

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT

Date: 13 June 2022

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Abubacarr Tambadou

Decision of: 13 June 2022

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON FÉLICIEN KABUGA'S FITNESS TO STAND TRIAL
AND TO BE TRANSFERRED TO AND DETAINED IN ARUSHA**

Office of the Prosecutor:

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

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

1. The Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively)¹ hereby renders its decision on whether Mr. Félicien Kabuga is presently fit to stand trial and whether it is appropriate at this time to transfer him to and detain him in Arusha, Tanzania. The Trial Chamber issues this decision publicly, consistent with the Defence’s practice of allowing for public disclosure of the key medical incidents relevant to the determination of Kabuga’s fitness to stand trial without revealing “intimate details”.²

I. BACKGROUND

2. Kabuga, who was initially indicted before the International Criminal Tribunal for Rwanda in 1997,³ is an 87-year-old accused before the Mechanism based on the amended indictment filed on 1 March 2021.⁴ Subsequent to his arrest in France in May 2020, he was temporarily transferred on 26 October 2020 to the Hague Branch of the Mechanism for a detailed medical assessment to determine whether and under what circumstances he may be safely transferred to the Arusha Branch of the Mechanism for trial.⁵

3. Since 9 December 2020, following initial orders for medical evaluations, the Trial Chamber has received twice monthly medical reports on Kabuga’s health from the Medical Officer at the United Nations Detention Unit (“UNDU”) at the Hague Branch.⁶ Early reports in December 2020 and January 2021 generally indicated that Kabuga was a moderately vulnerable, elderly individual

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

² See generally Transcript (“T.”) 7 June 2022. See also T. 7 June 2022 p. 2 (“The Trial Chamber also asked the Defence to confer with the accused and to determine to what extent these hearings may be held in public. Now, Maître Altit, can I turn to you to ascertain how much of the hearing you consider can be conducted in public session? [Mr. Altit]: [Interpretation] Your Honour, after reflection, and after discussing it with F[é]licien Kabuga, our conclusion is that the best would be probably to have part of the hearing, a small part of it, as a public session, and the remainder, particularly when we’re talking about intimate details, in private session. And we sent a request in writing to this effect yesterday evening.”).

³ See *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997.

⁴ See *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-PT, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, 13 April 2011 (confidential); *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-I, Amended Indictment, 14 April 2011; Decision on Prosecution Motion to Amend the Indictment, 24 February 2021; Prosecution’s Second Amended Indictment, 1 March 2021 (public, with public and confidential annexes). A detailed procedural history related to the prior indictments charging Kabuga can be seen in a prior decision in this case. See Decision on Prosecutor’s Request to Amend the Arrest Warrant and Order for Transfer, 27 May 2020, paras. 2, 3.

⁵ See, e.g., Decision on Félicien Kabuga’s Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020 (“Decision of 21 October 2020”), para. 2; Preliminary Order Regarding Medical Examination of Félicien Kabuga, 29 October 2020 (“Order of 29 October 2020”), p. 1; Order Scheduling an Initial Appearance, 8 November 2020, pp. 1, 2.

⁶ See Order of 29 October 2020, pp. 1, 2; T. 11 November 2020 p. 4; Order Following Initial Appearance, 25 November 2020, p. 3. The Registrar filed medical reports from the UNDU Medical Officer on 9 and 23 December 2020, 6 and 20 January 2021, 3 and 22 February 2021, 2, 5, 17 and 31 March 2021, 14 and 28 April 2021, 12 and 26 May 2021, 9 and 23 June 2021, 7 and 21 July 2021, 4, 18 and 25 August 2021, 1, 15 and 29 September 2021,

with substantial chronic physical and mental conditions as well as limitations to activities of daily living.⁷ In a report filed on 3 February 2021, the UNDU Medical Officer expressed that he did not consider that these conditions prevented Kabuga's transfer to the Arusha Branch of the Mechanism for trial and noted that an additional report from a consulting gerontologist supported this finding, provided adequate resources were provided on account of Kabuga's age.⁸

4. On 5 February 2021, however, the Registrar informed the Pre-Trial Judge that Kabuga had fallen and broken his femur, requiring surgery,⁹ and subsequent medical reports in February and March 2021 reflected the UNDU Medical Officer's position that the Accused's health situation had significantly changed following this trauma.¹⁰ Kabuga's treatment for this trauma led to the discovery of a serious cardio-pulmonary issue and a subsequent diagnosis of osteoporosis.¹¹ Interactions with Kabuga during this time revealed an apparent decline in his short-term memory and his ability to contextualize, leading to regular incidents of momentary confusion.¹²

A. Independent Expert Gerontologist: Professor Francesco Mattace-Raso

5. In view of these changed circumstances, on 15 April 2021, pursuant to Rule 84(A) of the Rules of Procedure and Evidence ("Rules"), the Trial Chamber granted in part a Defence motion and ordered the Registrar to appoint an independent expert gerontologist to examine Kabuga and assist in ascertaining his fitness to travel to Arusha and stand trial there.¹³ The Trial Chamber instructed the medical expert to include in his or her report, *inter alia*, assessments of: (i) Kabuga's

13 and 27 October 2021, 11 and 24 November 2021, 8 and 22 December 2021, 5 and 19 January 2022, 2 and 16 February 2022, 2 and 16 March 2022, 6 and 20 April 2022, 4 and 18 May 2022, and 1 June 2022, respectively.

⁷ See Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 9 December 2020 (public, with confidential Annex), Annex, Registry pagination ("RP.") 400-398; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 23 December 2020 (public, with confidential Annex), Annex, RP. 444; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 20 January 2021 (public, with confidential Annex), Annex, RP. 828.

⁸ See Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 3 February 2021 (public, with confidential Annex), Annex, RP. 880.

⁹ See Registrar's Submission in Relation to the "Order for Submissions Related to Health" of 29 January 2021, 10 February 2021 (strictly confidential and *ex parte*; disclosed to the Defence following the Pre-Trial Judge's Decision of 24 February 2021), para. 3.

¹⁰ See Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 22 February 2021 (public, with confidential Annex), Annex ("Medical Report of 22 February 2021"), RP. 959; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 2 March 2021 (public, with confidential Annex), Annex ("Medical Report of 2 March 2021"), RP. 1038, 1037.

¹¹ See Medical Report of 22 February 2021, RP. 960; Medical Report of 2 March 2021, RP. 1038.

¹² See Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 5 March 2021 (public, with confidential Annex), Annex, RP. 1055, 1054; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 17 March 2021 (public, with confidential Annex), Annex, RP. 1142.

¹³ See Decision on Defence Motion Seeking an Order for Expert Medical Assessments Pursuant to Rule 84, 15 April 2021 (confidential) ("Decision of 15 April 2021"), paras. 16, 19. See also Defence Motion Seeking an Order for an Expert Medical Assessment Pursuant to Rule 84 of the Rules of Procedure and Evidence, 2 February 2021 (original French version filed on 22 January 2021; confidential, with public redacted version filed on the same day).

ability to be transferred safely to the United Nations Detention Facility at the Arusha Branch (“UNDF”); (ii) the compatibility of Kabuga’s health condition with detention at the UNDU and/or the UNDF; (iii) Kabuga’s ability to attend trial proceedings and to effectively exercise his fair trial rights to such a degree as to be able to understand the essentials of the proceedings and to instruct his counsel; and (iv) whether it was necessary and advisable for Kabuga to be examined by medical professionals in other areas of specialization to assess his fitness for travel to and detention in Arusha and to stand trial.¹⁴

6. The initial expert appointed by the Registrar on 29 April 2021 informed the UNDU Medical Officer on 6 May 2021 that he was unable to complete the assignment.¹⁵ Professor Francesco Mattace-Raso was subsequently appointed as an independent expert gerontologist by the Registrar on 19 May 2021, and he accepted the appointment on 21 May 2021.¹⁶

7. On 18 June 2021, Professor Mattace-Raso filed his report and concluded, *inter alia*, that Kabuga, “[w]ith adequate translation and explanation, [...] is able to understand the essence of the procedure that applies” and that there was “[n]o objection to [his] transfer to Tanzania [and] to detention in an institution there, provided that it is comparable to the current institution”.¹⁷ Professor Mattace-Raso did not indicate that any further assessment by medical professionals in other areas of specialization was necessary.

8. The Trial Chamber was subsequently informed that Kabuga required surgery, which was scheduled for August 2021, and that he had been admitted on two occasions to a civilian hospital due to a sudden renal failure and a “trans-ischemic attack”.¹⁸ Given that these new circumstances could impact the conclusions in the original expert report, the Trial Chamber, on 13 August 2021, ordered Professor Mattace-Raso to conduct a further medical assessment after Kabuga recovered

¹⁴ See Decision of 15 April 2021, para. 19. The Trial Chamber further instructed the independent medical expert to include in his or her report: (i) a detailed assessment of Kabuga’s current physical and mental health and a comprehensive prognosis and the effectiveness of his course of treatment and rehabilitation; and (ii) recommendations, if any, concerning appropriate treatments and their availability at the UNDU and UNDF and/or elsewhere in The Netherlands and in Tanzania. See Decision of 15 April 2021, para. 19.

¹⁵ See Registrar’s Notification of Appointment of Medical Expert, 29 April 2021 (confidential, with confidential Annex), para. 2; Registrar’s Submission Regarding the Appointment of an Independent Medical Expert, 7 May 2021 (confidential), paras. 2-4.

¹⁶ See Registrar’s Notification of Appointment of Medical Expert, 21 May 2021 (confidential, with confidential Annex), para. 2.

¹⁷ Registrar’s Submission in Relation to the “Decision on Defence Motion Seeking an Order for Expert Medical Assessments Pursuant to Rule 84” of 15 April 2021, 18 June 2021 (confidential, with confidential Annex), para. 3, Annex, RP. 1497-1494.

