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UNITED NATIONS  
NATIONS UNIES

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:** 27 October 2009

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**

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

2009 OCT 27 P 4: 28  
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**DECISION ON CALLIXTE NZABONIMANA'S MOTION FOR PROTECTION  
MEASURES AND DEPOSITION OF WITNESS RW-42  
(Rules 69, 71 and 75 of the Rules of Procedure and Evidence ("RPE"))**

**Office of the Prosecution:**

Paul Ng'arua  
Elvis Bazawule  
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Ndeye Marie Ka

**Defence Counsel**

Vincent Courcelle-Labrousse, Lead Counsel  
Philippe Laroche, Co-Counsel

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## INTRODUCTION

1. On 16 September 2009, Callixte Nzabonimana filed a motion requesting an order from the Chamber for the deposition of witness RW-42 pursuant to Rule 71 of the Rules of Evidence and Procedure ("Rules").<sup>1</sup> Nzabonimana seeks the deposition of RW-42 on the basis of his old age and frail health.<sup>2</sup> Pursuant to Rules 69 and 75, Nzabonimana also requests that the Chamber issue protective measures for RW-42 to ensure the security of the witness.<sup>3</sup> On 23 September 2009, the Prosecution opposed the motion stating that the request was not supported by an affidavit or medical report demonstrating the "exceptional circumstances" of the request.<sup>4</sup> The Prosecution further contended that the Defence had not shown that the testimony of RW-42 is unique to himself.<sup>5</sup> The Prosecution made no submissions with respect to Nzabonimana's request for protective measures.

2. On 28 September 2009, the Defence filed a reply in which it submitted that annex A<sup>6</sup> to the Motion demonstrated that RW-42 was of old age; that his testimony was unique to himself and that it was crucial to Nzabonimana's case.<sup>7</sup> In addition, the Defence asked that the Trial Chamber suspend consideration of the Motion so that the Defence could obtain an affidavit confirming RW-42's frail health.<sup>8</sup> On 15 October 2009, the Defence filed additional submissions after obtaining an affidavit from Dr. Marie Nyiraziraje, a Medical Doctor attached to the Witness and Victims Support Section ("WVSS") of the UNICTR in Kigali.<sup>9</sup>

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<sup>1</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion for Protection Measures and Deposition of Witness RW-42 (Articles 69, 71 and 75 of the Rules of Procedure and Evidence ("RPE")) (hereinafter "Motion"), 16 September 2009.

<sup>2</sup> Motion, para.3.

<sup>3</sup> Motion, para.4.

<sup>4</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for Protection Measures and Deposition of Witness RW-42 (hereinafter "Response"), 23 September 2009, paras. 2-4.

<sup>5</sup> Response, para. 8.

<sup>6</sup> Annex A to the Motion is a Witness Statement of RW-42.

<sup>7</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Response to Prosecutor's Response to Nzabonimana's Motion for Protection Measures and Deposition of Witness RW-42 ("Reply"), 28 September 2009, paras. 4-16.

<sup>8</sup> Reply, para. 3.

<sup>9</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Further Submissions in Support of Motion for Protection Measures and Deposition of Witness RW-42 ("Additional Submissions"), 15 October 2009, para.4; See Annex B to the Additional Submissions (Affidavit of Dr. Marie Nyiraziraje).

3. On 19 October 2009, the Prosecutor filed a Response to the Defence's Additional Submissions, indicating that he no longer objected to the Defence Motion and requested for a timely notice to facilitate his travel arrangement.<sup>10</sup>

## DELIBERATIONS

### *Applicable Law*

4. Rule 71 (A) states that "At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer." Thus, while the general rule is that a witness must testify in person before the Trial Chamber during the trial, pursuant to Rule 71(A), the Chamber has the discretion to grant the taking of depositions for use at trial where exceptional circumstances exist and where it would be in the interests of justice. The moving party is required to comply with the formal requirements of Rule 71(B) by demonstrating the existence of exceptional circumstances justifying the taking of the deposition. In practice, Trial Chambers at the Tribunal have accepted that the poor health condition of a witness constitutes an exceptional circumstance which justifies taking a deposition.<sup>11</sup>

### *Request for Deposition*

#### *(A) Exceptional circumstances*

5. The Chamber notes that the Defence has adduced medical evidence in support of its motion through the annexed affidavit of Dr. Marie Nyiraziraje. The Chamber further observes

<sup>10</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecution's Response to Nzabonimana's Further Submissions in Support of Motion for Protection Measures and Deposition of Witness RW-42 (Articles 69, 71 and 75 of the Rules of Procedure and Evidence ("RPE")) ("Response to Additional Submissions"), 19 October 2009.

<sup>11</sup> See *Nahimana, Ngeze and Barayagwiza*, Case No. ICTR-99-52-A, Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition (TC), 10 April 2003, para. 8; *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Deposition of Witness OW (TC), 5 December 2001, para. 12; *Prosecutor v. Simba*, Case No. ICTR-2001-76-I, Decision on the Defence's Extremely Urgent Motion for a Deposition (TC), 11 March 2004, para. 7. In the present circumstances, the Witness and Victims Support Section (WVSS) have filed an affidavit sworn on 14 October 2009 by Dr. Marie Nyiraziraje, a medical doctor attached to WVSS in UNICTR, Kigali]. The Affidavit also indicates that RW-42 is unable to travel to the seat of the Tribunal in Arusha. The Defence requests 5 hours to examine the witness, and states that it would be safer to reserve 2 days for the deposition of RW-42.

that in principle, the Prosecution does not oppose the Motion as long as medical evidence or an affidavit from WVSS is adduced to show that RW-42 is in poor health.<sup>12</sup>

6. The Chamber is therefore satisfied that the Defence has demonstrated that Witness RW-42 will be unable to appear at trial and therefore that the circumstances are exceptional.

