



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-I 4609
09-07-2010
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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: 9 July 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL RECORDS DIVISION
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**DECISION ON NZABONIMANA'S URGENT MOTION FOR APPOINTMENT OF
AMICUS CURIAE TO INVESTIGATE CONTEMPT BY WITNESS CNAI AND FOR
SUPPLEMENTARY PROTECTIVE MEASURES FOR WITNESS T36
*Rules 54, 69, 73, 57 & 77(A), (C)ii) & (D)ii) of the Rules of Procedure and Evidence***

Office of the Prosecution

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INTRODUCTION

1. On 18 February 2010, the Trial Chamber ("Chamber") ordered a series of Protective Measures for Defence witnesses.¹ Witness T36 is among the witnesses covered by those measures.

2. On 19 May 2010, the Defence filed an urgent Motion pursuant to Rules 54, 69, 73, 75, 77 of the Rule of Procedure and Evidence ("Rules") requesting the appointment of *amicus curiae* to investigate allegations of contempt against Prosecution Witness CNAI,² and for supplementary protective measures for Defence Witness T36.³

3. On 21 May 2010, the Prosecution filed a response opposing the Motion.⁴ The Defence did not file a reply.

Submissions of the Parties

4. The Defence alleges that on 13 May 2010, its investigator was informed by Defence Witness T36 that Prosecution Witness CNAI had approached him on at least two occasions.⁵ On the first occasion, on 11 May 2010, Witness CNAI, accompanied by unidentified Rwandan national, visited Witness T36 and indicated that he knew that Witness T36 was scheduled to testify for the Defence in the *Nzabonimana* trial.⁶ On this occasion, the unidentified Rwandan national told Witness T36 that he was wasting his time testifying for the *Nzabonimana* Defence, and claimed that Witness T36 could have earned money had he accepted to testify against *Nzabonimana*.⁷ On the next occasion, on 12 May 2010, Witness CNAI told Witness T36 that there would be consequences if h[e] insisted on testifying for the Defence.⁸

5. In his statement attached to the Defence Motion, Witness T36 alleges that on earlier occasions, Witness CNAI attempted to convince him to testify against *Nzabonimana*. Witness T36 concludes that since Witness CNAI is aware of his status as a Defence witness, he feels threatened

¹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on Urgent Defence Motion for Protective Measures, 18 February 2010 ("Protective Measures Order").

² Prosecution Witness CNAI testified before this Chamber on 26 and 27 November 2009.

³ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, *Nzabonimana's* Urgent Motion for Appointment of An Amicus Curiae to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36 ("Motion"), 19 May 2010.

⁴ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to *Nzabonimana's* Urgent Motion for Appointment of An Amicus Curiae to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36 ("Response"), 21 May 2010.

⁵ Motion, para. 2.

⁶ Motion, para. 4.

⁷ Motion, para. 5.

⁸ Motion, para. 7.

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and is now reluctant to testify for the Defence.⁹ The Defence alleges that Witness CNAI could only have learned of Witness T36's status as a Defence witness from the Prosecution.¹⁰ The Defence concludes that these incidents indicate that members of the Prosecution Team have violated the Protective Measures Order of 18 February 2010.¹¹

6. The Defence asserts that, given that unknown individuals in Rwanda are now aware of Witness T36's status as a Defence witness and are attempting to coerce and intimidate T36 to prevent him from testifying,¹² supplementary special protective measures must be issued for Witness T36.¹³ It proposes that a representative of the Witnesses and Victims Support Section ("WVSS") assess the security situation of Witness T36 and report to the Chamber if further protective measures are required to ensure his security and anonymity.¹⁴

7. The Defence further requests the appointment of *amicus curiae* to investigate: i) whether protective measures granted on 18 February 2010 have been violated;¹⁵ and ii) the circumstances surrounding the threats received by Witness T36 in order to assess whether contempt proceedings should be initiated.¹⁶ The Defence suggests more specifically that the *amicus curiae*: a) determine how Witness CNAI learned that Witness T36 would appear for the Defence; b) confirm the attempted intimidation by Witness CNAI; c) and establish the identity and employer of the unidentified Rwandan national who accompanied Witness CNAI on 11 May 2010.¹⁷

8. The Prosecution submits that the Defence has failed to establish a *prima facie* case supporting the appointment of *amicus curiae*.¹⁸ It notes that the Defence has attached the statement of Witness T36¹⁹ but failed to attach affidavits from either of its investigators about the circumstances pertinent to Witness T36's allegations.²⁰

⁹ Motion, paras. 8-9, 12.

¹⁰ Motion, paras. 19-21.

