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UNITED NATIONS  
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ICTR-98-44D-T  
(21-10-2011)  
(8789-8781)

8789

OR: ENG

### 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 ON DEFENCE MOTION FOR ADMISSION OF DOCUMENTS

*(Rules 89 (C) of the Rules of Procedure and Evidence)*

#### Office of the Prosecutor

Paul Ng'arua  
Memory Maposa  
Simba Mawere  
Mary Diana Karanja

#### Defence Counsel

Vincent Courcelle-Labrousse  
Philippe Larochelle

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## PROCEDURAL HISTORY

1. On 26 and 27 November 2009, Prosecution Witness CNAI ("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 Witness CNAI had approached him on at least two occasions to dissuade him from testifying for the defence.<sup>2</sup> The Defence filed a motion requesting the appointment of *amicus curiae* to investigate allegations of contempt against Witness CNAI, and supplementary protective measures for Defence Witness T36.<sup>3</sup> The Chamber denied the motion for lack of sufficient information to warrant the appointment of an *amicus curiae*.<sup>4</sup>
4. On 10 August 2010, the Defence filed an appeal contesting the Chamber's 9 July 2010 Decision denying the appointment of an *amicus curiae*.<sup>5</sup> On 28 October 2010, the Appeals Chamber upheld the Trial Chamber Decision.<sup>6</sup>
5. On 18 September 2010, the Defence obtained a second and detailed sworn statement from Witness T36 ("second statement")<sup>7</sup> and two statements from two other persons corroborating parts

<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. On 17 May 2010, the Defence obtained a statement from Witness T36 in which the witness alleged that Witness CNAI threatened and intimidated him, see 19 May Motion, Annex A, paras. 4-6, 10, 19, 22, 27.

<sup>3</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.

<sup>4</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>5</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>6</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.

of Witness T36's statement.<sup>8</sup> On 7 October 2010, it 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 Witness CNAI.<sup>9</sup>

6. 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>10</sup> The *amicus curiae* report was duly filed<sup>11</sup> and on 13 May 2011, the *amicus curiae* report was disclosed to the parties. The Chamber instructed the parties to file any submissions on the *amicus curiae* report by 25 May 2011.

7. On 25 May 2011, the Prosecution noted that it had no submissions.<sup>12</sup> The Defence filed its submissions and 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>13</sup>

8. On 24 May 2011, the Defence filed the instant motion seeking to admit five statements attached to the *amicus curiae* report pursuant to Rules 54 and 89 (C).<sup>14</sup>

9. On 30 May 2011, the Prosecution filed its response.<sup>15</sup> The Defence did not file a reply.

<sup>7</sup> Motion, Annex D, Statement of T36 dated 18 September 2010.

<sup>8</sup> Motion, Annexes E & F, Statements dated 21 September 2010.

<sup>9</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. The Defence also requested that *amicus curiae* investigate threats made against Witness T37, and the admission into evidence of a number of Gacaca records.

<sup>10</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>11</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>12</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>13</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.

<sup>14</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Motion for Admission of Documents ("Motion"), 24 May 2011.

<sup>15</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Motion for Admission of Documents ("Response"), 30 May 2011.

## SUBMISSIONS OF THE PARTIES

### *Defence Motion*

10. In the instant Motion, the Defence seeks the admission of documentary evidence in form of 5 witness statements procured in the course of the *amicus curiae* investigations. These statements were attached to the *amicus curiae* report filed on 1 April 2011. They include a statement of Prosecution witness CNAI dated 8 March 2011,<sup>16</sup> a statement of Prosecution Investigator Djibo Moumouni dated 8 March 2011<sup>17</sup> and three statements of Defence witness T37, dated 8 March 2011<sup>18</sup>, 19 August 2010<sup>19</sup> and 23 September 2010.<sup>20</sup>

