observations on the Initial Report of Republic of Denmark, 30 October 2014 (CRPD/C/DNK/CO/1), para. 34.

[99] *See Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Defence Motion for Reconsideration of Document Admitted *Proprio Motu*, 28 February 2011 ("*Perišić* Decision of 28 February 2011"), para. 13, *referring to Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, para. 8.

[100] *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Decision on Joint Defence Motions for Reconsiderations of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution, 21 January 2003, p. 4 and references cited therein. *See also Perišić* Decision of 28 February 2011, para. 13. While the practice of the Mechanism is "primarily" based on an adversarial system, it is not so exclusively. *See Perišić* Decision of 28 February 2011, para. 13 and references cited therein.

[101] *See also* Rule 55 of the Rules.

[102] *See Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Judgement, 8 June 2021 ("*Mladić* Appeal Judgement"), para. 63 and references cited therein.

[103] *See* Majority Decision, paras. 57, 59.

[104] *See* Majority Decision, para. 57.

of the Accused. In my view, the alternative finding procedure proposed for this case is based on a revolutionary, albeit abstract idea, and is one that should presently mainly be of interest on a theoretical basis as it continues an emerging philosophical and intellectual debate on the feasibility of an ideal trial for unfit accused. Nevertheless, it is extremely difficult, if not impossible, to translate such theory into practice, particularly when the procedure itself entails grave breaches to the fundamental rights of the Accused, including his right to be present and to defend himself, as well as his right against arbitrary detention[105] (2), and does not have any basis in the legal framework of the Mechanism, namely its Statute, Rules, and jurisprudence (1).

1. The absence of legal grounds for an alternative finding procedure

32. I consider that there is no legal ground for a trial chamber to decide to set aside the regular trial procedure set out in the Rules, and replace it with an alternative finding procedure. While I note that Article 18 of the Statute provides the Trial Chamber with considerable discretion in relation to the management of proceedings as discussed above,[106] I do not consider that a trial chamber has such a discretionary power that enables it to create a completely novel procedure. The discretionary power enjoyed by the trial chambers in managing proceedings is not without any limits, as such discretion must be exercised in accordance with Article 18(1) and 19 of the Statute, which require trial chambers to ensure that trials are fair and conducted with full respect for the rights of the accused.[107] I also recall that Article 18 of the Statute states that trial chambers shall ensure that proceedings are conducted *in accordance with the Rules of Procedure and Evidence*. I wish to emphasize in this regard that the Rules do not provide for such alternative finding proceedings. On the other hand, should the judges wish to add a new procedure to the Rules in relation to unfit accused, Article 13 of the Statute and Rule 6 of the Rules provide the legal framework to do so.[108] Additionally, a discretionary decision may be scrutinized by the Appeals Chamber,[109] which held that it will reverse a discretionary decision where it is found to be based on

[105] I consider that such procedure threatens the requirements of a fair trial process in paving the way for an unlimited detention without any legal basis and without a foreseeable sentence to be served. *See infra*, para. 39.
[106] *See supra*, para. 30.
[107] *See Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Judgement, 20 March 2019 ("*Karadžić* Appeal Judgement"), paras. 26, 72 and references cited therein. *See also, e. g., Ephem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Judgement, 28 September 2011, para. 19; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 16 (wherein "[t]he Appeals Chamber affirms that the Trial Chamber has a broad discretion to direct the course of the proceedings in accordance with its fundamental duty to ensure a fair and expeditious trial pursuant to Article 18(1) of the Statute").
[108] These provisions establish that any amendment of the Rules shall take effect upon adoption by the judges of the Mechanism, unless the Security Council decides otherwise *See* Article 13(2) of the Statute; Rule 6(B) of the Rules. Moreover, Rule 6(C) of the Rules requires that "[a]n amendment shall not operate to prejudice the rights of the Accused [...]".
[109] *See* Rule 80(B) of the Rules.

an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[110] It has been argued that it is an abuse of discretion to act without any ground or basis for one's action.[111] Further, "not only some ground for the alleged exercise of discretion must be visible but [...] a *reasonable* foundation is essential. Thus it has been held an abuse of discretion to grant a new trial where no ground for the action is alleged except that a new trial 'could do no injury'".[112] I consider that, in the present case, the absence of legal basis susceptible of justifying the replacement of the trial by an alternative finding procedure, amounts to an abuse of discretion.

