
THE CONSEIL D'ETAT "KABUGA" JUDGMENT: FURTHER PROOF OF THE CLOSE INTERTWINING OF INTERNATIONAL CRIMINAL LAW AND STATE SOVEREIGNTY

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ABSTRACT

Félicien Kabuga was allegedly the financier behind the 1994 Rwandan genocide. Indicted by the International Tribunal for Rwanda, he was liberated due to his unfitness to be tried.

However, since his release, no solutions have been found between the International Residual Mechanism for Criminal Tribunals and several States, especially France.

By having implicitly upheld French authorities' refusal to host a disabled but high-profile Rwandese genocide suspect, the French « *Conseil d'Etat* » judgment of May 27th 2026 illustrates how international criminal law and domestic authorities may still closely intertwine.

As a prolegomenon, one has to keep in mind that the French "Conseil d'Etat" (Council of State) is the top-level administrative court as well as the provider of legal counsel for the French government.

Shaped under its modern configuration under Napoleon's Consulate in 1799, it is traditionally seen as a "Grand Corps de l'Etat" (i.e., Great Corps of the State), in which serve the epitome of France's high civil servants, trained mostly (if not exclusively) within the National Institute of Public Service (formerly known as the National School of Administration) Composed of six advisory sections¹ and an Administrative Bench, the latter ensures the jurisdictional duty of the *Conseil*.

¹ For a study on the advisory duty of the Conseil see e.g., Bell, J. (2000). What Is the function of the Conseil D'etat in the Preparation of Legislation?. *International & Comparative Law Quarterly*, 49(3), 661-672 ; Questiaux, N. (2000). Do the Opinions Expressed by the Conseil D'Etat in its Capacity as Legal Adviser to the Government Influence Policy?. *International & Comparative Law Quarterly*, 49(3), 672-679.

Following the path of the Napoleonic Civil Code, the Conseil d'Etat also influenced several States during the 19th Century until today² : One can think to States such as Turkey³, Belgium⁴, Lebanon, or even Indonesia⁵

If it's true that the Conseil d'Etat had to adapt itself to the European construction in a kind of love-hate relationship towards the primacy of international law⁶ and particularly European Union law⁷, it has kept under a firm hand its theory of the « actes de gouvernement » (governmental acts), refusing to judicially review administrative acts which cannot be detached from France's international relations in a similar way to *acta jure imperii* in international law⁸.

There is the heart of its judgement n°510773 of May 27th 2026: under French law, a decision that refuses to host, on French territory, an indicted person before an international jurisdiction falls within the « *actes de gouvernement* » category and is, as such, immune to judicial review

A) Background of Felicien Kabuga's proceedings before the IRMCT

Mr. Felicien Kabuga was indicted by the former International Criminal Tribunal for Rwanda (ICTR) in Case ICTR-98-44B on November 26th, 1996, for five international core crimes (i.e. : genocide, complicity in genocide (in the alternative to genocide), direct and public incitement to commit genocide, attempt to commit genocide, conspiracy to commit genocide, and crimes

² Galabert, J. M. (2000). The Influence of The Conseil D'etat Outside France. *International & Comparative Law Quarterly*, 49(3), 700-709.

³ Örücu, E. (2000). Conseil D'Etat: The French Layer of Turkish Administrative Law. *International & Comparative Law Quarterly*, 49(3), 679-700.

⁴ Farhat, N., & Poirier, P. (2023). Councils of State in Europe in their advisory and legislative functions: France, Belgium, Spain, Italy, and Luxembourg. *Parliaments, Estates and Representation*, 43(1), 1-6.

