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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: 29 March 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

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**DECISION ON PROSECUTION MOTION FOR APPOINTMENT OF AMICUS
CURIAE TO INVESTIGATE BREACH OF PROTECTIVE MEASURES OF
PROSECUTION WITNESSES CNBB, CNAD AND CNR1 BY THE DEFENCE**

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INTRODUCTION

1. On 15 March 2011, the Prosecution filed a Motion requesting that the Trial Chamber appoint an *Amicus Curiae* to investigate an alleged breach of the protective measures of Prosecution Witnesses CNBB, CNAD and CNR1 by the Defence.¹
2. On 21 March 2011, the Defence filed a Response opposing the Prosecution Motion.²
3. The Prosecution filed a Reply on 24 March 2011.³

PROCEDURAL HISTORY

4. On 12 February 2009, the Prosecution disclosed unredacted statements of individuals whom the Prosecution says it intended to call to testify. These included the statements of Jean-Marie Vianney Mporanzi, who was originally a Prosecution witness known as Witness CNAO, but eventually abandoned his protective measures and testified for the Defence; and individuals who were given the pseudonyms CNBB and CNAD by the Prosecution.⁴
5. On 13 February 2009, the Pre-Trial Chamber issued an Interim Order on Protective Measures which set out a series of protective measures covering "all Prosecution witnesses or potential Prosecution witnesses wherever they reside and who have not affirmatively waived their right to protective measures."⁵ Among these measures, Protective Measure (i) provides that:

the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any

¹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, (Strictly Confidential) Prosecutor's Motion for Appointment of Amicus Curiae to Investigate Breach of Protective Measures of Prosecution Witnesses by the Defence of Callixte Nzabonimana and Annexures A-I ("Motion"), 15 March 2011.

² *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Confidential Defence Response to Prosecutor's Motion for Appointment of Amicus Curiae to Investigate Breach of Protective Measures of Prosecution Witnesses by the Defence of Callixte Nzabonimana and Annexures A-I ("Response"), 21 March 2011.

³ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Reply to Confidential Defence Response to Prosecutor's Motion for Appointment of Amicus Curiae to Investigate Breach of Protective Measures of Prosecution Witnesses by the Defence of Callixte Nzabonimana and Annexures A-I ("Reply"), 24 March 2011.

⁴ Motion, para. 3, and Annex B.

⁵ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-I, Interim Order on Protective Measures for Prosecution Witnesses, 13 February 2009 ("Interim Order on Protective Measures"), Disposition.

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protected victim [sic] or potential Prosecution witnesses or any relative of such person...⁶

6. On 13 July 2009, the Prosecution filed a first revised Pre-Trial Brief. Witnesses Mporanzi/CNAO and CNBB appeared on the Prosecution list of witnesses; Witnesses CNAD and CNR1 did not.
7. On 24 August 2009, the Pre-Trial Chamber issued a Decision addressing a Defence motion requesting permission to meet with a number of Prosecution witnesses.⁷ In that Decision, the Chamber held that

... the removal of a witness from a Prosecution's list of witnesses does not necessarily imply that protective measures previous [sic] imposed no longer apply.⁸ Indeed, Rule 75(F) provides that once protective measures have been ordered in respect of a witness, those measures continue to have effect unless rescinded, varied or augmented. As such, the Defence was under an obligation, pursuant to the Protective Measures Order, to make a written request to the Chamber before contacting any Prosecution witness, whether they remain on the Prosecution's witness list or not...⁹

The same Decision granted the Defence permission to meet with, *inter alia*, Witness CNBB in the presence of the Prosecution,¹⁰ and Witness CNAD alone.¹¹

8. On 23 September 2009, the Defence indicated that it had not received the unredacted statements of a number of individuals pursuant to Rule 66 (A) (i).¹² On 28 September 2009, the Prosecution provided the Defence with what it called "grid of witness [sic]" with pseudonyms. Witnesses Mporanzi/CNAO, CNBB and CNAD appear on that list; Witness CNR1 does not.¹³
9. Also on 28 September 2009, in response to the same Defence request of 23 September 2009, the Prosecution transmitted a statement provided by Witness CNR1 to two Prosecution interviewers on 12 June 2002.¹⁴

⁶ Interim Order on Protective Measures, Disposition, (i).