¹⁸ See Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 21 July 2021 (public, with confidential Annex), Annex, RP. 1566; Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 4 August 2021 (public, with confidential Annex), Annex, RP. 1577, 1576. See also Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 23 June 2021 (public, with confidential Annex), Annex, RP. 1503.

from surgery and to file a supplemental report with information necessary to address issues central to determining Kabuga's fitness to travel and stand trial.¹⁹ As Kabuga's surgery had been planned for August 2021, the supplemental report of the Professor Mattace-Raso was originally ordered to be filed by 28 September 2021.²⁰ However, Kabuga was later diagnosed with pneumonia which, in combination with stresses on the Dutch medical system due to the Covid-19 pandemic, resulted in his surgery being delayed until 7 October 2021.²¹

9. Professor Mattace-Raso was able to meet with Kabuga on 11 November 2021²² and filed his supplemental expert report on 26 November 2021.²³ The expert concluded that Kabuga "has no additional risk when compared with other persons of the same age" as regards travelling and did not currently need specialist medical assistance.²⁴ However, the expert found that any new cardiovascular event or acute diseases while detained in Arusha "would bring an additional risk when compared with the UNDU at The Hague due to the limited [m]edical [a]ssistance in Arusha".²⁵

10. Professor Mattace-Raso further concluded, based on his preliminary neurological and psychiatric examination as well as on a neuropsychological investigation, that Kabuga had "mild vascular cognitive impairment" and "cognitive decline", which did not have yet the characteristics of a dementia, noting that his orientation in time, place, and person was partially maintained and his thinking was "normal in pace".²⁶ Professor Mattace-Raso advised, however, that an additional evaluation by a forensic psychiatrist be conducted to assess Kabuga's ability to attend trial

¹⁹ See Order for Further Independent Expert Evaluation and for Additional Information from the Registry, 13 August 2021 (confidential) ("Order of 13 August 2021"), pp. 2-4; T. 6 October 2021 pp. 7, 8.

²⁰ Order of 13 August 2021, pp. 3, 4.

²¹ See Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 1 September 2021 (public, with confidential Annex), Annex ("Medical Report of 1 September 2021"), RP. 2304, 2303; Registrar's Submission in Relation to the "Order for Further Independent Expert Evaluation and for Additional Information from the Registry" of 13 August 2021, 10 September 2021 (confidential), paras. 3, 4; Registrar's Submission in Relation to the "Order for Further Independent Expert Evaluation and for Additional Information from the Registry" of 13 August 2021, 26 November 2021 (confidential, with confidential Annex) ("Registrar Submission of 26 November 2021"), paras. 3, 4; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 13 October 2021 (public, with confidential Annex), Annex ("Medical Report of 13 October 2021"), RP. 2472.

²² Registrar Submission of 26 November 2021, para. 4, Annex ("Mattace-Raso Second Report"), RP. 2719. See also Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 27 October 2021 (public, with confidential Annex), Annex, RP. 2494, 2493.

²³ See Registrar Submission of 26 November 2021, para. 5; Mattace-Raso Second Report, RP. 2719-2713.

²⁴ See Mattace-Raso Second Report, RP. 2714.

²⁵ See Mattace-Raso Second Report, RP. 2715, 2714. Professor Mattace-Raso took into consideration the fact that medical specialist assistance is not present at location and that the nearest specialists in dermatology, internal medicine, surgery, eye surgery, neurology, psychiatry, radiology, and urology are in Moshi, Tanzania, and that the nearest department of cardiology is in Nairobi, Kenya. See Mattace-Raso Second Report, RP. 2714.

²⁶ See Mattace-Raso Second Report, RP. 2717-2714.

proceedings and effectively exercise his fair trial rights, notably in light of a recent cerebrovascular incident.²⁷

B. Registrar's Submissions on Detention Conditions in Arusha

11. On 26 November 2021, the Registrar provided additional information, pursuant to the Trial Chamber's order, regarding whether the UNDF can handle Kabuga's specific limitations for activities of daily living and whether medical facilities in and around Arusha can provide comparable treatments to those in The Hague.²⁸ The Registrar assured the Trial Chamber that the UNDF would be able to manage Kabuga's specific limitations for activities of daily living upon his transfer to Arusha and that the necessary physical modifications have been made in Kabuga's designated cell and throughout the detention unit, notably to mitigate the risk of falling.²⁹ The Registrar also submitted that Kabuga could be accompanied 24 hours a day by detention officers and nurses, if required, and that social interactions would be encouraged to mitigate any negative impact he may incur from being the sole detainee.³⁰

12. The Registrar further specified that, taking into account Kabuga's care regime, the medical facilities in Arusha and Moshi, Tanzania, coupled with periodic consultations by a visiting gerontologist, can provide comparable treatments to those Kabuga receives in The Hague.³¹ The Registrar, however, indicated that, in case of a life-threatening emergency or a need for medical care which cannot be secured locally, the UNDF Medical Officer would consider a medical evacuation to Nairobi, Kenya, which is the nearest recognized regional medical centre for medical evacuation of persons under the care of the Mechanism.³²

²⁷ See Mattace-Raso Second Report, RP. 2718, 2716, 2714, 2713. During the same period in late November 2021, the Registrar further submitted an evaluation by Kabuga's treating gerontologist, who conducted a neuropsychological assessment and concluded that he had "mild cognitive impairment with a vascular origin", and, taking into account "his resilience after several hospital admissions, his learning ability and mild [Instrumental Activities of Daily Living] interference", that "there is no dementia". See Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 24 November 2021 (public, with confidential Annex), Annex, RP. 2700.

²⁸ Order of 13 August 2021, p. 5; Registrar's Submission in Relation to the "Order for Further Independent Expert Evaluation and for Additional Information from the Registry" of 13 August 2021, 26 November 2021 (confidential) ("Registrar's Additional Information of 26 November 2021").

²⁹ Registrar's Additional Information of 26 November 2021, paras. 10-13, 16, 24.

³⁰ Registrar's Additional Information of 26 November 2021, paras. 14, 15.

³¹ Registrar's Additional Information of 26 November 2021, paras. 17-24. The Registrar lists the specialised services available at the Arusha Lutheran Medical Centre in Arusha as including: (i) internal medicine specialists; (ii) general and laparoscopic surgeons; and (iii) emergency physicians. In addition, specialised services available at the Kilimanjaro Christian Medical Centre in Moshi include: (i) otolaryngologists; (ii) ophthalmologists; (iii) neurologists; (iv) psychiatrists; (v) dermatologists; and (vi) urologists. See Registrar's Additional Information of 26 November 2021, para. 19.

³² Registrar's Additional Information of 26 November 2021, para. 20.

C. First Independent Expert Forensic Psychiatrist: Professor Gillian Mezey

13. On 1 December 2021, following Professor Mattace-Raso's 26 November 2021 recommendation, the Trial Chamber ordered a further medical evaluation by an independent expert forensic psychiatrist.³³ On 14 December 2021, the Registrar appointed Professor Gillian Mezey.³⁴ In view of a subsequent submission from the Registrar that the initial filing deadline for the expert report was not practicable, notably because of travel restrictions related to the Covid-19 pandemic and pending translations of key documents from Kabuga's medical file,³⁵ the Pre-Trial Judge extended the deadline for Professor Mezey to file her report until 31 January 2022.³⁶

14. Professor Mezey was able to meet Kabuga on 17 January 2022 and, following her clinical assessment, a magnetic resonance imaging ("MRI") brain scan was further conducted at her request on 20 January 2022.³⁷ The expert's report, dated 28 January 2022, was submitted to the Trial Chamber on 31 January 2022.³⁸

15. In her report, Professor Mezey noted that the MRI investigation revealed "evidence of generalised and regional structural changes and damage, which are characteristic of and highly suggestive of Alzheimers Disease".³⁹ Her clinical assessment was that Kabuga was "moderately to severely cognitively impaired",⁴⁰ and that the "overall clinical picture" is of "mixed dementia" or, more specifically, "a combination of vascular dementia and Alzheimers Disease".⁴¹ She considered that Kabuga's dementia "is moderate to severe in nature and is clearly progressive",⁴² with "clear progression of the dementia over the past year",⁴³ noting that his "cognitive functioning becomes markedly worse during episodes of physical illness".⁴⁴ Ultimately, she considered that her assessments, the medical records, information from Kabuga's daughter, and radiological findings

³³ See Order for Further Independent Medical Expert Evaluation, 1 December 2021 (confidential), p. 3.

³⁴ 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.

³⁵ Registrar's Submission in Relation to the "Order for Further Independent Medical Expert Evaluation" of 1 December 2021, 12 January 2022 (confidential), paras. 4-7.

³⁶ Supplemental Order on Order for Further Independent Medical Expert Evaluation, 14 January 2022, pp. 1, 2.

³⁷ Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 19 January 2022 (public, with confidential Annex) ("Medical Report of 19 January 2022"), Annex, RP. 2957; 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) ("Registrar's Submission of 31 January 2022"), Annex ("Mezey Report"), p. 3, para. 53; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 2 February 2022 (public, with confidential Annex), Annex ("Medical Report of 2 February 2022"), RP. 3048. See also Witness Mezey, T. 1 June 2022 pp. 37, 38, 49, 50.

³⁸ See Registrar's Submission of 31 January 2022, para. 3; Mezey Report, p. 1.

³⁹ Mezey Report, para. 56.

⁴⁰ Mezey Report, para. 90.

⁴¹ Mezey Report, para. 57.

⁴² Mezey Report, para. 58.

⁴³ Mezey Report, para. 59.