7. In addition, the Chamber notes that pursuant to Rule 71 (B), the Defence has indicated the name and current whereabouts of RW-42, and a *provisional* scheduled date and location for the deposition. In Annex A to its Motion, the Defence has also provided a statement of the matters on which the witness is to be examined.

*(B) Interests of justice*

8. In determining whether granting the request for the deposition of RW-42 is in the interests of justice, the Trial Chamber will consider whether the testimony of the witness is sufficiently important to make it unfair to proceed without it,<sup>13</sup> and whether the accused will not thereby be prejudiced in the exercise of his right to cross-examine the witness.

9. The Defence submits that the testimony of RW-42 is unique and crucial to the case, particularly as paragraphs 32 and 54 of the Indictment allege the Accused was involved in criminal events in Nyakabanda commune. The Defence contends that in prior statements of Prosecution witnesses CNAE and CNAL, RW-42 is referred to as Nzabonimana's main accomplice and allegedly his "right-hand man" in Nyakabanda commune. Furthermore, in these statements these same prosecution witnesses have alleged that it was through RW-42, that the Accused masterminded the distributions of weapons and mass killings in Nyakabanda commune.<sup>14</sup>

10. The Trial Chamber is satisfied that Nzabonimana has demonstrated that the testimony of RW-42 is sufficiently important to make it unfair to proceed without it. It is also satisfied

<sup>12</sup> Response, paras. 2, 4, 6-7, 11.

<sup>13</sup> *Prosecutor v. Mile Mrksic, Miroslav Radic, Veselin Sljivancanin, Slavko Dokmanovic*, Case No. IT-95-13/1, Decision on the Prosecutor's Motion for Deposition Evidence, dated 11 March 1998.

<sup>14</sup> Motion, paras. 13-20.

that the Prosecution will have an opportunity to cross-examine the witness. The Chamber therefore finds that it is in the interest of justice to permit the deposition of RW-42 to take place at his current location in Rwanda.

#### *Request for Protective Measures*

11. The Chamber recalls the provisions of Rule 69 (A) of the Rules, which stipulates that in exceptional circumstances, each of the Parties may request the Chamber to order the non-disclosure of the identity of a witness, who may be in danger or at risk, and that such order will be effective until the Chamber determines otherwise, without prejudice, pursuant to Rule 69 (C).

12. Rule 75(A) of the Rules entitles a Judge or a Chamber, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, to "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." Rule 75(B) of the Rules enumerates protective measures that may be ordered.

13. The case law of ICTR provides that witnesses for whom protective measures are sought must incur a real threat for their own safety or for their family and that their fear must be objectively grounded.<sup>15</sup> In addition, in conformity with the Tribunal's jurisprudence<sup>16</sup>, protective measures are granted on a case-by-case basis.

14. In view of the fact that the Prosecution raised no objections to the protective measure sought by the Defence, and given the current location of RW-42, the Chamber considers that the RW-42's concerns for his safety are well-founded. Accordingly, the Chamber will grant the full protective measures requested by the Defence.

<sup>15</sup> *Prosecutor v. Nzabirinda*, Case ICTR-2001-77-T, Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses, 4 May 2004, para.5.

<sup>16</sup> *Prosecutor v. Muvunyi at al.*, Case No. ICTR-00-55A-AR73(C), Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 25 April 2001, para. 28; *Prosecutor v. Muhimana*, Case No. ICTR-95-1B, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004", para. 17; *Prosecutor v. Aloys Simba*, Case ICTR-01-76-I, Decision on Defence Request for protection of Witnesses, 25 August 2004, para. 5.

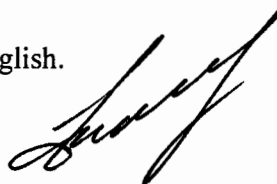
**FOR THE ABOVE NOTED REASONS, THE TRIAL CHAMBER**

- I. **GRANTS** in part Nzabonimana's Motion for Protective Measures and Deposition of Witness RW-42 filed on 16 September 2009;
- II. **ORDERS** that a deposition of Witness RW-42 be taken pursuant to Rule 71 of the Rules at the current place of location of the witness or in Kigali, on 2 November 2009, for use at trial, and that both an audio and visual recording of the deposition be made and placed under seal;
- III. **DESIGNATES** Judge Mparany Rajohnson of the International Criminal Tribunal of Rwanda, as Presiding Officer for this purpose;
- IV. **DIRECTS** the Registry, in consultation with the parties and the Kigali Office of the International Criminal Tribunal of Rwanda, to make urgent arrangements for the deposition to take place, and to communicate the necessary details for the deposition to all concerned parties;
- V. **REMINDS** the Prosecution of its right, pursuant to Rule 71 (C) of the Rules, to attend the taking of the deposition and to cross-examine Witness RW-42;
- VI. **ORDERS** the following Protective Measures for Witness RW-42, pursuant to Rule 75(B):
  - (a) Assignment of the pseudonym RW-42 to the witness;
  - (b) Non-disclosure to the public of any records identifying RW-42;
  - (c) Expunging names and identifying information of RW-42 from the Tribunal's public records;
  - (d) That the Prosecution, and any representative acting on its behalf, shall notify the Defence in writing if it wishes to contact Witness RW-42 and, if the witness consents, the Defence shall facilitate such contact; and
- VII. **ORDERS** the Prosecutor to comply with the Protective Measures granted to RW-42 and ensure that information pertaining to the identity and whereabouts of RW-42 is not disclosed.

Arusha, 27 October 2009, done in English.



Solomy Balungi Bossa  
Presiding Judge



Bakhtiyar Tuzmukhamedov  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]



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