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UNITED NATIONS  
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**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 21 October 2011

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**  
Case No. ICTR-98-44D-T

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**DECISION FOLLOWING *AMICUS CURIAE* REPORT PERTAINING TO  
ALLEGATIONS OF COMTEMPT OF THE TRIBUNAL BY PROSECUTION WITNESS  
CNAI AND/OR A MEMBER OF THE PROSECUTION OFFICE**

**Office of the Prosecutor**

Paul Ng'arua  
Memory Maposa  
Simba Mawere  
Mary Diana Karanja

**Defence Counsel**

Vincent Courcelle-Labrousse  
Philippe Laroche

## PROCEDURAL HISTORY

1. On 26 and 27 November 2009, Witness CNAI testified for the Prosecution in the instant case.
2. On 18 February 2010, the Trial Chamber ordered a series of protective measures for Defence witnesses.<sup>1</sup>
3. On 13 May 2010, Defence Witness T36 informed a Defence investigator that Prosecution Witness CNAI had approached him on at least two occasions to dissuade him from testifying for the Nzabonimana defence.<sup>2</sup>
4. On 17 May 2010, the Defence obtained a statement from Witness T36 in which the witness alleged that Witness CNAI offered him 5000 US dollars<sup>3</sup> to testify for the Prosecution, and threatened that he would suffer negative consequences if he testified for the Defence.<sup>4</sup> Witness T36 also alleged that Witness CNAI was improperly recruiting other individuals to testify for the Prosecution.<sup>5</sup>
5. On 19 May 2010, the Defence filed a motion requesting the appointment of *amicus curiae* to investigate allegations of contempt against Prosecution Witness CNAI, and supplementary protective measures for Defence Witness T36.<sup>6</sup> On 9 July 2010, the Chamber found that the Defence had provided insufficient information to warrant the

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<sup>1</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Urgent Defence Motion for Protective Measures (Protective Measures Order), 18 February 2010.

<sup>2</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. 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 ("19 May Motion"), 19 May 2010, para.2.

<sup>3</sup> 19 May Motion, Annex A, paras. 7, 14-16, 18.

<sup>4</sup> 19 May Motion, Annex A, paras. 4-6, 10, 19, 22, 27.

<sup>5</sup> 19 May Motion, Annex A, para. 21.

<sup>6</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. 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 ("19 May Motion"), 19 May 2010.

appointment of an *amicus curiae*, and stipulated certain additional information it believed would assist the Chamber in assessing any renewed Defence request.<sup>7</sup>

6. On 10 August 2010, the Defence filed an interlocutory appeal contesting the Chamber's 9 July 2010 Decision denying the appointment of an *amicus curiae*.<sup>8</sup> On 28 October 2010, the Appeals Chamber issued a Decision on the Defence Interlocutory Appeal, finding that the Trial Chamber acted within its discretion in deciding not to appoint an *amicus curiae* in the circumstances.<sup>9</sup>
7. On 18 September 2010, the Defence obtained a second and more detailed sworn statement from Witness T36 regarding the threats made against him ("second statement").<sup>10</sup> On 21 September 2010, the Defence obtained statements from two other persons apparently corroborating parts of Witness T36's statement.<sup>11</sup>
8. On 7 October 2010, the Defence filed a confidential motion pursuant to Rules 54, 73, 75, 77 of the Rules of Procedure and Evidence ("Rules") requesting, for the second time, the appointment of *amicus curiae* to investigate contempt allegations against Prosecution Witness CNAI. It also requested that *amicus curiae* investigate threats made against Witness T37, and the admission into evidence of a number of *Gacaca* records.<sup>12</sup>

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<sup>7</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, 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, 9 July 2010 ("9 July 2010 Decision").

<sup>8</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Interlocutory Appeal on the 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 ("Interlocutory Appeal Motion"), 10 August 2010.

