

**UNITED  
NATIONS**



International Residual Mechanism  
for Criminal Tribunals

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Cases no.: MICT-13-38-Misc.1  
              MICT-13-38-Misc.2  
              MICT-13-38-Misc.3  
Date: 14 October 2021  
Original: French

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**BEFORE A SINGLE JUDGE**

**Before:** Judge Mahandrisoa Edmond Randrianirina  
**Registrar:** Mr Abubacarr Tambadou  
**Decision rendered on:** 14 October 2021

**THE PROSECUTOR**

**v.**

**FÉLICIEN KABUGA**

***PUBLIC***

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**DECISION ON MOTIONS FILED BY FÉLICIEN KABUGA'S  
FAMILY FOR RETURN OF FROZEN ASSETS AND SEIZED  
PROPERTY**

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**Office of the Prosecutor**

Mr Serge Brammertz

**Counsel for Applicants**

Mr Peter Robinson

**Counsel for Félicien Kabuga**

Mr Emmanuel Altit

**I, MAHANDRISOA EDMOND RANDRIANIRINA**, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge in this case;<sup>1</sup>

**CONSIDERING** that Félicien Kabuga, initially indicted by the International Criminal Tribunal for Rwanda (“ICTR”) on 26 November 1997 and whose operative indictment was confirmed on 13 April 2011 and amended on 1 March 2021,<sup>2</sup> was arrested in France on 16 May 2020 and transferred to The Hague branch of the Mechanism on 26 October 2020;<sup>3</sup>

**BEING SEISED** of three motions filed on, respectively, 14 April 2021 as a confidential document by François Ngirabatware and Catherine Mukakayange (“First Applicants”),<sup>4</sup> on 15 April 2021 by Donatien Nshimyumuremyi, Innocent Twagirimukiza, Alain Gilbert Habumukiza and the heirs of Joséphine Mukazitoni, including her husband Kabuga and their children (“Second Applicants”),<sup>5</sup> and on 2 August 2021 by Nshimyumuremyi, Bernadette Uwamariya and Félicité Mukademali<sup>6</sup> (“Third Applicants”) (together, “Motions” and “Applicants”), for restitution of property and assets belonging to the Kabuga family that were frozen while he was a fugitive or seized during his arrest;<sup>7</sup>

**NOTING** the requests from the Applicants seeking: (i) to declare that there is no longer any justification in maintaining the freezing of the five bank accounts held by the First and Second Applicants in Belgium and in France, the six bank accounts held by Kabuga and/or Mukazitoni, his

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<sup>1</sup> *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.1, Order Assigning a Single Judge, 29 April 2021 (original English version filed on 26 April 2021), p. 1; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Order Assigning a Single Judge, 29 April 2021 (original English version filed on 26 April 2021), p. 1; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.3, Order Assigning a Single Judge, 17 August 2021 (original English version filed on 10 August 2021), p. 1.

<sup>2</sup> *The Prosecutor v. Félicien Kabuga*, Case no. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997; *The Prosecutor v. Félicien Kabuga*, Case no. ICTR-98-44B-I, Amended Indictment, 14 April 2011; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-PT, Second Amended Indictment, 1 March 2021 (public with confidential annex).

<sup>3</sup> *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-I, Order Scheduling an Initial Appearance, 10 November 2020 (original English version filed on 8 November 2020), pp. 1 to 3.

<sup>4</sup> *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.1, Motion for Order concerning Frozen Bank Accounts, 6 August 2021 (original English version filed on 14 April 2021; confidential with confidential Annexes A and B, public redacted version filed on the same day) (“First Motion”), para. 1. Ngirabatware is the former spouse of one of Kabuga’s children, Claudine Twagiriherwe, and Mukakayange is Ngirabatware’s sister. See First Motion, paras 4 and 12, Annex B, paras 1 and 2.

