

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

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 16 September 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

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**DECISION ON PROSECUTOR'S URGENT EX PARTE MOTION TO VARY
PROTECTIVE MEASURES FOR PROSECUTION WITNESS CNAT**

Article 28 & Rules 75 of the Rules of Procedure and Evidence

For the Prosecutor:
Hassan Bubacar Jallow
Richard Karegyesa
Fredrick Nyiti

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INTRODUCTION

1. On 13 February 2009, the Pre-Trial Chamber ordered a series of Protective Measures for Prosecution witnesses.¹ Witness CNAT is among the witnesses covered by those measures. Although the Prosecution elected not to call Witness CNAT to testify during the presentation of its case in the *Nzabonimana* Trial, the witness is still covered by these protective measures.

2. On 5 August 2010, the Prosecutor filed the instant confidential *ex parte* Motion seeking to vary the protective measures for Witness CNAT pursuant to Rule 75(G) of the Rules of Procedure and Evidence ("the Rules"). The Prosecutor seeks to disclose Witness CNAT's statements, transcripts, exhibits (including those tendered under seal), personal information sheets and other necessary information to authorities from the Republic of France, in order to facilitate investigations and prosecutions in France in a case in connection with international crimes committed in the territory of Rwanda in 1994.² The information requested by the French authorities encompasses information pertaining to Witness CNAT from this case or other cases before the Tribunal,³ and includes all confidential information concerning Witness CNAT disclosed to the Defence in accordance with Rule 66.⁴

Submissions of the Prosecutor

3. The Prosecutor avers that in accordance with Security Council Resolutions 1503 (2003) and 1534 (2004) it is vital that it assists in the transfer of evidence to national authorities to enable the prosecution of cases arising from international crimes committed in Rwanda in 1994.⁵ It states that by providing French authorities with the materials pertaining to Witness CNAT, it will assist France in its investigations of international crimes.⁶ It also asserts that the variation of protective measures to enable the disclosure of material concerning a protected witness to national jurisdictions is consistent with the jurisprudence of this Tribunal. In support of its submission, the Prosecutor cites *Nyiramasuhuko et al.*, in which that Chamber stated that:

"...the guiding principles of state cooperation under Article 28(1) of the Statute also apply to requests for cooperation or judicial assistance from states to the Tribunal, in their investigation or protection of persons accused of committing serious violations of

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-T, Prosecutor's Urgent *Ex Parte* Motion to Vary Protective Measures for Witness CNAT, 5 August 2010, ("Motion"), para. 1.

³ Motion, para. 5.

⁴ Motion, para. 3, see Prosecutor's Pre-Trial Brief Corrected of 12 February 2009.

⁵ Motion, para. 7.

⁶ Motion, para. 7.

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international humanitarian law. Moreover, the Chamber notes that the Danish authorities' investigation of witness WDUSA for crimes committed in Rwanda in 1994 is in line with the principles of state cooperation envisaged by the completion strategy in the Security Council Resolutions 1503 and 1534.⁷

4. In addition, the Prosecutor submits that Rule 75(E)–(H) covers disclosures of protected information from one case before the Tribunal to another without ending the protective measures but extending its effect in other cases.⁸ It submits that this Tribunal's jurisprudence has expanded these provisions to apply *mutatis mutandis* if the second case is not before the Tribunal,⁹ thus expanding the group of persons authorised to have access to the protected information whilst ensuring that the witness remains protected, since the new group of persons are bound by the protective orders pursuant to Rule 75(F).¹⁰

5. In its instant Motion, the Prosecutor does not seek to extend Witness CNAT's protective measures to apply *mutatis mutandis* to the proceedings in France, but it simply requests variation of the existing protective measures pursuant to Rule 75(G) to enable the French authorities to access and use the materials in public for the effective prosecution of persons responsible for international crimes in Rwanda.¹¹

6. Attached to its Motion is a signed affidavit from Witness CNAT consenting to the disclosure of any statements, transcripts, depositions and/or any information the witness furnished to the Prosecutor.¹² The Prosecutor asserts that this consent is indicative of the witness' willingness to testify under his own names in the French proceedings,¹³ and recalls that without the requested variation Witness CNAT would be required to use his pseudonyms and any materials that identify him would not be availed to the public in accordance with the standing order for protective measures.¹⁴

⁷ *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42, Decision on the Prosecutor's Motion to Unseal the Transcripts of Witness WDUSA, 1 November 2006, para. 5.

⁸ Motion, para. 10.

⁹ *Prosecutor v. Aloys Simba*, ICTR-01-76-R75, Decision on Charles Munyaneza's Motion for Disclosure of Documents Related to Protected Witnesses Before the Tribunal, 9 April 2008, para. 5.

¹⁰ Motion, para. 10.

¹¹ Motion, para. 11.

¹² Motion, paras. 5 & 14, *see* Annex A, Signed Affidavit of Witness CNAT, dated 9 April 2010.

¹³ Motion, paras. 6 & 13.

¹⁴ Motion, para. 13.

DELIBERATIONS

Applicable Law

7. Article 28(1) of the Statute of the Tribunal ("the Statute") provides that "States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."