33. I am of the view that the purpose for which the Mechanism and its predecessor tribunals were established, which is contributing to the restoration and maintenance of peace and reconciliation, while being an important factor to take into consideration to decide on the matter before the Trial Chamber,[113] nevertheless does not constitute a legal basis to establish a new procedure to continue the proceedings against Kabuga. In addition, I note that alternative finding procedures cannot be considered to be combatting impunity since such procedures, in removing any possibility of conviction and consequently of punitive sanction, are being deprived of their criminal nature.[114] I consider that establishing a new procedure without any legal grounds further infringes the principle of legality ("*principe de légalité*") which is, in civil countries, a cornerstone principle of the rule of law aimed at protecting the individual against an arbitrary application of the law, and which requires that any new legal provision (either on the substance or on the procedure) must first be adopted by the legislator or lawmaker before it is enforced, in a non-retroactive manner (except if the new dispositions are more beneficial to the individual).[115] In cases involving unfit accused,

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[110] *See Kabuga* Appeal Decision of 12 August 2022, para. 11 and references cited therein; *Mladić* Appeal Judgement, para. 63; *Karadžić* Appeal Judgement, para. 85. The Appeals Chamber also held that, to successfully challenge it, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party. *See Kabuga* Appeal Decision of 12 August 2022, para. 11 and references cited therein; *Mladić* Appeal Judgement, para. 63; *Karadžić* Appeal Judgement, paras. 85, 330.

[111] N. Isaacs, *The Limits of Judicial Discretion*, Yale Law Journal (1923), vol. 32, ("Isaacs, *The Limits of Judicial Discretion*), p. 349.

[112] Isaacs, *The Limits of Judicial Discretion*, p. 349 and references cited therein.

[113] I wish to emphasize that the notion of peace is very general as well as very different from the concept of reconciliation, which entails an involvement from the victims and their acceptation of such reconciliation process.

[114] *See* ECtHR, *Antoine v. The United Kingdom*, No. 62960/00, Decision, 13 May 2003 ("ECtHR, *Antoine* Decision"), p. 10 (wherein the European Court of Human Rights considered that Section 4A proceedings where no conviction is possible "[does] not therefore concern the determination of a criminal charge", and was not persuaded that the possibility of an acquittal "renders the proceedings criminal for the purposes of Article 6 § 1").

[115] *See* Article 34 of the French Constitution (1958, last amended on 23 July 2008) (which establishes that: "*[l]a loi fixe les règles concernant:* [...] *la détermination des crimes et délits ainsi que les peines qui leur sont applicables; la procédure pénale;* [...]"); Article 107(1) of the Dutch Constitution (1814, last amended on 22 February 2023) (wherein it states that "[t]he law regulates [...] criminal procedure law in general codes, subject to the power to regulate certain subjects in separate laws"); Article 9(3) of the Spanish Constitution (1978, last amended on 27 September 2011) (wherein "[t]he Constitution guarantees the principle of legality, [...], the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights [...]"); Article 117(l) of the Italian Constitution (1948, last amended on 19 October 2020) (stating that "[t]he State has exclusive legislative powers in the following

international courts, including the ICTY and the ICTR, have usually stayed the proceedings, or rules were adopted to enable the judges to do so.[116] In particular, I observe that alternative finding procedures have never previously been implemented at the Mechanism, nor by its predecessors the ICTR and the ICTY. Its implementation will therefore also infringe on the principle of equality of persons before the tribunals, as guaranteed by Article 19(1) of the Statute and Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"),[117] since no other accused before international criminal tribunals have been "tried" in accordance with this procedure. I am therefore of the view that Article 18 of the Statute does not constitute a legal basis enabling the Trial Chamber to proceed with an alternative finding procedure.

