

MICT-12-27  
20-12-2012  
(15-10)

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UNITED  
NATIONS



Mechanism for International Criminal Tribunals

Cases No. MICT-12-26  
                  MICT-12-27

Date: 20 December 2012

Original: English

SINGLE JUDGE

Before: Judge Vagn Joensen, Single Judge

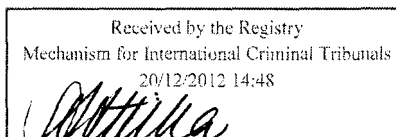
Registrar: Mr. John Hocking

*In Re.*  
Prosecutor v. Théoneste BAGOSORA *et al.*  
Prosecutor v. Protais ZIGIRANYIRAZO

INTERMEDIARY ORDER IN RESPECT TO THE REQUEST FOR ACCESS TO  
MATERIALS CONCERNING PASCAL SIMBIKANGWA

Office of the Prosecutor:

Hassan Bubacar Jallow



V.

## INTRODUCTION

1. On 5 November 2012, the Mechanism for International Criminal Tribunals (“MICT” or “Mechanism”) received a request from Ms. Emmanuelle Ducos, Vice-President of the *Tribunal de Grand Instance de Paris* (“*Tribunal de Paris*”), seeking confidential materials that are under the competence of the MICT.<sup>1</sup> The Request is made in regard to M. Safari Senyamuhara, alias Pascal Simbikangwa, who is currently being prosecuted in France for crimes against humanity and for events allegedly committed in Rwanda during the 1994 Genocide.<sup>2</sup> The Prosecution does not oppose the request.<sup>3</sup>

2. On 1 July 2012, jurisdiction for all judicial functions related to the protection of witnesses and victims in cases completed by the International Criminal Tribunal for Rwanda (“ICTR”) passed to the MICT. On 13 November 2012, I was designated as MICT Single Judge to rule on the Request.<sup>4</sup>

## DELIBERATIONS

### Preliminary Matters

#### *Scope of this Decision*

3. This decision only concerns:
- (i) cases that are no longer pending before a chamber.
  - (ii) material that is protected pursuant to a court order for witness protection. The *Tribunal de Paris* is advised to access non-protected material on the ICTR’s webpage or request it from the ICTR Court Management Section.

#### *Applicable Law*

4. Rule 86 of the MICT Rules of Procedure and Evidence (“Rules”) governs protection of witnesses in proceedings before the Tribunal and under the umbrella of the MICT, allowing for the

<sup>1</sup> Demande d’Entraide Internationale Complementaire, 5 November 2012 (“Request”).

<sup>2</sup> Request; *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. MICT-12-26, Prosecutor’s Submission Regarding “Demande d’Entraide Penale Internationale Complementaire” (“Prosecution Submission”), para. 3.

<sup>3</sup> Prosecution Submission, para. 10.

<sup>4</sup> Order Assigning a Single Judge to Consider an Application Pursuant to Rule 86(H), 13 November 2012.

protection orders to be varied or rescinded. Rule 86 (H) provides that “a judge or bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the ICTY, the ICTR, or the Mechanism may seek to rescind, vary, or augment protective measures ordered in proceedings before the ICTY, the ICTR, or the Mechanism.” The requests with respect to Pascal Simbikangwa have come from the Vice-President of the *Tribunal de Paris* and are therefore considered under the auspices of Rule 86 (H).<sup>5</sup>

5. In determining an application under MICT Rule 86(H), the Single Judge or Chamber appointed shall ensure through the Victims and Witnesses Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures, pursuant to MICT Rule 86(I). On the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, MICT Rule 86(I) also permits the Chamber to “order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent.”