<sup>5</sup> *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Motion for Order concerning Frozen Assets, 8 June 2021 (original English version filed on 15 April 2021; public with confidential Annexes A to E, public redacted version of Annexes A and B filed on 4 May 2021) (“Second Motion”), paras 1 and 5. Nshimyumuremyi, Twagirimukiza and Habumukiza are the children of Kabuga and Mukazitoni. See Second Motion, paras 4 and 5, Annex B, paras 1 and 2.

<sup>6</sup> *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.3, Motion for Return of Seized Property, 17 August 2021 (original English version filed on 2 August 2021) (“Third Motion”), para. 1. Nshimyumuremyi, Uwamariya and Mukademali are Kabuga’s children. See Third Motion, paras 1 to 5, Annex A, para. 1, Annex B, para. 1, Annex C, para. 1.

<sup>7</sup> First Motion, paras 1, 3, 4 and 12; Second Motion, paras 1, 3, 6, 6[*bis*] and 12; Third Motion, paras 1 to 6, 8 to 10, and 23.

late wife, in France and in Kenya, as well as the two real estate properties and associated revenues held by Twagirumukiza in Belgium and by Kabuga and Mukazitoni in Kenya (“Assets”) and to notify the relevant national authorities thereof;<sup>8</sup> (ii) alternatively, if the Assets belonging to Kabuga and/or Mukazitoni continue to be frozen, to order the unfreezing of the part of the Assets belonging to their heirs;<sup>9</sup> and (iii) to order the Office of the Prosecutor of the Mechanism, pursuant to Rule 55 of the Rules of Procedure and Evidence (“Rules”), to restore to the Third Applicants the property seized during the search of their homes in May 2020, namely the computers, telephones, SIM cards, electronic files, tapes, photographs and documents (“Seized Property”), and to set a reasonable time-limit to do so;<sup>10</sup>

**NOTING** the arguments of the Applicants that: (i) there is no longer any justification to continue to freeze the Assets after the arrest of Kabuga and it causes prejudice to the First and Second Applicants, who have not had access to their bank accounts or their real estate property for several years even though Kabuga is not the source of those funds nor does he have any interest in them,<sup>11</sup> with the exception of the Assets held with his wife Mukazitoni;<sup>12</sup> and (ii) the Prosecutor has had sufficient time since Kabuga’s arrest to assess the probative value of the Seized Property and to extract any data from the electronic devices and make copies of them, and should restore

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<sup>8</sup> First Motion, paras 1, 4, 11 to 13, Annex B, para. 1; Second Motion, paras 1, 6, 8, 12, 16 and 17, Annex A, paras 1 to 8.

<sup>9</sup> Second Motion, para. 18.

<sup>10</sup> Third Motion, paras 1, 2, 6 and 23. *See* also Third Motion, Annex A (inventory of items seized from the home of Nshimyumuremyi), p. 20 (Registry pagination), Annex B (inventory of items seized from the home of Uwamariya and record of search), pp. 17 to 15 (Registry pagination), Annex C (inventory of items seized from the home of Mukademali and record of search), pp. 12 to 9 (Registry pagination).