⁴⁴ Mezey Report, para. 60.

point to a genuine organic brain disease and not to a cognitive impairment being fabricated.⁴⁵ Professor Mezey suggested that Professor Mattace-Raso, who had previously considered that Kabuga was not suffering from dementia, may wish to review his diagnosis in view of this new information.⁴⁶

16. In light of these findings, Professor Mezey estimated that Kabuga is capable of understanding the nature of the charges, provided these are slowly and carefully explained, and that he is able to enter a plea.⁴⁷ However, noting that his ability to retain information remains extremely limited, that he is unable to read or write as a result of his dementia, that he is disoriented in time and place, and emotionally irritable, she considered that he is not capable of instructing counsel, of testifying, and generally of understanding or fully participating in any trial.⁴⁸ Professor Mezey concluded “on balance” that Kabuga is currently unfit for trial⁴⁹ and that, given the progressive nature of his degenerative brain disease, his cognitive function can only be expected to decline over time, with acute deterioration to be expected during physical health crises,⁵⁰ which may occur “regular[ly]” during the course of a possibly “prolonged trial”.⁵¹

D. Professor Mattace-Raso’s Supplement and Appointment of Additional Experts

17. On 16 February 2022, Professor Mattace-Raso filed a supplement to his existing reports in view of the new conclusions as to Kabuga suffering from dementia.⁵² Professor Mattace-Raso considered the Mezey Report complete and complementary to his, noting that the radiological findings give information “on the nature of the process” of dementia, and that “[c]ognitive disorders have progressive character” and are “expected to deteriorate over time”.⁵³

18. On 15 March 2022, the Trial Chamber granted a Prosecution motion seeking the appointment of a Kinyarwanda-speaking medical expert of its choice to conduct a forensic

⁴⁵ Mezey Report, para. 63.

⁴⁶ Mezey Report, para. 65.

⁴⁷ See Mezey Report, paras. 68-74.

⁴⁸ See Mezey Report, paras. 75-85.

⁴⁹ The Trial Chamber observes that the Professor Mezey used the phrasing “unfit to plead”. See Mezey Report, para. 87. Read in the context of the entire report and in light of her testimony, this is a conclusion as to Kabuga’s general ability to exercise his fair trial rights rather than a conclusion focused on his ability to enter a plea, of which she found him capable. See Mezey Report, paras. 68-91; Witness Mezey, T. 1 June 2022 p. 53.

⁵⁰ See Mezey Report, paras. 88, 89. Professor Mezey noted the inter-dependence between physical and mental health in the elderly, that Kabuga has had recurrent “health crises” requiring treatment in the civilian hospital, and he has repeatedly received emergency treatment. See Mezey Report, para. 90.

⁵¹ Mezey Report, para. 91.

⁵² Order on Further Submissions from the First Independent Expert, 8 February 2022 (confidential), p. 2; Registrar’s Submission in Relation to the “Order on Further Submissions from the First Independent Expert” of 8 February 2022, 16 February 2022 (confidential, with confidential Annex), para. 3, Annex (“Mattace-Raso Third Report”), RP. 3131.

⁵³ Mattace-Raso Third Report, RP. 3131.

psychiatric examination of Kabuga.⁵⁴ Furthermore, the Trial Chamber, noting that Professor Mezey's conclusion that Kabuga is unfit to stand trial may be a basis for terminating proceedings, considered it essential to receive a second independent expert opinion and *proprio motu* instructed the Registrar to appoint an independent expert in forensic psychiatry in order to assist it in reaching a reasoned and informed decision as to Kabuga's fitness to stand trial.⁵⁵ The Trial Chamber instructed the two experts to file their reports within 30 days of their respective appointments.⁵⁶ The Defence's request for certification to appeal this Decision of 15 March 2022 was subsequently dismissed as premature.⁵⁷

E. Second Independent Expert Forensic Psychiatrist: Professor Henry Kennedy

19. On 22 March 2022, following the Trial Chamber's order, the Registrar appointed Professor Henry Gerard Kennedy as the second independent expert forensic psychiatrist.⁵⁸ Professor Kennedy visited the UNDU and conducted interviews with Kabuga and various medical practitioners and detention officers on 6 and 7 April 2022 and filed his expert report on 21 April 2022.⁵⁹ Based on these interviews, as well as on medical records and recordings of status conference hearings,⁶⁰ Professor Kennedy estimated that Kabuga "meets some of the criteria for a possible mild neurocognitive disorder in the context of old age and physical frailty", with evidence of "modest cognitive decline from a previous level of performance",⁶¹ which he found is not best described by Alzheimer's disease but by normal aging.⁶² He underlined that "[l]oss of brain volume is a normal aspect of aging and does not necessarily relate to significant loss of cognitive capacity

⁵⁴ Decision on Prosecution Motion for Further Fitness Evaluation and Order for Independent Expert Evaluation, 15 March 2022 (confidential) ("Decision of 15 March 2022"), paras. 21-23, 28. *See also* Prosecution Motion for Further Fitness Evaluation and Access to Records, 9 February 2022 (confidential).

⁵⁵ Decision of 15 March 2022, paras. 24, 25, 28.

⁵⁶ Decision of 15 March 2022, para. 28.

⁵⁷ Decision on Félicien Kabuga's Motion for Certification to Appeal the Decision Regarding Further Fitness Evaluation of 15 March 2022, 8 April 2022 (confidential), p. 3.

⁵⁸ 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.

⁵⁹ 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), para. 3, Annex ("Kennedy Report"), paras. 1.8, 1.9, 40.1-55.45.

⁶⁰ Kennedy Report, paras. 1.10, 4.1-55.45.

⁶¹ Kennedy Report, Opinion paras. 5, 5(b). Professor Kennedy notably indicated that, despite Kabuga's complex attention and executive function being subject to "mild symptoms", he "could find no evidence of impairment beyond normal aging, effort and motivation" or "of a significant deficit in learning, immediate memory span or recent memory". *See* Kennedy Report, p. 46. He also found "no evidence of impairment of language functions beyond some possible educational gaps". *See* Kennedy Report, p. 46. With regard to perceptual motor functions and social cognition, Professor Kennedy noted the absence of obvious evidence of impairment "beyond normal aging and hearing loss" and observed that the Accused's interactions with the Court reveal "intact mental capacities for function here". *See* Kennedy Report, p. 47.

⁶² Kennedy Report, Opinion para. 5(c). Professor Kennedy noted several medical reports that he reviewed and suggested that other medical examiners did not consider that Kabuga suffered from dementia. *See, e.g.*, Kennedy Report, paras. 13.1, 28.10, 29.11, 30.1, 40.5.

although it may relate to reduced cognitive reserve”.⁶³ The expert also acknowledged that physical illness may be directly relevant to mental capacity and that Kabuga remains susceptible to future episodes of delirium – a temporary impairment of consciousness associated with confusion, illusions or hallucinations, mood swings, agitation, and irritability.⁶⁴

20. Regarding the Accused’s fitness to stand trial, Professor Kennedy concluded that Kabuga has the capacity to understand the meaning of a plea of not guilty or guilty and that he could demonstrate his capacity to understand the nature of the charges.⁶⁵ Professor Kennedy also expressed his opinion that Kabuga’s ability to understand the course of the proceedings and to understand details of the evidence is “sufficient when given appropriate assistance”, and underlined that this would be greatly facilitated by “[a] process whereby the amount of evidence to be presented in court could be minimised, summarised and where possible agreed”.⁶⁶ The expert further considered that Kabuga has the ability to understand the consequences of the proceedings and that he demonstrated the ability to make points relevant to his defence, and thus to instruct counsel, noting that communication with his legal team can be supported and assisted in a number of ways.⁶⁷ Professor Kennedy finally observed that the ability to testify is the most difficult to assess from a psychiatric point of view, but that, in his opinion, Kabuga is capable of giving oral evidence in chief if allowed sufficient time, assistance, and support, and that there may be a rational case for allowing written responses to questions for cross-examination.⁶⁸

F. Prosecution Medical Expert: Dr. Rutakayile Bizoza

21. On 22 March 2022, the Prosecution filed a notice of appointment, as its expert, of Dr. Rutakayile Bizoza,⁶⁹ whose qualifications were verified by the Registrar on 25 March 2022.⁷⁰ On 19 April 2022, in view, *inter alia*, of submissions that administrative delays prevented the expert from traveling to the Netherlands before 15 April 2022 and from accessing the UNDU before the initial deadline, the Trial Chamber allowed the Prosecution Medical Expert to file his report no later than 6 May 2022.⁷¹

⁶³ Kennedy Report, Opinion para. 4(b).

⁶⁴ Kennedy Report, Opinion paras. 4(d), 4(e).

⁶⁵ Kennedy Report, Opinion paras. 6(i), 6(ii). *See also* Kennedy Report, paras. 55.24-55.29.

⁶⁶ Kennedy Report, Opinion paras. 6(iii), 6(iv).

⁶⁷ Kennedy Report, Opinion paras. 6(v), 6(vi).

⁶⁸ Kennedy Report, Opinion para. 6(vii).

⁶⁹ Notice of Appointment of Prosecution Medical Expert, 22 March 2022 (confidential), paras. 1-3.

⁷⁰ Registrar’s Further Submission in Relation to the “Decision on Prosecution Motion for Further Fitness Evaluation and Order for Independent Expert Evaluation” of 15 March 2022, 25 March 2022 (confidential), paras. 4-6. *See also* Supplement to the Notice of Appointment of Prosecution Medical Expert, 29 March 2022 (confidential), para. 2.

⁷¹ Decision on Urgent Prosecution Motion for Extension of Time to File Medical Expert Report, 19 April 2022, pp. 1, 2.