⁵ Erlangga, S., Disyon, H., & Anh, H. T. (2023). Forced Money (Dwangsom) in the Indonesian State Administrative Court System and Astreinte in French Conseil d'État. *Supremasi Hukum: Jurnal Kajian Ilmu Hukum*, 12(2), 107-126. <https://doi.org/10.14421/sh.v12i2.3140>

⁶ For instance, it has recognized the supra-legal authority of international treaties in the case « Nicolo » Conseil d'État, Assemblée, 20 October 1989, Nicolo and laid the condition of a treaty's direct effect in domestic law in case « GISTI & Fapil » (Conseil d'État, Assemblée, 11/04/2012, 322326)

⁷ For instance, The European Court of Justice has criticized the « Conseil d'Etat » refusal to request before her floor a preliminary ruling in case CJEU Judgment of the Court (Fifth Chamber) of 4 October 2018, European Commission v French Republic C-416/17

⁸ Cf. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99 §60 “The Court considers that the terms “*jure imperii*” and “*jure gestionis*” do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*). “

We have to mention that “actes de gouvernement” can also deal with domestic political life and especially with links between institutions framed by the Constitution (lawmaking, relationships between executive and legislative powers ...). However, as this field only deals with domestic law, it goes outside of the scope of the current article.

against humanity (persecution and extermination).

Inter alia, he was suspected of having financially supported the Hutu militia (called « Interahamwe »), having provided them with machetes through the constitution of a “National Defense Fund” as well as having a directorial position within the *Radio Television Libre des Mille Collines* (Thousand Hills’ Free Radio Television or RTLM), which was the main vector of hate against the Tutsi population.⁹

Having fled Rwanda in 1994, he was finally arrested in France on May 16th 2020 and transferred to the then-competent International Residual Mechanism for Criminal Tribunals (hereafter IRMCT or The Mechanism), which has taken over the works of the former International Criminal Tribunals for Rwanda and Yugoslavia. With the approval of the French Court of Cassation’s criminal bench on September 30th 2020¹⁰, Félicien Kabuga was transferred to the Hague under the authority of an arrest of April 29th 2013.¹¹

However, since the warrant ordered the transfer of Félicien Kabuga to the “United Nations Detention Facility at the Arusha Branch” (UNDF) of the IRMCT, Mr. Kabuga’s counsel requested his transfer to the United Nations Detention Unit in the Hague (UNDU).

This was motivated, *inter alia*, by the then-context of a worldwide COVID-19 pandemic. By Decision of October 21st, 2020, a single judge of the IRMCT amended the arrest warrant, granting M. Kabuga permission to be transferred to The Hague. This decision¹² was grounded by two major considerations (§14 of the decision): the first one being “*that transit from France to Tanzania would involve a journey of more than 11 hours of flight time including passage through three airports. Transit directly to The Hague is far simpler and more direct, involving several hours by road or an hour in the air.*”

Moreover, the Registry medical staff stated that it needed more “*information to make an informed assessment as to Kabuga's ability to travel and to be effectively cared for in Arusha*”.

9 For a study on RTLM see Thompson, Allan, ed. (2007). *The Media and the Rwanda Genocide*. Pluto Press, Fountain Publishers, IDRC. p. 98. ISBN 978-0-74532-625-2

¹⁰ Cour de Cassation, Criminal division (Crim. 30 sept. 2020, FS-P+B+I, n° 20-83.181)

¹¹ IRMCT “The Prosecutor v Félicien Kabuga – KABUGA - WARRANT OF ARREST AND ORDER FOR TRANSFER ADDRESSED TO ALL STATES” MICT-13-38 29/04/2013 16-13h

¹² IRMCT « The Prosecutor v Félicien Kabuga – Decision on Félicien Kabuga’s Motion to Amend the Arrest Warrant and Order for Transfer » MICT-13-38-I D134 - D127 21 October 2020

This sparked a “guerrilla” of proceedings between forensic and medical experts as well as the Parties until the IRMCT stated that Mr. Kabuga was unfit for trial¹³. As a consequence, he was ordered on September 8th 2023 to remain “*in detention at the UNDU, pending the resolution of the issue of his provisional release*” under periodical medical examinations.¹⁴

Since this event, his whole family and counsel turned every stone to find a State to host the one who has become an 86-year-old man with cognitive impairments and aimed, notably, at France, where Kabuga’s children lived, where he lived himself (under aliases).

Mr. Kabuga special links with France were the seeds of the domestic procedures that we will examine now.

B) Mr. Kabuga’s proceedings before the French administrative courts.

In fact, the proceeds are, *ab initio*, a mix of legal questions and diplomacy.