<sup>11</sup> First Motion, paras 3 to 13, Annex B, paras 3 and 4; Second Motion, paras 3 to 15. The Applicants asserted that their assets have been frozen at the request of the ICTR Prosecutor pursuant to Rule 40 (A) (iii) of the ICTR Rules of Procedure and Evidence since 11 March 2003 for the First Applicants, and the bank accounts of the Second Applicants in France and Belgium respectively since 1999 and 2002. *See* First Motion, para. 4; Second Motion, para. 8, Annex B, paras 6 and 9. The Applicants also refer to the letter from the Prosecutor dated 13 February 2012 asking the Belgian authorities that the First Applicants’ assets remain seized, and the international warrant of arrest of 29 April 2013 requesting that all Member States adopt provisional measures to freeze the Accused’s assets in their territory. *See* First Motion, paras 4, 8 to 10, Annex A, p. 3 (Registry pagination), Annex B, para. 6; Second Motion, paras 6, 9 to 11. *See* also *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38, Warrant of Arrest and Order for Transfer Addressed to All States, 29 April 2013 (“Warrant of Arrest”), p. 3. The Applicants stated that they had attempted in vain to obtain access to their property by making a request to the banks and the relevant national courts. *See* First Motion, para. 4, Annex B, paras 5 and 6; Second Motion, Annex B, paras 6 and 9, Annex C (Ruling of the Tribunal de première instance in Brussels of 13 November 2007), pp. 31 and 30 (Registry pagination), Annex D (Decision of the Cour de cassation in Paris of 16 September 2008), pp. 28 to 25 (Registry pagination), Annex E (Judgement of the Court of Appeal at Nairobi of 25 September 2015 affirming the decision of the High Court of 30 June 2009), pp. 23 to 1 (Registry pagination). The Second Applicants emphasised that the indictment against Félicien Kabuga does not allege the unlawful taking of property and that the provisions in the Rules allowing for the restitution of property to be ordered are therefore not applicable. *See* Second Motion, paras 14 and 15.

<sup>12</sup> Second Motion, paras 5 [*bis*], 12 and 18. The Second Applicants indicate that the assets in the name of Mukazitoni and/or Kabuga come from the earnings that Mukazitoni and Kabuga jointly managed. *See* Second Motion, Annex B, paras 7 and 8. Moreover, Nshimyumuremyi acknowledges that the source of the Assets in his name and in the names of his brothers Habumukiza and Twagirumukiza was a financial gift from Kabuga. *See* Second Motion, Annex B, paras 3 to 5.

immediately to the Third Applicants the Seized Property that is not relevant to the criminal proceedings, in which they are only third parties;<sup>13</sup>

**NOTING** the Prosecutor’s submissions, filed as confidential on 28 and 29 April 2021 and on 11 August 2021 respectively, maintaining that the Motions should be dismissed<sup>14</sup> because: (i) the First and Second Applicants had not established their rights in respect of the Assets or that they had been blocked on the basis of the Prosecutor’s request or in execution of the Mechanism’s warrant of arrest and, in any event, none of the Assets would be released before the Registrar’s inquiry into Kabuga’s indigency status is completed;<sup>15</sup> (ii) any request for the release of the frozen funds pursuant to Rule 40 (A) (iii) of the ICTR Rules is premature and should first be submitted to the Prosecutor, whose responsibility it is to assess whether provisional measures, which are not limited to preventing the escape of the Accused, are still justified;<sup>16</sup> and (iii) the Third Applicants have not shown that Rule 39 of the Rules which provides for the restitution of the seized property of an accused applies to third parties and, in any event, the Seized Property may present probative value in the later stages of the proceedings;<sup>17</sup>

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<sup>13</sup> Third Motion, paras 8 to 22. The Third Applicants rely by analogy on Rule 39 of the Rules, which states that the Prosecutor has an obligation to assess in a timely manner the evidentiary value of items seized from an accused and to return any material that will not be used as evidence, in order to maintain that they should benefit from the same protection against their property rights being prejudiced and not find themselves in a situation that is worse than that of the accused. *See* Third Motion, paras 16 to 23. They indicated that they requested in vain that the Prosecutor set a date for the restitution of the Items seized. *See* Third Motion, para. 7, Annex D, pp. 7/28 BIS and 6/28 BIS (Registry pagination), Annex E, pp. 4/28 BIS to 1/28 BIS (Registry pagination).

<sup>14</sup> *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.1, Prosecution Response to Motion for Order concerning Frozen Bank Accounts, 6 August 2021 (original English version filed on 28 April 2021; confidential with confidential Annex A and confidential and *ex parte* Annexes B and C, public redacted version filed on 25 June 2021) (“Response to First Motion”), paras 1 and 17; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Prosecution Response to Motion for Order concerning Frozen Assets, 8 June 2021 (original English version filed on 29 April 2021; confidential, public redacted version filed on 25 June 2021) (“Response to Second Motion”), paras 1 and 17; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.3, Prosecution Response to Motion for Return of Seized Property, 24 August 2021 (original English version filed on 11 August 2021) (“Response to Third Motion”), paras 1 and 8.

