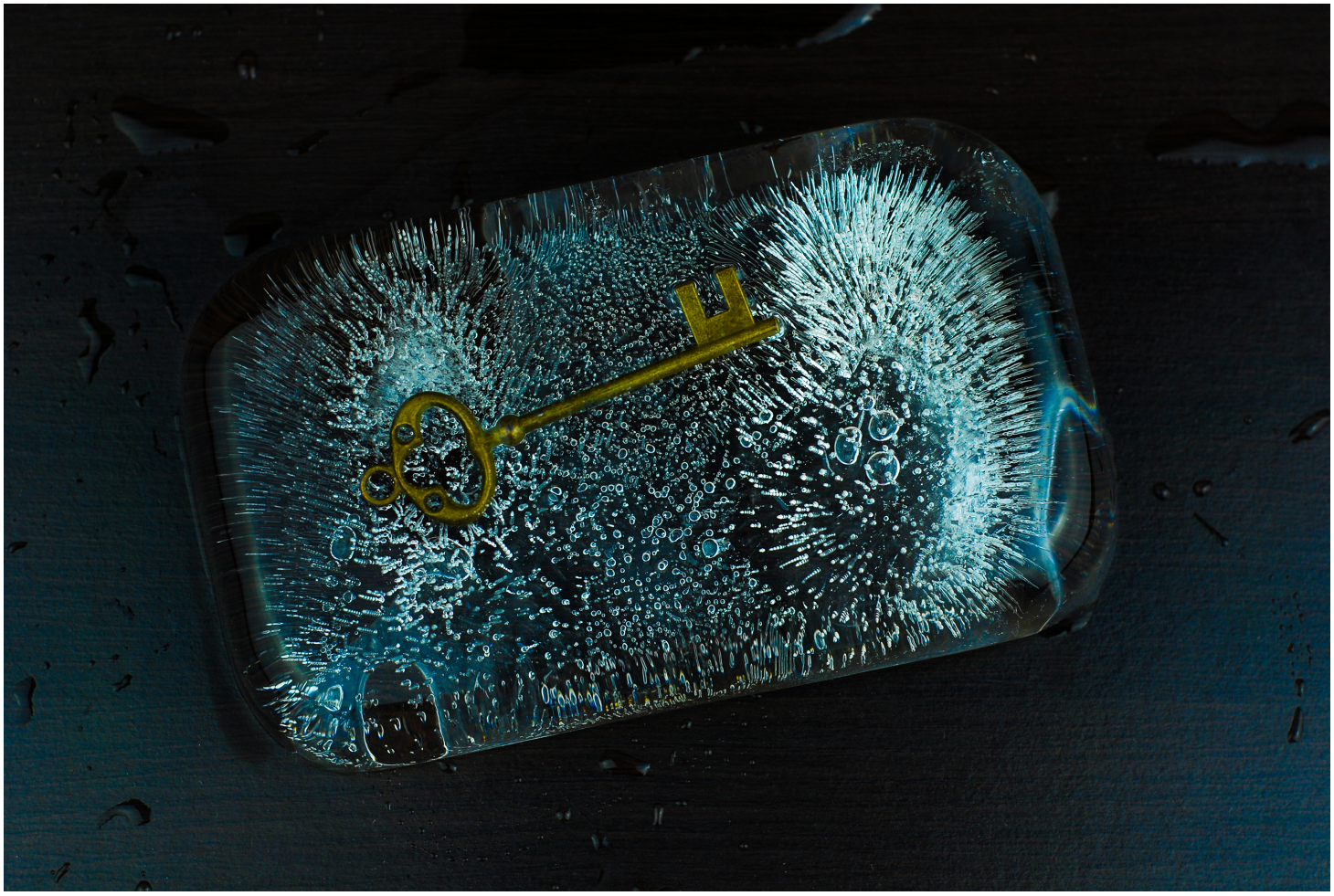

Distilling the Aims of International(ized) Criminal Tribunals' Asset Freezing Powers through the Crucible of Prosecutor v Félicien Kabuga

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By: Daley J. Birkett

1. Introduction

In the early hours of Saturday, 16 May 2020, French authorities arrested Félicien Kabuga in the Parisian suburb of Asnières-sur-Seine, bringing an end to a manhunt that spanned more than two decades since he was first indicted by the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR). Kabuga is now charged by the Prosecutor of the United Nations International Residual Mechanism for Criminal Tribunals (MICT), the successor tribunal to the ICTR, with crimes related to both genocide (genocide itself, direct and public incitement to commit genocide, and conspiracy to commit genocide) and crimes against humanity (persecution on political grounds, extermination, and murder).

