



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 7 December 2009

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

**DECISION ON THE STATUS OF PROSECUTION WITNESS CNAO AND
ASSOCIATED PROTECTIVE MEASURES**

(Rules 69, 73(B) and 75 of the Rules of Procedure and Evidence)

Office of the Prosecution:

Paul Ng'arua
Elvis Bazawule
Memory Maposa
Ndeye Marie Ka

Defence Counsel

Vincent Courcelle-Labrousse, Lead Counsel
Philippe Larochelle, Co-Counsel

INTRODUCTION

1. On 13 February 2009, the Pre-Trial Chamber issued an Interim Order granting a series of protective measures to all Prosecution witnesses.¹
2. On 2 October 2009, the Pre-Trial Chamber denied a Defence Motion asking for permission to meet with Witness CNAO privately,² but held that the Defence could meet with the witness in the presence of WVSS and the Prosecution,³ and requested that WVSS arrange this meeting.⁴
3. On 5 October 2009, the Defence filed a Motion asking for reconsideration of, and/or certification to appeal, the Pre-Trial Chamber's 2 October 2009 Decision.⁵
4. On 12 October 2009, the Prosecution filed a Response to the Reconsideration Motion.⁶
5. The Defence filed a Reply to the Prosecution Response on 19 October 2009.⁷
6. On 19 October 2009, the Defence also filed a Motion requesting Protective Measures for Witness CNAO.⁸ The Defence attached to its Motion a letter, purportedly from Witness CNAO, stating that he was prepared to testify for the Defence, alleging that he had been intimidated by the Prosecution, and declaring that he was no longer willing to testify for the Prosecution.⁹ On this basis, the Defence requested that the Trial Chamber order a set of protective measures.¹⁰

¹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-I, Interim Order on Protective Measures for Prosecution Witnesses, 13 February 2009 ("Protective Measures Order").

² *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-PT, Decision on Callixte Nzabonimana's Confidential *Ex Parte* Motion Seeking Order Allowing a Meeting with Witness CNAO, 2 October 2009 ("2 October 2009 Decision").

³ 2 October 2009 Decision, paras 5-7, and Disposition, II.

⁴ 2 October 2009 Decision, Disposition, II.

⁵ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44-D, Nzabonimana's Motion for Reconsideration, and/or Certification of the Decision Rendered on 2 October on Nzabonimana's Confidential *Ex Parte* Motion Seeking an Order Allowing a Meeting with Witness CNAO, 5 October 2009 ("Reconsideration Motion").

⁶ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44-D-PT [sic], Prosecutor's Response to Nzabonimana's Motion for Reconsideration, and/or Certification of the Decision Rendered on 2 October on Nzabonimana's Confidential *Ex Parte* Motion Seeking an Order Allowing a Meeting with Witness CNAO, 12 October 2009 ("Reconsideration Response").

⁷ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44-D, Nzabonimana's Reply to Prosecutor's Response to, Nzabonimana's Motion for Reconsideration, and/or Certification of the Decision Rendered on 2 October on Nzabonimana's Confidential *Ex Parte* Motion Seeking an Order Allowing a Meeting with Witness CNAO, 19 October 2009 ("Reconsideration Reply").

⁸ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44 D, Nzabonimana's Confidential Motion for Protection [sic] Measures for Witness CNAO, 19 October 2009 ("Protective Measures Motion").

⁹ Protective Measures Motion, Annex A.

¹⁰ Protective Measures Motion, paras 11-14.

7. On 26 October 2009, the Prosecution filed a Response to the Motion¹¹ challenging the authenticity of the letter annexed to the Protective Measures Motion,¹² and submitting that the Defence had not satisfied the criteria of Rule 75 of the Rules of Procedure and Evidence (“the Rules”).¹³
8. On 28 October 2009, the Defence filed a Reply to the Prosecution Motion.¹⁴
9. On 16 November 2009, a representative of WVSS reported that WVSS had not implemented the Pre-Trial Chamber’s Decision of 2 October 2009 requesting that it set up a meeting between the parties and CNAO because the Prosecution had been unable to provide contact information for Witness CNAO.¹⁵ In response to this information, the Trial Chamber¹⁶ informed the Defence that if it intended to call Witness CNAO as a Defence witness it would have to convey to Witness CNAO-- through intermediaries-- the importance of agreeing to a meeting with WVSS at which WVSS would establish whether CNAO wished to testify for the Prosecution or the Defence. Such a meeting would not be possible unless Witness CNAO agreed to provide contact information to WVSS. The Trial Chamber then instructed WVSS to report back to the Trial Chamber on the matter.¹⁷
10. On 27 November 2009, WVSS reported that it had been able to meet with the Witness and that he had signed an affidavit stating that he wished to testify for the Defence. However, WVSS noted that the Witness had not brought any form of identification with him to the meeting. Thus, WVSS provided a photograph of the person it met purporting to be Witness CNAO.¹⁸ After looking at the photograph, the Prosecution stated that it could not be certain that the person in the photograph was the person it believed to be CNAO, and asked for permission to make a final statement on the matter on 1 December 2009, a request accorded by the Trial Chamber.¹⁹

¹¹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-PT [sic], Prosecutor’s Response to Nzabonimana’s Confidential Motion for Protection [sic] Measure for Witness CNAO, 26 October 2009 (“Protective Measures Response”).