<sup>15</sup> Response to First Motion, paras 1 to 8, 11 and 12; Response to Second Motion, paras 1 to 7, 10 and 11. The Prosecutor indicates, *inter alia*, having reviewed the ICTR records to verify the information provided by the Applicants and to have reasons to believe that the First Applicants’ bank accounts were in fact jointly owned Ngirabatware and his ex-wife Twagirihirwe. *See* Response to First Motion, paras 5 to 7, Annex B, p. 2/33 BIS (Registry pagination), Annex C, p. 1/33 BIS (Registry pagination). The Prosecutor adds that care should be exercised to avoid any prejudice to the rights of victims to restitution of their property and/or compensation. *See* Response to First Motion, paras 2, 13 to 16; Response to Second Motion, paras 2, 12 to 16.

<sup>16</sup> Response to First Motion, paras 1, 9 and 10; Response to Second Motion, paras 1, 8 and 9. The Prosecutor underscores that Rules 37 (A) of the Rules and 40 (A) of the ICTR Rules allow him, *inter alia*, to take all necessary measures to prevent intimidation of or injury to a victim or witness, or the destruction of evidence. *See* Response to First Motion, para. 10; Response to Second Motion, para. 9.

<sup>17</sup> Response to Third Motion, paras 1 to 7.

**NOTING** the replies, filed on 3 and 4 May 2021 and 12 August 2021,<sup>18</sup> maintaining that: (i) the First and Second Applicants are owners of the Assets, which do not belong to Kabuga and were not transferred by him for the purpose of concealing them from the ICTR;<sup>19</sup> and (ii) there is no justification not to extract or copy the data in order to return the Seized Property to the Third Applicants, thus reconciling their right to enjoy their property with the right of the Prosecutor to use the evidence that is relevant to the trial;<sup>20</sup>

**NOTING** the arguments in the Prosecutor’s sur-reply filed on 11 May 2021;<sup>21</sup>

**NOTING** the Registrar’s submissions filed on 9 June 2021 that the Motions reveal the existence of assets that may be appropriately considered in determining the means of the Accused and inviting me to defer adjudication until the Mechanism’s Registry has completed its assessment of Kabuga’s indigency status;<sup>22</sup>

**CONSIDERING** that the present litigation is not the appropriate setting to discuss the matter of Kabuga’s representation and that the Applicants have not sought leave to file their further submissions, dated 14 and 23 June 2021, and 9 and 21 July 2021, respectively, as well as the

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<sup>18</sup> The Applicants sought permission to file replies limited to the questions raised in the Responses. *See The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.1, Request for Leave to Reply and Reply: Motion for Order concerning Frozen Bank Accounts, 16 June 2021 (original English version filed on 3 May 2021; public with confidential Annexes A to C, public redacted version of Annexes B and C filed on the same day) (“First Reply”), paras 1 to 3; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Request for Leave to Reply and Reply: Motion for Order concerning Frozen Assets, 17 June 2021 (original English version filed on 4 May 2021; public with confidential Annexes A to D, public redacted version filed on the same day) (“Second Reply”), paras 1 to 3; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.3, Request for Leave to Reply and Reply: Motion for Return of Seized Property, 26 August 2021 (original English version filed on 12 August 2021) (“Third Reply”), paras 1, 2. The Prosecutor requested that I deny the First and Second Replies on the grounds that they expanded the scope of the Motions, or, in the alternative, to afford him an opportunity to sur-reply. *See The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.1, Prosecution Opposition to Request for Leave to Reply: Frozen Bank Accounts Motion, 6 August 2021 (original English version filed on 11 May 2021; confidential with confidential and *ex parte* Annexes 1 to 3) (“First Sur-Reply”), paras 1 to 7, 24 and 25; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Prosecution Opposition to Request for Leave to Reply: Frozen Assets Motion, 6 August 2021 (original English version filed on 11 May 2021; confidential) (“Second Sur-Reply”), paras 1 to 7, 22 and 23. I deem it appropriate, in the interest of justice, to take into consideration of the arguments and documents filed in reply and sur-reply, and consider the filings valid pursuant to Rule 153 (A) of the Rules.