Indeed, following the IRMCT decision of September 8th, 2023, the Registry of this Mechanism has sent a “note verbale” to the French Embassy in The Hague, in accordance with Rule 68 B of the Mechanism’s Rule of Evidence and Procedure (REP).

This states that “*Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by the Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness, or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release.*”

By a “note verbale” in response dated December 29th, 2024, the French embassy in The Hague stated that France “*was not in a position to respond favorably to the request*”. Mr. Kabuga then asked for the judicial review of this *de facto* decision to ban him from access

¹³ IRCMT “The Prosecutor v Félicien Kabuga - Decision on Félicien Kabuga's Fitness to Stand Trial and to be Transferred to and Detained in Arusha” MICT-13-38-PT D3844 - D3818 13 June 2022 and Further Decision on Félicien Kabuga's Fitness to Stand Trial - MICT-13-38-T D5667 - D5612 06 June 2023

¹⁴ IRMCT « The Prosecutor v Félicien Kabuga - Decision Imposing an Indefinite Stay of Proceedings - MICT-13-38-T D5859 - D5854 08 September 2023 »

to French territory.¹⁵

At first, before the Paris (first instance) Administrative Tribunal (3rd Bench), which declined its jurisdiction by a judgement of July 1st 2025¹⁶

It stated that “ *To distinguish between a governmental act focused on international affairs—which a judge cannot review without interfering in the conduct of diplomatic action—and a measure focused on domestic affairs, the nature of the contested act, its purpose, its context, and its impact on France’s foreign policy must be subject to a detailed assessment.*”

This has driven the judge to conclude that “*The response from the Minister of Foreign Affairs dated February 28th , 2024, cannot be viewed as isolated from this international criminal proceeding or from the conduct of France’s diplomatic relations, and therefore cannot be challenged separately before an administrative court*”

The Paris Administrative Court of Appeal, to which the applicant lodged a request, has upheld by a judgement of December 10th 2025¹⁷ : it deepened the reasoning of the first instance court by adding that the “*requested measure would drive the State to intervene with the [IRCMT Registry] to organize his release in accordance with article 68 of the [IRCMT REP]*” before quoting the *ratio decidendi* of the first instance court.

The Conseil d’Etat, in its judgment n°510773 of May 27th 2026, upheld once and for all that the decision revealed by the “*note verbale*” of February 28th 2024 cannot be detached from the exercise of France’s international relations.

If Mr. Kabuga, aged 96, passed away on May 16th 2026¹⁸, less than a fortnight before the Conseil d’Etat judgement, the latter will nourish reflections in both domestic and comparative case-law.

¹⁵ This kind of de facto decision, hurting a legal subject without this latter being directly and formally aimed by the decision, is called “revealed decisions” (*Décisions révélées*) in French administrative dispute law. They can be judicially challenged but the issue is to identify them as such, which is an *in concreto* case-law issue, discussed by scholars (see, in French, Alonso, C. (2020). Les décisions révélées en droit administratif. *Revue du droit public*, 1223-1248. <https://droit.cairn.info/revue-revue-du-droit-public-2020-5-page-1223?lang=fr>.)

¹⁶ Paris Administrative Tribunal (3rd Bench) July 1st, 2025, n° 2420066

¹⁷ Paris Administrative Court of Appeal (Fast-track procedure) December 10th, 2025, 25PA04519

¹⁸ "Statement on the passing of Félicien Kabuga". International Residual Mechanism for Criminal Tribunals. 16 May 2026.

II) Discussion of the Conseil d'Etat's judgment n°510773 of May 27th, 2026, under the lens of domestic and international case-law.

A) The Conseil d'Etat's judgment n°510773 of May 27th, 2026, under the lens of French domestic law

The judgment of May 27th, 2026, is not the first to be rendered in the field of international relations of France or, more specifically, in relations between France and international jurisdictions.

Indeed, France, as a member of the UN Council of Security, has, under this quality, a permanent seat in both the International Court of Justice and, to a lesser extent, is a proactive member of the International Criminal Court¹⁹

As such, French administrative case-law recognizes the quality of “Actes de gouvernement” in decisions involving or aiming at international jurisdictions.