34. I also note that there are relevant precedents, notably at the ICTY, on the procedure to follow when an accused is determined to be unfit to stand trial, which is a stay of proceedings,[118] that the Majority did not quite address. I believe that the case of Goran Hadžić is particularly pertinent, in particular how his medical condition led the trial chamber to find him unfit to stand trial, and, in his situation, to determine that an indefinite stay of the proceedings would serve the interests of justice, in line with the practice of the ICTY.[119] While I am of the view that an indefinite detention following an unfitness decision in case of a suspension of the proceedings actually runs counter to the requirements of the CRPD as explained above,[120] I am of the view that the Majority did not necessarily provide the reasons to depart so drastically from such precedent,

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matters: jurisdiction and procedural law; civil and criminal law; [...]"); Article 74(1) of the Basic Law for the Federal Republic of Germany (1949, last amended on 19 December 2022) (stating that "[c]oncurrent legislative power shall extend to the following matters: 1. civil law, criminal law, court organisation and procedure [...]").

[116] *See* Majority Decision, para. 48 and references cited therein.

[117] *See also* Article 20(1) of the Statute of the ICTR; Article 21(1) of the Statute of the ICTY.

[118] *See* Majority Decision, para. 48 and references cited therein.

[119] *See Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Remand on the Continuation of Proceedings, 24 March 2016 (public redacted version filed on 5 April 2016) ("*Hadžić* Decision of 24 March 2016"), paras. 23-31. *See also Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006 (confidential version filed on 7 April 2006), p. 12 (wherein the trial chamber found that "the accused d[id] not have the capacity to enter a plea and to stand trial, without prejudice to any future criminal proceedings against him should his mental health condition change"). Vladimir Kovačević was subsequently granted provisional release until further notice, went to a mental facility in Serbia, and his case was referred to Serbia. *See Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-AR11*bis*.1, Decision on Appeal Against Decision on Referral Under Rule 11*bis*, 28 March 2007, paras. 2, 7, 14-16, 20-22, 27-30, 35-37. Similar outcomes, ordering the suspension of the proceedings, were decided by the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), and the SPSC. *See* ECCC, Case No. 002/19-09-2007-ECCC-TC/SC(16), Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, 14 December 2012 ("*Ieng Thirith* Decision of 14 December 2012"), para. 47 (and references cited therein), pp. 45, 46.

[120] *See supra*, para. 23.

where *Hadžić* did not actually have a realistic prospect of regaining fitness when the suspension was decided.[121]

35. I now turn to the existing practice at the national level in order to determine, whether alternative finding proceedings may be considered to amount to a general principle of law common to all major legal systems,[122] as implied by the Prosecution,[123] which could have been a legal ground for "importing" such procedure before the Mechanism.[124] I observe that, in the 2012 case against Ieng Thirith, the Supreme Court Chamber of the ECCC undertook an extensive survey of the domestic rules and practice on the existing criminal procedures when an accused is found unfit to stand trial, and grouped the various approaches into three broad categories,[125] which included various types of alternative finding procedures identified as "special verdict" procedures.[126] The Supreme Court Chamber noted that such practice "has been developed in the United Kingdom and adopted by a number of common-law countries such as Hong Kong, Zambia, and, with some variations, Australia".[127] In the present proceedings, the Prosecution submits that in "jurisdictions such as England and Wales, Northern Ireland, Scotland, Ireland, Australia, New Zealand, Guatemala and South Africa, the [...] court undertakes a fact-finding process akin to the proposed Examination of Facts".[128] Among these countries, I wish to highlight that, in relation to the England and Wales, their Law Commission has actually stated that:

> "the normal criminal trial is the optimum process where a defendant faces an allegation in our criminal justice system. *We consider that full trial is best not just for the defendant, but also for those affected by an offence and society more generally.*[129] [...] We consider that every effort should be made to afford a defendant whose capacity may be in doubt such adjustments to the

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[121] *See* Majority Decision, para. 49. *Compare with Hadžić* Decision of 24 March 2016, paras. 23-29; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Order Terminating the Proceedings, 22 July 2016, p. 1.