22. Dr. Bizoza met with Kabuga on 21 April 2022 and filed his report on 6 May 2022.⁷² In his report, he observed that Kabuga maintains “a good capacity to recall memories” and shows “a very good coherence of the mind”.⁷³ Dr. Bizoza concluded that the Accused has the ability to plead, understand the nature of his charges, instruct counsel, testify if helped by hearing aids, and therefore that he is fit to stand trial⁷⁴ and could be transferred to Arusha and continue his medical care there.⁷⁵

G. Scheduling of Hearing and Appointment of Defence Medical Expert

23. On 27 April 2022, the Trial Chamber informed the parties of its intent to hold a hearing of the experts the week of 30 May 2022.⁷⁶ During the status conference of 11 May 2022, the Trial Chamber provisionally maintained the schedule.⁷⁷

24. On 9 May 2022, the Defence filed a motion seeking the appointment of its own medical expert, Dr. An Chuc,⁷⁸ which was granted on 13 May 2022.⁷⁹ Dr. Chuc’s qualifications were verified by the Registrar 17 May 2022.⁸⁰ Having previously examined Kabuga, she was already familiar with his medical history and, consequently, was ordered to file her report before 30 May 2022.⁸¹ After an extension of time requested by the Defence was granted,⁸² Dr. Chuc filed her report on 3 June 2022.⁸³

H. Joint Statement of Professor Mezey and Professor Kennedy

25. On 16 May 2022, the Pre-Trial Judge further ordered Professor Mezey and Professor Kennedy, on a confidential basis, to discuss issues upon which they had been called to evaluate as experts and to prepare a joint statement on points of agreement and disagreement, detailing their

⁷² Notice of Filing of Prosecution Medical Expert Report, 6 May 2022 (confidential, with confidential Annex A), para. 1, Annex A (“Bizoza Report”), p. 3.

⁷³ Bizoza Report, p. 5.

⁷⁴ Bizoza Report, pp. 6, 7.

⁷⁵ Bizoza Report, p. 7.

⁷⁶ T. 11 May 2022 p. 6.

⁷⁷ T. 11 May 2022 p. 10.

⁷⁸ Request for an Expert Report on the Health of Félicien Kabuga by an Expert Proposed by the Defence, 27 May 2022 (confidential; original French version filed on 9 May 2022).

⁷⁹ Decision on Defence Motion for Appointment of a Defence Medical Expert, 13 May 2022 (confidential) (“Decision of 13 May 2022”), pp. 2, 3.

⁸⁰ Registrar’s Submission in Relation to the “Decision on Defence Motion for Appointment of a Defence Medical Expert” of 13 May 2022”, 17 May 2022 (confidential), para. 3.

⁸¹ Decision of 13 May 2022, pp. 2, 3.

⁸² See T. 31 May 2022 p. 3.

⁸³ The Trial Chamber observes that Dr. Chuc’s report was received at 12.18 a.m. Arusha time on 3 June 2022, which was 11.18 p.m. in The Hague. *Notification par la Défense de Félicien Kabuga du dépôt au dossier de l’affaire du rapport de son expert*, 3 June 2022 (confidential, with confidential Annex), Annex (“Chuc Report”), Notification Page. The Trial Chamber finds that the Chuc Report is validly filed.

reasons.⁸⁴ On 25 May 2022, the independent expert forensic psychiatrists filed their joint statement,⁸⁵ wherein they agreed that fitness to stand trial is a dynamic concept.⁸⁶ They also agreed that Kabuga has significant physical illnesses, is physically frail with reduced physiological reserve to cope with intercurrent illnesses, and that his mental health, including his cognitive functioning, tends to fluctuate day to day and that he is liable to episodes of delirium during acute illnesses, from which he recovers.⁸⁷ They also agreed that there is evidence of vascular disease affecting the brain and of previous cerebrovascular accidents, evidenced on the MRI by “patchy ischaemic and other age related changes to Mr. Kabuga’s brain”.⁸⁸

26. Professor Mezey re-affirmed that she considers the degree of Kabuga’s cognitive impairment to be substantial, and manifested in fluctuations in mood and personality and, *inter alia*, deficits in: (i) short term memory (acquisition and retention); (ii) complex decision making; (iii) attention and concentration; and (iv) reasoning and judgement and executive functioning.⁸⁹ Professor Mezey considered that the cognitive impairment results from a combination of vascular cognitive impairment and dementia.⁹⁰ She believed that there is evidence of “step wise decline and persisting residual deficits” following each physical health crisis.⁹¹

27. Professor Kennedy maintained that Kabuga’s cognitive impairment is mild and concomitant with his age and general health, and he did not agree that Kabuga meets the diagnostic criteria for dementia or Alzheimer’s disease.⁹² Professor Kennedy considered that Kabuga recovers fully between acute episodes of physical health crisis.⁹³

28. Turning to the non-exhaustive list of capacities relevant to assessing Kabuga’s fitness for trial, the independent expert forensic psychiatrists agreed that Kabuga has the ability to plead, and to understand the nature of the charges and the consequences of the proceedings.⁹⁴ However, they

⁸⁴ Order Instructing the Independent Medical Experts to Prepare a Joint Statement, 16 May 2022 (confidential), p. 2.

⁸⁵ 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), para. 3, Annex (“Joint Statement”).

⁸⁶ Joint Statement, p. 2.

⁸⁷ Joint Statement, pp. 2, 3.

⁸⁸ Joint Statement, p. 3.

⁸⁹ Joint Statement, p. 3.

⁹⁰ Joint Statement, p. 3.

⁹¹ Joint Statement, p. 3.

⁹² Joint Statement, p. 3.

⁹³ Joint Statement, p. 3.

⁹⁴ Joint Statement, pp. 4, 7. Professor Mezey, however, is of the view that Kabuga will not engage in discussion or contemplate any outcome other than a finding of not guilty. *See* Joint Statement, p. 7.

disagreed as to whether Kabuga could understand the course of proceedings, understand the details of the evidence, instruct counsel, and testify.⁹⁵

29. In relation to understanding the course of the proceedings, Professor Kennedy considered that Kabuga can understand them and concluded that his short-term memory is functionally intact, given his capacity to learn new material and notable social awareness, interest, and sensitivity.⁹⁶ Professor Kennedy, nonetheless, found that Kabuga would benefit from limited duration and content of live evidence at trial, breaks every hour with refreshments, two hours of proceedings twice per day, “chunking” and “scaffolding” of evidence, and presenting evidence in ways that assist Kabuga such as oral explanation in Kinyarwanda.⁹⁷ Professor Mezey, on the other hand, considered that Kabuga is not able to understand the course of proceedings due to his short-term memory impairment.⁹⁸ Even with Professor Kennedy’s proposed support in court, Professor Mezey was of the view that Kabuga will not be able to follow or understand the course of proceedings or participate meaningfully in his trial given marked cognitive deficits, including his inability to process or retain complex pieces of information, lack of mental agility, and poor short-term memory.⁹⁹

30. With respect to understanding the details of the evidence, Professor Kennedy found that Kabuga retains this capacity, but is subject to “editing and curating” of the content, limiting the duration of proceedings daily, allowing for breaks and refreshments, providing assistance in person before trial and in the “dock” at trial by a Defence team or trusted family member who speaks Kinyarwanda, and the provision of sensory aids including on-ear headphones and large video screen.¹⁰⁰ Professor Mezey, on the other hand, concluded that Kabuga’s cognitive deficits severely limit his capacity to understand the details of the evidence more than superficially.¹⁰¹ She emphasized that, because he cannot read, it would be necessary to go through the evidence with him orally and that he would need to be repeatedly reminded of the details of the evidence (and any emerging new evidence) to assist in understanding.¹⁰² While “editing down” the details would help, Professor Mezey was unsure as to how feasible this may be.¹⁰³ Professor Mezey agreed that the

⁹⁵ Joint Statement, pp. 4-8.

⁹⁶ Joint Statement, p. 4.

⁹⁷ Joint Statement, pp. 4, 5.

⁹⁸ Joint Statement, p. 4.

⁹⁹ Joint Statement, pp. 4, 5.

¹⁰⁰ Joint Statement, p. 5.

¹⁰¹ Joint Statement, p. 5.

¹⁰² Joint Statement, pp. 5, 6.

¹⁰³ Joint Statement, p. 6.

measures proposed by Professor Kennedy would be required to assist Kabuga to understand the details of the evidence should the case proceed to trial.¹⁰⁴

31. As it relates to Kabuga's ability to instruct counsel, both independent expert forensic psychiatrists remarked on the mistrust Kabuga has had towards his counsel.¹⁰⁵ Professor Kennedy, nevertheless, maintained that Kabuga sufficiently possesses this capacity and that he would benefit from having a member of his Defence team who speaks Kinyarwanda, who visits him at least twice per week prior to trial to build trust and to ensure he is aware of the evidence against him, and who will be in the dock with him during trial, as well as a familiar language assistant and a family member for reassurance.¹⁰⁶ Professor Mezey, however, concluded that, regardless of remedial supportive measures aimed at assisting Kabuga, he would not be able to instruct his counsel because of his "mixed picture" brain disease, which impacts his memory retrieval and retention, receptive and expressive communication, judgement, attention, decision making, and reasoning and problem solving abilities.¹⁰⁷

32. Concerning Kabuga's ability to testify, Professor Kennedy found that he does possess that capacity as he has shown that he can address the Court in a succinct and relevant way.¹⁰⁸ He considered that Kabuga could be assisted, for instance in direct examination, with a prepared statement read out on his behalf and, in cross-examination, with prepared questions notified in advance, and allowing assistance to prepare answers in advance if necessary.¹⁰⁹ Professor Mezey, however, found that Kabuga lacks this capacity because of "receptive and expressive communication difficulties".¹¹⁰ She did not think that Kabuga could address the Court on complex or detailed matters and considered that, for example, his brief interactions with the Court are not a fair indication of how he would do under intense cross-examination.¹¹¹ Professor Mezey also did not view Professor Kennedy's suggestions as an appropriate or acceptable replacement for the opportunity to give evidence in chief "directly on the day" and considers his suggestions for cross-examination to be impractical.¹¹²

¹⁰⁴ Joint Statement, p. 6.