¹² Protective Measures Response, para. 1.

¹³ Protective Measures Response, paras. 6-8.

¹⁴ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44-D [sic], Nzabonimana’s Reply to Prosecutor’s Response to Nzabonimana’s Confidential Motion for Protection [sic] Measure for Witness CNAO, 28 October 2009 (“Protective Measures Reply”).

¹⁵ T. 16 November 2009 (ICS), p. 30.

¹⁶ T. 16 November 2009 (ICS), pp. 40-41.

¹⁷ T. 16 November 2009 (ICS), p. 41.

¹⁸ T. 27 November 2009, p. 1.

¹⁹ T. 27 November 2009, pp. 1-2.

11. On 1 December 2009, the Prosecution informed the Trial Chamber that it would not challenge the authenticity of the Affidavit obtained by WVSS.²⁰

DELIBERATIONS

Applicable Law

12. Rule 75 of the Rules provides that:

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused....

Reconsideration Motion

13. Given the recent developments with respect to Witness CNAO, the Trial Chamber considers that the Defence Reconsideration Motion is Moot.

Protective Measures Motion

14. The Trial Chamber takes note of the affidavit signed by CNAO and provided to the Trial Chamber by WVSS, as well as the Prosecution's decision not to challenge the authenticity of the document. The Trial Chamber is satisfied that the witness wishes to testify for the Defence rather than the Prosecution, and therefore holds that Witness CNAO is no longer a Prosecution witness and that he is now a witness for the Defence.
15. That said, the Trial Chamber observes that the Protective Measures accorded to Witness CNAO by the Pre-Trial Chamber in its Protective Measures Order remain in effect. Therefore, the Trial Chamber considers it more appropriate to adapt the existing Protective Measures than accord a new set of protective measures.
16. The Trial Chamber has reviewed the existing Protective Measures and considers that there is no need to adapt Protective Measures (a), (b), (d), (e) and (h), except to stress

²⁰ T. 1 December 2009 (ICS), p. 9.

that these measures apply only to CNAO and no other potential Defence witnesses at this time.²¹

17. However, the Trial Chamber orders that Protective Measure (c) shall be adjusted to read as follows:

... [T]he Witness will be referred to by the pseudonym CNAO. This pseudonym will be used whenever referring to this witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time that the Chamber otherwise decides.

18. The Trial Chamber also orders that Protective Measure (f) shall be adapted to read as follows:

...[T]he Prosecution is prohibited from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of Witness CNAO to any person or entity other than persons working on the immediate Prosecution team;

19. The Trial Chamber further orders that Protective Measure (g) shall be adjusted to read as follows:

... [T]he Prosecution shall designate to the WVSS, the Chamber and the Defence the names of all persons working on the immediate Prosecution team who, pursuant to paragraph (e) above, will have access to any information referred to in Paragraphs (a) through (d) above, and requiring Prosecution Counsel to advise the Chamber in writing of any changes in the composition of this team and to ensure that any member leaving the Prosecution team has remitted all materials that could lead to the identification of Witness CNAO.

20. Finally, the Trial Chamber orders that Protective Measure (i) shall be adapted as follows:

²¹ Thus: Protective Measures Order, Disposition: (a) That the name, address, whereabouts of, and other identifying information concerning Witness CNAO which is the subject of unredacted disclosure by the Defence shall be sealed by the Registry and not included in any public records of the Tribunal; (b) That the name, address, whereabouts of, and other identifying information concerning Witness CNAO cited above be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals; (d) That, to the extent that any name, address, whereabouts of, and any other identifying information concerning Witness CNAO is contained in existing records of the Tribunal, that such information be kept confidential including, where appropriate, the documents in question; (e) That disclosure to the public or the media of the name, address, whereabouts of, and any other identifying data in the supporting material or any other information on file with the Registry or any other information which would reveal the identity of Witness CNAO, is prohibited and this order shall remain in effect pending a final order and, if appropriate, after the termination of the trial; (h) That the photographing, audio and/or video recording, or sketching of Witness CNAO at any time or place without leave of the Chamber and the Parties is prohibited; (i)

...Prosecution Counsel shall make a written request, on reasonable notice to the Defence, to the Chamber or a Judge thereof, to contact Witness CNAO or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person, that the Defence shall undertake all necessary arrangements to facilitate such interview.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

- I. DENIES** the Defence Reconsideration Motion as Moot;
- II. DENIES** the Defence Protective Measures Motion, in part;
- III. ORDERS** that the Protective Measures ordered by the Pre-Trial on 13 February 2009 Decision with respect to Witness CNAO be adapted as instructed above.

Arusha, 7 December 2009, done in English.

Solomy Balungi Bossa
Presiding Judge

Bakhtiyar Tuzmukhamedov
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]