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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
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 1 February 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

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DECISION ON PROSECUTOR'S NOTICE OF DELAY IN FILING EXPERT
REPORT OF PROFESSOR ANDRÉ GUICHAOUA; DEFENCE MOTION TO
EXCLUDE THE WITNESS' TESTIMONY; AND
TRIAL CHAMBER'S ORDER TO SHOW CAUSE

*Article 20 of the Statute and Rules 46 (A) and 94 bis (A) of the
Rules of Procedure and Evidence*

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Defence Counsel for Mathieu Ngirumpatse
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Defence Counsel for Joseph Nzirorera
Peter Robinson and
Patrick Nimy Nayidika Ngimbi

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam (the "Chamber");

BEING SEIZED of the "Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua and Request for Additional Time to Comply with the Trial Chamber Decision of 8 November 2005," filed on 8 December 2005 (the "Notice of Delay").

CONSIDERING Joseph Nzirorera's "Motion to Exclude Testimony of André Guichaoua," filed on 13 December 2005 ("Nzirorera's Motion") and the Prosecutor's Response thereto, filed on 14 December 2005 (the "Prosecutor's Response");

NOTING this Chamber's "Order on Filing of Expert Report of André Guichaoua," dated 15 December 2005 (the "Order to Show Cause");

CONSIDERING ALSO the Prosecutor's Responsive and Supplementary Filings, annexing correspondence from Professor André Guichaoua, filed on 3, 4 and 19 January 2006, respectively, as well as the Prosecutor's Responsive Filing to the Trial Chamber's Order to Show Cause, filed on 9 January 2006;

HEREBY DECIDES the Motion pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the "Rules").

INTRODUCTION

1. On 16 May 2005, the Chamber ordered the Prosecution to disclose the statements of all expert witnesses the Prosecution intended to call to testify to the Chamber, and to the Defence of each of the Accused, by 15 August 2005.¹ In case of default of disclosure, the Prosecutor was ordered to provide the Chamber and the Defence with reasons and to indicate the revised date by which the disclosure would occur.

2. On 9 September 2005, being satisfied with the explanations provided by the Prosecution in its request for more time to fulfill its disclosure obligations under Rule 94 *bis* (A) of the Rules, the Chamber granted the Prosecution's application for an extension of time to disclose the Expert Report of Mr. André Guichaoua.² The revised date - which date was proposed by the Prosecution - was 25 November 2005.

3. On 8 November 2005, the Chamber granted the Prosecution's application for an extension of time to disclose the Expert Report of Mr. André Guichaoua, in part.³ On this occasion, the extension of time had been sought on medical grounds. The Chamber, however, noted that the available materials did not disclose the need for an extension of time of the length sought by the Prosecution.⁴ Accordingly, the new deadline for disclosure ordered was 12 December 2005.

¹ *Prosecutor v. Edouard Karemera et. al.*, Decision on Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts (TC), 16 May 2005.

² *Prosecutor v. Edouard Karemera et. al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Reports and Request for Additional Time to Comply with the Chamber Decision of 16 May 2005 (TC), 9 September 2005.

³ *Prosecutor v. Edouard Karemera et. al.*, Decision Granting Extension of Time to File Prosecution Expert Report (TC), 8 November 2005.

⁴ The Prosecution sought an extension of time to 6 January 2006.

4. On 8 December 2005, the Prosecutor filed a further Notice of Delay in relation to the Expert Report of Professor Guichaoua, requesting additional time to comply with the Chamber's Decision of 8 November 2005.

5. As a result of this application, the Defence for Nzirorera filed a Motion seeking the exclusion of Mr. Guichaoua's testimony on the basis of the further delay.

6. The Chamber was not satisfied, on the basis of the Prosecution's submissions, that a further extension of time should be granted. In that regard, on 15 December 2005, and as a result of the Prosecution's repeated requests for extensions of time in the filing of its expert witness statements under Rule 94 *bis* (A), the Chamber ordered that further information be provided directly by Expert Witness André Guichaoua in order for the Chamber to rule on both the Prosecution and Defence Motions. The deadline for compliance with the Order was 2 January 2006 (the "first Order"). Further, and in light of the Prosecution's repetitive failures to comply with the Chamber's deadlines, the Chamber ordered that the Prosecution should explain why a warning under Rule 46 of the Rules was not warranted (the "second Order").

7. This Decision, therefore, will address three questions flowing from the Prosecution's Notice of Delay, Nzirorera's Motion and the Chamber's first and second Orders of 15 December 2005. Firstly, should the Chamber now grant the extension of time requested by the Prosecution? If not, then should the Defence Motion to exclude the Witness' testimony in its entirety be granted? Lastly, has the Prosecution succeeded in showing why a warning under Rule 46 of the Rules is not warranted?