**Requirements for Access to Confidential Material**

6. According to the practice of the ICTR and the ICTY which I consider should also apply to requests for confidential information from MICT protected material may be disclosed to a party in a case before a domestic or other court provided that the applicant demonstrates that it is likely to assist its case materially or that there is a good chance that it would. This can be done by showing that there is a factual nexus between the case before this Tribunal and the case in the other jurisdiction. Such a nexus has been determined to exist in cases which are based upon the same subject matter as the case before the Tribunal.<sup>6</sup>

**Specific Material Sought**

*Requests for access to materials in the Bagosora et al. case*

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<sup>5</sup> Request.  
<sup>6</sup> *The Prosecutor v. Augustin Ndingiyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu*, Case No. ICTR-00-56-T, Decision on the Prosecution Motion to Unseal and Disclose to the Canadian Authorities the Closed Session Transcripts of Witness ANA (TC), 23 March 2007, para. 10.

7. The *Tribunal de Paris* requests material from the *Bagosora et al.* case.<sup>7</sup> The specific materials requested from this case are the identification records of witness DAS and exhibits labelled P120A-D.<sup>8</sup>

8. The Prosecution submits that the *Tribunal de Paris* has established a nexus between the *Bagosora et al.* case and the case against Pascal Simbikangwa. Both cases involve, in part, events that occurred at roadblocks in Kiyovu between April and July 1994.<sup>9</sup> Witness DAS testified about events that occurred at roadblocks in Kiyovu between April and July 1994, while at the same time, the case against Captain Pascal Simbikangwa is concerned with the latter's role in the establishment of roadblocks in Kiyovu and the distribution of weapons at these roadblocks for the killings of Tutsi during that same time period.<sup>10</sup> The Prosecution and the *Tribunal de Paris* submit that the sealed personal identification sheet of DAS may materially assist the *Tribunal de Paris* in its investigation of Simbikangwa's role in the same events, or at least have a good chance of so doing.<sup>11</sup> I find there is a factual nexus between the *Simbikangwa* case in France and the *Bagosora et al.* case.

9. DAS is a protected witness, and the identification record was admitted under seal.<sup>12</sup> Witness Support and Protection ("WISP") shall consult this witness on the possible variation of protective measures to allow the disclosure of identity for use in the French proceedings against Pascal Simbikangwa.

10. The *Tribunal de Paris* also requests the disclosure of Exhibits P120A-D, which are photographs.<sup>13</sup> However, those exhibits were admitted as public exhibits<sup>14</sup> and can be accessed as indicated above in paragraph 4 (ii).

*Requests for access to materials in the case against Protais Zigiranyirazo*

11. The *Tribunal de Paris* also requests the disclosure of material from the *Protais Zigiranyirazo* case. First, the Court seeks disclosure of the identifications of witnesses SGP, APJ, AKK, AKR, AKO, AKP, AKL, RDP109, and RDP46.<sup>15</sup>

<sup>7</sup> Request.

<sup>8</sup> Request.

<sup>9</sup> Prosecution Submission, para. 6.

<sup>10</sup> Statement of DAS, given 17 July 2002, admitted 7 November 2003, *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Anatole Nsengiyumva and Aloys Ntabakuze*, Case No. ICTR-98-41-T, ("Prosecutor v. Bagosora et al."); Submission, para. 3.

<sup>11</sup> Prosecution Submission, paras. 6; Request.

<sup>12</sup> *Prosecutor v. Bagosora et al.*, Exhibit No. P119, Admitted 4 November 2003.

<sup>13</sup> Request.

<sup>14</sup> *Prosecutor v. Bagosora et al.*, Exhibit Nos. P120A-D, Admitted 6 November 2003.

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12. The *Tribunal de Paris* has explained that Simbikangwa's case and the *Zigiranyirazo* case both centred upon events that occurred in Kesho hill, and that several witnesses from the Simbikangwa case have stated that they previously testified at the ICTR in the *Zigiranyirazo* case. The *Tribunal de Paris* requests access to these witnesses' personal identification records so it can confirm whether the witnesses who testified in the *Zigiranyirazo* case are the same witnesses who testified in Simbikangwa's case. If so, the *Tribunal de Paris* seeks to determine whether their testimonies in both cases relating to the events on Kesho hill are consistent.<sup>16</sup> I find the request sufficient to establish that a factual nexus between the *Simbikangwa* case in France and the *Zigiranyirazo* case exists.

