

ICTR-98-44D-T
15-12-2009
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

-0147

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 15 December 2009

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

2009 DEC 15 A 11: 36
JUDICIAL RECORDS ARCHIVES
RECEIVED

**DECISION ON THE PROSECUTION'S URGENT MOTION ALLEGING
CONTEMPT OF THE TRIBUNAL**

Rule 77 (C) 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

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INTRODUCTION

1. On 13 February 2009, the Pre-Trial Chamber Ordered a series of Protective Measures for Prosecution witnesses.¹
2. On 2 December 2009, Witness CNAL testified that a member of the Defence team had "disclosed my statement to Callixte Nzabonimana's family members. He read my statement to Callixte Nzabonimana's family members." The witness concluded that he felt threatened.² In response to the witness' allegations, the Trial Chamber instructed the Witness and Victims Support Section ("WVSS") to investigate the allegations made by the witness.³
3. Also on 2 December 2009, the Prosecution filed an urgent Motion pursuant to Rule 77(C) of the Rules of Procedure and Evidence ("the Rules") alleging that a Defence investigator was impermissibly revealing protected information about Prosecution witnesses.⁴
4. On 7 December 2009, the Defence filed a Response to the Prosecution Motion contesting the Prosecution's allegations.⁵

Submissions of the parties

5. In its Motion, the Prosecution requests that the Trial Chamber issue an Order "directing the Defence to desist from engaging in conduct likely to threaten the safety and security of prosecution witnesses."⁶ In support of its Motion, the Prosecution attaches four affidavits alleging that a certain Defence investigator has been "discussing and displaying" the unredacted witness statements of two Prosecution witnesses to relatives of the Accused.⁷ The first affidavit is signed by a person alleging that he was shown the unredacted witness statements of Prosecution Witnesses CNAL and CNAE.⁸ Two additional affidavits are signed by Witnesses CNAL and CNAE.⁹ The fourth affidavit is by a Prosecution Investigator at the International Criminal Tribunal for Rwanda ("ICTR").¹⁰ Upon learning of the alleged breach of their protective measures, Witness CNAE and CNAL expressed concerns about their safety to the Prosecution.¹¹

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

² T. 2 December 2009, pp. 19, 21 (ICS).

³ T. 2 December 2009, pp. 20-21 (ICS).

⁴ *Prosecutor v. Callixte Nzabonimana*, Case ICTR-98-44D-T, Prosecutor's Urgent Motion For Prohibition of Conduct Contrary to Rule 77(C) of The Rules of Procedure and Evidence, 2 December 2009 ("Prosecution Motion").

⁵ *Prosecutor v. Callixte Nzabonimana*, Case ICTR-98-44D-T, Nzabonimana's Confidential Response to Prosecutor's Urgent Motion For Prohibition of Conduct Contrary to Rule 77(C) of The Rules of Procedure and Evidence (Rule 77(C) of The Rules of Procedure and Evidence), 7 December 2009 ("Defence Response").

⁶ Prosecution Motion, para. 1.1.

⁷ Prosecution Motion, para. 2.1 and Annexes to the Prosecution Motion: Annex A; Annex B: Affidavit of CNAL dated 24 November 2009; Annex C: Affidavit of CNAE dated 3 November 2009; Annexure D: Affidavit of Prosecution Investigator Djibo Moumouni dated 13 October 2009.

⁸ Prosecution Motion, Annex A, Affidavit dated 6 November 2009.

⁹ Prosecution Motion, Annexes B and C.

¹⁰ Prosecution Motion, Annex D.

¹¹ Prosecution Motion, para. 2.2.

6. The Prosecution requests that the Trial Chamber issue an Order prohibiting Defence investigators from disclosing protected information.¹² Further the Prosecution asks that the Trial Chamber either: i) issue an Order allowing the Prosecution to investigate the allegations; ii) issue an Order for the appointment of independent *amicus curiae* to investigate the allegations of contempt pursuant to Rule 77 (C)(ii); or iii) appoint officers of WVSS to investigate and issue a report for further action by the Trial Chamber.¹³
7. In its Response, the Defence contests the Prosecution submission that the matter is urgent.¹⁴ The Defence submits that the allegations against the Defence investigator were first raised in a Prosecution letter dated 18 September 2009, and that at a Status Conference, dated 1 October 2009, the Pre-Trial Chamber instructed the Prosecution to desist from making such allegations without providing evidence.¹⁵ The Defence contends that the Prosecution is resurrecting the issue two months later simply to bolster the credibility of one of the complaining witnesses, CNAL, who completed his testimony on the day the Prosecution filed its Motion.¹⁶
8. The Defence challenges the credibility of those making the allegations against the Defence investigator stressing inconsistencies in their accounts of the matter.¹⁷
9. The Defence contends that it is not Prosecution witnesses who are the subject of threats and intimidation but Defence witnesses.¹⁸ It further argues that by raising such allegations against the Defence investigator, the Prosecution is making his job "very dangerous" and "obstructing the work of the Defence."¹⁹
10. The Defence submits that it needs additional time to investigate matters raised in the instant Motion and to show that the Prosecution witnesses are fabricating evidence. It further contends that it is Witness CNAL who is threatening Defence witnesses.²⁰
11. Nevertheless, the Defence "stresses that it fully supports the appointment of an *Amicus Curiae*,"²¹ but questions the timing of the appointment and wishes to expand the terms of reference of the investigation.²² In particular, it asks that the mandate of the *amicus curiae* be expanded to investigate the intimidation of Defence witnesses and the role of Witness CNAL in any intimidation campaign, as well as the roles of Witness CNAL and CNAE in fabricating evidence against the Accused before the ICTR, and before Gacaca courts in Rwanda.²³ The Defence also asks that the Trial Chamber suspend any investigation until the close of the Defence case when "all the evidence on that topic has been presented, and the right of the accused to present such Defence has not been jeopardized by other investigations."²⁴

¹² Prosecution Motion, para. 4.1.