¹¹ Motion, para. 10.

¹² Motion, para. 22.

¹³ Motion, para. 14.

¹⁴ Motion, para. 14b) & 31-33.

¹⁵ Motion, para. 11; also see *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Protective Measures Order, paras. (a, b, d, f, g & i).

¹⁶ Motion, para. 13.

¹⁷ Motion, para. 23.

¹⁸ Response, paras. 10-11.

¹⁹ Annex A to the Motion.

²⁰ Response, paras. 12-13. In support, the Prosecution relies on a prior Trial Chamber Decision relating to alleged violation of protective measures by two of its witnesses CNAL and CNAE in which its investigator recorded his investigations and prepared an affidavit showing all the circumstances of the investigation; see *Prosecutor v.*

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9. The Prosecution submits that a long-standing relationship exists between Witnesses CNAI and T36. It submits that it is therefore vital that the Defence investigators file affidavits with preliminary observations about the relationship between these witnesses.²¹ It notes that such affidavits may confirm statements made by Witness T36, such as his decision to relocate following the alleged intimidation.²²

10. The Prosecution requests that the Chamber issue an order prohibiting contact between the Defence and Witness T36, adding that any further contact with the witness take place in the presence of a representative of WVSS.²³ It further suggests that all contacts be recorded and that the record be filed with the Chamber.²⁴

DELIBERATIONS

Applicable Law

11. 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...

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 willfully interfere with its administration of justice, including any person who
(ii) discloses information relating to those proceedings in knowing violation of an order of 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;

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:

(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:

(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.

Callixte Nzabonimana, ICTR-98-44D-T, Decision on the Prosecution's Urgent Motion Alleging Contempt of the Tribunal ("Contempt Decision"), 15 December 2009, para. 10.

²¹ Response, paras. 14-15.

²² Response, paras. 16-17.

²³ Response, para. 19, para. 21 (4).

²⁴ Response, para. 20.

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Requests to investigate allegations of contempt

14. The Chamber recalls that under Rule 77 (A)(ii) any person who discloses information relating to [the] proceedings in knowing violation of an order of a Chamber may be held in contempt. The Chamber notes that the Defence attaches to its Motion a statement from Witness T36 alleging intimidation by Prosecution Witness CNAI,²⁵ and observes that Annex A of the Defence Motion is merely a statement made by Witness T36 before two Defence investigators. This document cannot replace a properly sworn affidavit from the witness.

15. In addition, the Chamber considers that should the Defence choose to pursue this issue, it must obtain from Witness T36 an affidavit providing further details on the following matters:

- i) In paragraph 3 of his statement, Witness T36 claims that Witness CNAI repeatedly sought to have him testify for the Prosecution over the past years. The Chamber directs the Defence to seek from Witness T36 more specific information such as the approximate dates and number of times the witness was approached by Witness CNAI to testify for the Prosecution.
- ii) In paragraph 4 of his statement, Witness T36 states that Witness CNAI told him that he had sources who told him that Witness T36 was going to testify for the Nzabonimana Defence. The Chamber directs the Defence to ask Witness T36 to clarify whether he has advised any person(s) of his plans to testify for the Nzabonimana Defence, and if so, who.
- iii) With respect to paragraph 11 of Witness T36's statement, the Chamber directs that the Defence seek affidavits from its investigator(s) and /or any person(s) who might be able to corroborate any part of Witness T36's statement, or explain why it is unable to.
- iv) With respect to the alleged prior relationship between the two witnesses, the Chamber directs the Defence to seek further clarification from Witness T36 about any prior relationship the witness may have had with Witness CNAI.

16. In paragraph 17 of its response, the Prosecution "observes that Witness T36 has relocated from his usual place of residence" and asks for further information about this relocation. The Chamber sees no reference to such relocation by the Defence or Witness T36.

²⁵ See Annex A.

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17. Finally, the Chamber considers that the Prosecution has not justified its request that it prohibit contact between the Defence and Witness T36. The request is therefore denied.

18. Should the Defence choose to pursue the issues raised in its Motion, the Chamber would further direct it to specify which type of additional protective measures it is seeking for Witness T36.

19. In conclusion, the Chamber concludes that at this juncture it lacks sufficient information to warrant the appointment of *amicus curiae* to investigate these allegations.

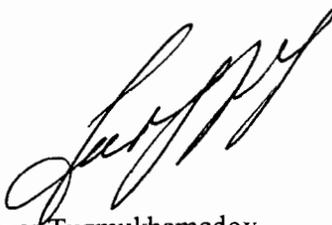
FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

Arusha, 9 July 2010, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