<sup>19</sup> First Reply, paras 4 to 29; Second Reply, paras 4 to 33. The First Applicants presented, in support of their claims in respect of their rights to the Assets, two additional declarations and a Judgement of the Court of Appeal in Brussels. *See* First Reply, Annex A (Judgement of the Court of Appeal in Brussels of 26 October 2017 affirming the judgement of 28 March 2013), pp. 55 to 40 (Registry pagination), Annex B, pp. 38 and 37 (Registry pagination), Annex C, p. 35 (Registry pagination). The Second Applicants also presented four additional declarations, bank documents dating from 2008 to 2015 (or undated), a request from Habumukiza to a Belgian investigating judge in 2002, and a warrant for provisional seizure issued by a Belgian investigating judge dated 28 October 2004 concerning Twagirumukiza’s real estate property. *See* Second Reply, Annex A, pp. 79 to 73 (Registry pagination), Annex B, pp. 71 to 69 (Registry pagination), Annex C, pp. 67 to 65 (Registry pagination), Annex D, p. 63 (Registry pagination).

<sup>20</sup> Third Reply, paras 5 to 8.

<sup>21</sup> First Sur-Reply, paras 8 to 23; Second Sur-Reply, paras 8 to 21.

<sup>22</sup> *The Prosecutor v. Félicien Kabuga*, Cases no. MICT-13-38-Misc.1 & MICT-13-38-Misc.2, Registrar’s Submission in Relation to the Motions for Orders concerning Frozen Assets, 2 August 2021 (original English version filed on 9 June 2021), paras 7 to 9.

declaration in English attributed to Kabuga with regard to the possible withdrawal of his assigned Counsel in the main case,<sup>23</sup> and, consequently, that it is neither necessary nor relevant to take them into consideration to adjudicate on the Motions;<sup>24</sup>

**CONSIDERING** that the Assets, which belong at least in part to Kabuga and/or originate from funds whose source he is,<sup>25</sup> are *prima facie* relevant to the assessment by the Registrar of the indigency status of the Accused who still benefits from assigned Counsel in the main case under way,<sup>26</sup> and it is therefore appropriate to defer adjudication on the question of continuing to freeze the Assets until the conclusion of the Registrar’s inquiry;

**CONSIDERING** that, in any event, documents presented in support of the First and Second Motions, in particular the letter from the ICTR Prosecutor to the Belgian authorities of 13 February 2012<sup>27</sup> and the four decisions issued by Belgian, French and Kenyan courts between 2007 and

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<sup>23</sup> See *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.1, Response to Registrar’s Submission, 17 June 2021 (original English version filed on 14 June 2021); *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Response to Registrar’s Submission, 23 August 2021 (original English version filed on 23 June 2021) (“Response of 23 June 2021”; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Supplemental Response to Registrar’s Submissions, 23 August 2021 (original English version filed on 9 July 2021); *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Filing of Signed Declaration, 23 August 2021 (original English version filed on 21 July 2021) (“Response of 21 July 2021”). See also *The Prosecutor v. Félicien Kabuga*, Cases no. MICT-13-38-Misc.1 & MICT-13-38-Misc.2, Information Filed further to the “Registrar’s Submission in Relation to the Motions for Orders Concerning Frozen Assets”, 16 June 2021 (confidential and *ex parte*); *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Félicien Kabuga’s Defence Submissions on Protecting the Interests and Rights of Félicien Kabuga, 5 July 2021 (confidential and *ex parte*, public redacted version filed on the same day); *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-Misc.2, Registrar’s Submission in Relation to the “Response to Registrar’s Submission”, 23 August 2021 (original English version filed on 8 July 2021). In this regard, the Second Applicants indicated that they wanted the Assets to be used to remunerate Counsel of the Accused’s choice, namely Peter Robinson, as attested to by the declaration attributed to Kabuga. See Response of 23 June 2021, paras 3 and 4, Annex A, p. 3/127 BIS (Registry pagination), Annex B, p. 1/127 BIS (Registry pagination); Response of 21 July 2021, para. 1, Annex A, p. 1/180 BIS (Registry pagination).