[122] *See Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-AR79.1, Decision on Prosecution Appeal Against Decision on Challenges to Jurisdiction, 28 June 2019, para. 21, *referring to Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 225 (wherein the ICTY Appeals Chamber held that to rely upon domestic legislation and case law as a source of an international principle or rule under the doctrine of the general principles of law recognized by the nations of the world "it would be necessary to show that, in any case, the major legal systems of the world take the same approach to [a] notion").

[123] *See* Prosecution Submission, para. 3.

[124] *See* D. Akande, "Sources of International Criminal Law", *in* A. Cassese (eds.), *The Oxford Companion to International Criminal Justice*, Oxford University Press (2009), p. 52.

[125] *Ieng Thirith* Decision of 14 December 2012, para. 40.

[126] *Ieng Thirith* Decision of 14 December 2012, paras. 40, 49.

[127] *See Ieng Thirith* Decision of 14 December 2012, para. 49 and references cited therein.

[128] *See* Prosecution Submission, para. 7. *See also* Prosecution Submission, Annex A, paras. 1-7, 72, 95, 103, 114, 122, 134, 144, 154. I note that England and Wales, Northern Ireland, and Scotland are all components of the United Kingdom. I further note that the Prosecution describes procedures that are presented as similar to an examination of facts or alternative finding procedure in eight state jurisdictions of the United States of America out of fifty, noting the absence of such procedure at the Federal level. *See* Prosecution Submission, paras 173-181.

[129] England and Wales Law Commission, *Unfitness to Plead, Volume 1: Report* (2016) ("England and Wales 2016 Law Commission Report"), para. 1.11 (emphasis added).

> proceedings as he or she reasonably requites to be able to participate in the full criminal process, and to maintain that capacity for the whole of the process."[130]

I, therefore, consider that the Prosecution, in showing that less than ten countries around the world, and only from the common-law tradition, adopted procedures comparable to an alternative finding procedure, does not succeed in demonstrating that "[n]umerous domestic jurisdictions – espousing different legal traditions – employ such procedures."[131] On the contrary, I am of the view that the practice of alternative finding procedures, in their various forms, constitute a very sporadic practice at the domestic level, therefore failing to demonstrate the existence of a general principle of law common to all major legal systems,[132] and to provide any other legal basis to consider that such procedure may be implemented before the Mechanism.

36. Finally, I am of the view that this procedure is not compatible with the CRPD, since it creates a discriminatory procedure for persons with disabilities in comparison with others, in violation of Articles 3 and 5 of the CRPD.[133] In its General Comment No. 6 on equality and non-discrimination, the CRPD Committee emphasized that:

> "12. Equality and non-discrimination are principles and rights. The Convention refers to them in article 3 as principles and in article 5 as rights. *They are also an interpretative tool for all the other principles and rights enshrined in the Convention.* The principles/rights of equality and non-discrimination are a *cornerstone* of the international protection guaranteed by the Convention. Promoting equality and tackling discrimination are cross-cutting obligations of immediate realization. They are not subject to progressive realization."[134]

As enunciated above, the CRPD Committee also considered that "[p]ersons with disabilities who have committed a crime *should be tried under the ordinary criminal procedure*, on an equal basis with others and with the same guarantees, although with specific procedural adjustments to ensure their equal participation in the criminal justice system".[135] I am, therefore, in agreement with the doctrinal view that such alternative finding procedures, as "deviations from regular trial

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[130] England and Wales 2016 Law Commission Report, para. 1.12. *See also* England and Wales 2016 Law Commission Report, para. 3.168(1) (wherein a consultee declared that "[t]he URCRPD required more to be done to enable defendants to undergo full trial wherever possible"), 3.170 (wherein academics specialised in this area stress that "focus must be on considering in the round the adjustments and supports that can be provided to the individual rather than assessing the individual's capacity", and that "the UNCRPD is about doing things "with" vulnerable individuals rather than "to" them").

[131] *See* Prosecution Submission, para. 3.

[132] I further note that such limited practice is insufficient to demonstrate that this procedure exists in customary international law, which is defined as "evidence of a general practice accepted as law". *See* Statute of the International Court of Justice, Article 38(1)(b). *See also André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 14 (wherein the ICTR Appeals Chamber stated that "[n]orms of customary international law are characterized by the two familiar components of state practice and *opinio juris*.")