¹³ Prosecution Motion, paras. 4.2 and 4.3.

¹⁴ Defence Response, paras. 4-15.

¹⁵ Defence Response, paras. 6-11.

¹⁶ Defence Response, paras 14-15.

¹⁷ Defence Response, paras 16-24.

¹⁸ Defence Response, para. 37 and Annex A.

¹⁹ Defence Response, para. 39.

²⁰ Defence Response, paras 41-43.

²¹ Defence Response, para. 44.

²² Defence Response, paras 45-46.

²³ Defence Response, Conclusion.

²⁴ Defence Response, para. 47.

DELIBERATIONS

Applicable Law

12. Rule 77 (A) of the Rules stipulates that:

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

13. Rules 77 (C) and 77 (D) of the Rules stipulate that:

(C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) initiate proceedings itself.

(D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:

(i) in circumstances described in paragraph (C) (i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (C) (ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

Parties' requests to investigate allegations of Contempt of the Tribunal

14. The Trial Chamber recalls that Rule 77 (a) (ii) states that any person who discloses information relating to [the] proceedings in knowing violation of an order of a Chamber" may be held in contempt. The Prosecution has attached to its Motion an affidavit from a person claiming to have been shown confidential information relating to protected Prosecution witnesses CNAE and CNAL.²⁵ Witness CNAL signed an affidavit stating that this person then contacted him to tell him about this breach of protective measures.²⁶ Witness CNAL then informed Witness CNAE, who signed an affidavit stating that he then sought and received confirmation of these allegations from the person who had been

²⁵ Prosecution Motion, Annex A.

²⁶ Prosecution Motion, Annex B.

approached by the Defence investigator.²⁷ A Prosecution investigator signed an affidavit stating that Witness CNAL had reported the matter to him.²⁸ Witness CNAL reiterated the allegations at trial during his cross-examination by the Defence.²⁹

15. Upon consideration of the submissions of the parties, and based on the affidavits provided by the Prosecution, the Trial Chamber concludes that there is reason to believe that the Defence investigator may be in contempt of the Tribunal and considers that the allegations are serious and require further investigation.
16. The Trial Chamber notes that the Defence itself supports the appointment of *amicus curiae* to investigate the allegations, but that it wishes to postpone the investigation until after the closing of the Defence case, and expand the terms of reference of any investigation. With respect to the request to postpone the investigation, the Defence submits that its witnesses may be interviewed by the investigator appointed and this may intimidate them, cause them to revisit their decisions to come testify for the Defence, and jeopardise their security.³⁰ The Trial Chamber considers the Defence request to be speculative and unreasonable. It cannot allow such serious allegations to remain in suspension for months.
17. With respect to the Defence request that the Trial Chamber expand the terms of reference of any investigation to include allegations of intimidation of Defence witnesses, the Trial Chamber notes that the Prosecution's allegations are concrete, that the alleged victims are named, that the suspect is a party to the proceedings before this Trial Chamber, and that the allegation is supported by four affidavits. The Defence allegations are vague and refer to a general climate of intimidation rather than specific incidents and allegations. The Trial Chamber has already observed that the political climate in Rwanda may be less than ideal.³¹ Nevertheless, the Defence has not adduced the concrete detail necessary to initiate a Rule 77 (C) investigation. Thus, the Trial Chamber will only request that the investigator review the allegations made by the Prosecution in the instant Motion. The Defence is free to follow up on the issue if it so wishes.
18. The Trial Chamber considers that neither the Trial Chamber nor the Prosecution are the appropriate bodies to conduct the investigation. In addition, WVSS may not have the investigative resources necessary to conduct such an inquiry. Therefore, the Trial Chamber concludes that the Registry should appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings.

²⁷ Prosecution Motion, Annex C.

²⁸ Prosecution Motion, Annex D.

²⁹ T. 2 December 2009, pp. 19, 21 (ICS).

³⁰ Defence Response, paras 46-48.

³¹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on Defence Motion for Postponement of the Start of Trial, 30 October 2009, paras. 45-48.

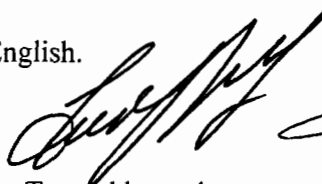
FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

- I. GRANTS** the Prosecution Motion;
- II. DIRECTS** the Registry to appoint an *amicus curiae* to investigate the allegations that the named Defence investigator revealed protected information pertaining to Witnesses CNAL and CNAE, and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings, as soon as practicable, and in no case later than 29 March 2009;
- III. INSTRUCTS** WVSS to provide any information it may have gathered regarding the allegations to the *amicus curiae*.

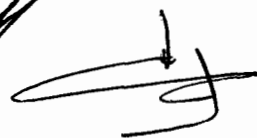
Arusha, 15 December 2009, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

