



**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

UNITED NATIONS  
NATIONS UNIES

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OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 16 September 2010

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**

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

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**DECISION ON PROSECUTOR'S MOTION FOR THE ADMISSION OF  
MARGUERITE MUKANSANGA AND ALFRED KWENDE'S AFFIDAVITS  
PERTAINING TO THE TESTIMONY OF JEAN VIANNEY MPORANZI**  
*Rules 89(C) of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. Defence witness Jean Marie Vianney Mporanzi ("Mr. Mporanzi"), formerly identified by his pseudonym CNAO, waived his rights to protective measures prior to testifying on 25, 26, 27 and 31 May 2010.

2. During his examination-in-chief, Mr. Mporanzi testified that in the course of an interview with a Prosecution investigator from the ICTR in August 1998,<sup>1</sup> his travel allowance was dispersed through the Rwandan administrative authorities in Kigali, by a *Sous-Préfet* named "Marguerite".<sup>2</sup> The Prosecution objected to this line of questioning for lack of notice and requested from the Trial Chamber ("Chamber") three weeks to investigate this new allegation by Mr. Mporanzi.<sup>3</sup> After hearing both parties, the Chamber ruled that:

"the alleged facilitation of reimbursement of travel and related expenses borne by the Prosecution witnesses by Rwandan authorities was an issue that was not specifically covered by the pre-Defence brief or by the witness statement, dated January 11<sup>th</sup>, 2010. The Trial Chamber further observes that this is a crucial issue that goes to the heart of not only the Defence case, but the integrity of the Office of the Prosecutor of this Tribunal. The Trial Chamber notes that, after initial objection by the Prosecution, lead counsel for the Defence did not pose further questions to the witness regarding the issue. However, given that this serious allegation was raised during the examination-in-chief of the current Defence witness, for which proper notice was not given to the Prosecution, the Trial Chamber considers that the Prosecution entitled to cross-examine the witness on the issue. Therefore, the Trial Chamber considers that the Prosecution is entitled to time to investigate the matter and that one week constitutes sufficient time for the Prosecution to undertake this investigation. We shall, therefore, expect the Prosecution to complete the cross-examination of this witness by the end of this session, if not earlier, whenever they're ready with their investigations."<sup>4</sup>

3. By the end of the session, the Prosecution was unable to complete its investigations and thus did not recall Mr. Mporanzi for further cross-examination.

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<sup>1</sup> Transcript of 26 May 2010 [Open Session], p. 22.

<sup>2</sup> Transcript of 26 May 2010 [Open Session], p. 33; Transcript of 27 May 2010 [Open Session], pp. 6-13.

<sup>3</sup> Transcript of 26 May 2010 [Open Session], p. 33, pp. 43-46.

<sup>4</sup> Transcript of 27 May 2010 [Open Session], pp1-2.

4. On 10 August 2010, the Prosecution filed the instant Motion seeking the admission of affidavits signed by Marguerite Mukansanga and Alfred Kwende, pursuant to Rule 89(C) of the Rules of Procedure and Evidence ("Rules").<sup>5</sup>

5. On 16 August 2010, the Defence filed its Response.<sup>6</sup> On 18 August 2010, the Prosecution filed its Reply.<sup>7</sup>

#### *Submissions of the Parties*

6. The Prosecution submits that Mr. Mporanzi alleges a collaboration between the ICTR and Rwandan authorities in coercing witnesses to give false testimony against accused persons in this Tribunal and in particular the Accused Callixte Nzabonimana.<sup>8</sup> Mr. Mporanzi testified that the 'collaboration' extended to the payment of travel allowance to Prosecution witnesses with payments being dispersed through the Rwandan authorities in Kigali,<sup>9</sup> and alleged to have been a victim of this 'coercion', causing him to fabricate accusations against the Accused Nzabonimana in his initial statements to the Prosecution.<sup>10</sup>

7. The Prosecution asserts that the Defence has in its Pre-Defence Brief alluded to calling witnesses to adduce evidence of fabrication of testimony against the Accused Nzabonimana, making this a core argument in its case.<sup>11</sup> The Prosecution notes that the Defence, in cross-examining witnesses such as Mr. Mporanzi, imputed improper conduct by the Prosecution team,<sup>12</sup> for instance

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<sup>5</sup> *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor's Motion for the Admission of Maguerite Mukansanga and Alfred Kwende's Affidavits Pertaining to the Testimony of Jean Vianney Mporanzi , 10 August 2010 ("Motion").