13. I recall the importance of a witness's consent to the variation of his or her protective measures. Witnesses SGP, APJ, AKK, AKR, AKO, AKP, AKL, RDP109, and RDP46 have not yet been consulted regarding their protective measures. Therefore, it will be necessary for the WISP S to consult these witnesses on the possible variation of their protective measures to allow the disclosure of their statements for confidential use in the proceedings against Pascal Simbikangwa.

14. Next, the *Tribunal de Paris* requests disclosure of exhibits D76 and D77 containing the lists of participants in events in Kesho hill.<sup>17</sup> Exhibits D76 and D77 were admitted under seal and contain the names of individuals I am unable to identify.<sup>18</sup> Because the exhibits pertain to the events in Kesho hill and were admitted through the testimony of Witness RDP109 from the *Zigiranyirazo* case, who potentially also testified in the *Simbikangwa* case, the exhibits are relevant to the *Simbikangwa* case. I therefore find the requisite factual nexus between Simbikangwa's case and the *Zigiranyirazo* case in this regard. Taking into account that the lists do not identify the individuals as witnesses I consider that the lists may be disclosed on a confidential basis.

15. Finally, the *Tribunal de Paris* requests disclosure of exhibits P104, P104E, P104F, and P104K, which refer to a gathering of the gacaca around 12 April 2002.<sup>19</sup> The *Tribunal de Paris* submits that the records would assist in evaluating the credibility of protected Witness RDP46, who testified about the events in Kesho Hill.<sup>20</sup>

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<sup>15</sup> Request.

<sup>16</sup> Prosecution Submission, para. 7.

<sup>17</sup> Request.

<sup>18</sup> *Prosecutor v. Zigiranyirazo*, Exhibit Nos. D76, D77, Admitted 26 March 2007.

<sup>19</sup> Request.


<sup>20</sup> Request.

16. Exhibit P104 was admitted under seal.<sup>21</sup> I have not located any subsequent documents numbered P104E, P104F, and P104K admitted in the *Zigiranyirazo* case. The Prosecution submitted it is satisfied that the requested materials may assist the *Tribunal de Paris* in the *Simbikangwa* case, and because the record pertains to the credibility of one of the protected witnesses regarding the events in Kesho Hill, I find the requisite nexus between the *Simbikangwa* case and the *Zigiranyirazo* case has been established.<sup>22</sup> Because exhibit P 104 does not identify any protected witness I consider that it may be disclosed on a confidential basis.

**FOR THE ABOVE REASONS, I**

- I. **REQUEST** the Registry to provide copies of sealed exhibits D76, D77, and P104 from the *Zigiranyirazo* case to the Prosecution for the purpose of transmission to the French authorities on the condition that the exhibits only be disclosed to parties in the French proceedings;
- II. **DIRECT** the WISPS to contact Witness DAS in the *Bagosora et al.* case, and Witnesses SGP, APJ, AKK, AKR, AKO, AKP, AKL, RDP109, RDP46 in the *Zigiranyirazo* case, in order to ascertain whether each of them consents to the variation of protective measures granted to them in order to disclose their identification and/or documents under seal for their protection for disclosure to the French authorities, and to file a confidential report indicating whether, and to what extent, these witnesses agree to the variation of their protective measures with their affidavit in annex by 19 January 2013;
- III. **INSTRUCT** the WISP to inform me of any difficulties in fulfilling the present Order.

Arusha, 20 December 2012, done in English.

  
 Judge Vagn Joensen  
 Single Judge




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<sup>21</sup> *Prosecutor v. Zigiranyirazo*, Exhibit No. P104, Admitted 28 March 2007.  
<sup>22</sup> Prosecution Submission, para. 10; Request.



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