⁷ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-PT, Decision on Motion to Interview Prosecution Witnesses ("24 August 2009 Decision"), 24 August 2009.

⁸ *Karemera et al.*, Decision on Defence Written Request to Interview Prosecution Witnesses, 20 September 2005, para. 4.

⁹ 24 August 2009 Decision, para. 8.

¹⁰ 24 August 2009, Decision, Disposition point II.

¹¹ 24 August 2009 Decision, Disposition point III.

¹² Motion, para. 7 and Annex C.

¹³ Motion, para. 8 and Annex D.

¹⁴ Motion, para. 8 and Annex E.

10. On 1 October 2009, the Prosecution filed an amended Pre-Trial Brief with an amended list of witnesses. Witnesses Mporanzi/CNAO and CNBB appeared on that list; Witnesses CNAD and CNR1 did not.¹⁵
11. On 2 October 2009, the Pre-Trial Chamber denied a Defence Motion asking for permission to meet with Witness Mporanzi/CNAO privately.¹⁶
12. On 7 December 2009, with the assistance of the Witness and Victims Support Section (WVSS), the Trial Chamber was able to establish that Witness Mporanzi/CNAO wished to testify for the Defence rather than the Prosecution, and adapted his protective measures accordingly.¹⁷
13. On 9 November 2009, the Prosecution opened its case.
14. On 25 November 2009, the Defence met with Witness CNAD and recorded a statement given by him. In that statement, the witness referred to a meeting with the Defence two days earlier.¹⁸
15. On 1 December 2009, the Prosecution informed the Trial Chamber that it was dropping Witness CNBB, one of its "fugitive witnesses," from its list of witnesses.¹⁹
16. On 18 February 2010, the Trial Chamber accorded a series of Protective Measures to those Defence witnesses whose identities the Defence would disclose to the Prosecution "on or by 22 February 2010 as ordered by the Trial Chamber; wherever they reside and who have no affirmatively waived their right to protective measures."²⁰ Among these measures, Protective Measure (i) provides that

The Prosecution, and any other representative acting on its behalf, shall make a written request, on reasonable notice to the Defence, the Chamber or a Judge thereof, to contact any protected victims [sic] or Defence witness or any relative of such person...
17. On 22 February 2010, the Defence disclosed a proofing chart with its list of witnesses to the Prosecution as ordered by the Trial Chamber.²¹ On this chart, the Defence

¹⁵ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor's Revised Pre-Trial Brief, 1 October 2009.

¹⁶ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on the status of Prosecution Witness CNAO and Associated Protective Measures, 2 October 2009.

¹⁷ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on the Status of Prosecution Witness CNAO and Associated Protective Measures, 7 December 2009.

¹⁸ Motion, para. 14 and Annex F.

¹⁹ T. 1 December 2009, p. 2 (ICS).

²⁰ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on Urgent Defence Motion for Protective Measures, 18 February 2010 ("18 February 2010 Decision"), Disposition.

²¹ Motion, Annex H.

included an individual with the same surname as CNR1 and no first name, to whom it assigned the pseudonym T18. The Defence indicated that this witness would testify on all paragraphs of the Indictment, and that he would discuss the “schedule and itineraries of the Accused.”²² In the same filing, the Defence also stated that it could not provide identifying information for this witness as it had not yet met with him.²³ Witnesses CNAD²⁴ and CNBB²⁵ also appeared on this list. The Defence assigned the pseudonyms T24 to Witness CNAD, and T65 to Witness CNBB. The Defence indicated that it would provide no identifying information with respect to Witness CNBB as the witness was “known to the Prosecution.”²⁶

18. On 8 March 2010, the Defence met with Witness CNBB and recorded a statement provided by him. The statement was disclosed by the Defence to the Prosecution on 1 April 2010.²⁷

19. Witness CNAD/T24 testified before the Chamber for the Defence on 26-28 April and 4 May 2010. Witness T65/CNBB was scheduled to testify for the Defence during the week of 28 February to 4 March 2011 but did not do so. Witness T18/CNR1 did not appear on any Defence orders of appearance.