<sup>24</sup> I note that in its decision of 1 April 2021 on Kabuga’s representation, the Trial Chamber currently seised of the main case recalled that the right to legal assistance funded by the Mechanism does not confer on the Accused the right to choose his counsel and that in this instance, Kabuga’s family members have no standing in this proceeding. It deemed, in particular that assigned Counsel’s refusal to take instructions from members of Kabuga’s family or to discuss Defence strategy with them was in line with his professional obligations, as well as judicial decisions and orders on confidentiality of the case, and that it was in the interest of justice to order the Registrar to assign a counsel, namely Emmanuel Altit, as Kabuga’s Counsel under the Mechanism’s legal aid scheme until further order. See *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-PT, Decision on Matters Related to Félicien Kabuga’s Representation, 12 April 2021 (original English version filed on 1 April 2021) (“Decision of 1 April 2021”), paras 12, 14, 15 and 18.

<sup>25</sup> See *supra* note 12. See also First Sur-Reply, Annex 2, p. 78 (Registry pagination), Annex 3, p. 76 (Registry pagination).

<sup>26</sup> See Decision of 1 April 2021, para. 18.

<sup>27</sup> First Motion, Annex A, p. 3 (Registry pagination); Response to First Motion, Annex A, p. 27 (Registry pagination).

2017,<sup>28</sup> which correspond to requests to release the Assets prior to Kabuga's arrest, do not establish the current unavailability of Assets as alleged by the Applicants<sup>29</sup> or their rights to these Assets;<sup>30</sup>

**CONCLUDE** for these reasons that 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,<sup>31</sup> 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;<sup>32</sup>

**CONSIDERING** that Rule 55 of the Rules states that a Judge or a Chamber may issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial;

**CONSIDERING** that, pursuant to Article 16 of the Statute of the Mechanism and Rule 39 (A) of the Rules, the Prosecutor has the power, in the course of investigations, to collect evidence and is responsible for retention, storage and security of physical material obtained in the course of investigations until formally tendered into evidence;

**CONSIDERING** that, as the Single Judge assigned to this case, it is for me to oversee the actions of the Prosecutor on the basis of regulations issued by the Judges of the Mechanism, in particular when a third party has alleged prejudice;<sup>33</sup>

**CONSIDERING** that it has been established, from the presented records, that the Property seized by the French authorities in May 2020, namely the electronic devices,<sup>34</sup> and that the Third

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<sup>28</sup> See Second Motion, Annex C, pp. 31 and 30 (Registry pagination), Annex D, pp. 28 to 25 (Registry pagination), Annex E, pp. 23 to 1 (Registry pagination); First Reply, Annex A, pp. 55 to 40 (Registry pagination). See also Second Reply, Annex B, pp. 70 and 69 (Registry pagination), Annex C, pp. 66 and 65 (Registry pagination).

<sup>29</sup> Likewise, mere reference to the warrant of arrest does not go to establish that the Assets in question had actually been frozen as any provisional measures by the Member States.