11. The Defence submits that the proffered statements are reliable, relevant and have probative value.<sup>21</sup> Specifically, the Defence notes that the statement of Witness CNAI is relevant as it contradicts the witness' oral testimony before the Chamber and thus puts the witness' credibility in question.<sup>22</sup> The Defence recalls that whilst giving his oral testimony, Witness CNAI denied assisting the Prosecution in obtaining witnesses, whereas the *amicus curiae* report concluded that the witness co-operated with the Prosecution.<sup>23</sup> It also notes that the Prosecution Investigator Djibo Moumouni approached Witness CNAI with a list of Defence witnesses for the purpose of obtaining background information on these witnesses.<sup>24</sup>

12. In addition, the Defence asserts that the statement of Witness CNAI is relevant as it demonstrates the inadequacy of protective measures for Defence witnesses.<sup>25</sup> It submits that though the *amicus*' conclusions do not find that the Office of the Prosecutor ("OTP") Investigator and other OTP officials disclosed protective information of Defence witnesses, Witness CNAI received such information and as a result certain Defence witnesses such as T36 and T37 felt threatened and feared to give testimony for the Defence.<sup>26</sup> The Defence asserts that the *amicus curiae* report finds that

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<sup>16</sup> See Annex 1.

<sup>17</sup> See Annex 3.

<sup>18</sup> See Annex 2-c.

<sup>19</sup> See Annex 2-a.

<sup>20</sup> See Annex 2-b.

<sup>21</sup> Motion, paras. 15-22.

<sup>22</sup> Motion, paras. 23-24, 28.

<sup>23</sup> Motion, para. 25.

<sup>24</sup> Motion, para. 26.

<sup>25</sup> Motion, paras. 29-30.

<sup>26</sup> Motion, para. 31.



securing protective measures for Defence witnesses is more difficult, thus the Defence submits that the statement of Witness CNAI will assist in evaluating the fairness of these proceedings.<sup>27</sup>

13. Regarding the three statements of Witness T37, the Defence asserts that the 8 March 2011 statement is relevant because it shows T37's unwillingness to testify for fear of persecution.<sup>28</sup> According to the Defence, the statement also shows the adverse effect of witness intimidation and fabrication of evidence on Nzabonimana's defence.<sup>29</sup>

14. In respect to T37's 19 August 2010 statement, the Defence notes that the witness indicated to the Witness and Victims Support Section ("WVSS") that "he did not want to testify in Arusha for fear of reprisals against him and his family before the Gacaca Courts."<sup>30</sup> In addition, the Defence submits that T37's statement of 23 September 2010 shows that the witness' testimony supported the Defence assertion that evidence in the instant case was fabricated, particularly once witnesses met Defence Investigators.<sup>31</sup> The Defence submits that the relevance of the statements of T37 is demonstrated by the findings of the *amicus curiae* report, which notably stated that there exists a lacuna in the protective measures granted to witnesses.<sup>32</sup>

15. In respect of the statement of OTP Investigator Djibo Moumouni, the Defence argues that the statement is relevant as it tends to prove that OTP used Rwandan intermediaries to secure the attendance of witnesses and in the process divulged protected information of Defence witnesses.<sup>33</sup> It asserts that the OTP has breached the protective measure ordered by the Trial Chamber on 18 February 2010, which in effect puts all Defence witnesses at risk.<sup>34</sup>

16. The Defence submits that the probative value of the statements outweighs their prejudicial effect. It notes that the admission of the statements causes no prejudice to the Prosecution or its witnesses nor does it unduly delay the trial. It seeks to use the documents in its closing brief which

<sup>27</sup> Motion, paras. 32-35.

<sup>28</sup> See Annex 2-c, para. 8 (Statement of 8 March 2011).

<sup>29</sup> Motion, paras. 36-37.

<sup>30</sup> Motion, paras. 39, 43-44.

<sup>31</sup> Motion, para. 41.

<sup>32</sup> Motion, paras. 45-47.

<sup>33</sup> Motion, paras. 48-49.