20. On 7 February 2011, in response to a Prosecution Motion requesting leave to call Witness CNR1 as a rebuttal witness, the Defence alleged that the Prosecution had violated the protective measures accorded to the witness by the Trial Chamber on 18 February 2010.²⁸

21. In its Reply of 10 February 2011, the Prosecution countered that it was the Defence which had violated the Protective Measures of Witnesses CNR1, CNAD and CNBB, as accorded by the Pre-Trial Chamber to Prosecution witnesses on 13 February 2009.²⁹

²² Motion, para. 18 and Annex H, registry number p. 6026 (unofficial translation).

²³ Motion, Annex I, A.

²⁴ Motion, para. 18 and Annex H, registry number p. 6025.

²⁵ Motion, para. 18 and Annex H, registry number p. 6018.

²⁶ Motion, Annex I, B.

²⁷ Motion, Annex G.

²⁸ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Response to Prosecutor’s Motion to Call Rebuttal Evidence Pursuant to Rules 54, 73 and 85 (A) of the Rules of Procedure and Evidence, 7 February 2011, paras. 20-26.

²⁹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Reply to Nzabonimana’s Response to Prosecutor’s Motion to Call Rebuttal Evidence Pursuant to Rules 54, 73 and 85 (A) of the Rules of Procedure and Evidence, 10 February 2011.

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22. On 8 March 2011, the Trial Chamber held that it had not been properly moved to address the allegations of breaches of protective measures, and directed the parties to file proper submissions, if they wished to do so, within seven days; hence, the instant Motion.³⁰

DELIBERATIONS

Applicable Law

23. Rule 66 (A) of the Rules states:

Subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the Defence:

i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and

ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

24. Rule 75 (A) on measures for the protection of victims and witnesses provides that

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

25. The Appeals Chamber has held that each party to proceedings before the Tribunal has the right to interview a potential witness as “[w]itnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them.”³¹

Trial Chambers have held that where a witness is listed by one party as expected to testify on its behalf with respect to certain issues, it does not

³⁰ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on Prosecution Motion to Call Rebuttal Evidence, 8 March 2011, para. 37 and Disposition.

³¹ *Prosecutor v. Mile Mrksić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003.

necessarily follow that this witness will have no information of value to the opposing party on other issues related to the case. The opposing party may have a legitimate expectation of interviewing the witness in order to obtain this information and thereby better prepare its case.³² The right to contact and interview a potential witness, however, is not without limitation. The Chamber must ensure that there is no inference with the course of justice...³³

Preliminary Matter- The Prosecution Reply

26. The Trial Chamber observes that in its Motion, the Prosecution argues that the Defence violated the Interim Order on Protective Measures. In the Motion, the Prosecution makes no reference at all to the Chamber's 24 August 2009 Decision. Yet, in its Reply the Prosecution contends that "despite the fact that the Defence was allowed to meet with [the witnesses at issue], the Defence breached the protective order by meeting them without first obtaining confirmation from WVSS that the witness consented to meet with them."³⁴ Moreover, the Prosecution submits that the Defence was only granted permission to meet with Prosecution witnesses by the Pre-Trial Chamber in its 24 August 2009 Decision "in order to obtain information regarding which witnesses have either testified or been accused in Rwanda."³⁵
27. The Chamber notes that Protective Measure (i) of the Interim Order on Protective Measures states that a meeting by the opposing party with a protected witness can only take place "...when such an interview has been granted by the Chamber...with the consent of such protected person..." This measure suggests that the Chamber would request proof of consent before granting authorization for the meeting. However, in granting the Defence Motion in its 24 August 2009 Decision, the Chamber held that "the witnesses should first be contacted to ensure that they agree to meet with the Defence."³⁶

³² *The Prosecutor v. Sefer Halilović*, Case No. IT-01-42-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 14.

³³ *The Prosecutor v. Augustin Ndingiyimana et al.*, Case No. ICTR-00-56-T, Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP, 26 October 2007, para. 3

³⁴ Reply, paras. 3 and 24.

³⁵ Reply, para. 23.

³⁶ 24 August 2009 Decision, para. 9.

