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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 DEFENCE MOTION FOR THE RECALL OF WITNESSES CNAL,
CNAQ AND CNBU**
(Rules 54 of the Rules of Procedure and Evidence)

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INTRODUCTION

1. On 12 February 2009, the Prosecution disclosed to the Defence one prior written statement of Prosecution Witness CNBU, two prior statements of Witness CNAQ, and two prior statements of Witness CNAL.¹
2. On 11 November 2009, Prosecution Witness CNBU testified in this case. He was cross-examined the same day by the Defence. One of the issues raised by the Defence was the number of prior statements given by the witness to the Prosecution.²
3. Witness CNAQ testified in this case on 16, 17 and 23 November 2009. On 23 November 2009, the Defence cross-examined the witness on the number of prior statements he provided to the Prosecution.³
4. On 1 and 2 December 2009, Prosecution Witness CNAL testified in this case. He was cross-examined by the Defence on 1 December 2009 regarding, *inter alia*, the number of written statements he provided to the Prosecution.⁴
5. On 31 May 2010, the Defence sent a letter to the Prosecution asking for the disclosure of:
 - i. The Kinyarwanda version of Witness CNBU's written statement of 4 October 2008;
 - ii. A statement of Witness CNAQ taken between 1998 and 2008; and
 - iii. Two statements of Witness CNAL taken in the years 1999, 2000, 2003 or 2005.⁵
6. On 3 June 2010, the Prosecution responded via email that it could not find the statements requested by the Defence.⁶
7. On 9 March 2011, the Defence filed the instant Motion requesting that the Trial Chamber recall Defence Witnesses CNBU, CNAQ and CNAL for further cross-examination of the witnesses on the issue of their prior statements.⁷
8. On 14 March 2011, the Prosecution filed a Response, objecting to the recall of the witnesses.⁸ The Defence did not file a reply.

¹ CNBU Written and signed Statement, 4 October 2008; CNAQ Written Statements, 26 August and 24 September 1998, signed 24 September 1998; CNAQ Written and signed Statement, 4 October 2008; CNAL Written Statement, 7 September and 7 October 1998, signed 8 October 1998; CNAL Written and signed Statements, 12 November 2008

² T. 11 November 2009 (ICS), pp. 76-77.

³ T. 11 November 2009 (ICS), pp. 6-9, 16-17; Prosecutor's Response (Annex B).

⁴ T. 1 December 2009 (ICS) pp. 36-43; Prosecutor's Response (Annex C).

⁵ Letter for Disclosure from the Defence to the Prosecution, 31 May 2010; Defence Motion (Annex B).

⁶ The Defence Motion (Annex C).

⁷ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Defence's Motion for the Recall of Defence Witnesses CNAQ, CNAL and CNBU ("Motion"), 9 March 2011.

SUBMISSIONS OF THE PARTIES

Defence Motion

9. The Defence asserts that there is good cause for recalling witnesses CNBU, CNAQ and CNAL.⁹ To this end, the Defence likens its present request to the situation of Defence Witness T61, who testified that he signed a written statement in Kigali when he met members of the Defence Team and the Defence indicated that such statements did not exist.¹⁰ The Defence recalls that on this occasion the Trial Chamber considered this a matter for further cross-examination as the Defence denied being in possession of the alleged statements which it were therefore unable to disclose to the Prosecution. The Defence recalls that Prosecution witnesses CNBU, CNAQ and CNAL also testified to the existence of prior statements which the Prosecution was unable to find in its records. Thus, the Defence submits that the circumstances warrant the recall of these three witnesses for further cross-examination on this point.¹¹
10. Specifically, the Defence argues that recalling these witnesses will grant it the opportunity to confront them regarding:
- i. The numbers of statements signed by them;
 - ii. The non existence of these statements; and
 - iii. The grounds upon which the statements were originally made.¹²
11. The Defence contends that it was unable to question these witnesses earlier because it ‘the Prosecutor confirmed only long after the cross-examination of these witnesses that their mention of non disclosed statements were misleading’.¹³
12. Finally, the Defence underscores the importance of being allowed an opportunity to impeach the credibility of Prosecution witnesses, and stresses such concerns are “immediately apparent in the case of witness CNAL, who clearly invented the existence of these statements to minimize certain contradictions within the truly existing

⁸ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Response to Defence’s Motion for the Recall of Defence Witnesses CNAQ, CNAL and CNBU (“Motion”), 14 March 2011.

⁹ Motion, Para. 25

¹⁰ Motion, paras. 13-14.

¹¹ Motion, paras. 23-24.

¹² Motion, para. 26.

