Félicien Kabuga Trial: Can the International Residual Mechanism for Criminal Tribunals do better than the ICTR?

On 16 May 2020, the world was awash with the news that the most wanted fugitive suspected of financing the 1994 genocide against the Tutsi was arrested. The arrest of Félicien Kabuga in Paris, France, has raised a lot of questions attracting various responses and scenarios. There are those questions which can reasonably be answered through the Statute creating the International Residual Mechanism for Criminal Tribunals ("the Mechanism") and its Rule of Procedure and Evidence such as where the trial will be conducted, and whether those who helped him to evade justice for all these years can be charged for the obstruction of justice as it is provided for in article 1(4) (a) of the Statute, and/or whether Rwanda can request his referral to its national jurisdiction. However, the most intriguing questions such as how Kabuga was able to evade justice for about half a century, travelling between different capitals and airports, and how he was able to live less than 5 miles away from the French President's residence unnoticed for about 5 years will certainly never be convincingly answered. For the benefit of our readers, it is important to at least respond to those questions that are evident in the Statute.

The United Nations Security Council Resolution (Resolution 1966 (2010)) creating the Mechanism is clear on some of those questions. The Resolution 1966 (2010) created the Mechanism with "two branches, one branch for the ICTY and one branch for the ICTR (…). The branch for the ICTY shall have its seat in

The Hague. The branch for the ICTR shall have its seat in Arusha." In addition to dealing with residual functions of the ICTY and ICTR, the mandate of the Mechanism pertains to prosecuting those "who are among the most senior leaders suspected of being most responsible for the crimes …" Based on that understanding, the ICTR made a categorization of the 8 suspects who were still at large into those who are most senior leaders responsible and those who are not. It was determined that 3 (Félicien Kabuga, Protais Mpiranya and Augustin Bizimana) out of the 8 are the most senior and thus shall be tried by the Mechanism, and the remaining 5 (Fulgence Kayishema, Charles Sikubwabo, Aloys Ndimbati, Ryandikayo, and Phénéas Munyarugarama) were transferred to Rwanda's national jurisdiction. Therefore, a straightforward answer to where Félicien Kabuga will be tried is Arusha (Tanzania) at the seat of the Mechanism. However, the context of the current covid-19 and the place of arrest can result in some activities taking place in The Hague. The Prosecutor has already filed an urgent motion requesting for the amendment of the arrest warrant that instead of transferring Kabuga to Arusha be temporarily transferred to The Hague considering the situation of covid-19.

Understandably, some people are arguing that Kabuga be tried in Rwanda because Rwanda's judicial system meets international standards, since the security concerns based on which the ICTR was located in Arusha in 1994 no longer exist. In addition, the fact that the Mechanism has downsized its resources can all be reasonable justifications in favour of Rwanda. However, if not accepted to be tried by Rwandan courts/judges, at least the trial can be hosted on the Rwandan territory, or create a relationship similar to that of hybrid tribunals. That is, establishing a relationship that would greatly benefit both the Mechanism and Rwanda's legal system and people. It is very easy to dismiss these wishes based on the legal interpretation that the Security Council clearly gave these powers to the Mechanism. Fair enough, and as Barnett and Finnemore argue

‘[w]hen bureaucrats do something contrary to your interests or that you do not like, they defend themselves by saying “Sorry, those are the rules” or “just doing my job.” In this kind of a response, “the rules” and “the job” become a source of great power that goes beyond the desired possible broad thinking and compromises. However, the mere legality of where the trial will take place will not resolve the old question of how international justice has failed to connect with real beneficiaries of its work – the failure to attend to national and victims’ interests. The Mechanism still asserts its supremacy over domestic courts which is the same criticism ad hoc tribunals (ICTY and ICTR) were accused of. Like ICTR, the Mechanism still operates away from the situation country (Rwanda), where the crimes were committed. The question now is: can the Mechanism be better than ICTR, can we expect some improvement in the areas of outreach and information-sharing? There are good reasons for both Rwanda and the Mechanism to positively collaborate. Rwanda has an interest in seeing the Mechanism successfully complete its work, especially that of tracking all the genocide fugitives, and the Mechanism, too, has interests in achieving local legitimacy.

It is important to be reminded that the people of Rwanda deserve to know. The essence of the accused’s right to a public hearing has two aspects to it. The first and the primary purpose of a public trial is to protect the rights of fair trial of the accused person. Still, the second, equally important, consideration is the public’s right to know that justice is being served and to hold the system accountable. Conducting a trial in public is of great benefit to the general public because it provides an ambiance that justice is being served. If the trail takes place in Arusha or in The Hague, the court audience will constitute mainly journalists, researchers and lawyers. But, if the trial takes place in Rwanda, ordinary Rwandans will be added to that list. Still, most Rwandans who would want to follow the trial cannot afford the cost of travelling because of visa concerns and the cost

of stay, if it takes place outside Rwanda. It is in addressing these concerns that the Mechanism can prove that it is better than its predecessor.