According to the latest Indictment, Kabuga's supposed participation in the foregoing crimes is twofold. First, the Prosecutor avers that Kabuga operated the Rwandan radio station, *Radio Télévision Libre des Mille Collines* (RTLM), found by the ICTR Trial Chamber in its Judgement in *Nahimana et al*. (also known as the *Media* case) to have "actively encouraged" the killing of Tutsi in Rwanda (para. 488). The Prosecutor further alleges that Kabuga is responsible for providing support—including of a financial nature—to *Interahamwe* militia alleged to have attacked, harmed, and killed Tutsi individuals. The legal issues stemming from Kabuga's alleged role as a financier are the focus of this article.

Over the course of the more than 22 years during which Kabuga remained at large after his first indictment by the ICTR, the *ad hoc* tribunal's Prosecutor requested the authorities of several States, including France and Kenya, to freeze assets ostensibly belonging to Kabuga. Among other submissions, recent filings before the MICT assert, however, that some of the assets frozen pursuant to the Prosecutor's requests and a subsequent order issued by MICT Judge Vagn Joensen (the Order) should no longer remain frozen following his arrest. These assets include bank accounts in France, Kenya, and Belgium, and property in the latter two States. According to these pleadings, filed by individuals and an estate, Kabuga does not have any interest in the frozen property and, in any event, given his current incarceration, the funds can no longer be used to evade arrest. Significantly, the affected individuals are all (former) members of Kabuga's family, while the estate concerned also belongs to that of a deceased relative:

- François Ngirabatware is Kabuga's former son-in-law;
- Catherine Mukakayange is François Ngirabatware's sister;
- Donatien Nshimyumuremyi, Innocent Twagirumukiza, and Alain Gilbert Habumukiza are Kabuga's sons; and
- Joséphine Mukazitoni is Kabuga's late wife. (Donatien Nshimyumuremyi is the executor of her estate.)

In light of this procedural posture, this article aims to analyze two issues through the crucible of the early litigation in the Kabuga case: (i) the implications of protracted asset freezes for the rights of *bona fide* third parties before international(ized) criminal tribunals (ICTs); and (ii) in a more theoretical vein, the underlying purpose(s) of equipping the MICT and other ICTs with the power to request the execution of such protective measures. The following sections proceed by first exploring the MICT's legal framework applicable to freezing assets before offering a brief procedural account of the relevant

litigation. The article concludes by considering the prospective consequences—both for the MICT and beyond—of how the tribunal responds to the issues raised therein.

2. Legal Framework

The preceding paragraphs intimate that there are two legal bases pursuant to which Félicien Kabuga's assets were frozen. The first is Rule 40(A) of the ICTR Rules of Procedure and Evidence (ICTR RPE), which provides as follows (emphasis added):

"(A) In case of urgency, the Prosecutor may request any State:

(i) To arrest a suspect and place him in custody;

(ii) To seize all physical evidence;

(iii) *To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.*

The State concerned shall comply forthwith, in accordance with Article 28 of the Statute."

A similar provision is incorporated into Rule 37 of the MICT Rules of Procedure and Evidence (MICT Rules). This first legal basis accordingly details a Prosecutor-led freezing process, which is centred on preventing an accused person from evading arrest, intimidating victims and/or witnesses, and/or tampering with evidence.

A second legal basis, setting out what could be termed Judge-led asset freezing procedures, is enshrined in Rule 63(D) of the MICT Rules. Provided that a number of conditions detailed in the preceding provisions are satisfied, Rule 63(D) of the MICT Rules states that:

"Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Single Judge may order a State or States to adopt provisional measures to freeze the assets of the accused, considering the gravity of the crimes charged and the level of responsibility of the accused, without prejudice to the rights of third parties."

Here, the interests of third parties are introduced and granted explicit protection, while the Single Judge is also mandated to take into account the gravity of the charges brought against the accused person(s) as well as the extent of his alleged responsibility for the commission thereof when deciding whether to order provisional measures to freeze his assets.

It is pursuant to the two foregoing legal bases that multiple States are alleged to have frozen assets in which Kabuga purportedly had an interest, while it is these same processes that form the subject of the early litigation in the instant case. The article now turns to consider this litigation in greater detail.