¹³ Motion, para. 27.

statements, and stated that these contradictions had in the past been corrected in the non-existing statements.”¹⁴

Prosecution Response

13. In its Response, the Prosecution counters that the Defence has failed to demonstrate good cause or compelling circumstances warranting the recall of Prosecution Witnesses CNBU, CNAQ and CNAL.¹⁵ It argues that the Defence had sufficient opportunity to extensively cross-examine these witnesses on the “non-existent” statements, and therefore that further cross-examination would serve no useful purpose.¹⁶
14. The Prosecution asserts that “[t]he Defence motion does not cite any new developments or any unforeseen circumstances” after the initial cross-examination that would warrant the recall of these witnesses, and that the motion is nothing more than an attempt “to rehash matters which were dealt with during the cross-examination of these witnesses”, meaning that to grant recall on the bases advanced by the Defence “could only amount to a wastage of the court’s and the witness’ time”.¹⁷
15. It also submits that the Defence’s reliance on Witness T61’s situation is inapposite.¹⁸ The Prosecution argues that the issue with Witness T61 arose from the fact that it had not been in receipt of any statement of Witness T61 whilst the witness claimed to have signed a statement.¹⁹ Indeed, Witness T61 testified that he met the Defence four times, in March 2008, September 2009, June 2010 and September 2010 during which he signed statements in the presence of Defence Co-Counsel and a Defence investigator.²⁰ The issue therefore was whether Witness T61 signed a statement or not, and not the number of statements he signed.²¹
16. The Prosecution asserts that the Defence not only fails to show any real prejudice²² but also failed to diligently file the Motion in a timely manner. Specifically, it did not file the instant motion until approximately 10 months after receiving communication from the Prosecution that it did not have the statements in question.²³

¹⁴ Motion, paras. 22, 28.

¹⁵ Response, paras. 10, 11(vi).

¹⁶ Reponse, paras. 11(i), 15, 50, 57.

¹⁷ Response, paras. 45-47.

¹⁸ Response, para. 11 (i-ii), 48-57.

¹⁹ Response, para.52.

²⁰ Response, para. 54-56.

²¹ Response, para. 53.

²² Response, para. 11(iii), 48.

²³ Response, paras, 11 (iv),. 58-60.

17. The Prosecution submits that the witnesses the Defence seeks to recall do not raise extraneous issues which required additional investigations warranting a recall, unlike the case of Jean Marie Vianney Mporanzi.²⁴

Witness CNBU

18. With respect to Prosecution Witness CNBU, the Prosecution avers that the witness was extensively cross-examined on the issue of the supposed Kinyarwanda version of his statement of 4 October 2008. His testimony demonstrates that he was questioned in Kinyarwanda, had his statement read back to him in the same language which was subsequently translated into English.²⁵ It submits that Witness CNBU's explanation for the supposed Kinyarwanda version of his statement demonstrates that any inconsistency arising on this point "is minor or self-evident", meaning that a recall will provide no additional value to his testimony.²⁶

Witness CNAQ

19. Regarding the proposed recall of Witness CNAQ for further cross-examination on an alleged additional statement provided some time between 1998 and 2008,²⁷ the Prosecution submits that the witness' testimony establishes that she indeed met with Prosecution investigators on two occasions in 1998—26 August and 24 September—and "[i]t was during the course of these two dates that her sole statement of 1998 was taken and signed on the [sic] 24 September 1998". Moreover, Witness CNAQ conceded that she provided one statement in 2008, which the Defence is in receipt of.²⁸ Thus, the Prosecution contends that it is by no means clear from the testimony of Witness CNAQ that a third statement was provided between 1998 and 2008²⁹.

20. Furthermore, the Prosecution suggests that the line of questioning employed by the Defence that gave rise to its belief that a third statement exists was not constrained to any given time period, and "therefore it cannot be reasonably inferred that the witness was making reference to other statements instead of those she specifically referred to

²⁴ Response, para. 61.

²⁵ Response, paras. 16-20; T. 11 November 2009 (close session), p. 76 lines 30-37; p. 77 lines 14-19.

²⁶ Response, paras. 18-22.

²⁷ Response, para. 24.

²⁸ Response, paras. 24-28; Response (Annex A and B)

²⁹ Response, paras. 24-32.

during her testimony.”³⁰ The Prosecution submits that the Defence fails to show good cause to warrant recall of CNAQ. Moreover, the Prosecution recalls the witness’ “particularly devastating circumstances as a result of the genocide.”³¹

Witness CNAL

21. The Prosecution asserts that during the extensive cross-examination of Witness CNAL, he maintained that he gave several statements to the Prosecution, in which he “severally and specifically stated that he could not remember the number of times that he signed these statements.”³² It submits that Witness CNAL may be mistaken about the number of statements he signed, particularly as he recalled meeting the Prosecution on two specific occasions in 1998.³³
22. The Prosecution submits that questions concerning the statements of Witness CNAL were exhaustively dealt with during cross-examination,³⁴ and therefore recalling him over a year later “would not assist in this regard”.³⁵ It also notes that the Defence has failed to demonstrate how Witness CNAL “invented the evidence of his other purported statements” in order to mislead the court.³⁶

DELIBERATIONS

Applicable Law

23. Rule 54 states that:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrant and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

24. According to the established jurisprudence of the Tribunal, the party seeking to recall a witness must demonstrate good cause.³⁷ Assessing good cause requires fulfilling a two-

³⁰ Response, para. 32.