¹⁰⁵ Joint Statement, p. 6.

¹⁰⁶ Joint Statement, p. 6.

¹⁰⁷ Joint Statement, pp. 6, 7.

¹⁰⁸ Joint Statement, p. 7.

¹⁰⁹ Joint Statement, p. 7.

¹¹⁰ Joint Statement, p. 7.

¹¹¹ Joint Statement, p. 7.

¹¹² Joint Statement, pp. 7, 8.

I. Defence Medical Expert: Dr. An Chuc

33. As noted above, the Defence expert, Dr. Chuc, filed her report on 3 June 2022 after having received Kabuga's complete medical file, including the other expert reports filed in the case.¹¹³ Dr. Chuc, who had previously examined Kabuga on 23 September 2020, interviewed him on 27 May 2022.¹¹⁴ She reported that Kabuga requires almost permanent assistance for activities of daily living.¹¹⁵ She considered standardized measurements related to fall risks and independence and found that he has very high risk of falling and is not far from complete loss of independence.¹¹⁶

34. Dr. Chuc, who conducted the Mini Mental State Assessment and the Montreal Cognitive Assessment, concluded that, even allowing for Kabuga's illiteracy, the results of the tests were very low¹¹⁷ and show troubles in focussing, learning, memory, visual construction, and orientation in space and time.¹¹⁸ She did not consider that there are signs of a degenerative dementia, nor of a frontal syndrome.¹¹⁹

35. Dr. Chuc considered that, compared to the 6 September 2020 cerebral scan, the MRI from January 2022 shows an extension of cortico-subcortical atrophy and hippocampal atrophy that was not visible before.¹²⁰ In her opinion, such lesions may be seen in the elderly, even without known or documented diseases.¹²¹ She cautioned that the lacunar lesions (otherwise called Pierre Marie syndrome) and hippocampal atrophy (otherwise called Alzheimer's disease) progressively evolve towards dementia¹²² and that one cannot exclude that such pathology may develop with Kabuga.¹²³ Dr. Chuc considered that the inevitable worsening of the various pathologies which impact one another will increase Kabuga's frailty and vulnerability and lessen his capacities to follow the course of the proceedings.¹²⁴

36. Dr. Chuc considered that Kabuga is physically unable to keep pace with even slightly prolonged hearings due to his tiredness, as he is unable to control it.¹²⁵ Due to the fluctuations in his health and notwithstanding the modalities the Trial Chamber could adopt for the hearings, Dr. Chuc

¹¹³ Chuc Report, pp. 20, 27.

¹¹⁴ Chuc Report, pp. 2, 19-25.

¹¹⁵ Chuc Report, p. 24.

¹¹⁶ Chuc Report, pp. 23, 28.

¹¹⁷ Chuc Report, pp. 22, 23.

¹¹⁸ Chuc Report, p. 28.

¹¹⁹ Chuc Report, p. 28.

¹²⁰ Chuc Report, pp. 28, 29.

¹²¹ Chuc Report, p. 29.

¹²² Chuc Report, p. 29.

¹²³ Chuc Report, p. 29.

¹²⁴ Chuc Report, p. 29.

¹²⁵ Chuc Report, p. 30.

concluded that it is not medically possible to consider that Kabuga is: (i) capable of entering a plea and justifying his decision; (ii) capable of understanding the nature of the charges against him or understanding the difference between his direct or indirect implication in the events; (iii) capable of understanding the course of the proceedings, including what is happening around him during hearings, the impact of the oral arguments, the legal or factual questions discussed by the parties, nor the objections during questioning and the role of the participants; (iv) capable of understanding the details of the evidence, following the construction of a narrative, grasping the weaknesses or inconsistencies in the explanation and use of the facts; (v) capable of understanding the debates, their impact and their nature; (vi) capable of instructing counsel or discussing strategies with them; (vii) capable of orientating himself in time and space; and (viii) capable of testifying under oath and understanding the consequences of his testimony and its impact on his own fate.¹²⁶

J. Hearings: 31 May, 1 June, and 7 June 2022

37. After the parties agreed that there was no need to examine Professor Mattace-Raso,¹²⁷ the Trial Chamber held hearings from 31 May to 1 June 2022 to allow the parties and the Trial Chamber to question Professor Kennedy, Dr. Bizoza, and Professor Mezey. Professor Kennedy and Dr. Bizoza testified on 31 May 2022, and Professor Mezey testified on 1 June 2022. These experts principally maintained the evidence and opinions provided in their reports,¹²⁸ subject to some additions and clarifications which are detailed as necessary in the Discussion section below.

38. The parties presented oral submissions on 7 June 2022. The Defence places particular weight on the assessments provided by Professor Mezey and Dr. Chuc.¹²⁹ Notably, it highlights Professor Mezey's coherent reliance on anatomical changes to Kabuga's brain reflected in radiological evidence as supporting her diagnosis of dementia in the form of Alzheimer's disease,¹³⁰ and emphasizes Dr. Chuc's description of Kabuga's considerable disabilities that inhibit his meaningful participation.¹³¹ It contends that Professor Mezey has effectively countered suggestions that Kabuga is malingering – *i.e.* pretending to be ill.¹³² The Defence also highlights deficits in Professor Kennedy's evidence and his examination of Kabuga¹³³ and suggests that the accommodations he proposed are not practical and cannot compensate for an accused who is clearly

¹²⁶ Chuc Report, pp. 29, 30.

¹²⁷ See T. 7 June 2022 p. 2.

¹²⁸ See generally T. 31 May 2022; T. 1 June 2022.

¹²⁹ T. 7 June 2022 pp. 6-10, 12-17, 19-23, 25, 29, 31.

¹³⁰ T. 7 June 2022 pp. 5-10, 12-14, 22.

¹³¹ T. 7 June 2022 pp. 15-17.

¹³² T. 7 June 2022 p. 19.

¹³³ T. 7 June 2022 pp. 21-25.

unfit.¹³⁴ The Defence also contests the reliability of Dr. Bizoza's evidence, highlighting, in particular, his association with the Rwandan Patriotic Front and a lack of clarity as to his expertise in forensic psychiatric assessments.¹³⁵ It stresses that all experts agree that Kabuga should not be sent to Arusha and argues that sending him there would be a death sentence.¹³⁶

39. The Prosecution emphasizes that Kabuga's capacities must be viewed in light of the fact that he is represented and his fitness to stand trial should not erroneously be assessed on his abilities to carry out complex tasks that are expected to be borne by legal counsel.¹³⁷ It also asserts that a determination of fitness is dependent upon Kabuga's current state and is not an exercise that should include possible future decline impacting his prospective ability to exercise relevant capacities.¹³⁸ In this regard, it expressed its willingness to waive cross-examination to accommodate Kabuga's ability to testify.¹³⁹ The Prosecution further submits that Professor Mezey's opinions are not reliable, noting that she is the only physician to diagnose Kabuga with dementia, and submits that her process of evaluation is flawed.¹⁴⁰ The Prosecution notes that Kabuga relates less well to women and that Professor Mezey conducted her interview in an environment with stricter Covid-19 measures at the height of the pandemic.¹⁴¹ The Prosecution contends that these circumstances could have negatively impacted her assessment.¹⁴² The Prosecution highlights that Dr. Bizoza did not need translation to interact with Kabuga and argues that no weight should be given to Dr. Chuc's evidence, as she is a general practitioner, not a specialist.¹⁴³ Finally, the Prosecution takes no position on the suitability of transferring Kabuga to Arusha, Tanzania.¹⁴⁴

II. APPLICABLE LAW

40. The Trial Chamber recalls that the standard of fitness is that of "meaningful participation", allowing the accused to exercise his or her fair trial rights to such a degree as to be able to participate effectively in and understand the essentials of the proceedings, and that an accused's

¹³⁴ T. 7 June 2022 pp. 27-29.

¹³⁵ T. 7 June 2022 pp. 29, 30, 32, 33.

¹³⁶ T. 7 June 2022 p. 31.

¹³⁷ T. 7 June 2022 pp. 38-40.

¹³⁸ T. 7 June 2022 pp. 36, 41-44, 67.

¹³⁹ T. 7 June 2022 pp. 44, 45.

¹⁴⁰ T. 7 June 2022 pp. 37, 46-49, 51-57, 59, 60. Specifically, the Prosecution argues that Professor Mezey applied too high a standard for meaningful participation and that her assessment is flawed in light of her undue reliance on: (i) the Mini Mental State Assessment, which is a screening test rather than a diagnostic tool; (ii) information from Kabuga's daughter, who has a vested interest in a finding that her father is not fit; and (iii) the radiological report, which, having subsequently been officially translated from Dutch into English, is different from the translation she relied upon. See T. 7 June 2022 pp. 37, 48, 49, 51-55, 57.

¹⁴¹ T. 7 June 2022 pp. 55, 56.

¹⁴² T. 7 June 2022 pp. 55, 56.

¹⁴³ T. 7 June 2022 pp. 62, 63, 66, 67.