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28. The Trial Chamber notes that in its Reply the Prosecution is no longer alleging that the Defence violated the Interim Order on Protective Measures, it is making an entirely new allegation that the Defence violated the Chamber's 24 August 2009 Decision. However, a party is not permitted to raise an entirely new allegation in a Reply as the opposing party is not provided an opportunity to respond. The Chamber therefore dismisses that section of the Prosecution Reply.

Discussion- CNR1

29. The Prosecution submits that the Defence has violated the protective measures accorded to Witness CNR1 in the Interim Order on Protective Measures. In support of its position, it notes that it disclosed a statement provided by this individual to the Defence on 18 March 2008, pursuant to "Rule 66 (A)," and an unredacted statement on 28 September 2009, in response to a Defence Motion requesting "statements initially disclosed to Mr. Nzabonimana as material supporting the Indictment pursuant to Rule 66 (A) (i)..."³⁷

30. The Trial Chamber observes that it is unable to confirm the Prosecution contention regarding the statements disclosed on 18 March 2008, as the information at issue has been redacted.³⁸

31. The Chamber also notes that the Prosecution points to no witness list on which the individual it refers to as CNR1 appears, and the Trial Chamber can find no reference to this individual on Prosecution witness lists of 13 July 2009 or 1 October 2009. Moreover this individual does not appear on the "grid" of witnesses provided by the Prosecution to the Defence on 28 September 2009.

32. Thus, the Prosecution's claim that CNR1 was a Prosecution witness rests solely on the disclosure of the individual's statement by the Prosecution to the Defence pursuant to Rule 66 (A) (i). On this point, the Trial Chamber observes that Rules 66 (A) (i) and 66 (A) (ii) refer to two separate and distinct disclosure obligations. Rule 66 (A) (i) requires the disclosure of "supporting material which accompanied the indictment", while Rule 66 (A) (ii) requires the disclosure of "the statements of all witnesses whom the Prosecutor intends to call to testify at trial." Clearly, the fact that an individual's statement was disclosed pursuant to Rule 66 (A) (i) does not indicate, in and of itself, that the individual who provided the statement would be a

³⁷ Motion, paras. 2, 7-8.

³⁸ Motion, Annex A.

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Prosecution witness. The Prosecution's position would have far greater merit had the statement been disclosed pursuant to Rule 66 (A) (ii).

33. In conclusion, the Trial Chamber finds that the Prosecution has not established a *prima facie* case that the individual it refers to as CNR1 was covered by the Interim Order on Protective Measures and thus that the Defence violated that order.

34. With respect to the Defence contention that it was in fact the Prosecution that violated this witness' protective measures,³⁹ the Trial Chamber recalls that in its filing of 22 February 2010, the Defence included a person with the same last name as Witness CNR1 but noted only that the witness would testify on all points of the Indictment and did not disclose this witness' identifying information. The Chamber concludes that the information provided by the Defence to the Prosecution regarding this witness in the 22 February 2010 filing did not suffice to put the Prosecution on notice that it intended to call the individual known as CNR1 as a witness. Thus, the Trial Chamber finds that the Defence has not established a *prima facie* case that the Prosecution violated the protective measures accorded to Defence witnesses in its 18 February 2010 Decision.

Discussion-Witness CNAD

35. The Prosecution alleges that the Defence contacted Witness CNAD without the prior approval of the Trial Chamber, thereby violating the Interim Order on Protective Measures which covered this witness.

36. The Trial Chamber observes that contrary to the Prosecution submission, the Defence did seek the prior approval of Pre-Trial Chamber to meet with the witness in accordance with Protective Measure (i) of the Interim Order on Protective Measures, and that the Pre-Trial Chamber granted permission to the Defence to meet with this witness in the absence of the Prosecution in its 24 August 2009 Decision.⁴⁰

37. The Chamber concludes that the Prosecution submission with respect to this witness is wholly without merit.

³⁹ Response, para. 37.

⁴⁰ 24 August 2009 Decision, Disposition pt. III.