<sup>34</sup> Motion, paras. 50-51.

grants the Prosecution ample time to rebut the contents therein.<sup>35</sup> Accordingly, the Defence requests admission of all 5 statements into evidence.

### *Prosecution Response*

17. According to the Prosecution the Defence request for admission of the statements of Witness CNAI, the OTP Investigator Djibo Moumouni and Witness T37 made to the *amicus curiae* and one statement of Witness T37 made to a Defence Investigator and another to WVSS is unacceptable.<sup>36</sup> The Prosecution notes that these are not mere documents but witness statements<sup>37</sup> which amount to testimony and thus the Defence request for admission under Rule 89 (C) is improper because it circumvents the requirements of Rule 92 *bis*.<sup>38</sup>

18. The Prosecution further argues that under Rule 90 (A) testimony shall be given orally, unless the Chamber orders for a deposition in accordance to Rule 71.<sup>39</sup> It notes that Rule 92 *bis* is an exception to the principle of giving direct testimony before the Chamber.<sup>40</sup> In sum, the Prosecution submits that the Defence has deliberately circumvented and avoided the stringent requirements of Rule 92 *bis* by wrongly proceeding under Rule 89 (C).<sup>41</sup> It contends that proceeding under Rule 89 (C) is prejudicial to the Prosecution particularly when it is not afforded the opportunity for cross-examination.<sup>42</sup>

19. The Prosecution concludes that the Defence request should be dismissed as it has failed to demonstrate any justification for proceeding under Rule 89 (C) instead of Rule 92 *bis*.<sup>43</sup>

## **DELIBERATIONS**

### *Applicable Law*

<sup>35</sup> Motion, paras. 52-53.

<sup>36</sup> Response, para. 31.

<sup>37</sup> Response, para. 32.

<sup>38</sup> Response, para. 33.

<sup>39</sup> Response, paras. 34-37.

<sup>40</sup> Response, para. 38. Referring to Prosecutor v. Bagosora et al, ICTR-98-41-T, Decision on Admission of Statements of Deceased Witnesses, 19 January 2005, para. 14.

<sup>41</sup> Response, para. 46.

<sup>42</sup> Response, para. 49.

<sup>43</sup> Response, para. 50.

20. Under Rule 89 (C) a Chamber “may admit any relevant evidence which it deems to have probative value.” Rule 89 (D) adds that a Chamber “may request verification of the authenticity of evidence obtained out of court.” In determining the relevance of evidence, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment.<sup>44</sup> In order to establish the probative value of the evidence, the moving party must show that the evidence tends to prove or disprove an issue.<sup>45</sup> A factor in the assessment of the relevance and probative value of evidence is the requirement that it be *prima facie* credible; that is, it must have sufficient indicia of reliability.<sup>46</sup> Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting.<sup>47</sup>

21. Finally, the admissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence, or even whether its contents are truthful or accurate,<sup>48</sup> which are issues to be decided by the Chamber after hearing the totality of the evidence.<sup>49</sup>

<sup>44</sup> *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirodera*, Case No. ICTR-98-44-T (“*Karemera et al.*”), Decision on the Prosecution’s Motion for Admission of Certain Exhibits into Evidence, 25 January 2008, para. 6; *Karemera et al.*, Decision on Joseph Nzirodera’s Motion to Admit Documents Authored by Enoch Ruhigira, 26 March 2008, para. 3.

<sup>45</sup> *Karemera et al.*, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirodera and Mathieu Ndirumpatse, 2 November 2007, para. 2; *Karemera et al.*, Interim Order on the Prosecutor’s Motion for Admission of Documents, 8 August 2007, para. 7.

<sup>46</sup> *The Prosecutor v. Delalic and Delic*, Case No. IT-96-21 (“*Delalic et al.*”), Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998 (“Decision on Admissibility”), para. 20; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41 (“*Bagosora et al.*”), Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8.