<sup>30</sup> In this regard, the judgement of the Court of Appeal in Brussels presented by the First Applicants, *inter alia*, that Ngirabatware owns bank account no. [...]56, which in the present litigation is maintained to belong to his sister Mukakayange, that he is seeking for this reason a payment equivalent to the frozen amount in this account, which had previously been seized in the context of a charge against him for money laundering in Belgium. Compare First Reply, Annex A, pp. 53, 49 and 42 (Registry pagination) with First Motion, Annex B, para. 1 and First Reply, Annex C, para. 2. See also Response to First Motion, Annex B, p. 2/33 BIS (Registry pagination); First Sur-Reply, Annex 2, p. 78 (Registry pagination).

<sup>31</sup> For the same reasons, it is appropriate to deny the alternative request for the unfreezing of the Assets belonging to Kabuga and Mukazitoni's heirs.

<sup>32</sup> If necessary, at the end of the Registrar's inquiry, the Applicants will need to send their request to the Prosecutor of the Mechanism, who is the one to decide, under my judicial oversight, if all the provisional measures that may have been required under Rule 40 (A) (iii) of the ICTR Rules, which resulted in the freezing of the Assets, remain justified after Kabuga's arrest, taking given, *inter alia*, the stage of and implications for the main case. See, for example, in Case no. Misc.-Kabuga Family-01-A, Decision (Appeal of the Family of Félicien Kabuga Against Decisions of the Prosecutor and President of the Tribunal), 22 November 2002 ("Decision of 22 November 2002"), pp. 3 and 4.

<sup>33</sup> See Decision of 22 November 2002, p. 3.

<sup>34</sup> See Third Motion, Annex A, p. 20 (Registry pagination), Annex B, pp. 17 to 15 (Registry pagination), Annex C, pp. 12 to 9 (Registry pagination).

Applicants allege that their property right has been disproportionately affected, including their right to use or sell the property;<sup>35</sup>

**CONSIDERING** that the Seized Property was transferred to the Prosecutor who indicated that this property is “undergoing review” and that he intends to retain it in case it has probative value in the proceedings against Kabuga, meaning after the presentation of the Prosecution case,<sup>36</sup> which is the reason he refused, on 28 July 2021, to set a date for its return to the Third Applicants;<sup>37</sup>

**NOTING**, moreover, that on 23 August 2021 the Prosecutor filed his Pre-Trial Brief in the main case and the list of exhibits he intends to present at trial, pursuant to Rule 70 (E) (iii) of the Rules;<sup>38</sup>

**CONSIDERING** that the Prosecutor does not provide justification, at this stage of the investigation and trial preparation in the main case, for the need to retain indiscriminately all the Property seized from third parties to the proceedings or the existence of grounds that would prevent him from making copies of the documents and/or extracting data from electronic devices in order to return either all or some of them to the Third Applicants;

**CONCLUDE** that it is appropriate in these circumstances to invite the Prosecutor to complete as soon as possible his preliminary assessment of whether the Seized Property has probative value, to return the property that does not appear likely to be used as evidence and, if necessary, to make copies of document and/or extract data held on the electronic devices seized in order to return either some or all of them to the Third Applicants;

**PURSUANT** to Rule 55 of the Rules,

**DENY** the First and Second Motions, without prejudice;

**INVITE** the Prosecutor to complete, within 60 days of the present Decision, his preliminary assessment of the probative value of the Seized Property, to return the property that does not appear likely to be used as evidence and, if necessary, to make copies of document and/or extract data contained on the electronic devices seized in order to return either some or all of them to the Third Applicants; and

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<sup>35</sup> See Third Motion, para. 9; Third Reply, para. 5.

<sup>36</sup> See Response to Third Motion, paras 1, 6 and 7; Third Motion, Annex E, pp. 4/28 BIS and 2/28 BIS (Registry pagination).

<sup>37</sup> See Third Motion, Annex E, p. 2/28 BIS (Registry pagination).

<sup>38</sup> See *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-PT, Prosecution Pre-Trial Brief and Witness and Exhibit List, 23 August 2021 (confidential; public redacted version of Pre-Trial Brief filed on 12 October 2021).