Discussion- Witness CNBB

38. The Prosecution alleges that the Defence contacted Witness CNBB without the prior approval of the Trial Chamber, thereby violating the Interim Order on Protective Measures which covered this witness.
39. The Trial Chamber observes that contrary to the Prosecution submission, the Defence did seek the prior approval of Pre-Trial Chamber to meet with the witness in accordance with Protective Measure (i) of the Interim Order on Protective Measures, and that the Pre-Trial Chamber granted permission to the Defence to meet with this witness in its 24 August 2009 Decision. The Chamber, however, stipulated that the meeting should take place in the presence of the Prosecution.⁴¹
40. Thus, the issue is not whether the Defence violated the Interim Order on Protective Measures, but whether it violated the 24 August 2009 Decision by meeting with Witness CNBB in the absence of the Prosecution.
41. The Trial Chamber recalls that in its 24 August 2009 Decision, the Pre-Trial Chamber held that "...the Prosecution may be present for the Defence interviews of only those witnesses that remain on its witness list."⁴² At the time the Decision was rendered, CNBB was on the Prosecution list of witnesses, and therefore the Chamber granted the Defence permission to meet with the witness provided the meeting took place in the presence of the Prosecution.⁴³ The same Decision granted permission to the Defence to meet alone with other witnesses covered by the Interim Protective Measures Order who had been removed by the Prosecution from its list of witnesses.⁴⁴ On 1 December 2009, the Prosecution informed the Trial Chamber and the Defence that it was dropping Witness CNBB from its list of witnesses.⁴⁵ The Defence met with the witness four months later on 8 March 2010.⁴⁶
42. The Trial Chamber has already concluded that the Defence properly sought permission of the Chamber to meet with Witness CNBB, and therefore did not violate the Interim Order on Protective Measures. It further concludes that as the witness had been formally dropped by the Prosecution, the Defence was under no obligation to hold the meeting in the presence of the Prosecution, and thus the Defence did not

⁴¹ 24 August 2009 Decision, Disposition pt. II.

⁴² 24 August 2009 Decision, para 10.

⁴³ 24 August 2009 Decision, Disposition pt. II.

⁴⁴ 24 August 2009 Decision, Disposition pt. III.

⁴⁵ T. 1 December 2009, p. 2 (ICS).

⁴⁶ Motion, para. 37.

violate the Chamber’s 24 August 2009 Decision. Moreover, while the preceding analysis demonstrates that the Defence was under no obligation to invite the Prosecution to a meeting with its former witnesses once it was granted permission to meet with these witnesses by the Chamber, the Chamber wishes to note Annex C of the Defence Response which is a copy of an email sent by Defence Co-Counsel Philippe Larochelle to Lead Prosecutor Paul Ng’arua on 15 November 2009 titled “Meeting with Prosecutor witnesses no longer on your list.” In it Mr. Larochelle asks Mr. Ng’arua to confirm in writing that Defence could meet with Witness CNBB and other witnesses no longer on the Prosecution list. He proposed that the parties address the Chamber if the Prosecution had an objection.⁴⁷ The Prosecution has not suggested it responded to this message. And in the absence of a response, the Chamber finds that the Defence’s conclusion that the Prosecution did not object to the proposed meeting was not unreasonable.

Timing of the Prosecution Motion

43. Finally, the Trial Chamber notes that according to the Prosecution’s own submission, the Defence first indicated to the Prosecution that it met with Witness CNBB/T65 when it disclosed his statement to the Prosecution on 1 April 2010.⁴⁸ In addition, Witness CNAD/T24 began testifying before the Chamber for the Defence on 26 April 2010. The Chamber has previously held that it “considers the security of witnesses to be of paramount importance to the sanctity of trial proceedings.”⁴⁹ The Chamber is therefore at a loss to understand why the Prosecution waited over a year before bringing these allegations that the Defence had interfered with its witnesses. The Chamber strongly disapproves of the delay.

⁴⁷ Response, Annex C.

⁴⁸ Motion, Annex G

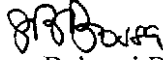
⁴⁹ See for example, *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on Defence Urgent Motion to Hear Testimony of Dr. Susan Thomson via Video-Link, 9 March 2011, para. 18.

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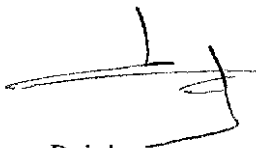
FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 29 March 2011, done in English.



Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tuzmukhamedov
Judge
Mparany Rajohnson
Judge

[Seal of the Tribunal]