[133] *See also* Arstein-Kerslake *et al.*, *Human Rights and Unfitness to Plead*, p. 404.

[134] General Comment No. 6, para. 12 (emphasis added).

[135] *See supra*, para. 26 and references cited therein.

procedures[,] amount to differential treatment of persons with disabilities",[136] which contradicts the CRPD provisions.[137] I consider that this convention should be interpreted in accordance with the ordinary meaning to be given to its terms in their context and *in light of its object and purpose*, in accordance with Article 31 of the Vienna Convention,[138] which requires a consistent application of all the rights and principles set out in the CRPD. For the foregoing reasons, I am convinced that Kabuga should be tried within the existing legal framework established by the Statute, the Rules, and the jurisprudence.

2. The consequences on Kabuga's fundamental rights

37. I am of the view that the alternative finding procedure as determined does not provide sufficient *indicia* on its nature, on the modalities of its application, and on its consequences notably on Kabuga's fundamental rights. In relation to the determination that the Prosecution will retain the burden to prove both the *actus reus* and the *meas rea* of each charge against Kabuga,[139] I note that the procedures such as a trial of facts, examinations of facts or special verdicts are usually limited to the *actus reus* of the crime(s) and not the *mens rea*.[140] Such fact-findings procedures transform the proceedings from a criminal trial into a civil procedure that is usually intended to determine whether the court should make an admission order into a mental facility for the unfit accused, or a guardianship order, amongst other measures.[141] On the other hand, if the mental state of the accused is discussed and determined, this entails that the criminal nature of the proceedings remains. The alternative finding procedure in the present case, envisaging both *actus reus* and *mens rea*, therefore lacks clarity on its nature. In addition, I am not convinced that the applicable legislation in only three states, including only three territories in Australia, and the work of law commissions, which has not led to modifications in the legislations so far, which provide that the *mens rea* of the unfit accused should be determined in alternative finding procedures,[142] constitute sufficient support to justify that the Trial Chamber should enter a determination on Kabuga's *mens rea* in the framework of the envisaged procedure. I am further concerned about the fact that Kabuga's presence will not be required when his *mens rea* will be discussed.

38. I disagree that Kabuga's alleged limitations in the effective exercise of his rights, which constitute the legal standard to declare him unfit to stand trial, entails, as a consequence, the denial

[136] Arstein-Kerslake *et al.*, *Human Rights and Unfitness to Plead*, p. 404.
[137] *See also* Arstein-Kerslake *et al.*, *Human Rights and Unfitness to Plead*, p. 415 (wherein the authors argue that "[a] separate adjudication system for persons with disabilities likely does not meet CRPD standards").
[138] Vienna Convention on the Law of Treaties (1969), article 31(1).
[139] *See* Majority Decision, para. 57.
[140] *See* Majority Decision, para. 54.
[141] *See* ECtHR, *Antoine* Decision, pp. 9-11. *See also* ECtHR, *Antoine* Decision, p. 5.

of his fair trial rights enshrined in Article 19 of the Statute, and in particular his right to be tried in his presence. While the Rules and the jurisprudence of the Mechanism only set out the framework for "regular" trials and not the new alternative finding procedure, I am of the opinion that it is nevertheless important to recall how these provisions envisage the limitations to the right of the accused to be present during the proceedings. In this regard, Rule 98 of the Rules provides that "[i]f an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused, provided that the Trial Chamber is satisfied that: [...] (iii) the accused is physically and mentally fit to be present for trial [...]". This Rule essentially provides that the fitness of the accused is a pre-requisite and a *sine qua non* condition to the determination that the trial may continue in the absence of the accused. In other words, should the accused be unfit, the trial chamber may not decide that the trial shall proceed. In addition, Rule 94(B) of the Rules provides that a trial chamber may continue the proceedings in the absence of an accused if the accused persisted in a disruptive conduct, following a warning that such conduct may warrant his or her removal. The ICTY Appeals Chamber has found that such limitations to the accused's right to be present may be justified pursuant to this Rule on the basis of "substantial trial disruptions".[143] It "further emphasise[d] that in assessing a particular limitation on a statutory guarantee, such as the right to be physically present, the proportionality principle must be taken into account, pursuant to which any restriction of a fundamental right must be in service of a sufficient important objective and must impair the right no more than it is necessary to accomplish the objective".[144] I am of the view that any limitation to Kabuga's right to be present during the proceedings should be analyzed and determined within the existing framework provided by the Statute, the Rules, and the jurisprudence.

