

INTRODUCTION

1. The trial in this case started on 25 September 2006 with the presentation of the Prosecution case which closed on 29 January 2007. On 20 March 2007, Prior to the commencement of the Defence case, the Chamber granted a number of protective measures designed to ensure the security of Defence witnesses. In its decision, the Chamber stipulated that the Defence should disclose the identifying information of its prospective witnesses to the Prosecution 30 days prior to the commencement of the trial session during which they are scheduled to testify.¹ However, the Chamber stipulated the following conditions to ensure that the Prosecutor does not compromise the protection availed to Defence witnesses by the Chamber's order in the course of its investigations:

9. The Prosecutor, in making investigations and inquiries, will limit the exposure of witness identifying information and not disclose to any person the fact that the witness has testified or will be a witness before the Tribunal.

10. The Prosecution shall keep confidential to itself any Identifying Information, and shall not expose, share, discuss or reveal, directly or indirectly, any Identifying Information to any person or entity other than the Prosecution.

2. In a Motion filed on 14 June 2007, the Defence contends that the Prosecution is in breach of the above-mentioned Chamber's order for protective measures for Defence witnesses.² Furthermore, the Defence requests the Chamber to determine whether the Prosecution has committed contempt of court.³ The Defence also requests a variation of the said protective measures. The Prosecution opposes the motion⁴ and avers that the Defence has not communicated to the Prosecution the identifying information of the witnesses it intends to call to testify in the next trial session commencing on 27 August 2007.⁵

DISCUSSION

3. Relying upon correspondences from a Prosecution Senior Legal Adviser to the General Prosecutor of the Republic of Rwanda,⁷ the Defence submits that the nature of the

¹ *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence Motion for Protection of Defence Witnesses (TC), 20 March 2007, Order 11.

² *Requête demandant l'examen des motifs de croire à un outrage au Tribunal et en modification de l'ordonnance de protection des témoins de la défense rendue le 20 mars 2007*, filed confidential on 14 June 2007 ("Defence Motion").

³ Defence Motion and see Reply filed on 21 June 2007.

⁴ Prosecution Response, filed on 20 June 2007.

⁵ *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-T, Scheduling Order (TC), 22 May 2007.

⁷ Exhibit P-68 and Annex II of Motion, Letter sent to Martin Ngoga by Mohammed Ayat, Senior Legal Officer, 19 April 2007, filed strictly confidential.

correspondence and the context within which they were relayed to the Rwandan authorities, the Prosecution has disclosed the identity of the Defence witnesses, the latter being a protected information, to the Rwandan authorities. It argues that this disclosure may affect the defence of the Accused as some future witnesses may refuse to come to testify. It therefore requests the Chamber to relieve the Defence from its obligation to disclose to the Prosecution the address of the forthcoming Defence witnesses and to prohibit the Prosecution from liaising with the Rwandan authorities in order to obtain the judicial records of Defence witnesses.

4. The Prosecution responds that it did not submit a request to the Rwandan authorities to furnish it with the judicial records of prospective Defence witnesses, but merely requested their cooperation to obtain the judicial records if the Defence omits to file a request to obtain them. The Prosecution maintains that it only provided, in the correspondences sent to the Rwandan authorities, names of the witnesses without any further information on them.⁸ The Prosecutor is, therefore, adamant that it did not deliberately violate the witness protection Order nor did it contrive to hinder the course of the trial. Furthermore, the Prosecution contends that the Defence has failed to demonstrate any prejudice or threat posed to the security of the witnesses as a result of them being mentioned in the Prosecutor's correspondences to Rwandan authorities.

5. According to the Chamber's order for Protective measures dated 20 March 2007, the Prosecution is obliged not to disclose in the course of its investigation the identifying information of protected Defence witnesses or the fact that they are featured in the list of prospective Defence witnesses or their intention to testify for the Defence before this Tribunal. The Prosecution must also ascertain that it does not expose, share, discuss or reveal, directly or indirectly, any protected information to any person or entity other than the Prosecution.

6. In the present case, the Chamber notes that in the correspondence sent by the Prosecution to the Rwandan authorities, which is provided by the Defence, it specified ;

Members of the *Nchamihigo* Trial team are currently on mission Rwanda from 16 to 19 April 2007. They need access to the files of the individuals whose identities are listed below. [...] They

⁸ Prosecution's Response, filed 20 June 2007, p.4.

will have the opportunity to orally explain to your office the context of the urgency of their request and highly appreciate your kind usual diligence in processing this request.⁹

7. On 19 April 2007, the Prosecution submitted an additional request stating:

Nchamihigo case trial team needs your kind assistance to obtain judicial records of the following persons: (The names and reference of the files available to the Prosecution team are spelled out below).¹⁰

8. The Chamber is of the view that the basic tenor of these inquiries is such that it would lead a reasonable trier of fact to infer plausibly that the subjects of these inquiries are prospective witnesses in a case before the Tribunal. The Chamber expresses its dismay at the Prosecution's failure to exercise due diligence by couching its correspondence to the Rwandan authorities in a manner that led to the disclosure of the identifying information of protected Defence witnesses. The Chamber, therefore, finds the Prosecution to be in breach of the Chamber's order for protective measures for Defence witnesses. However, the Chamber hastens to add that the Prosecutor's contravention of its order for protective measures for Defence witnesses is not a compelling reason to hold the Prosecution in contempt of court in light of the extenuating circumstances pertaining to the events in question.