3. Procedural History

At the outset, it is acknowledged that many documents—parties' submissions and tribunals' decisions—in the sphere of ICTs' asset freezing measures are necessarily confidential. In this light, the following paragraphs proffer a summary of the litigation in the Kabuga case insofar as the filings are publicly available and pertain to the (un)freezing of assets.

On 14 April 2021, Counsel for François Ngirabatware and Catherine Mukakayange (the First Applicants) filed the Motion for Order Concerning Frozen Bank Accounts (First Motion). On 15 April 2021, Counsel for three further individuals — Donatien Nshimyumuremyi, Innocent Twagirumukiza, and Alain Gilbert Habumukiza — and for the estate of Joséphine Mukazitoni (the Second Applicants) filed a comparable motion, the Motion for Order Concerning Frozen Assets (Second Motion). Both the First Motion and the Second Motion submit that there no longer exists any legal basis for the continued application of freezing measures in respect of the applicants' assets. In each Motion, the applicants assert that third parties whose assets are frozen pursuant to a request from the Prosecutor or an order from a MICT Judge have the right to request a review thereof or to be heard, respectively (see First Motion, para. 10; Second Motion, para. 11). The applicants further submit that there has existed no legal basis for the continued freezing of their assets, whether pursuant to the Prosecutor's requests or the Single Judge's ensuing order, because of Kabuga's arrest in May 2020 or because he has no proprietary interest therein (see First Motion, para. 11; Second Motion, paras 12-13).

On 26 April 2021, in two orders (MICT-13-38-Misc.1 and MICT-13-38-Misc.2), the President of the MICT, Judge Carmel Agius, assigned the two motions to Judge Mahandrisoa Edmond Randrianirina, sitting as a Single Judge.

The Prosecution filed its response to the First Motion (First Response) on 28 April 2021 and its response to the Second Motion (Second Response) on the following day. The Prosecution made four similar arguments in each of its responses:

(i) the Applicants fail to demonstrate a factual basis to support their claims (First Response, paras 3-8; Second Response, paras 3-7);
(ii) the Prosecutor should be the first recipient of any request to release funds frozen under ICTR Rule 40(A)(iii) (First Response, paras 9-10; Second Response, paras 8-9);
(iii) no funds should be released until the Registrar has established what proprietary interest Kabuga has therein (First Response, paras 11-12; Second Response, paras 10-11); and
(iv) victims' rights ought to be taken into consideration with respect to any order made (First Response , paras 13-16; Second Response, paras 12-16).

The First Applicants replied to the First Response on 3 May 2021, with the Second Applicants lodging their reply to the Second Response on 4 May 2021. Each reply proffered a number of primarily factual arguments concerning, *inter alia,* Félicien Kabuga's lack of any proprietary interest in the frozen funds.

The Registrar filed submissions in relation to the First Motion and with respect to the Second Motion on 9 June 2021. In his submissions, after detailing the law applicable to determining the capacity of

applicants for legal aid to (partially) remunerate their counsel in proceedings before the MICT, the Registrar states *verbatim* in the penultimate paragraph (i.e., para. 9) of each filing (footnotes omitted):

"I consider that the requests contained in the Motions to unfreeze the assets and unconditionally release them to the Applicants would frustrate the process of determining the disposable means of the Accused and any related contribution to his defence. Consequently, any adjudication of the Motions is premature, and should be deferred until the Registry has meaningfully assessed the Accused's indigency status. This process remains ongoing, but has been frustrated to date due to lack of cooperation from the Accused."

The First Applicants filed their response to the Registrar's submissions on 14 June 2021, with the Second Applicants responding thereto on 23 June 2021. The First Applicants focus their response on Kabuga's lack of any proprietary interest in the frozen funds, arguing that they would be prejudiced, contrary to Rule 63(D) of the MICT Rules, by any further delay in their release. The Second Applicants focus instead on Kabuga's desire to use the frozen assets to retain counsel of his own choosing, submitting that, should this request be granted, and the Registry therefore control the assets, the Prosecution's submissions that the funds could be used to intimidate victims and/or witnesses and/or to destroy evidence would be rendered moot.

