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UNITED
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Mechanism for International Criminal Tribunals

Cases No. MICT-12-26
 MICT-12-27
Date: 21 January 2013
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

DECISION IN RESPECT TO THE REQUEST FOR ACCESS TO MATERIALS
CONCERNING PASCAL SIMBIKANGWA

The Office of the Prosecutor:

Hassan Bubacar Jallow

Tribunal de Grande Instance de Paris:

Mme Emmanuelle Ducos

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INTRODUCTION

1. Pascal Simbikangwa is currently being prosecuted in France for genocide and crimes against humanity in relation to events allegedly committed in Rwanda during the 1994 Genocide. On 5 November 2012, the Registry of the Mechanism for International Criminal Tribunals (“MICT” or “Mechanism”) received a request from Ms. Emmanuelle Ducos, Vice-President of the *Tribunal de Grande Instance de Paris* (“*Tribunal de Paris*”), seeking confidential materials that are under the competence of the MICT and also a variation of protective measures granted to particular witnesses in the cases of *Prosecutor v. Théoneste Bagosora et al.* and *Prosecutor v. Protais Zigiranyirazo*.¹

2. On 13 November 2012, I was designated as MICT Single Judge to rule on the request.² In an order dated 20 December 2012 I requested the Registry to provide copies of sealed exhibits D76, D77 and P104 from the *Zigiranyirazo* case to the Prosecution for transmission to the French authorities.³ I also directed the Witness Support and Protection unit (“WISP”) of the MICT to consult the concerned witnesses on their positions with respect to the request for variation of protective measures.⁴

3. The WISP filed its submissions on 17 January 2013.⁵

DELIBERATIONS

Preliminary Matter

4. Because this decision does not contain information that reveals the identity of protected witnesses, I consider that this decision should be filed publicly.

The Requests for Variation of Protective Measures

¹ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Demande d’Entraide Internationale Complémentaire, 5 November 2012.

² *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Order Assigning a Single Judge to Consider an Application Pursuant to Rule 86(H), 13 November 2012.

³ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa, 20 December 2012.

⁴ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa, 20 December 2012.

⁵ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Registrar’s Submission in Respect of the “Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa”, 17 January 2013.

5. The MICT Rules specifically regulate the requirement of consent by the concerned protected witness to a variation of protective measures. MICT Rule 86(I) provides that it shall be ensured “through the Victims and Witnesses Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures; however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent.” Additionally, as the MICT Rules are based on the Rules of the ICTY and ICTR, I consider that the standards developed in the ICTR and ICTY jurisprudence for allowing access to confidential information for use in proceedings in other jurisdictions also apply to Rule 86 of the MICT Rules.⁶

6. WISP has reported the following on the position of the concerned witnesses to the requests of the *Tribunal de Paris*.⁷

7. In the *Bagosora et al.* case, Witness DAS is deceased.

8. In the *Zigiranyirazo* case, Witnesses SGP, APJ, AKR, AKO, AKP, AKL and RDP46 have signed affidavits that they, for security reasons, oppose that their identity be disclosed to the *Tribunal de Paris*. Witness AKK is deceased. Witness RDP109 has signed an affidavit consenting to disclosure to the *Tribunal de Paris*.

9. In accordance with the affidavit of Witness RDP109 I vary their protective measures to allow disclosure of closed session transcripts and exhibits under seal from the *Zigiranyirazo* case which reveal the witness’ identity.

10. With respect to the other protected witnesses for whom there is no consent I find that there has been no compelling showing of exigent circumstances that could justify a variation of the protective measures of the concerned witnesses without consent or that a miscarriage of justice would result if the identity of the witnesses were not revealed to the *Tribunal de Paris*.

⁶ *The Prosecutor v. Elizephan and Gérard Ntakirutimana*, Case No. MICT-12-17, *Alfred Musema*, Case No. MICT-12-15, *Clément Kayishema et al.*, Case No. MICT-12-10, *Yussuf Muryakazi*, Case No. MICT-12-18, *Ignace Bagilishema*, Case No. MICT-12-11, *Mikaeli Muhimana*, Case No. MICT-12-12, *Siméon Nchamihigo*, Case No. MICT-12-19, *Aloys Ndimbati*, Case No. MICT-12-14, *Emmanuel Ndinabahizi*, Case No. MICT-12-08, *Charles Sikubwabo*, Case No. MICT-12-13, *Eliézer Niyitegeka*, Case No. MICT-12-16, Decision in Respect to Jacques Mungwarere’s Motions to Access Materials, 18 January 2013, para. 7.

⁷ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Registrar’s Submission in Respect of the “Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa”, 17 January 2013.

The Requests for Exhibits

11. The *Tribunal de Paris* requested the disclosure of exhibits labelled P120A-D from the *Bagosora et al.* case.⁸ In the 20 December 2012 order I noted that these exhibits were admitted as public exhibits and can therefore be accessed through the International Criminal Tribunal for Rwanda's (ICTR) webpage or by requesting the exhibits from the ICTR Registry Court Management Section.⁹

12. The *Tribunal de Paris* is advised to make a request directed to the Registrar of the ICTR to access exhibits P120A-D.

13. The *Tribunal de Paris* also requested the disclosure of exhibits D76, D77, P104, P104E, P104F and P104K from the *Zigiranyirazo* case.¹⁰ Exhibits D76, D77 and P104 were admitted under seal.¹¹ Exhibits P104E, P104F and P104K, which are translations of Exhibit P104, were unable to be located.¹²

14. As exhibits D76, D77 and P104 do not identify any protected witnesses I requested the Registry to provide copies of these exhibits to the Prosecution for the purpose of transmission to the French authorities.¹³ The Registry made note in its 17 January 2013 submission that the Prosecution had been provided with copies of the exhibits for transmission to the French authorities.¹⁴

FOR THE ABOVE REASONS, I

I. GRANT the request of the *Tribunal de Paris* in part;

⁸ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Demande d'Entraide Internationale Complémentaire, 5 November 2012.

⁹ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa, 20 December 2012.

¹⁰ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Demande d'Entraide Internationale Complémentaire, 5 November 2012.

¹¹ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa, 20 December 2012.


¹² *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa, 20 December 2012.

¹³ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa, 20 December 2012.

¹⁴ *Prosecutor v. Théoneste Bagosora et al.*, Case No. MICT-12-26, *Prosecutor v. Protais Zigiranyirazo*, Case No. MICT-12-27, Registrar's Submission in Respect of the "Intermediary Order in Respect to the Request for Access to Materials Concerning Pascal Simbikangwa", 17 January 2013.

- II. **REQUEST** the Registry to provide the statements of Witness RDP109 who testified in the *Zigiranyirazo* case in related to events that occurred in Kesho hill to the *Tribunal de Paris* for disclosure to the parties in the case against Pascal Simbikangwa before that jurisdiction.
- III. **ALLOW** the disclosure of the transmitted material to the *Tribunal de Paris*, on the condition that the information that Witness RDP109 gave statements to the ICTR Prosecution and that the material originates from proceedings before the ICTR shall be treated confidentially and only revealed to the Parties in the proceedings against Pascal Simbikangwa before that jurisdiction.
- IV. **REJECT** the request of the *Tribunal de Paris* in all other aspects.

Arusha, 21 January 2013, done in English.


Judge Yagn Joensen
Single Judge

[Seal of the Mechanism]





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