<sup>6</sup> *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Response to Prosecutor's Motion for the Admission of Maguerite Mukansanga and Alfred Kwende's Affidavits Pertaining to the Testimony of Jean Vianney Mporanzi , 16 August 2010 ("Response").

<sup>7</sup> *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor's Reply to Nzabonimana's Response to Prosecutor's Motion for the Admission of Maguerite Mukansanga and Alfred Kwende's Affidavits Pertaining to the Testimony of Jean Vianney Mporanzi , 18 August 2010 ("Reply").

<sup>8</sup> Motion, para. 18.

<sup>9</sup> Transcript of 26 May 2010 [Open Session], p. 33; Transcript of 27 May 2010 [Open Session], pp. 6-13.

<sup>10</sup> Motion, para. 19. see Statement of January 2010; Also note that Mporanzi was formerly a Prosecution witness identified as Prosecution Witness CNAO before he elected to testify instead, for the Defence for the Accused Callixte Nzabonimana.

<sup>11</sup> Motion, para. 21. The Defence in its Pre-Defence Brief stated as follows, "What is troubling about this case is the deliberate will to fabricate charges against Callixte Nzabonimana. This will be manifest in the evidence to be adduced by the Defence. More troubling still is the fact that the documents to be adduced by the Defence on this subject will confirm that the will to make false allegations against Callixte Nzabonimana is, indeed part of a larger bid to accuse and to keep major sections of the Rwandan population in detention. The Chamber should, therefore exercise extreme caution before believing the testimonies of those who come to testify against Nzabonimana." See Nzabonimana's Revised and Amended Pre-Defence Brief, paras. 69-71.

<sup>12</sup> Motion, paras. 23-24. During the cross-examination of witness CNAC, the Defence asked the witness "Is it the Prosecution Team who asked you to add that major detail concerning the fact that Jean- Marie Vianney had

on 14 April 2010 the Defence continued to pile similar accusations of fabrication of evidence on the Prosecution.<sup>13</sup> It states that these accusations are false and baseless.<sup>14</sup>

8. Attached to its instant Motion are two affidavits dated and signed on 2 June 2010 by Marguerite Mukansanga and Alfred Kwende, which according to the Prosecution contradict Mr. Mporanzi's testimony concerning alleged payments of witnesses by Rwandan authorities on behalf of the Tribunal.<sup>15</sup> It thus requests the admission of the affidavits under Rule 89(C) in order to challenge the falsehood of the Defence thesis that the Office of the Prosecutor maintains an illegitimate 'cooperative' relationship with Rwandan authorities for the purpose of fabricating charges against accused persons, in particular the Accused Nzabonimana.<sup>16</sup> It also seeks to use the affidavits to challenge the credibility of Mr. Mporanzi as a witness.<sup>17</sup>

9. In its Response, the Defence does not dispute that Mr. Mporanzi's testimony raised issues concerning the integrity of the Office of the Prosecutor, which was granted leave to investigate the allegations and cross-examine Mr. Mporanzi thereafter.<sup>18</sup> It notes that the Prosecution obtained the affidavits in question on 2 June 2010 but did not state its desire to put further questions to Mr. Mporanzi regarding the contents of the affidavits.<sup>19</sup> It also submits that for two months the Prosecution, instead of disclosing the affidavits to the Defence and the Chamber under Rules 66 and 68, chose to withhold them.<sup>20</sup> It notes that on 2 June 2010 the Prosecutor stated in court that he had received notification from his investigators that they were unable to give him the results he had requested in order to confront Mr. Mporanzi with the new evidence.<sup>21</sup> It recalls that the Prosecutor then requested Mr. Mporanzi be taken back to his place of refuge "because it

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allegedly told you that at the prefectural office he had been slapped by Callixte Nzabonimana?" see Transcript of 12 April 2010 (Close Session), p. 31.