The Registrar responded to the Second Applicants' response on 8 July 2021, in response to which the Second Applicants filed a supplemental response on 9 July 2021, the most recent filing in this series at the time of writing. In the latter, the Second Applicants submit that the assets were not transferred to conceal them (paras 5-12) and that they are now required to retain counsel (paras 13-21). Particularly noteworthy for the purposes of the present article, the Second Applicants argue as follows at paragraph 17 of their supplemental response:

"To retain the freeze on the funds on the grounds that they might someday be used for restitution of victims would violate not only the right to counsel of one's choice, but also the presumption of innocence. This is particularly true when considering that the Mechanism has no power to order restitution, except in cases where the indictment alleges the unlawful taking of property."

The following section will discuss the implications of how the MICT decides to address the issues raised in this litigation, including in respect of the balance between victims' rights and interests and the rights of the accused, to which the foregoing quotation alludes.

4. The Consequences for, and beyond, the MICT

Judge Randrianirina's impending decisions on the two motions represent a rare opportunity to elaborate the purpose(s) underpinning the MICT's asset freezing powers as well as third parties' rights in the protective measures process. Additionally, the forthcoming decision(s) might serve to shed light thereon for ICTs beyond the MICT insofar as their respective legal frameworks equip them with the power to request the freezing of accused persons' assets. Without wishing to prejudge the Single Judge's findings, this section aims to highlight some of the most pressing questions arising from the

early litigation in the Kabuga case in relation to the freezing of individuals' assets during the pre-trial phase of international(ized) criminal proceedings.

Besides the right to a fair trial, encompassing the right to be presumed innocent until proven guilty and the right to defend oneself through legal assistance of one's own choosing, asset freezing measures infringe other rights. The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights have found that the execution of pre-trial protective measures potentially infringe the right to the peaceful enjoyment of property and the right to respect for private and family life. Moreover, these infringements will often have a more severe impact on the affected rights-holders the longer the assets remain frozen. A striking example of the potential consequences of the lengthy application of freezing measures can be seen at the ICC in the aftermath of the acquittal on appeal of Jean-Pierre Bemba Gombo, more than ten years after he was arrested. It was following his acquittal that Bemba filed a claim against the ICC, totalling €42.4 million, for compensation and damages resulting from the alleged mismanagement of his frozen assets. Though his claim was ultimately dismissed, the saga highlights the interests at times at stake in the protective measures process.

As for the rights-holders' themselves, the accused is not the only person to consider. That victims' rights and interests and the rights of the accused must be balanced—both inter se and alongside those of other stakeholders, including third parties—in pre-trial protective measures processes is not a consideration novel to the *Kabuga* case before the MICT (and the ICTR). Indeed, the Chambers of the International Criminal Court (ICC) have also issued a number of publicly available decisions addressing this important issue, establishing several important principles with respect to how such a balance might be fairly struck.

This balance did not always have to be struck, though. Historically, ICTs were predominantly concerned with protecting the due process rights to which accused persons are entitled under international human rights law and their respective constituent instruments. It was not until the Rome Statute that victims' interests were afforded greater prominence and protection, though the rights of the accused must still be prioritized. For instance, Article 68(3) of the Rome Statute only permits victims to participate in proceedings "in a manner which is not prejudicial to or inconsistent with the rights of the accused". Similarly, Article 18 of the MICT Statute provides that trial proceedings must be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses", while Article 19 of the ICTR Statute stipulates likewise. This interplay comes to the fore in the context of asset freezing, though it must be acknowledged that third parties do not enjoy the same level of protection as the accused in international(ized) criminal proceedings.

Turning to third parties, as the Kabuga litigation demonstrates, they might have their assets frozen for several years during frequently lengthy international(ized) criminal proceedings. This might occur because, for instance, they have assisted the accused person, *mala fide*, to conceal his assets or for other *bona fide* reasons. In the *Bemba and others* case before the ICC, Aimé Kilolo Musamba requested that a freezing order with respect to his bank account be partially lifted, claiming, inter alia, that the order infringed his right to respect for private and family life. In rejecting the request, applying

the ECtHR criteria, Judge Bertram Schmitt considered the legitimate aim(s) underpinning the measures and whether the restrictions placed on Kilolo's bank account were proportionate to the former. Applying these criteria to the Kabuga litigation, multiple legitimate aims—some of which ought to be afforded greater weight than others—can be discerned:

1. In the event of a conviction, to preserve assets for the payment of fines (under Rule 91 of the MICT Rules);
2. Also in the event of a conviction, to preserve assets for restitution (pursuant to Rule 122(B) and Rule 129 the MICT Rules);
3. Again in the event of a conviction, to preserve assets for potential compensation to victims under national legislation (under Rule 130 the MICT Rules) and;
4. In the view of the Registrar and the Prosecution, to calculate whether Kabuga ought to bear the costs of retaining counsel in MICT proceedings.