¹⁴⁴ T. 7 June 2022 p. 68.

fitness should turn on whether his or her capacities, “viewed overall and in a reasonable and [common sense] manner, are 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”.¹⁴⁵

41. As a practical matter, a non-exhaustive list of capacities to be evaluated in assessing an accused’s fitness to stand trial includes the ability 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.¹⁴⁶

42. In understanding the extent to which an accused must be able to exercise these and other capacities relevant to assessing his or her fitness to stand trial, the Appeals Chamber has emphasized that “fitness to stand trial should be distinguished from fitness to represent oneself” and that an “accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer.”¹⁴⁷ What is required for an accused to be deemed fit to stand trial is a standard of overall capacity allowing for meaningful participation in trial, provided that he or she is duly represented by counsel.¹⁴⁸

43. Finally, an accused claiming to be unfit to stand trial bears the burden of so proving by a preponderance of the evidence.¹⁴⁹

III. DISCUSSION

A. Fitness to Stand Trial

44. The Trial Chamber places particular weight on the evidence provided by the independent expert forensic psychiatrists appointed by the Trial Chamber. The weight afforded to their evidence and opinions is based on their considerable experience in the field, their field’s direct relevance to assessing Kabuga’s present fitness to stand trial, and the depth of their assessments, all of which are

¹⁴⁵ See Decision of 15 April 2021, para. 14, referring to *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, pp. 2, 3, n. 15 and references cited therein; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 (“*Strugar* Appeal Judgement”), para. 55.

¹⁴⁶ See *Strugar* Appeal Judgement, paras. 41, 55.

¹⁴⁷ *Strugar* Appeal Judgement, para. 60. See also *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 (“Processing the wealth of complex information inherent in international criminal proceedings is the role of defence counsel, in order to advise their clients.”).

¹⁴⁸ *Strugar* Appeal Judgement, para. 60.

¹⁴⁹ *Strugar* Appeal Judgement, para. 56 (“In this regard, the Appeals Chamber notes that this approach is consistent with the one used in common law jurisdictions where the burden of proof generally lies on the party which alleges the accused’s unfitness to stand trial and is considered to be discharged if this party can show its claim on the balance of probabilities.”).

apparent from their reports and testimony. Dr. Bizoza is a psychiatrist with experience in undertaking forensic psychiatric assessments. Likewise, Dr. Chuc is a physician, who is head of the forensic services unit at a hospital in France. She also medically assessed Kabuga in Paris prior to his transfer to The Hague. However, these party appointed experts do not possess the highly specialized experience in forensic psychiatric assessment acquired by Professor Mezey and Professor Kennedy during their distinguished careers. Nonetheless, the Trial Chamber considers that they provided relevant and useful information that complements the assessments and conclusions of the independent expert forensic psychiatrists, and it has, therefore, also relied, where appropriate, on certain aspects of their assessments, bearing in mind the reliability and credibility challenges raised as it concerns their evidence and opinions. The Trial Chamber has also taken account of Professor Mattace-Raso's assessment of Kabuga's medical condition, but is mindful that, in terms of conclusions on fitness for trial, he expressly recommended that a forensic psychiatrist undertake that assessment.¹⁵⁰ In view of this, the Trial Chamber has placed no weight on the conclusions he reached regarding Kabuga's fitness for trial in his June 2021 report.

45. The determination of Kabuga's fitness to stand trial turns on the extent of his cognitive decline and the impact that this presently has on capacities relevant to his meaningful participation in this trial. There is no dispute that Kabuga is frail and suffers from numerous, significant physical illnesses and has vascular damage to his brain.¹⁵¹ In this state, Kabuga has reduced physiological and cognitive reserves to cope with his existing underlying conditions and any new acute illnesses, which, at times, have severely inhibited his cognitive abilities.¹⁵²

46. Furthermore, in terms of the capacities relevant to the assessment of Kabuga's ability to participate meaningfully in his trial, the independent expert forensic psychiatrists agree that Kabuga possesses the capacity to enter a plea, understand the nature of the charges, and understand the consequences of the proceedings,¹⁵³ and the Trial Chamber accepts their shared view as to Kabuga's abilities in these respects. In so concluding, the Trial Chamber is mindful of Dr. Chuc's assertion that Kabuga does not possess any of these capacities.¹⁵⁴ However, Dr. Chuc is not an expert in forensic psychiatry, and her report lacks the nuanced consideration of these particular capacities demonstrated in the reports and testimony of the court-appointed independent expert

¹⁵⁰ See Mattace-Raso Second Report, RP. 2714, 2713.

¹⁵¹ See Joint Statement, pp. 2, 3 ("We agree that there is evidence of vascular disease affecting the brain and previous cerebrovascular accidents, evidenced on the MRI by patchy ischaemic and other age related changes to Mr Kabuga's brain."). See also Witness Bizoza, T. 31 May 2022 pp. 99, 100.

¹⁵² See Joint Statement, pp. 2, 3. See also Witness Kennedy, T. 31 May 2022 pp. 18-20, 38.

¹⁵³ See Joint Statement, pp. 4, 7. See also Witness Mezey, T. 1 June 2022 pp. 17, 55.

¹⁵⁴ See Chuc Report, pp. 29, 30.

forensic psychiatrists. The Trial Chamber, accordingly, places less weight on Dr. Chuc's opinion with respect to these competencies.

47. The first point of disagreement relates to diagnosing Kabuga as either having mild cognitive decline (generally concomitant with his age and health) or moderate to substantial cognitive decline evidencing dementia, likely in the form of Alzheimer's disease. The ensuing points of disagreement then turn on Kabuga's capacity to understand the course of the proceedings, understand the evidence, instruct counsel, and testify. Notably, no party has pointed to another capacity that should be considered in determining Kabuga's fitness for trial.

48. A number of doctors and experts, including Professor Kennedy, Dr. Bizoza, and Professor Mattace-Raso, have concluded that Kabuga's cognitive decline is mild and does not yet have the characteristics of dementia generally, or dementia in the form of Alzheimer's disease specifically.¹⁵⁵ Notably, the Defence expert, Dr. Chuc, has also indicated that she does not consider that there are signs of dementia in light of her cognitive testing, but cautioned that the radiological picture of lacunar lesions and hippocampal atrophy progressively evolve towards dementia and that it cannot be excluded that such pathology may develop with Kabuga.¹⁵⁶ Professor Kennedy's evidence is that, while Kabuga's mental health fluctuates day-to-day, he fully recovers cognitively between acute health crises.¹⁵⁷ Professor Kennedy is of the view that physical health crises accompanied by cognitive decline "may occur" over the course of a prolonged trial, and has taken account of that in expressing his expert opinion.¹⁵⁸

49. Professor Mezey, on the other hand, concludes that Kabuga's cognitive impairment is moderate to substantial and evidences Alzheimer's disease, the most common form of dementia.¹⁵⁹ In this respect, Professor Mezey considers that Kabuga's cognitive abilities are already quite low¹⁶⁰ and that each acute health crisis results in further cognitive decline from which Kabuga does not fully recover.¹⁶¹ Professor Mezey considers that recurrent physical health crises during the course of a prolonged trial accompanied by periods of cognitive decline (including delirium) are probable and will require breaks in the trial.¹⁶² Dr. Chuc likewise views it as inevitable that Kabuga's

¹⁵⁵ See Witness Kennedy, T. 31 May 2022 pp. 6, 27, 28, 32, 33, 37, 38, 45, 61; Witness Bizoza, T. 31 May 2022 pp. 86-88, 100, 101, 108, 109. See also Kennedy Report, paras. 13.1, 28.10, 29.11, 30.1, 40.5, Opinion para. 5(c); Mattace-Raso Second Report, RP. 2714; Bizoza Report, p. 5.

¹⁵⁶ Chuc Report, pp. 28, 29.

¹⁵⁷ See Witness Kennedy, T. 31 May 2022 pp. 18-20; Joint Statement, p. 3.

¹⁵⁸ See Joint Statement, pp. 2, 3.

¹⁵⁹ See, e.g., Mezey Report, paras. 56-58; Witness Mezey, T. 1 June 2022 pp. 79, 80.

¹⁶⁰ See, e.g., Witness Mezey, T. 1 June 2022 pp. 15, 16.

¹⁶¹ See Joint Statement, p. 3; Witness Mezey, T. 1 June 2022 pp. 9, 10.

¹⁶² See, e.g., Joint Statement, pp. 2, 3.

pathologies, which impact each other, will lead to further decline and that he possesses none of the capacities relevant to meaningful participation, and that he is not fit for trial.¹⁶³

50. The Trial Chamber has carefully examined the methods each court-appointed independent expert forensic psychiatrist used to form their differing diagnoses and is persuaded that their methods were thorough and driven by their vast and impartial medical expertise. They reviewed the medical files, conducted multiple interviews of persons who provide medical care to and/or are in regular contact with Kabuga, interviewed Kabuga, and, in particular, reviewed the radiology report from Kabuga's January 2022 MRI.¹⁶⁴ The Trial Chamber has also carefully considered the divergences between Professor Kennedy's and Professor Mezey's views as to the implications of the radiological evidence and what weight should be accorded to it,¹⁶⁵ and the utility of tests in determining Kabuga's capacities.¹⁶⁶ They both carefully considered the possibility of malingering.¹⁶⁷ Ultimately, the Trial Chamber has reached the view that both independent expert forensic psychiatrists drew on various pertinent sources of information in reaching their diagnoses, and the record simply does not show clearly that either expert's process in diagnosing Kabuga or that either diagnosis is more compelling than the other.¹⁶⁸ Neither the evidence of Dr. Bizoza nor Dr. Chuc, nor other relevant evidence on the record, alters the Trial Chamber's views in this respect.

¹⁶³ See Chuc Report, pp. 29, 30.

¹⁶⁴ See generally Kennedy Report; Mezey Report. See also, e.g., Witness Kennedy, T. 31 May 2022 pp. 59, 60; Witness Mezey, T. 1 June 2022 pp. 50, 52.