For instance, the Conseil d'Etat stated twice (in 1952²⁰ and 1988²¹) that lodging a request before the International Court of Justice was an “Acte de Gouvernement” at the discretion of the authorities. So was the proposition of a candidate serving as a judge in the International Criminal Court²².

Both of these Courts are founded by their own constitutive treaties (the UN Charter and the Rome Statute respectively) and, as treaties are “*international agreement[s] concluded between States in written form and governed by international law*”(Article 2-1-A of the 1969 Vienna Convention on the Law of Treaties).

The current judgement, even if it deals with the IRMCT, is nevertheless in line with the previous case-law.

¹⁹ For this latter, as Russia, People's China and the United States do not recognize the jurisdiction of the International Criminal Court, it is self-evident they do not participate in this Court's activities despite of being Members of the UN Council of Security.

²⁰ CE, June 9th 1952, *Gény*, n° 92255

²¹ CE March 25th, 1988, *Société d'approvisionnement vinicole* (SAPVIN), n° 65022

²² CE, Sect March 2014, *Groupe français de la Cour permanente d'arbitrage*, n° 373064

The Paris administrative Court of Appeal did not say otherwise when stating that the “*requested measure would drive the State to intervene with the [IRCMT Registry]*” “

As there would be “an intervention with” an international subject of law, this would as such, put international public law at stake.

B) The Conseil d’Etat’s judgment n°510773 of May 27th 2026 under the lens of international public law

The “Conseil d’Etat” judgement is also in line with international public law: for instance, in its Advisory Opinion of August 26th 1930, “*Free City of Danzig and ILO*” the Permanent Court of International Justice stated in clear language that, in accordance with its then-applicable status linking it to Poland for foreign relationships “*The Free City as a Member of the Labour Organization could not take any such steps itself. It would be obliged to use the Polish Government as its intermediary, and therefore in au such cases Polish consent would be necessary, because the Polish Government would be entitled to refuse to take these steps on behalf of the Free City if they were prejudicial to important interests of the Polish State.*” So, as the Free City of Dantzig was, at that time, an autonomous subject of international law.

The ICJ, in its Advisory Opinion of 11 April 1949 on the “Reparation for Injuries Suffered in the Service of the United Nations” confirmed the fact that “*Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute. This capacity certainly belongs to the State [...]*”²³

The political weight of such litigations might have an impact on the International Court of Justice itself: if author J. ODERMATT analyzed the thin line that can exist between a political question and the one of “*legal nature*” on which the World Court can deliver an Advisory opinion²⁴, Vice President of the said Court Julia Sebutinde stated and detailed that, in her

²³ “Reparation for injuries suffered in the service of the United Nations,” Advisory Opinion: I.C. J. Reports 1949, p. 174.”

²⁴ Odermatt, J. (2018). Patterns of avoidance: Political questions before international courts. *International Journal of Law in Context*, 14(2), pp. 221-236. doi: 10.1017/s1744552318000046. We might also mention

dissent opinion under the Order of January 26th 2024 in case “Genocide Convention in Gaza Strip (South Africa v Israel)”²⁵ that the “*Controversy between Israel and Palestine Is Historically a Political One [...] [and not a] legal one calling for judicial settlement by the International Court of Justice*”. We can hardly help but think that her opinion on this point can be seen as an international counterpart of “Actes de gouvernement.”

We may state that, even if the World Court has never refused to this day to hear a contentious or advisory case due to the “non-legal/political issue” at stake, this question might arise in international law.

But whether international courts may have or may not have encountered such questions, it cannot be ignored that they are also known in legal systems other than the French one.

For instance, the US Supreme Court in the famous case “Marbury v Madison” not only dealt with constitutional judicial review but also laid the first steps of the political questions doctrine by stating inter alia that “*By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience*”.