This list, of course, does not include what is submitted to be the one of—if not the—primary purpose underlying pre-trial protective measures outside the Rome Statute system, namely, preventing a fugitive accused from using the assets to evade arrest. (At the ICC, in the event of a conviction and a consequent order for forfeiture of assets or property, the interests of victims are afforded explicit priority under Article 57(3)(e) of the Rome Statute and Rule 221 of the ICC Rules of Procedure and Evidence. The ICC might accordingly be considered as the exception to the general rule that preserving assets for victims' reparations is not the central purpose underpinning ICTs' powers to request States to freeze individuals' assets.)

As for whether the measures are proportionate, central to Judge Schmitt's reasoning in the *Bemba and others* case was Kilolo's capacity to continue to support his family financially by earning a living as a lawyer. Judge Schmitt also considered it to be relevant that the ICC had no alternative means through which to protect its interests underpinning the freezing order. Not every third party targeted by the freezing measures in *Kabuga* is in Kilolo's position. For instance, Peter Robinson, counsel for the First Applicants, observed in an interview that the asset freezing measures "plunged François [Ngirabatware] into poverty for years." It will be for Judge Randrianirina to decide whether prolonging the protective measures even further remains proportionate to one or more of the legitimate aims they pursue.

5. Conclusion

Whether Kabuga will ultimately face justice in The Hague remains unknown considering his purportedly deteriorating health, but the issues raised in this article are of relevance beyond the MICT. Though individuals accused of crimes before ICTs are usually found to be indigent, this is not always the case. For instance, the transfer of the former President of Sudan, Omar Al Bashir, to the ICC is reportedly under discussion at the time of writing. Like Al Bashir, other so-called "big fish" indicted by ICTs—think Muammar Gaddafi, Hissène Habré, or Charles Taylor—are known for their allegedly having plundered State resources together with their (alleged) commission of international crimes.

What is also well-known, however, is that such resources are often concealed. Where *bona fide* third parties are implicated therein, their rights must be taken into consideration when decisions are made in relation to protective measures such as asset freezing. This article has sought to highlight some of the issues at stake in the *Kabuga* case in the hope of stimulating further discussion. In the author's opinion, however the Single Judge decides, the instant case represents an opportunity for the MICT not only to elaborate the limited case law on ICTs' asset freezing powers, but also to endorse the human rights-oriented approach taken by the permanent ICC in *Kilolo*.

6. Postscript

On 14 October 2021, Judge Randrianirina rendered his decision on the motions, in which he concluded, in relevant part, as follows:

"the Motions seeking the unfreezing of the Assets are premature pending the completion of the Registrar's inquiry in respect of the legal aid granted to Kabuga, without prejudice to any subsequent requests from the Applicants who have not shown at this stage on what legal basis the Assets remain unavailable or demonstrated the need for my involvement[.]"

Among other reasons, this conclusion—and the Single Judge's ensuing decision to deny the motions without prejudice—was informed by his finding that "documents presented in support of the First and Second Motions do not establish the current unavailability of Assets as alleged by the Applicants or their rights to these Assets".

In his decision, Judge Randrianirina did not tackle the issues raised in this article, though the possibility remains that he will be asked to do so in the future. Notably, in footnote 32 to the foregoing extract, he observed that, after the Registrar has completed his inquiry, the Applicants ought to first ask the Prosecutor to decide, under judicial oversight, whether the measures continue to be justified "after Kabuga's arrest, […] given, *inter alia*, the stage of and implications for the main case." It would therefore appear that significant weight is afforded to the Registrar's ability to accurately determine Kabuga's financial position, surely an ancillary aim underlying ICT asset freezing powers, particularly where the frozen assets are not alleged to be ill-gotten gains. It will be for a future decision, if any, to shed light on whether this, and other, aims remain proportionate when weighed against the rights of the accused person and any affected *bona fide* third parties. In view of the Single Judge's decision denying the two motions in *Kabuga*, I await clarification on these opaque, yet important, legal questions, albeit more in hope than in expectation.

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