¹⁶⁵ Compare Witness Kennedy, T. 31 May 2022 pp. 12, 13, 38, 59, 60 with Witness Mezey, T. 1 June 2022 pp. 5, 6, 16, 17, 27, 50-52, 75, 76, 89, 90.

¹⁶⁶ Compare Kennedy Report, para. 35.22 and Witness Kennedy, T. 31 May 2022 pp. 8-10, 46, 47 with Witness Mezey, T. 1 June 2022 pp. 87, 88.

¹⁶⁷ See, e.g., Witness Kennedy, T. 31 May 2022 pp. 14, 15; Witness Mezey, T. 1 June 2022 pp. 23-26.

¹⁶⁸ The Trial Chamber notes the Prosecution's challenges to the credibility of Professor Mezey's evidence based on her reliance on information from Kabuga's daughter and son-in-law, who were aware that the Trial Chamber ordered her to investigate Kabuga's mental health. See, e.g., Joint Statement, p. 3; Mezey Report, paras. 34-50, 54, 64; Witness Mezey, T. 1 June 2022 pp. 19, 20, 32-37, 78. While there exists a possible interest for Kabuga's family to manipulate the information and present a picture that he is unfit for trial, Professor Mezey considered this and her evidence is persuasive as to why this circumstance did not dissuade her from considering information from them in reaching her diagnosis. See Witness Mezey, T. 1 June 2022 pp. 32-37. See also Witness Mezey, T. 1 June 2022 pp. 19, 20, 78, 84, 85. The Trial Chamber also finds no objective basis to discount Professor Mezey's evidence in light of the Prosecution's submissions that she, as a woman, might have experienced greater difficulty interviewing Kabuga than Professor Kennedy or because of different circumstances between her interview with Kabuga and Professor Kennedy's interviews with him. See T. 7 June 2022 pp. 55, 56. Finally, the Trial Chamber is not persuaded that it should discount Professor Mezey's diagnosis in light of the translation of the radiological report of Kabuga's January 2022 MRI that she relied upon in lieu of the subsequent "official" translation of the report that used different terminology. See T. 7 June 2022 p. 54. The Prosecution did not pose this difference when questioning Professor Mezey and provides no basis to suggest that changes are "fundamental" in relation of "key words". See Witness Mezey, T. 1 June 2022 pp. 32-74; T. 7 June 2022 p. 54. Furthermore, Professor Mezey was quite certain as to her diagnosis based on the overall clinical picture. See, e.g., Witness Mezey, T. 1 June 2022 pp. 79, 80.

51. A precise medical diagnosis or identifying the exact cause of the cognitive deficits currently afflicting Kabuga is not essential to the Trial Chamber's determination.¹⁶⁹ What matters is if the evidence, in particular the evidence of the court appointed independent expert forensic psychiatrists, demonstrates that it is more likely than not that Kabuga cannot participate meaningfully in this trial.¹⁷⁰ As noted above, the disputed capacities relevant to this conclusion concern Kabuga's ability to understand the course of proceedings, understand the evidence, instruct counsel, and testify. Professor Kennedy's report indicates that Kabuga possesses the capacities necessary to allow him to participate meaningfully in this trial.¹⁷¹ He has unequivocally testified that Kabuga can participate meaningfully in his trial having evaluated Kabuga's complex attention, executive function, learning and memory, language functions, perceptual motor functions, and social cognition.¹⁷² However, he proposes accommodations that would help Kabuga understand the course of proceedings,¹⁷³ evidence,¹⁷⁴ instruct counsel,¹⁷⁵ and testify.¹⁷⁶ The Trial Chamber disagrees with the Defence submissions that, *a priori*, the accommodations that have been proposed by Professor Kennedy are not practicable.¹⁷⁷

52. Professor Kennedy notes that Kabuga's cognitive deficits do not interfere with his capacity for "complex instrumental activities of daily living".¹⁷⁸ He places emphasis on Kabuga's ability to sustain attention during psychiatric interviews lasting one to two hours as well as contribute meaningfully in proceedings in person and in videoconference.¹⁷⁹ He notes Kabuga's ability to learn and retain new material and process it in a relevant way observing, for example, that Kabuga remembered the professor's name from one day to the next, and his awareness of information of current events gleaned from television watching.¹⁸⁰ Professor Kennedy highlighted anecdotal evidence of Kabuga's ability to make an entertaining joke as reflecting a high level of executive

¹⁶⁹ See *Strugar* Appeal Judgement, para. 61. This position is shared by the independent expert forensic psychiatrists. See, e.g., Joint Statement, p. 2 ("While the question of diagnosis is important to medical practitioners, for the court's purposes what is required is a view regarding the nature and degree of impairment of mental capacities relevant to participating in proceedings and exercising the identified rights"). See also Mezey Report, para. 66.

¹⁷⁰ *Strugar* Appeal Judgement, paras. 55, 61.

¹⁷¹ See Kennedy Report, Opinion para. 6.

¹⁷² See Witness Kennedy, T. 31 May 2022 pp. 6, 11, 27, 28.

¹⁷³ See Kennedy Report, Opinion, para. 6 (iii).

¹⁷⁴ See Witness Kennedy, T. 31 May 2022 pp. 48, 49, 73, 74; Kennedy Report, Opinion para. 6(iv).

¹⁷⁵ See Witness Kennedy, T. 31 May 2022 pp. 50, 68-70; Kennedy Report, Opinion para. 6(v).

¹⁷⁶ See Witness Kennedy, T. 31 May 2022 pp. 50-53, 74-76; Kennedy Report, Opinion para. 6(vii).

¹⁷⁷ See T. 7 June 2022 pp. 27-29.

¹⁷⁸ See Kennedy Report, Opinion para. 5(b).

¹⁷⁹ See Kennedy Report, Opinion para. 6(iii).

¹⁸⁰ See Kennedy Report, paras. 54.2, p. 46, Opinion para. 6(iv); Witness Kennedy, T. 31 May 2022 p. 26 ("Q. You also described a conversation in which Mr. Kabuga talked about his television viewing habits and his explanation of the current war in Ukraine, making parallels between events in Ukraine and the actions of President Kagame in Rwanda? A. Yes. Q. Does this episode reveal, again, anything in relation to those higher order functions? A. The ability to learn new material and retain it and produce it in a relevant way. Q. And would that transpose to the sorts of things that he would need to do in order to meaningfully participate in his trial? A. I believe so.").

functioning.¹⁸¹ Furthermore, while Professor Kennedy has proposed several accommodations for Kabuga to allow him to testify, he also testified that Kabuga could provide oral testimony as might be expected of any witness.¹⁸²

53. Professor Mezey, on the other hand, has found that Kabuga is not fit for meaningful participation in his trial.¹⁸³ Her assessment of Kabuga revealed short-term memory problems, problems in terms of information retention and processing, and problems with executive functioning, including not being able to follow rudimentary instructions.¹⁸⁴ She does not reach the same conclusions as Professor Kennedy on the significance of Kabuga's awareness of current events¹⁸⁵ and his ability to make a joke¹⁸⁶ on his fitness to stand trial. She does not agree that Kabuga is necessarily acquiring and processing new information and has given evidence that the severity of Kabuga's cognitive impairment is demonstrated in part by the fact that Kabuga lost the ability to write and can no longer speak French,¹⁸⁷ although Professor Kennedy's evidence suggests that Kabuga continues to engage in some limited communication in French and has learned some Dutch words or phrases.¹⁸⁸

54. The Trial Chamber, having reviewed the record as a whole does not consider that there is a persuasive evidentiary basis to wholly disregard one independent expert forensic psychiatrist's conclusions as to Kabuga's capacities to understand the course of proceedings, understand the evidence, instruct counsel, and testify. The Trial Chamber is mindful that Kabuga is represented and that his capacities need not be at their notionally highest level, or at the highest level that he has ever enjoyed.¹⁸⁹ The Trial Chamber disagrees with the Defence's suggestion that Professor Kennedy has set the bar too low in assessing Kabuga's capacities for meaningful participation or that his evidence which suggests extensive accommodations dictates a conclusion that he is not fit.¹⁹⁰ Conversely, the Trial Chamber also rejects the Prosecution's contention that Professor Mezey's assessment of Kabuga's abilities to exercise certain capacities, in some instances, applied a standard above what might be essential for an accused's meaningful participation in the trial.¹⁹¹

¹⁸¹ See Kennedy Report, paras. 55.1, 55.2; Witness Kennedy, T. 31 May 2022 pp. 25, 26, 40.

¹⁸² See Kennedy Report, Opinion para. 6(vii); Witness Kennedy, T. 31 May 2022 pp. 50-53. See also Witness Kennedy, T. 31 May 2022 pp. 74-76.

¹⁸³ See, e.g., Mezey Report, para. 87; Witness Mezey, T. 1 June 2022 pp. 17, 29, 76, 77.

¹⁸⁴ See Witness Mezey, T. 1 June 2022 pp. 18, 19.

¹⁸⁵ See Witness Mezey, T. 1 June 2022 pp. 63-65.

¹⁸⁶ See Witness Mezey, T. 1 June 2022 pp. 65, 66.

¹⁸⁷ See Mezey Report, paras. 6, 44; Witness Mezey, T. 31 May 2022 pp. 26, 65.

¹⁸⁸ See Kennedy Report, paras. 40.5, 41.2; Witness Kennedy, T. 31 May 2022 p. 64.

¹⁸⁹ See *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Consolidated Decision on the Continuation of Proceedings, 26 October 2015, para. 40.

¹⁹⁰ See T. 7 June 2022 pp. 21, 26-28.

¹⁹¹ See Witness Mezey, T. 1 June 2022 pp. 66, 67; T. 7 June 2022 pp. 37, 38, 54.