<sup>9</sup> *Callixte Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-AR77, Decision on Callixte Nzabonimana's Interlocutory Appeal of the Trial Chamber's Decision Dated 9 July 2010 ("Interlocutory Appeal Decision"), 28 October 2010.

<sup>10</sup> Motion, Annex D.

<sup>11</sup> Motion, Annexes E & F.

<sup>12</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Confidential Renewed Motion for Appointment of An *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Admission of a *Gacaca* Record into Evidence ("Motion"), 7 October 2010.

9. On 8 December 2010, the Trial Chamber granted the Defence motion and directed the Registry to appoint an *amicus curiae* to investigate the allegations made by Witness T36 and to report back to the Chamber no later than 1 April 2011.<sup>13</sup>
10. On 1 April 2011, the *amicus curiae* assigned by the Registrar filed a report on his findings.<sup>14</sup> Subsequently, the Trial Chamber requested that Language Services provide a translation of the report.
11. On 13 May 2011, the Trial Chamber directed the Registrar to disclose the *amicus curiae* report to the parties and instructed the parties to file any submissions they may have on the *amicus curiae* report by 25 May 2011.
12. On 25 May 2011, the Prosecution noted that it had no submissions.<sup>15</sup> On the same day, the Defence filed its submission and noted that it generally agreed with the conclusions of the *amicus*, particularly in regard to the need for the Tribunal to strengthen protective measures for Defence witnesses.<sup>16</sup>

## DELIBERATIONS

### *Applicable Standard to Initiate Contempt Proceedings*

13. Rule 77(A)(iv) provides that the Tribunal may hold in contempt those who knowingly and wilfully interfere with the administration of justice - including any person who threatens, intimidates, causes injury, 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. If a Chamber has reason to believe that a person may be in contempt of

<sup>13</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Renewed and Confidential Motion for Appointment of *Amicus Curiae* to Investigate Allegations of Contempt of the Tribunal Against Prosecution Witness CNAI ("8 December 2010 Decision"), 8 December 2010.

<sup>14</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Report of the *Amicus Curiae* on Allegations of Contempt of the Tribunal by Witness CNAI and/or A Member of the Prosecution Office Pertaining to Defence Witness T36, ("*Amicus Curiae* Report"), filed 1 April 2011.

<sup>15</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Submissions on the *Amicus Curiae* Report on Allegations of Contempt of the Tribunal by Prosecution Witness CNAI Pertaining to Defence Witness T36 ("Prosecutor's Submissions"), 25 May 2011.

<sup>16</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Submissions on the *Amicus Curiae* Report on Allegations of Contempt of the Tribunal by Prosecution Witness CNAI ("Defence Submissions"), 25 May 2011.

the Tribunal, it may, in its discretion, direct an investigation of the matter under Rule 77(C). The Chamber again notes the permissive language (*i.e.* the use of the word “may”) of both provisions of Rule 77.

14. The ICTR Appeals Chamber has held that the “sufficient grounds” requirement within Rules 77 [...] is satisfied if the Chamber finds that a *prima facie* case exists.<sup>17</sup> The *prima facie* standard is the standard employed by Trial Chambers in determining whether to confirm an indictment pursuant to Article 18 of the Statute.<sup>18</sup> The *prima facie* standard for confirming an indictment was articulated by the ICTY Trial Chamber in *Milošević*, as “a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused.”<sup>19</sup> In general, this means that the Chamber will not consider the credibility or reliability of evidence at this stage of the proceedings.

15. The *prima facie* standard is a relatively low burden which requires the Chamber to take the evidence adduced in support of the allegations as true. If there is evidence in support of each of the elements of the alleged crime, the *prima facie* standard has been satisfied and there are sufficient grounds to initiate proceedings. The credibility and reliability of witness testimony is only to be examined at the conclusion of the case.