8. Pursuant to Rule 75(F)(i), once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal ("first proceedings"), such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in Rule 75. Rule 75(G) and (H) provides that an application to vary protective measures should be submitted to the Chamber seised of the first proceedings, and that if no Chamber remains seised of the case, the application is to be decided by the Chamber seised with the second proceedings, subject to consultation with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

Preliminary Issue

9. As a preliminary matter, the Chamber observes that the Prosecutor's Motion was filed *ex parte*. The Chamber recalls that as a general rule, applications must be filed *inter partes*. An *ex parte* filing should be entertained only when it is in the interest of justice and where it is not prejudicial to any party to the proceedings.¹⁵ When a Trial Chamber renders a decision on an *ex parte* application, it should consider whether the *ex parte* nature of the filing is appropriate.¹⁶ In the present circumstances, the Chamber observes that because of the distinctive nature of this request for disclosure of confidential information of a Protected Witness CNAT by a party outside the Tribunal, the Chamber considers it appropriate to accept this *ex parte* filing in the interest of justice.

Variation of Protective Measures of Witness CNAT

10. The Chamber is seized of a request for disclosure of confidential material concerning protected witness CNAT by French authorities who are not party to proceedings before this Tribunal. This request was filed through the Prosecutor of the Tribunal. The Chamber recalls a similar situation in *Nyiramasuhuko et al.*, where the Danish authorities, being aware of the protected

¹⁵ *Karemera et al.*, Decision on Motion to Unseal *Ex Parte* Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment, 3 May 2005, para. 11.

¹⁶ *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials, 18 January 2008, para. 5.

status of witness WDUSA, sought the disclosure of transcripts of the testimony of that witness.¹⁷ The Trial Chamber in *Nyiramasuhuko et al.* considered that the guiding principle of state cooperation enshrined in Article 28(1) of the Statute also apply to requests for cooperation or judicial assistance from States to the Tribunal, in their investigations or prosecution of persons accused of committing serious violations of international humanitarian law.¹⁸ The Chamber accepts that the investigation of international crimes committed in Rwanda in 1994 is in line with the principles of state cooperation envisaged by the completion strategy in Security Council Resolutions 1503 and 1534.¹⁹ The Chamber therefore considers that the disclosure of material concerning a protected witness to national jurisdictions is consistent with the spirit of the Statute and Rules of the Tribunal and in the interest of justice.

11. However, the Chamber notes that pursuant to Rule 75(F), once protective measures have been ordered in respect of a witness, such measures remain in force until they are rescinded, varied, or augmented by a Chamber, in the interests of justice. The Chamber notes that the practice of the Tribunal requires that the party seeking variation of protective measures demonstrate that the protected witness has given his or her clear consent to this variation²⁰ or that there are new elements showing a change in the situation that initially justified the protective measures.²¹ In the present circumstances, the Chamber notes that the Prosecutor has attached to his Motion a signed affidavit by Witness CNAT²² which in the Chamber's view supports the Prosecutor's request to vary the protective measures for this witness. The Chamber observes that the witness in his affidavit has given full written consent allowing the disclosure to the French authorities of prior statements, transcripts, depositions and/or any other documents being well aware of the effect the variation of the protective measures may have on the witness and/or the witness' family.

¹⁷ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA, filed 1 November 2006.

¹⁸ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA, filed 1 November 2006, para. 15.

¹⁹ See also *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA, filed 1 November 2006, para. 15.

²⁰ See *Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B; *Prosecutor v. Obed Ruzindana and Clément Kayishema*, Case No. ICTR-95-1; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14; *Prosecutor v. Gérard Ntakirutimana et al.*, Case No. ICTR-96-10/17; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Decision on Prosecution's Urgent Ex-Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Witnesses (TC III), 13 August 2008, par. 6; *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Joseph Nzirorera's Motion for Variation of Protective Measures for Witness DC2-5 and CBP99, 16 July 2009, para. 7-9.

²¹ *Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-2000-56-I, Décision sur la requête du Procureur aux fins de modification et d'extension des mesures de protection des victimes et des témoins, 39 ; *Procureur v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Décision relative à la requête en extrême urgence du Procureur en prescription de mesures de protection en faveur de victimes et de témoins, 24 November 2008.

²² Motion, paras. 5 & 14, see Annex A, Signed Affidavit of Witness CNAT, dated 9 April 2010.

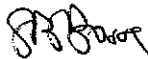
The Prosecutor v. Callixte Nzabonimana, Case No. ICTR-98-44D-T

12. Having considered that there is no prejudice to the witness, the Chamber considers that it is in the interests of justice to vary the protective measures for Witness CNAT to enable the Prosecutor to disclose such statements and/or any other information pertaining to Witness CNAT to the French authorities.

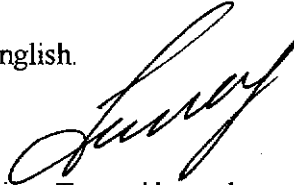
FOR THESE REASONS, THE TRIAL CHAMBER

- I. **GRANTS** the Motion and accordingly **VARIES** the applicable protective measures for the purposes of the disclosures as specified below;
- II. **DIRECTS** the Registry to transmit to the Prosecutor for onward transmission to the French authorities, all the confidential statements, transcripts, personal information sheets, exhibits, depositions and/or other necessary documents in the current proceedings concerning Prosecution Witness CNAT together with the "Interim Order on Protective Measures for Prosecution Witnesses, filed in the *Nzabonimana Trial* on 13 February 2009 which governs the protective measures applicable to Prosecution Witness CNAT ("Protective Measures Order").
- III. **RESCINDS** the protective measures enjoyed by Witness CNAT as requested by the Prosecution.

Arusha, 16 September 2010, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge



(Read and approved)
Mparany Rajohnson
Judge

(Absent at the time of
signature)

[Seal of the Tribunal]