<sup>13</sup> Motion, paras. 26-27, The Prosecution notes the Defence submissions of 14 April 2010 that "Nonetheless, the Defence here is a victim to these two parameters, that is, the Prosecutor's manner of work in this Tribunal. And I would say its passive complicity with the exploitation – or, instrumentalisation of his office by the Kigali regime, which only thrives on the remnants of the genocide, which it uses as its only international policy... I am simply saying that the Prosecution has no human logic, no historic logic because the facts that were presented to you were completely artificial, artificial in context to testimonies because the testimonies were false, deliberately concocted with the clear objective of having this man convicted." Transcript of 14 April 2010 [Close Session], p. 6.

<sup>14</sup> Motion, para. 27.

<sup>15</sup> Motion, para. 29. See Annex A and B to Instant Motion. Marguerite states that she never met Mr. Mporanzi or paid out any money on behalf of the ICTR.

<sup>16</sup> Motion, para. 32.

<sup>17</sup> Motion, para. 8, 17 & 33.

<sup>18</sup> Response, paras. 2 & 18.

<sup>19</sup> Response, paras. 3 & 19.

<sup>20</sup> Response, para. 6.

<sup>21</sup> Response, para. 20. see also Transcript of 2 June 2010, p. 11.

will not serve any purpose to have him here until the completion of the trial session on Thursday, 3 June 2010.”<sup>22</sup>

10. The Defence states that the sole purpose for the Prosecutor's request for admission of the affidavits is their effect on the credibility of Mr. Mporanzi.<sup>23</sup> It objects to the admission of the affidavits under Rule 89(C)<sup>24</sup> because the Prosecutor had the opportunity to use the documents in court to confront Mr. Mporanzi and his failure to do so prohibits him to seek admission under Rule 89(C).<sup>25</sup> Further, it argues that the Prosecutor's request for admission of the affidavits circumvents admissibility of statements under Rule 92 *bis* by having them admitted under Rule 89(C).<sup>26</sup> The Defence submits that the admission of statements would be contrary to Rule 90(A) which provides for preference for oral evidence.<sup>27</sup>

11. The Defence requests proper exhibits of the payments made by investigators for witnesses from the 'imprest fund' rather than the admission of Alfred Kwende's affidavit.<sup>28</sup> It argues that in August 1998, Alfred Kwende was not among the persons who examined Mr. Mporanzi, but rather the investigators present at the interview were Almahamoud Sidibe and Adamou Allagouma.<sup>29</sup> It also argues that the Prosecutor's request for admission of the affidavits circumvents the remedy granted by the Trial Chamber on 2 June 2010.<sup>30</sup>

12. In its Reply, the Prosecution reiterates numerous arguments already furnished in its Motion. However, it notes that the Defence response contain erroneous and misleading factual and legal assumptions which the Trial Chamber should disregard.<sup>31</sup> It states that it's not at liberty to invoke Rule 92*bis* for the admission of the affidavits because the authors of the affidavits were not witnesses to these proceedings.<sup>32</sup>

13. The Prosecution argues the affidavits are not subject to disclosure under Rules 66 and 68 because they are not exculpatory nor do they have any implication on the case against the Accused

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<sup>22</sup> Response, para. 20, see Transcript of 2 June 2010, p.11.

<sup>23</sup> Response, para. 21.

<sup>24</sup> Response, para. 7.

<sup>25</sup> Response, para. 22.

<sup>26</sup> Response, para. 17.

<sup>27</sup> Response, para. 23.

<sup>28</sup> Response, paras. 24-26.

<sup>29</sup> Response, para. 27.

<sup>30</sup> Response, para.28; On 2 June 2010, the Trial Chamber observed that “We note that the investigations for the Prosecution are not complete and when the investigations are completed, and should the need arise for the recall of this witness, the Prosecution can always raise these matters with the Trial Chamber. That is all we can observe for the moment, and the witness shall be returned to his country of residence.” See Transcript of 2 June 2010, p. 12.

<sup>31</sup> Reply, paras. 12 -13.

<sup>32</sup> Reply, para.16.