39. In addition, the alternative finding procedure may have important implications on the legal basis for Kabuga's detention. While Kabuga is currently detained at the UNDU under the regime of detention on remand, pursuant to Rule 67 of the Rules, it is yet unknown how the discontinuation of the trial and its replacement by an alternative finding procedure impact the legal ground justifying such detention. Further, the question of the hypothetical detention of Kabuga should a verdict of "non-acquittal" be entered as the outcome of the alternative finding procedure is similarly unknown. These are particularly important questions affecting Kabuga's fundamental right to

[142] *See* Majority Decision, para. 54.
[143] *See, e.g., Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR73.1, Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 4 March 2016 ("*Hadžić* Decision of 4 March 2016"), para. 8. The Appeals Chamber had further found that this rule is not limited to intentional disruptions. *See Hadžić* Decision of 4 March 2016, para. 8.
[144] *Hadžić* Decision of 4 March 2016, para. 8.

liberty, and his right not to be subject to arbitrary detention, as enshrined in Article 9 of the ICCPR.[145]

40. I consider that the Trial Chamber should resume the trial of the Accused without undue delay, as guaranteed by Article 19(4)(c) of the Statute, and follow the applicable procedure as regulated by the Statute and the Rules, also taking into account the relevant jurisprudence. For the foregoing reasons, I respectfully disagree with the decision from the Majority to exercise such a form of paternalism[146] and *de facto* guardianship over the Accused, which runs against his interests and preferences.[147] As detailed above, I am of the view that the public interest and general objectives such as peace and reconciliation cannot justify the implementation of such innovative criminal procedure.

41. I therefore consider that recognizing Kabuga's rights while ensuring that the Mechanism fulfils its purpose commands: first, to recognize Kabuga's right to legal capacity, in refraining from declaring him unfit to stand trial; second, to avoid trying him within the framework of an alternative process to a regular trial – such as an alternative finding procedure – which is not provided for by the Statute, the Rules, nor the jurisprudence of the Mechanism, is in itself discriminatory, and fails to provide the legal framework for such procedure as well as for Kabuga's detention; and third, to conduct Kabuga's trial within the regular framework of the Mechanism, provided that all accommodations are put in place to enable Kabuga to participate in his trial, to the maximum extent possible.

42. In conclusion, I respectfully disagree with the Majority's finding that Kabuga is unfit to stand trial. I consider that Kabuga has not demonstrated his unfitness to stand trial, and that such unfitness is not supported by the medical evidence on the record. On the contrary, I am convinced that Kabuga retains a number of capacities which allow him to reach the legal standard set out in our jurisprudence. Further, and in order to safeguard Kabuga's best interests and his right to legal

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[145] Article 9 of the ICCPR provides that: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[146] *See* Arstein-Kerslake *et al.*, *Human Rights and Unfitness to Plead*, p. 408.

[147] *See* Defence Submission in Response to the Chamber's Order of 25 April 2023, 15 May 2023 (original French version filed on 9 May 2023), paras. 11-31.

capacity in accordance with the CRPD, I am of the view that Kabuga should be tried within the regular framework established by the Statute, the Rules and the jurisprudence, and should benefit from all necessary accommodations to facilitate his meaningful participation. I am further convinced that the Statute and the Rules enable the Trial Chamber to exercise its discretionary powers to ensure that Kabuga's fair trial rights are guaranteed. In my opinion, such approach would be in the interest of justice, as it would strike a fair balance between the interests of the victims and Kabuga's right to participate in the proceedings against him.

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

Done this 6th day of June 2023,
At The Hague,
The Netherlands

Judge Mustapha El Baaj

[Seal of the Mechanism]

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