<sup>17</sup> *Karemera et al.*, Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera’s and the Prosecutor’s Appeals of Decision Not to Prosecute Witness BTH for False Testimony, para. 19 citing *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution’s Appeal Against the Trial Chamber’s Decision of 10 June 2008, 25 July 2008 (“*Šešelj* Decision”), para. 16; *See also*, *Prosecutor v. Augustin Ndirabatware*, Case No. ICTR-99-54-R77.1, Decision on Allegations of Contempt, 12 March 2010 (“*Ndirabatware* Decision”), para 4.

<sup>18</sup> Article 18 – “The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.”; *See also*, *Prosecutor v. Karemera et. al.*, Case No. ICTR-98-44-AR91, Decision on “Joseph Nzirorera’s Appeal From Refusal to Investigate [a] Prosecution Witness for False Testimony” and on Motion for Oral Arguments, 22 January 2009, para. 19 (“since a *prima facie* case must be established to confirm an indictment, it is therefore logical for a Chamber to employ this standard when ordering the prosecution of an individual.”).

<sup>19</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-01-51-I, Decision on Review of Indictment, 22 November 2001.

16. Nonetheless, even where the *prima facie* standard has been met, the Chamber retains discretion whether to initiate proceedings for contempt or false testimony.<sup>20</sup> In the *Nsengimana* case, four protected Prosecution witnesses testified that they were approached by members of Nsengimana's Defence team shortly prior to testifying before the Tribunal.<sup>21</sup> The Registry completed an investigation and concluded there was a *prima facie* case that the Defence Investigators knowingly violated the witness protection measures.<sup>22</sup> The Prosecution requested that contempt proceedings be instituted.<sup>23</sup> The Trial Chamber observed that the Investigators' "violations appear to have had little impact on the proceedings," noted their apologies, and concluded that, under these circumstances, the initiation of contempt proceedings would not be the "most effective and efficient way to ensure compliance with the witness protection measures."<sup>24</sup>

17. The Appeals Chamber held that this was within the discretion of the Trial Chamber. Recalling that the decisions taken pursuant to Rule 77(D) of the Rules were discretionary, the Appeals Chamber held that the Trial Chamber was entitled to find a *prima facie* case of contempt and then determine, within the bounds of its discretion, whether or not to initiate proceedings against the Investigators.<sup>25</sup>

18. In exercising its discretion whether to initiate proceedings for false testimony or contempt, the Chamber may take into consideration certain factors, such as (i) indicia as to the *mens rea* of the witness, including his intent to mislead and cause harm; (ii) the relationship between the statement in question and a material matter in the case; and (iii) the possible bearing of the statement in question on the Chamber's final decision.<sup>26</sup> In short, the

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<sup>20</sup> *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-A/ICTR-2010-92, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses, 16 December 2010.

<sup>21</sup> *Id.* at para. 3.

<sup>22</sup> *Id.* at para. 3.

<sup>23</sup> *Id.* at para. 4.

<sup>24</sup> *Id.* at para. 7.

<sup>25</sup> *Id.* at para. 17.

<sup>26</sup> *Prosecutor v. Karemera*, Case No. 98-44-AR.91, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [A] Prosecution Witness for False Testimony" and on Motion for Oral Arguments, 22 January 2009, para. 21; *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-A/ICTR-2010-92, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses, 16 December 2010, para. 22.

Chamber must consider carefully if proceedings for false testimony or contempt are the most effective and efficient way to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of the case.<sup>27</sup>

19. Therefore, the Chamber will examine the evidence set forth in the *amicus curiae* report to determine whether, if uncontradicted and accepted, it supports allegations of contempt of the Tribunal. Having made those determinations, the Chamber will consider whether initiating contempt proceedings is the most effective and efficient way to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of this case.