Nzabonimana.<sup>33</sup> It clarifies that its request for admission of the affidavits is for the purpose of assessing the credibility of Mr. Mporanzi as a witness.<sup>34</sup>

14. The Prosecution states that it could not be expected to use affidavits received on the same day whilst its investigations were still incomplete. It notes that it was not obliged to recall Mr. Mporanzi after its findings<sup>35</sup> and that the prerogative to establish which evidence to call or not to call in its case lies with the Prosecution.<sup>36</sup>

## **DELIBERATIONS**

### *Preliminary Matter*

15. The Chamber notes that the Prosecutor seeks to admit the affidavits<sup>37</sup> as relevant and probative pursuant to Rule 89 (C). However, the Chamber considers that the admission of evidence in the form of written statements, such as the affidavits in question, is also specifically governed by the provisions of Rule 92 *bis*, with certain conditions to be satisfied therein. Therefore, the application of both Rules will be examined below.

### *Applicable Law*

16. Under Rule 89(C) the Chamber may admit any relevant evidence it deems to have probative value.<sup>38</sup> In order for evidence to be considered relevant, 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>39</sup> To establish the probative value of the evidence, the applicant must show that the evidence tends to prove or disprove an issue.<sup>40</sup> It is sufficient for the moving party to establish the *prima facie* relevance and probative value of the evidence for admission under Rule 89(C).<sup>41</sup>

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<sup>33</sup> Reply, para. 20.

<sup>34</sup> Reply, para. 21.

<sup>35</sup> Reply, para. 25.

<sup>36</sup> Reply, paras. 31-32.

<sup>37</sup> Annex A & B to the Instant Motion.

<sup>38</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44, (“*Karemera, et al.*”), Decision on the Prosecution Motion for Admission into Evidence of UNAMIR Documents (TC), 20 October 2007, paras. 5-7.

<sup>39</sup> *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible” (AC), 2 July 2004, para. 15.

<sup>40</sup> *Karemera et al.*, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse (TC), 2 November 2007, para. 2.

<sup>41</sup> *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda, 11 April 2007, para. 4.

17. Pursuant to Rule 92 *bis* (A), a written statement may be admitted in lieu of oral testimony provided that it “goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. In addition, the statement must meet the formal requirements of 92 *bis* (B). As documentary evidence, any written statement tendered for admission must be relevant and have probative value in accordance with Rule 89(C).<sup>42</sup>

18. The Chamber recalls that 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>43</sup> which are issues to be decided by the Chamber after hearing the totality of the evidence.<sup>44</sup>

#### *Analysis*

19. The Trial Chamber considers that because the Prosecution has not based its application for the admission of the annexed affidavits on Rule 92 *bis*, its application is not properly filed before this Chamber. Therefore, for the purposes of the instant Motion, the Chamber considers it inappropriate to entertain the Prosecution Motion for lack of legal basis. The Chamber further recalls that the general rule governing the hearing of the testimony of witnesses is Rule 90(A) which provides that “witnesses shall, in principle, be heard directly by the Chambers...” Only exceptional circumstances justify departure from this Rule.<sup>45</sup>

20. The Chamber further recalls its oral ruling delivered during the testimony of Defence Witness Mporanzi, which not only granted the Prosecution the permission to investigate this allegation but also allowed it to recall him for further cross-examination “whenever it is ready with its investigations.”<sup>46</sup> In the Chamber’s view, the Prosecution has not exhausted all the remedies available to it. For instance, the Chamber also notes that, in the presentation of its evidence, the Prosecution may invoke Rule 85(A)(iii) by calling rebuttal evidence.

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<sup>42</sup> *Prosecutor v. Bagosora et al.*, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents (TC), 19 March 2007, para. 9; *Prosecutor v. Bagosora et al.*, Decision on Defence Motion for the Admission of Written Statements under Rule 92 *bis* (TC), 1 June 2006, para. 3.

<sup>43</sup> *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C), 25 May 2006, para. 4.

<sup>44</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.

<sup>45</sup> See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeal Judgement, para.134.

<sup>46</sup> See Oral Ruling, Transcript of 27 May 2010 [Open Session], pp1-2.

21. Accordingly, the Chamber considers that it is up to the Prosecution, if it so wishes, to move the Chamber under the appropriate Rules and/or choose to exhausted other remedies available to it.

**FOR THESE REASONS, THE TRIAL CHAMBER**

**DENIES** the Motion in its entirety.

Arusha, 16 September 2010, done in English.

Solomy Balungi Bossa  
Presiding Judge

Bakhtiyar Tuzmukhamedov  
Judge

(Read and approved)  
Mparany Rajohnson  
Judge  
(Absent at the time of  
signature)

[Seal of the Tribunal]