DISCUSSION

Extension of Time and Exclusion of Evidence

8. With respect to the Chamber's first Order, the Prosecutor filed three documents dated 3, 4 and 19 January 2006, respectively, annexing email correspondence between the Prosecution and Mr. Guichaoua. Those emails outlined the competing professional obligations the Witness had faced at the end of the 2005 calendar year, as well as health problems he had had, and his obligations to attend a research mission in Africa in late 2005. Mr. Guichaoua also said that there had been some delay caused by the Prosecutor's office dispatching documents to him later than anticipated. Further, the Witness advised of the death of his father in late December 2005 and the impact that it had had on his work schedule. The Witness advised that he would not be able to submit his report until 20 February 2006 and that he expected to be in Arusha from 15 February 2006 for the purposes of testifying in another case before the Tribunal.

9. The Chamber is now satisfied, on the basis of all of the available material, that a further extension of time - to 20 February 2006 - should be granted. The Chamber notes that the Witness has not been able to comply with the deadline previously set forth by the Chamber for a number of reasons, both personal and professional. The Chamber also notes that, but for the Witness' reference to the Prosecution's late dispatch of certain documents, it does not appear that this further delay is attributable to the Prosecution's conduct. Despite this fact, however, the Chamber directs the Prosecution to take all necessary measures to

ensure that the Witness is able to complete his Report in enough time for the Prosecution to comply with the Chamber's new order for disclosure.

10. In his separate Motion for the exclusion of Professor Guichaoua's testimony, Nzirorera submitted that, when a party fails to disclose by a date set by the Trial Chamber, the evidence should be excluded unless the Prosecution can show due diligence for its failure to comply with the Trial Chamber's order. This, the Defence submitted, is the standard set by the Appeals Chamber when deciding whether to consider evidence not produced on time pursuant to Rule 115.⁵ In the Defence's submission, the Prosecution had failed to meet the standard for reconsideration of the Trial Chamber's Decision of 8 November 2005, the only new consideration being that Professor Guichaoua had unilaterally decided not to complete his report on time.

11. It must follow, in light of the Chamber granting the Prosecution's request for a further extension of time, that the application for exclusion of evidence should be rejected. The Chamber also considers that, at this stage in the proceedings, it cannot be said that granting this further extension of time will offend the rights of the Accused guaranteed under Article 20 of the Statute. It must also be noted that the Chamber has the ability to manage the trial to ensure that a delay in disclosure will not manifest in unfairness to the Accused. If, when the Witness is called to testify, the Chamber is of the view that the Accused has still not had enough time to prepare or investigate and that this has resulted in unfairness to the Accused, it will then be open to the Chamber to consider exclusion of the Witness' evidence. It is clear that the exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing delay in disclosure. Consequently, the application for exclusion, at this stage in the proceedings, must be rejected.

Order to Show Cause

12. In response to the Chamber's second Order, the Prosecutor submits that no warning should be issued under Rule 46 (A). The Prosecutor contends that delays in filing expert reports are not wholly within his control and that his past submissions concerning deadlines and delays were made on the basis of the best available information at the time, and in good faith. He further submits that the delays were not deliberate or negligent and do not reflect a lack of respect for the authority of the Trial Chamber.

13. Rule 46 (A) of the Rules provides that a Chamber may, after a warning, impose sanctions against a Counsel if, in its opinion, his conduct remains offensive or abusive or obstructs the proceedings, or is otherwise contrary to the interests of justice. The Chamber is satisfied on the basis of the Prosecution's submissions and the available material that sufficient cause has been shown as to why a warning should not, at this stage, be administered under Rule 46 (A). In particular, the Chamber has had regard to the Prosecutor's submission that previous deadlines sought by the Prosecutor have been sought on the basis of the material available to him at the time and that his previous applications for extensions of time have been made in good faith. Whilst the Chamber also notes the reasons advanced by the Witness for the delay in finalising his report, the Chamber wishes to make clear to both the Prosecution and the Witness that any further request for an extension of time will be met with the utmost disapproval. In this regard, the Chamber directs the Prosecutor to take

⁵ *Prosecutor v. Ntagerura et. al.*, Decision on Prosecution Motion for Admission of Additional Evidence, para. 9.


concrete steps to ensure that the Witness complies with his undertaking to submit the report by 28 February 2006. To this end, the Chamber is also of the view that a copy of this Decision should be served upon the Witness.

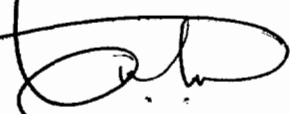
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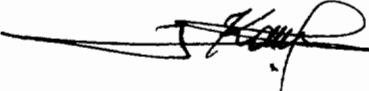
THE CHAMBER

- I. **GRANTS** the Prosecution's Motion for an extension of time in relation to the disclosure of the statement of Expert Witness André Guichaoua;
- II. **ORDERS:**
 - a. That the said statement be disclosed to the Defence of each of the Accused and to the Chamber by 28 February 2006; and
 - b. That the Registry serve a copy of this Decision upon Expert Witness André Guichaoua as soon as practicable; and
- III. **DENIES** Joseph Nzirorera's "Motion to Exclude Testimony of André Guichaoua" in its entirety.

Arusha, 1 February 2006, done in English.


 Dennis C. M. Byron
 Presiding


 Emile Francis Short
 Judge


 Gberdao Gustave Kam
 Judge

[Seal of the Tribunal]