9. The Chamber recalls Rule 77 of the ICTR Rules of Procedure and Evidence ("the Rules"), which prescribes that a Trial Chamber may hold in contempt any person who "knowingly and wilfully" interferes with its administration of justice, including those who disclose information relating to those proceedings in knowing violation of an order of a Trial Chamber. As such, the party alleging that such conduct occurred should satisfy the Trial Chamber that the alleged contemnor acted with an intention to commit the crime of contempt.¹¹ In the Chamber's view, the defence fails to show such specific intention on the part of the Prosecution counsel. Considering all the circumstances of the case, the explanations provided by the Prosecution in its response as well as the views expressed by the Prosecution Counsel in court concerning the inability of the Defence to provide the Prosecution with the judicial

⁹ Exhibit P-67 and Annex I of Motion, Letter sent to Martin Ngoga by Mohammed Ayat, Senior Legal Officer, 16 April 2007, Filed Strictly Confidential.

¹⁰ Exhibit P-68 and Annex II of Motion, Letter sent to Martin Ngoga by Mohammed Ayat, Senior Legal Officer, 19 April 2007, Filed Strictly Confidential.

¹¹ *Prosecutor v. Pauline Nyiramasuhuko & Arsene Shalom Ntahobali*, Case No. ICTR-97-21-T, *Sylvain Nsabimana & Alphonse Nteziryayo*, Case No. ICTR-97-29-T, *Joseph Kanyabashi*, Case No. ICTR-96-15-T, and *Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Prosecutor's Further Allegations of Contempt (TC), 30 November 2001, para.20.

records of the Witnesses. Considering all the circumstances of the case, including the explanations provided by the Prosecution in its Response as well as the views expressed by the Prosecution Counsel in court concerning the inability of the Defence to provide the Prosecution with the judicial records of the witnesses it intends to call,¹² the Chamber concludes that the Prosecution did not intend to disclose the fact that the Defence was intend to call those witnesses to testify before the Tribunal and therefore breach the Chamber's order.

11. Concerning the Defence's request to vary the protective orders, the Chamber does not find that the Prosecution's failure to comply in part with the protective orders amounts to a new fact or material change thereby warranting the exceptional remedy of reconsideration.¹³

12. The Chamber reminds the Defence of its mandatory obligation to provide the prosecution with the information stipulated in the Protection order for protective measures for Defence witnesses issued by the Chamber. This was in the interest of justice and served dual purposes of protection and facilitating the prosecution conduct of its own investigations. The Chamber notes that Defence has failed to abide by its mandatory obligation to disclose the information regarding the identities of its prospective witnesses prior to the commencement of its case. The Chamber notes that the Defence filed a motion for relief from its obligations to disclose information to the Prosecutor arising from the Chamber's order for protective measures on 27 July 2007 just before the start of the period in which it was required to abide by its disclosure obligation. The Chamber has not adjudicated on the Defence motion for relief from its disclosure obligation, and therefore, the Defence cannot be sanctioned for contravening the order of the Chamber. The Chamber reminds the Defence the importance of abiding by its disclosure obligation mandated by its protective order. Failure to disclose such information will significantly impair the ability of the Prosecution to conduct its investigations in a meaningful manner.

¹² T. May 3 2007, English version, Status Conference, p. 8, lines 28-33.

¹³ *Baruyagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, Separate Opinion of Judge Shahabuddeen, paras. 4-5; *Bugosura et al.*, Decision on Reconsideration of Order to Reduce Witness list and on Motion for Contempt for Violation of that Order (TC), 1 March 2004, para. 11; *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, para. 25.; Rule 75(1) of the Rules reads: An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber".

13. The Chamber is of the view that it is inappropriate for the Chamber to prohibit the Prosecution from obtaining the judicial records of Defence witnesses. The Chamber finds it reasonable to conclude that where the Defence fails or is not well placed to provide the information in question to the Prosecutor, the Prosecutor should be permitted to use its own efforts to secure such information. The Chamber views such information as an indispensable tool in assisting the Chamber to assess the credibility of the Defence witnesses and also assist the Prosecutor to raise issues regarding the veracity of the Defence witnesses.¹⁴ However, as the Jurisprudence of this Tribunal has consistently held and the protection order issued by this Chamber specifically mandates, the Prosecutor must seek out the information regarding prospective Defence witnesses in a manner which does not reveal that the subject of the inquiry is a prospective Defence witness in contrariety with the Protective orders including the fact that the individual will be called to testify before the Tribunal.

FOR THE ABOVE REASONS, THE CHAMBER

- I. **DECLARES** that the Prosecutor has violated the Chamber's Decision on Defence Motion for protection of Defence witnesses dated 20 March 2007.
- II. **RECALLS** the Prosecution's obligations under its Decision of 20 March 2007
- III. **DENIES** the Defence request to the Chamber to determine whether the Prosecution has committed contempt of court.
- IV. **DENIES** the Defence Request to vary the Chamber's Decision of 20 March 2007; and accordingly
- V. **ORDERS** the Defence to disclose immediately the identifying information of all the witnesses it intends to call during the next trial session.

¹⁴ See, e.g., *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 10-11.

Arusha, 10 August 2007, done in English.



Dennis C. M. Byron

Presiding Judge



With the consent and on
behalf of
Gberdao Gustave Kam
Judge
(Absent during signature)



With the consent and on
behalf of
Robert Fremr
Judge
(Absent during signature)

[Seal of the Tribunal]