If the case “*Baker v Carr*”²⁶ were the first one to mention such “political question”, we can mention, in international political questions, the unilateral termination of a defense treaty by former President Jimmy Carter in the US Supreme Court case “*Goldwater v Carter*” of 1979²⁷. Similarly, the *Conseil d’Etat* refused to recognize its jurisdiction in the case of an oil company wanting to defend its interests in the middle of a treaty negotiation between France and Algeria on the topic.²⁸

The Taiwanese Constitutional Court (under an American jurisprudential influence ?) stated similarly that the definition of the national territory’s boundaries was immune to judicial review.²⁹

Odermatt J, B Petkova “A Political Question Doctrine at the International Court of Justice? European Journal of International Law Talks (EJIL Talks !) February 26, 2024

²⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024, p. 3

²⁶ Baker v. Carr, 369 U.S. 186 (1962)

²⁷ Goldwater v. Carter, 444 U.S. 996 (1979)

²⁸ Conseil d’État, Section, “COPAREX” July 13th 1979, 04880 04881

²⁹ “Interpretation No.328: The Boundaries of National Territory Case”. Constitutional Court R.O.C. (Taiwan). 1993-11-26.

Finally, post-1945 Japan, its “pacifist” constitution, and the debate surrounding its Article 9 created an American-influenced crucible for the Japanese Supreme Court’s version of international political doctrine³⁰.

If the last comparative examples are more of an adjunct to help non-French-trained legal minds to understand what an “international” *acte de government* is, one has to mention that the rationale of the *Conseil d’Etat* in its Kabuga judgement is quite easy to understand given the French case-law on this topic, which is also in line with international practice and, foremost, international law.

The latter has indeed shown weaknesses: we can mention the South African non-compliance to arrest former Sudanese president Omar El Beshir³¹ or the Mongolian non-compliance to do so with current Russian President V.V. Putin³².

On a historical plan, one has to remember that former German Emperor William II, was declared responsible for WWI and, under Article 227 of the 1919 Versailles Treaty, was arraigned by the Allied and Associate Powers “*for a supreme offence against international morality and the sanctity of treaties.*”. However, the trial never occurred as William II went into exile in the Netherlands, which wanted to keep a strict neutrality³³

However, Félicien Kabuga was not a Head of State, and his criminal responsibility will never be established or denied on a legal plan.

Conclusions

Following its namesake *Conseil d’Etat* judgement, the “*acte de gouvernement*” theory was given a new vigor along with the debates around the repatriation of French children born to

³⁰ Po L. Chen & Jordan T. Wada, Comment, *Can the Japanese Supreme Court Overcome the Political Question Hurdle?*, 26 Wash. Int’l L.J. 349 (2017). Available at: <https://digitalcommons.law.uw.edu/wilj/vol26/iss2/8>

³¹ Among other pieces of literature cf. Pavlopoulos, Nikolaos. “South Africa’s Failure to Arrest President al-Bashir: An Analysis of the Supreme Court of Appeal’s Decision and Its Implications.” *The Comparative and International Law Journal of Southern Africa*, vol. 49, no. 2, 2016, pp. 164–81. JSTOR, <https://www.jstor.org/stable/26367598>. Accessed 5 July 2026.

³² Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties ICC-01/22-90 24 October 2024 | Pre-Trial Chamber | Decision

³³ Rens Steenhard “A Supreme Offence against International Morality and the Sanctity of Treaties: William II of Hohenzollern and the Treaty of Versailles”

jihadist parents in Syria.³⁴

Relations between French foreign affairs authorities and international registries can be seen, as of now, as immune to judicial review through the lens of this theory.

But if one cannot foresee how top-level French judges might deal with future cases of “*acte de gouvernement*” applied to international criminal law, one (if not everybody) should never forget the famous moral of Jean De La Fontaine’s fable “The Animals Sick of the Plague”, familiar to every French child.

*“Accordingly, as your power is great or small, the judgments of a court will whiten or blacken your reputation.”*³⁵

³⁴ For an example cf. European Court of Human Rights (Grand Chamber) « HF and Others v. France » May 14th, 2022, *Applications nos. 24384/19 and 44234/20* (and especially §60 et seq)

³⁵ The Animals Sick of the Plague - (Book VII.—No. 1) - The Original Fables of La Fontaine by Jean de La Fontaine, translated by F. C. Tilney (1913)