When confronted that her standard was too high, Professor Mezey affirmed that she also does not consider that Kabuga can “meaningfully” participate in his defence and that she would be happy to reword her report to this effect.¹⁹² Elsewhere, she expressed a concept of participation that is consistent with what might be expected of an accused represented by counsel.¹⁹³ Likewise, the timeframe in which she produced her report does not diminish her findings when considering their clarity and her subsequent testimony. Thus, the Trial Chamber does not consider this as a basis for disregarding her conclusions.

55. The Trial Chamber notes that this case is in the pre-trial phase during which the only opportunity for the judges to observe Kabuga was during his appearance at various status conferences. However, the video recordings of the two most recent status conferences tend to reflect that Kabuga can participate meaningfully. His conduct during the status conference in February 2022 reflects that he can follow what is happening in court, acquire and process the information put forth, and communicate his own and distinct positions on matters central to his defence. Moreover, the most recent reports from the UNDU Medical Officer show that Kabuga’s condition has been relatively stable.¹⁹⁴

56. Ultimately, the record reflects some uncertainty as to the precise extent to which Kabuga possesses the contested capacities. However, a finding that Kabuga is unfit to stand trial must be demonstrated by the preponderance of the evidence,¹⁹⁵ and the Trial Chamber finds that this evidentiary threshold has not been met by the Defence at the present time. Although Professor Mezey’s views raise concern, the Trial Chamber is not persuaded that Kabuga is unfit to participate meaningfully in a trial, especially with the accommodations that can be put in place, which the Prosecution has accepted are appropriate in this case, and having regard to the persuasive evidence of Professor Kennedy.

¹⁹² See Witness Mezey, T. 1 June 2022 pp. 68, 69.

¹⁹³ Compare Witness Mezey, T. 1 June 2022 pp. 76, 77 (“[The Witness]: The short answer is, yes, absolutely, you need to be able to actively engage in the process, and that means attend to what’s happened, take in what’s happening, understand what’s happening, process what’s going on, retain the information. All of these processes require active engagement and active ability to cognitively engage fully with what is going on in court. And there also needs to be a degree of flexibility because clearly the situation may change from day to day. So new information will get heard, new evidence will get produced, witnesses will say things in court that he will need to understand and understand the significance and then be able to instruct his lawyer.”) with *Strugar* Appeal Judgement, paras. 47, 60.

¹⁹⁴ See, e.g., Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 4 May 2022 (public, with confidential Annex), Annex, RP. 3633; Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 18 May 2022 (public, with confidential Annex), Annex, RP. 3681; Registrar’s Submission in Relation to the “Order Following Initial Appearance” of 25 November 2020, 1 June 2022 (public, with confidential Annex), Annex, RP. 3752.

¹⁹⁵ *Strugar* Appeal Judgement, para. 56.

57. The Trial Chamber has not found it easy to determine the question of Kabuga's fitness for trial, and is acutely aware that the situation may change with the passage of time. Bearing in mind the expert view that fitness is a dynamic concept and in light of the particular circumstances of this case, the Trial Chamber considers it appropriate to monitor on an ongoing basis Kabuga's ability to meaningfully participate in his trial and, for that purpose, to put in place a monitoring regime by independent experts. The Trial Chamber considers that this would ideally be done by a panel of independent experts, comprising Professor Mezey, Professor Kennedy, and a neurologist with no prior involvement in this case. In the event that the reports of the monitoring team or of the UNDU Medical Officer give rise to concern, the Trial Chamber will review the situation before proceeding further.

B. Fitness to Travel to Arusha and Be Detained at the UNDF

58. The Trial Chamber recalls that, shortly after Kabuga's arrest in May 2020, the Defence, the Prosecution, and the Registrar all filed submissions that, in view of Kabuga's uncertain health and the ongoing Covid-19 pandemic, he should be transferred to the Hague Branch of the Mechanism and not to the Arusha Branch.¹⁹⁶ The record unequivocally demonstrates that Kabuga is in a vulnerable and fragile state and requires intensive medical care and monitoring. Since arriving in The Hague in October 2020, Kabuga has been transferred several times to a civilian hospital on an emergency basis for urgent or specialist treatment.¹⁹⁷ He has undergone two surgeries.¹⁹⁸ He currently resides not in the UNDU but in a prison hospital in light of his need for 24-hour nursing care.¹⁹⁹

59. While the independent forensic experts diverge as to whether Kabuga is fit to stand trial, their views align on the fact that he has had repeated acute health incidents that would necessarily render him unfit at the given time.²⁰⁰ Professor Kennedy's position that Kabuga possesses the capacities that are relevant to determining his fitness to stand trial is materially reliant on ensuring that Kabuga's surroundings are familiar and comfortable,²⁰¹ and he testified unequivocally that

¹⁹⁶ See Decision of 21 October 2020, paras. 5, 6, 8, 9.

¹⁹⁷ See, e.g., Medical Report of 22 February 2021, RP. 961, 960; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 4 August 2021 (public, with confidential Annex), Annex, RP. 1577; Medical Report of 1 September 2021, RP. 2304; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 22 December 2021 (public, with confidential Annex), Annex, RP. 2872; Medical Report of 2 February 2022, RP. 3048.

¹⁹⁸ See Medical Report of 22 February 2021, RP. 961, 960; Medical Report of 13 October 2021, RP. 2472.

¹⁹⁹ Registrar's Additional Information of 26 November 2021, para. 3. See also Chuc Report, p. 22; Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 16 March 2022 (public, with confidential Annex), RP. 3375; Medical Report of 19 January 2022, RP. 2957.

²⁰⁰ See, e.g., Joint Statement, pp. 2, 3.

²⁰¹ See, e.g., Kennedy Report, Opinion para. 6. See also Joint Statement, pp. 5, 6.

transferring Kabuga to a different environment would materially delay the commencement of the proceedings.²⁰² Professor Mezey testified that transferring Kabuga to Arusha would likely have a “very significant impact” on the ability to commence and conduct proceedings²⁰³ and suggested that transferring him to Arusha presents “extremely high” risks of him deteriorating physically and cognitively.²⁰⁴ The Prosecution’s expert, Dr. Bizoza, testified that, in light of investigations conducted after he filed his report, he had reconsidered his position on the suitability of Kabuga being tried in Arusha.²⁰⁵

60. The Trial Chamber is mindful and appreciative of the extensive accommodations made to the UNDF so that Kabuga can safely be detained there, including the availability of 24-hour nursing care. It notes that the medical officers at both branches consider that Kabuga can be safely maintained at the UNDF.²⁰⁶ While Kabuga may not need specialist medical care at this moment, the record nonetheless reflects that the specialist care he would likely require is not present in Arusha specifically or nearby.²⁰⁷ The Prosecution no longer maintains the position expressed in 2021 that Kabuga should be transferred to the Arusha Branch,²⁰⁸ presently taking no position on the matter.²⁰⁹

61. Having determined that the trial should proceed, the Trial Chamber considers that the risks of disruption to Kabuga’s familiar surroundings may materially and adversely impact the ability to swiftly commence and conclude these proceedings, which is of paramount importance given Kabuga’s age and fragile health. As a result, Kabuga’s fundamental rights to fair and expeditious proceedings without undue delay dictate that they commence at the Hague Branch of the Mechanism. As a statutory matter, this case is intended to be tried at the Arusha Branch, and the Trial Chamber cannot exclude that, should Kabuga’s condition improve, this trial will eventually move to the Arusha Branch and that Kabuga will be detained there. This will be highly contingent on Kabuga’s medical situation and the balance between holding the trial there and avoiding unnecessary trial disruptions, which may bring this proceeding to a premature close. The Trial Chamber will revisit this issue as and when it is deemed necessary. However, at present, the Trial Chamber considers that it is in the interests of justice to commence this trial as soon as possible, which means proceeding at the Hague Branch.

²⁰² See Witness Kennedy, T. 31 May 2022 p. 81.

²⁰³ Witness Mezey, T. 1 June 2022 pp. 93, 94.

²⁰⁴ Witness Mezey, T. 1 June 2022 p. 94. See also Witness Mezey, T. 1 June 2022 p. 31.

²⁰⁵ Witness Bizoza, T. 31 May 2022 p. 113.

²⁰⁶ Registrar’s Additional Information of 26 November 2021, paras. 23, 24.

²⁰⁷ Registrar’s Additional Information of 26 November 2021, paras. 19, 20.

²⁰⁸ Prosecution Response to Order for Submissions of 24 June 2021, 2 July 2021 (confidential), para. 1.

²⁰⁹ See T. 7 June 2022 p. 68.

IV. DISPOSITION

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

FINDS that the Defence has not established that Kabuga is presently unfit for trial;

INVITES the Defence to consider the joint recommendation to include a Kinyarwanda speaking lawyer or legal assistant on its team and the Registry to facilitate this to the extent possible;

DECIDES that Kabuga shall remain detained at the Hague Branch of the Mechanism and that his trial shall commence there until otherwise decided;

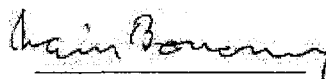
DECIDES that Kabuga shall be subject to periodic monitoring by a panel of three independent medical experts who shall submit a joint report on Kabuga's fitness for trial to the Trial Chamber every 180 days from the filing of this decision unless otherwise decided;

INSTRUCTS the Registrar to appoint Professor Gillian Mezey, Professor Henry Kennedy, and an independent neurologist with no prior involvement in this case as the panel of independent experts; and

INSTRUCTS the Registrar to file submissions should anything prevent the appointment of these experts.

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

Done this 13th day of June 2022,
At Arusha,
Tanzania


Judge Iain Bonomy
Presiding Judge

[Seal of the Mechanism]



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