³¹ Response, para. 34.

³² Response, paras. 35-36.

³³ Response, para. 37.

³⁴ Response, paras. 40-42; T. 1 December 2009 (closed session) p. 37 lines 26-30, p. 38 lines 14-15.

³⁵ Response, paras. 43-44.

³⁶ Response, para. 11 (v).

³⁷ *Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumve* (“*Bagosora et al.*”), Case No. ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2; *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T,

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pronged analysis: (1) considering the purpose for which the witness will testify; and (2) the reasons why the witness was not questioned earlier on those matters.³⁸ If the Defence discovers inconsistent statements pertaining to a witness who has already testified, fairness to the accused justifies recalling that witness.³⁹ Furthermore, the right to be tried without undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.⁴⁰

Purpose of Recalling Prosecution Witness CNBU, CNAQ and CNAL

25. The Defence requests that it be permitted to recall Prosecution Witnesses CNBU, CNAQ and CNAL to further cross-examine them on the number of prior statements each witness provided to the Prosecution, and the existence or non-existence of such statements.⁴¹ The Defence submits that the information it seeks to further cross-examine the three witnesses on is “highly significant” as it relates to the credibility of the witnesses. It cites Witness CNAL:

who clearly invented the existence of these statements to minimize certain contradictions within the truly existing statements, and stated that these contradictions had in the past been corrected in the non-existing statements.⁴²

It is the Chamber’s understanding that the Defence is arguing that when confronting discrepancies between their testimony at trial and the prior statements available to the Defence, the witnesses concocted the existence of prior statements in which they allegedly corrected earlier mistakes.

Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5.

³⁸ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera* (“*Karemera et al.*”), Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Recall Ahmed Mbonnyunkiza (TC), 25 September 2007, para. 5.

³⁹ *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera’s Motion to Recall the Witness (TC), 4 March 2008, para. 30.

⁴⁰ *Bagosora et al.* Case No. ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6; *See also Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Decision on the Defence Motion for the Re-examination of Defence Witness DE, August 1998, para. 14. *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirprera*, Case No. ICTR -98-44-T. Decision on Joseph Nzirorera’s Motion to recall Prosecution Witness BTH, 12 March 2008, para. 5.

⁴¹ Motion, para. 26.

⁴² Motion, para. 28.

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26. The Trial Chamber accepts that recalling witnesses in order to confront them with new information challenging their credibility may be a legitimate purpose of witness recall. However, having reviewed the respective testimonies of Witnesses CNAQ, CNAL and CNBU in this case, the Trial Chamber considers that the Defence cross-examined these witnesses in detail regarding their respective prior statements.⁴³ The Chamber is of the view that the witnesses will have no more to add regarding the existence or non-existence of statements which the Prosecution states are not in its possession. For example, in response to the following question from the Presiding Judge: "Witness, do you recall when you made these statements or how many you made?" Witness CNAL responded:

...All I remember is that I met [Prosecution Investigators] for the first time in 1998. I confirm that I met them several times. However, I do not remember when. If the Court has other statement, I kindly request...and I will tell you whether they are, indeed my statements.⁴⁴

27. The Trial Chamber concludes that the Defence has not established a sufficient reason to justify recalling these witnesses, and has thus failed the first prong of the recall test. However, the Chamber, will take into account any discrepancies in the witness' testimonies and prior statements when assessing their credibility at a later stage.

Late Filing of the Instant Motion

28. With respect to the timing of its Motion, the Defence explains that "the reason why those witnesses have not been questioned on those matters earlier is because the Prosecutor confirmed only long after the cross-examination of these witnesses that their mention of non-disclosed statements was misleading."⁴⁵

29. The Trial Chamber observes that the Defence did not request copies of the alleged statements until 31 May 2010,⁴⁶ and that the Prosecution informed the Defence on 3 June 2010 that it did not have the statements.⁴⁷ The Defence has not explained why it

⁴³ With respect to Witness CNBU see T. 11 November 2009 (ICS), pp. 76, 77; With respect to Witness CNAQ, see T. 23 November 2011, pp. 6, 8, 9 (ICS); with respect to Witness CNAL see T. 1 December 2009, pp. 37-38 (ICS).

⁴⁴ Transcript of 1 December 2009, pp. 36-37 (ICS)

⁴⁵ Motion, para. 27.

⁴⁶ Motion, Annex B.

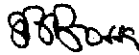
⁴⁷ Motion, Annex C.

waited over nine months to file the instant motion. Therefore, the Chamber finds that the Defence has not established good cause for not questioning the witnesses earlier. Thus, it has failed to satisfy the second prong of the recall test.

FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.


Dated in Arusha, this 29 day of March 2011, done in English



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Toqir Medov
Judge



[Seal of the Tribunal]



Mparany Rajohnson
Judge