#### *Mandate of the Amicus Curiae Investigations*

20. In its 8 December 2010 Decision appointing an *amicus curiae*, the Trial Chamber specially directed: (i) the Registry to appoint an *amicus curiae* to investigate the allegations that a) Witness CNAI or a member of the Prosecutor's office disclosed protected information pertaining to Defence Witness T36 and b) that Prosecution Witness CNAI threatened and/or bribed and/or intimidated Witness T36; (ii) the *amicus curiae* to 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 1 April 2011; (iii) WVSS to provide any information it may have gathered regarding the allegations to the *amicus curiae*; (iv) the Registrar to instruct the *amicus curiae* that should he or she require any further instruction from the Chamber during the course of the investigation, the *amicus curiae* may request such instruction through the Registry.

#### *Amicus Curiae Findings and Recommendations*

21. In the report, the *amicus curiae*, having interviewed 10 persons, concluded that Witness T36's allegations that he was threatened, intimidated and bribed by Prosecution Witness CNAI were unfounded. The *amicus curiae* stated that Witness T36's allegations were

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<sup>27</sup> *Id.*

based on a need to secure protection from any future prosecutions or arrests.<sup>28</sup> The *amicus curiae* further found no evidence implicating Witness CNAI or any officers of the Prosecution in disclosing protected information pertaining to Witness T36, as alleged by Witness T36.

22. With respect to divulging protected information of Defence witnesses, the *amicus curiae* received a statement from the Prosecution Investigator stating that “when undertaking investigations of the defence witnesses, on making inquiries the individuals from whom we are making inquiries may infer that those individuals are defence witnesses.”<sup>29</sup> He further noted that the “investigator does not personally have any control over such inferences.”<sup>30</sup> The *amicus curiae* also interviewed the Prosecution Lead Counsel on the instant case, who denied disclosing protected information of defence witnesses to unauthorised persons or being aware of any breach of protective measures accorded to defence witnesses by any Prosecution official.<sup>31</sup>

23. The *amicus curiae* therefore concluded that “a thin line exists between disclosure of protected information on defence witnesses and what may be legitimate and necessary background investigations by the Prosecution [...] to facilitate trial.”<sup>32</sup> The *amicus curiae*’s interpreted protective measures to mean that a party may undertake investigations on witnesses of the opposing party by making inquiries about such persons from its own pool of witnesses, as long as the party does not identify the person it is inquiring about as a potential witness for the opposing party.”<sup>33</sup> Accordingly, the *amicus curiae* found that the Prosecution officials acted within their parameters of investigation and thus no protective measure against Witness T36 was violated.<sup>34</sup>

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<sup>28</sup> *Amicus Curiae* Report, para. 60.

<sup>29</sup> *Amicus Curiae* Report, para. 23, see Annex G to the *Amicus Curiae* Report, para. 24.

<sup>30</sup> *Amicus Curiae* Report, para. 23. See Annex G to the *Amicus Curiae* Report, para. 25.

<sup>31</sup> *Amicus Curiae* Report, para. 24.

<sup>32</sup> *Amicus Curiae* Report, para. 63.

<sup>33</sup> *Amicus Curiae* Report, paras. 63-66.

<sup>34</sup> *Amicus Curiae* Report, para. 71.



24. However, the *amicus curiae* found that protective measures accorded, particularly to defence witnesses, may be inadequate to truly protect their identities. The *amicus curiae* hence recommended that the Tribunal commission solid measures to further enhance witness protection in this case as a whole, and in particular the protection of defence witnesses.<sup>35</sup> In making this recommendation, the *amicus curiae* highlighted the difficulties faced by defence witnesses in their communities, such as insecurity, discrimination and general fear and disparity of resources between the prosecution and the defence teams in the protection and investigatory measures of their current and prospective witnesses.<sup>36</sup> The *amicus curiae* identified Defence Witness T37, as an example of a witness who was no longer willing to testify for the Defence for fear of harm to himself and his family. The *amicus curiae* recommended that supplementary protective measures be accorded to witnesses, especially defence witnesses.

