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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: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 13 February 2009

2009 MAR -3 P 12:17
JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

Callixte KALIMANZIRA

Case No. ICTR-05-88-T

**ORAL DECISION ON DEFENCE MOTION TO EXCLUDE EVIDENCE OR
RECALL WITNESSES FILED ON 9 FEBRUARY 2009**

Office of the Prosecutor

Christine Graham
Veronic Wright
Ousman Jammeh
Stephen Agaba
Kartik Murukutla

Defence Counsel

Arthur Vercken
Anta Guisse

See T. 13 February 2009 (E – original language) pp. 9-11:

MR. PRESIDENT:

The Chamber has considered its position on this matter, and Judge Joensen will manage delivery of our decision.

JUDGE JOENSEN:

Thank you, Mr. President.

By its motion of 9 February 2009, the Defence seeks the exclusion of the testimony of seven Prosecution witnesses, or, in the alternative, the permission to recall the witnesses for further cross-examination.

The Defence claims that the Prosecution has violated Rule 60 – 68(A) of the Rules of Procedure and Evidence for failing to disclose, as soon as practicable, the transcripts of seven other witnesses who testified in the Butare trial on the events at Kabuye hill.

Under Rule 68(A) the Prosecutor has a continuous obligation to actively review all material in his possession to identify material that may suggest the innocence or mitigate the guilt of the Accused or affect the credibility of Prosecution evidence and, as soon as practicable, disclose such material to the Defence.

What is at issue here is whether the material in question actually falls within the ambit of Rule 68(A).

The Chamber has reviewed the transcripts in question and they review the absence of any mention of Kalimanzira. However, the witnesses did not assert that they did not see Kalimanzira there. Rather, no questions were asked regarding Kalimanzira, and, therefore, he was simply not mentioned. Such evidence does not contradict the evidence adduced in the Kalimanzira trial. There is no indication whether the Butare witnesses knew Kalimanzira. Even if it could be shown that they knew him or knew of him, the mere omission to make mention of Kalimanzira's presence at Kabuye hill during the period at issue does not mean that Kalimanzira could not have been there.

As such, the Defence has failed to make a prima facie showing of the exculpatory nature of the transcripts, as well as the witnesses' prior statements. With no violation of Rule 68(A), the remedial measures requested should therefore be rejected.

In the same motion, the Defence request that the transcripts be admitted into evidence under Rule 89(C) and Rule 92 bis. The Defence has not complied with the time limits in 92 bis (E). However -- which prescribes that it shall give two weeks' notice to the Prosecution before making the application. However, it appears that the material in question has been known to the Prosecution for a very long time, since the Prosecution disclosed it already seven months ago. So, therefore, the Chamber wants to raise the issue with the Prosecution whether they will consent to the transcripts being admitted or not.

Thank you.

MS. GRAHAM:

Yes, Your Honour, we will consent to that. We consider that evidence complementary to ours, so we are happy for it to be admitted.

MR. VERCKEN:

If I may -- Mr. President, if I may, since counsel for the Prosecution accept that these materials be entered into evidence, let me restate the request of Defence, that the use that may be made of the Defence or Prosecution be strictly limited to events relating to Gisagara and Kabuye.

MS. GRAHAM:

Your Honours, a brief comment. I understand my friend's concern, and if I was him I would be concerned too. I think there is a way around this -- will be according to the book. If the -- let's say that we admit them under Rule 92(D), they can only be admitted insofar as the transcript evidence does not go to the acts and conduct of the Accused. So an easy way around the problem my friend is facing with his client being incriminating in other criminal conduct, that can just be stricken out, that passage of QBC when he talks about Kalimanzira delivering weapons to the Muganza *commune* office. We take no issue with that. Apart from that, all of the evidence should go in for all of its effect, so to say.

JUDGE JOENSEN:

Well, accordingly, the Chamber accepts the motion from the Defence to admit the transcripts, with the exclusion of passages that may go to proof of a matter of the acts and conduct of the Accused.

Thank you.

MR. PRESIDENT:

Thank you, Judge Joensen.