<sup>47</sup> *Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 9; and *Bagosora et al.*, Decision on request to Admit United Nations Documents into Evidence Under Rule 89(C) (TC), 25 May 2006, para. 4 (and sources cited therein).

<sup>48</sup> *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C), 25 May 2006, para. 4.

<sup>49</sup> *Karemera et al.*, Decision on Admission of UNAMIR Documents, para. 7; *Karemera et al.*, Decision on Admission of Certain Exhibits, para. 6; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admission of Prosecution Exhibits 27 and 28, 31 January 2005, para. 12.

### Analysis

#### *Relevance and Probative Value*

22. The Trial Chamber notes that the Defence seeks to admit certain documents attached to the *amicus curiae* report on the basis that the documents are relevant and have probative value pursuant to Rule 89 (C).

23. With respect to the statement of Prosecution Witness CNAI dated 8 March 2011, the Defence asserts that the statement is relevant as it contradicts the witness' oral testimony before the Chamber and thus puts his credibility in question.<sup>50</sup> Specifically, the Defence notes that whilst giving his oral testimony, Witness CNAI denied assisting the Prosecution in obtaining witnesses, whereas the *amicus curiae* report concluded that the witness co-operated with the Prosecution<sup>51</sup> because he was approached by the Prosecution Investigator Djibo Moumouni for the purpose of obtaining background information on Defence witnesses.<sup>52</sup>

24. Having reviewed the submissions of the parties, the Trial Chamber considers that the statement of Witness CNAI dated 8 March 2011 is relevant and has probative value because it may assist in assessing the witness' credibility. Accordingly, the Chamber admits the said statement under Rule 89 (C) for the sole purpose of challenging and assessing the credibility of Prosecution Witness CNAI.

25. The Trial Chamber also finds that the Defence has failed to shown the relevance and probative value of the statement of Prosecution Investigator Djibo Moumouni dated 8 March 2011.<sup>53</sup> The Chamber notes that the statement reflects how the Prosecution Investigator undertakes his investigations. The Chamber does not consider the statement to have sufficient relevance and probative value to be admitted into evidence.

26. Regarding the three statements of Defence witness T37, dated 8 March 2011<sup>54</sup>, 19 August 2010<sup>55</sup> and 23 September 2010<sup>56</sup>, the Chamber also finds that the Defence has failed to show their

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<sup>50</sup> Motion, paras. 23-24, 28.

<sup>51</sup> Motion, para. 25.

<sup>52</sup> Motion, para. 26.

<sup>53</sup> See Annex 3.

<sup>54</sup> See Annex 2-c.

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relevance and probative value. Moreover, the Trial Chamber notes that because Witness T37 was a prospective Defence witness who declined to testify in the instant trial, it considers that admitting the three statements under Rule 89 (C) without following the procedure prescribed in Rule 92 bis would be improper.

27. Accordingly, the Trial Chamber denies the Defence request to admit the four remaining documents in question pursuant to Rule 89 (C).

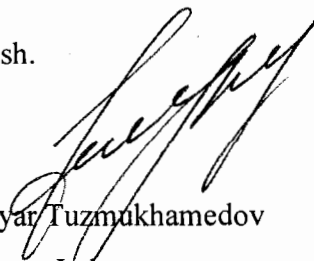
**FOR THESE REASONS, THE TRIAL CHAMBER**

- I. **GRANTS** the Defence Motion in part;
- II. **ADMITS** into evidence the statement of Prosecution Witness CNAI dated 8 March 2011;
- III. **REQUESTS** the Registrar to assign an exhibit number to the document;
- IV. **DENIES** the remainder of Motion.

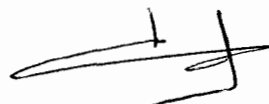
Arusha, 21 October 2011, done in English.



Solomy Balungi Bossa  
Presiding Judge



Bakhtiyar Tuzmukhamedov  
Judge



Mparany Rajohnson  
Judge



<sup>55</sup> See Annex 2-a.

<sup>56</sup> See Annex 2-b.