#### *Parties Submissions*

25. The Trial Chamber recalls that on 25 May 2011, the Parties filed submissions regarding the conclusions of the *amicus curiae*. The Chamber notes that whilst the Prosecution noted that it had no submissions to make<sup>37</sup>, the Defence stated that it generally accepted the conclusions of the *amicus curiae*.<sup>38</sup> In particular, the Defence did not disagree with the *amicus curiae* conclusions that Defence witness T36 was not intimidated, threatened or bribed by Prosecution witness CNAI.<sup>39</sup> Although, the Defence accepted the *amicus curiae* conclusions that neither Witness CNAI nor any Prosecution official divulged protected information pertaining to Witness T36, it reiterated the *amicus curiae* recommendation that protective measures for witnesses should be enhanced.<sup>40</sup> Having reviewed the Parties submissions, the Trial Chamber therefore considers that they do not challenge or object to the conclusions to the *amicus curiae* report.

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<sup>35</sup> *Amicus Curiae* Report, para. 76.

<sup>36</sup> *Amicus Curiae* Report, para. 72-75.

<sup>37</sup> Prosecutor's Submissions, 25 May 2011.

<sup>38</sup> Defence Submissions, para. 16.

<sup>39</sup> Defence Submissions, para. 17.

<sup>40</sup> Defence Submissions, paras. 18-21.

26. However, the Trial Chamber observes that the Defence has filed a Contempt Motion in which it challenges certain portions of the *amicus curiae* report. For instance, the Defence takes issue with the *amicus curiae* conclusions that no protected information of Defence witnesses was disclosed by any member of the Prosecution team.

*Allegations of Contempt of the Tribunal*

27. The Trial Chamber agrees with the *amicus curiae* that there is no *prima facie* case against Prosecution Witness CNAI or any member of the Prosecution officials for disclosing protected information of Witness T36. The Trial Chamber notes there is no direct evidence of the violation alleged by Witness T36, who in the course of the *amicus curiae* investigations retracted his prior statement in which he alleged intimidation by Prosecution Witness CNAI. Regarding any possible violation of protective measures by Prosecution Investigator Djibo Moumouni, the Trial Chamber observes that in his statement to the *amicus curiae* Moumouni stated that prior to conducting his investigations he received the identifying information of Defence witnesses from the Prosecution Lead Counsel. He then proceeded to contact Witness CNAI to establish whether he knew these persons. Moumouni therefore concluded that prosecution witnesses are generally known in the community and thus members of the community may draw inferences about the identities of Defence witnesses based on the questions he put to them.<sup>41</sup> The Chamber accepts this explanation.

28. Having carefully reviewed the *amicus curiae* report, the Trial Chamber agrees with the *amicus curiae*'s conclusions pertaining to the inadequacy of protective measures and its possible impact on witnesses. The Trial Chamber recalls that in the instant case, it has ordered protective measures for both the Prosecution and Defence current and potential witnesses with the view of securing concrete protective measures and protecting the identities of these witnesses. The Chamber notes that from the findings of the *amicus curiae* it is apparent that once investigators engage in their investigatory work in the field, it is inevitable that individuals make inferences as to whether or not the persons contacted

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<sup>41</sup> Annex G, para. 24 .

will be witnesses. The Trial Chamber therefore urges the Parties strictly to adhere to witness protection measures.

29. The Trial Chamber having reviewed *the amicus curiae* report and statements attached thereto believes that at this point the contempt allegations by Defence *Witness* T36 do not reach the threshold for initiating contempt proceedings against Witness CNAI and/or members of the Prosecution. Based upon the evidence as it currently stands, the Chamber exercises its discretion and does not find it reasonable to order any further investigations at this time or to initiate contempt proceedings.

**FOR THESE REASONS, THE TRIAL CHAMBER**

**DECLINES** to initiate contempt proceedings against any persons in this matter.

**ACCEPTS** the *amicus curiae* report.

Arusha, 21 October 2011, done in English.



Solomy Balungi Bossa  
Presiding Judge



Bakhtiyar Tuzmukhamedov  
Judge



Mparany Rajohnson  
Judge

