

What is next for Félicien Kabuga? Socratic connivance and rupture in international criminal trials

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An unpredictable side-effect of the COVID-19 related lockdown measures in France came in the form of the arrest of high profile fugitive Félicien Kabuga in a home raid outside Paris. The arrest ended twenty six years of Kabuga's colorful flight across the globe, stopped finally by the COVID-19 pandemic induced restrictions on his movement. Long considered the key financier of the Rwandan genocide, Kabuga was indicted by the United Nations International Criminal Tribunal for Rwanda in 1996. He is now 84 years old and faces the possibility of a criminal trial in Arusha, Tanzania.

This is definitely the biggest breakthrough for international criminal law this year. For the International (Residual) Mechanism for International Criminal Tribunals (Mechanism / IRMCT), this capture and the promise of justice it carries is an important achievement in proving its own relevance in the face of questions about its legitimacy and permanence. If Prosecutor Brammertz decides to open this trial, it will be the IRMCT's first full fledged trial.

For critical scholarship, this is an opportunity to re-open the conversation about legal institutions born out of the Rwandan genocide and the importance of narrative in transitional justice. The successful co-option of a particular narrative of the Rwandan genocide into mainstream international criminal law has created the Rwandan genocide story most know today. Rwanda, with the most at stake, must also have supported this narrative for the continued public interest in the tribunal to translate into funding for the Mechanism. The complex histories of the 1994 genocide and the peculiarly situated narratives based on geographical, political and ethnic lines created through Uganda, Burundi, and the DRC, of which the Rwanda chapter of the genocide, was arguably only one part, have been revised and ferociously protected by all the institutional powers that are now competent to try Kabuga.

There is something inescapably theatrical about the optics of a trial for Kabuga at the Mechanism – the symbolic irony of pitting the alleged financier of the Rwandan genocide against the “financiers” of the institutions supporting the mainstream account of the Rwandan genocide, that is, the assembly of states funding the international criminal tribunals.

Martti Koskeniemi's skepticism about the justice quotient of high profile criminal trials may be well placed here: the optics of finally putting on trial the wealthy businessman who headed important public offices connected to the genocide is a ticket to salvage, reinvigorate and popularise the Mechanism; and conversely, a great defence team could use this opportunity to raise important questions about the narrative of the genocide that the Mechanism and its predecessor the United Nations International Criminal Tribunal for Rwanda are founded on: they could revitalise the dormant questions on institutional legitimacy and shake the foundations of “truth” on which these tribunals are based. Whichever of these two ways it plays out, per Koskeniemi, this will be a show trial at best and a terrible waste of public resources during the ongoing global pandemic at worst.

But the optics of the trial are also its biggest upside.

(or Reinvigorating the IRMCT: *Kabuga* as a symbol of renewal)

Kabuga's notoriously enormous private wealth has long been considered a key enabler of the Rwandan genocide. There is no comparable indictee in the rich jurisprudence of the ICTR; this makes Kabuga comparable to financiers of other comparable state sponsored campaigns. The Nazi party's activities were bankrolled by the leadership of huge German private companies like I. G. Farben, Fritz Thyssen and Gustav Krupp. The Nuremberg Tribunal indicted Farben and Krupp on multiple charges related to the crimes committed by the Nazi party. Other private financiers like Martin Bormann, Flick and Steinbrinck, Hjalmar Schacht were key figures in the Holocaust who held top banking and accounting positions in the inter-war years and were complicit in funnelling massive donations to the party.

Kabuga served as final adviser to President Habyarimana and the two families were also related by marriage. Kabuga was also the main financier and logistical backer of the radicalised extremist militia *Interahamwe* directly responsible for the massacre of Tutsi, moderate Hutu, and Twa ethnicities during the genocide. He was a member of the Akazu (the "small house" in Kinyarwanda) and Réseau Zéro (network zero), two small circles of influential leadership within the cadres of the extremist Hutu groups masterminding the genocide. As a private entrepreneur, his vast business empire spanned tea and coffee plantations, flour mills and commercial properties. As president of the National Defense Fund during the interim government in Rwanda, Kabuga is accused of financing the training and supply of machetes to the *Interahamwe*, allegedly importing for distribution to the militia, vast supplies of machetes during the genocide to supplement the firearms that Habyarimana had imported through ancillary channels in the run up to the genocide in April 1994.

Kabuga was president of the board of directors of the Radio Television Libres des Mille Collines (RTL) which was a widely popular radio network responsible for broadcasting racist hate propaganda against the Tutsi and the moderate Hutu in Rwanda during the period of the genocide. Broadcasts instigating violence against the Tutsi were carried on RTL and played a crucial role in escalating the pace and frenzy of the genocide. In the famous *Media case*, the ICTR convicted two other key ideologues of the RTL, Ferdinand Nahimana and Jean-Bosco Barayagwiza on counts of genocide, conspiracy and crimes against humanity. The ICTR affirmed through the *Media case* the incendiary power of media to instigate and directly commit crimes related to the genocide. With Kabuga's arrest the larger question of the RTL's corporate criminal liability will find an opportunity to be studied as an extension of the Julius Streicher case at Nuremberg discussing the role of harnessing the power of popular institutions as vehicles of racist genocidal propaganda.

With this case, the IRMCT will perhaps be under scrutiny as an international criminal tribunal for the first time. So far, it has been tasked with trial and appellate functions that had an appreciable measure of continuity from their story at the ICTY and ICTR; but it is only now that the IRMCT is required to begin a trial from nothing more than an indictment. The lean structure of staffing, the judicial roster system and the expectation that the IRMCT which has been more or less fully operational for about five years now can deliver on a full fledged trial are about to be tested.

Specifically, the question of judicial independence that has haunted the Mechanism since the detention of the Turkish judge in the *Ngirabatware* case will be one of the biggest challenges should the MICT commence trial proceedings in *Kabuga*. Starting from the logistics and the costs involved in transferring Kabuga from France to Tanzania, a series of high pressure (and time sensitive due to the advanced age of the accused) challenges await the IRMCT. It will now be put under enormous financial and staffing strain to undertake a trial without compromising on the high standards of fairness and representation that its predecessor institutions have established.

Kabuga has evaded arrest for 26 years, escaping the wide net cast in 1997 by Operation Naki through which dozens of accused were caught in East African states and brought to face trial in Arusha. His vast fortunes bought him false identities and passports that enabled him to escape arrests despite intelligence and sightings that span Kenya, Switzerland, Belgium, South East Asia and France over the last 26 years that he has been at large. Under Rule 40 (A) of the ICTR's Rules of Procedure and Evidence, a former prosecutor of the tribunal successfully requested France to freeze the Kabuga family assets and bank accounts worth \$2.5 million in Switzerland, France, Germany and Belgium in the late 1990s. In the jurisprudence of the *ad hoc* international criminal tribunals this is noteworthy because it is most unusual for the assets of an accused pending trial to be seized or frozen. The US State Department in 2002 expanded its Rewards for Justice programme to include a reward of up to \$5 million for Kabuga's capture.

Cynics may well compare this belaboured delivery of an 84 year old Kabuga to trial with images of frail and old indictees with failing memories at the UNAKRT ECCC in Phnom Penh, but the jubilation in Rwanda appears to discount the long delay in tracking down Kabuga. This arrest will go a long way in reinstating the faith of victims and survivors in the fragile promise to fight impunity enshrined in Security Council Resolution 1966 (2010) that created the Mechanism:

“Reaffirming its determination to combat impunity for those responsible for serious violations of international humanitarian law and the necessity that all persons indicted by the ICTY and ICTR are brought to justice.”