



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44-T  
20-04-2006  
(26480-26477)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

26480

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Emile Francis Short  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 20 April 2006

**THE PROSECUTOR**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

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

20-04-2006  
ICTR-98-44-T  
2006

**DECISION ON DEFENCE MOTIONS TO EXCLUDE TESTIMONY OF  
PROFESSOR ANDRE GUICHAOUA**

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

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

SS

## INTRODUCTION

1. On 16 May 2005, this Chamber ordered the Prosecution to disclose the statement of Expert Witness André Guichaoua to the Defence of each of the Accused by 15 August 2005.<sup>1</sup> As a result of Prosecution requests for extensions of that deadline on three occasions, the Chamber extended the deadline: firstly to 25 November 2005;<sup>2</sup> secondly to 12 December 2005;<sup>3</sup> and, most recently, to 28 February 2006.<sup>4</sup>

2. During the trial proceedings in this case of 27 February 2006, the Prosecution drew to the attention of the Chamber, and the Defence, the fact that Professor Guichaoua's Report had been completed and would be dispatched that day by international courier, but that the filing of the Report would be delayed by a short time.<sup>5</sup> The Report was subsequently filed with the Registry, after which it was disclosed to the Defence between 7 and 9 March 2006.

3. On 10 March 2006, the Defence for Nzirorera and the Defence for Ngirumpatse filed Motions<sup>6</sup> seeking the exclusion of Professor Guichaoua's Report on the basis of the further delay occasioned. By Response dated 15 March 2006,<sup>7</sup> the Prosecution opposes both Motions.

## DISCUSSION

4. The Defence for Ngirumpatse relies upon Articles 19 and 20 of the Tribunal's Statute, as well as on Rule 54 of the Rules of Procedure and Evidence, as a foundation for its Motion.

5. In support of its application, the Defence for Nzirorera outlines the history of this matter before the Chamber, submitting that the Prosecution's "chronic non-compliance" with the Trial Chamber's orders should be remedied by exclusion of the witness' testimony. Relying upon Appeals Chamber authority in the case of *Ntagerura*,<sup>8</sup> Nzirorera submits 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. Nzirorera further submits that the exclusion of the Report in its entirety is in the interests of a fair trial due to the length of the Report and the matters therein which must be investigated by the Defence.

<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("Karemera et al") Decision on Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts (TC), 16 May 2005.

<sup>2</sup> *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.

<sup>3</sup> *Karemera et al.*, Decision on Prosecution Request for Additional Time to File Expert Report and Joseph Nzirorera's Motion to Exclude Testimony of Charles Ntampaka (TC), 12 December 2005.

<sup>4</sup> *Karemera et al.*, 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 (TC), 1 February 2006.

<sup>5</sup> T 27 February 2006, p. 53.

<sup>6</sup> See "Requête de M. Ngirumpatse aux Fins de Rejet du Rapport de M. Guichaoua (Art. 54) et Subsidiatement aux Fins de l'Article 94 bis," filed on 10 March 2006. See also "Second Motion to Exclude Testimony of André Guichaoua," filed by the Defence for Joseph Nzirorera on 10 March 2006.

<sup>7</sup> See "Prosecutor's Response to Joseph Nzirorera's Second Motion to Exclude Testimony of André Guichaoua and Mathieu Ngirumpatse's Requête aux Fins de Rejet du Rapport de M. Guichaoua," filed on 15 March 2006.

<sup>8</sup> *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence (AC), 10 December 2004, para. 9. Note that this Decision concerned failure to comply with disclosure deadlines set under Rule 115 of the Rules.

6. The Prosecution opposes both Motions for exclusion of evidence, noting that such exclusion would be contrary to the interests of justice and judicial economy. It notes that neither Nzirorera nor Ngirumpatse raised any objections to the further delay when the matter was ventilated in open court. The Prosecution also notes that international courier delay resulted in the Report being received in Arusha on 5 March 2006, despite its dispatch on 27 and 28 February 2006, and that the additional delay was occasioned as a result of the Registry processing the Report for filing purposes.

7. As Annexures to its Response, the Prosecutor attaches relevant email correspondence between Mr. Guichaoua and the Registry. The first email from Mr. Guichaoua to the Registry notes that the first part of his Report had been dispatched by international courier to Arusha on 27 February 2006 and indicates that the supporting exhibits will be dispatched by international courier in the next 48 hours. The second email from Mr. Guichaoua to the Registry, dated 1 March 2006, advises the Registry that the supporting exhibits were dispatched by international courier the previous day. The reason for the delay advanced by Mr. Guichaoua in his email is difficulties he experienced in arranging his return ticket to France after his time spent in consultation with the Prosecutor in Arusha. He says that he needed to have access to the facilities available to him in France, prior to finalising the Report for dispatch. The delay in his return to France impacted upon his ability to finalise the Report within the timeframe stipulated.

8. The Chamber is of the view that the applications of Ngirumpatse and Nzirorera for exclusion of Mr. Guichaoua's testimony should be rejected. In reaching this conclusion, the Chamber has firstly taken into account the reasons advanced for the delay. In this respect, it is noteworthy that although the Report was served upon the Defence some seven to nine days after the deadline set in the Chamber's Order of 1 February 2006, part of the delay occasioned was due to the use of international courier services, and part of it was due to the time required by the Registry to process the material for filing purposes – both matters which were outside the Prosecutor's control. The Chamber further accepts that difficulties encountered by Mr. Guichaoua in arranging his return trip to France had some impact upon his ability to finalise his Report for its timely dispatch. Secondly, the Chamber has taken into account the extent to which the Accused's rights under Articles 19 and 20 of the Statute would be offended by the further delay of between seven and nine days, if indeed at all. As the Chamber has noted in its prior Decisions concerning the delay in disclosure of the reports of expert witnesses, the Chamber considers that it cannot be said that this delay will offend the rights of the Accused. The Chamber has an ability to manage the trial to ensure that the delay will not manifest in unfairness to the Accused – this includes being able to deal with the concerns raised by Nzirorera relating to the length of the Report and the matters requiring investigation, on an ongoing basis. In this sense, the Chamber wishes to make clear that the exclusion of evidence is a remedy which is at the extreme end of a scale of remedies at its disposition. Thirdly, the Appeals Chamber Decision relied upon by Nzirorera is factually distinguishable from the case before this Chamber. The Appeals Chamber Decision concerns the timeframe for the presentation of additional evidence before the Appeals Chamber under Rule 115 of the Rules, whereas the question before this Chamber relates to how it should deal with a party's non-compliance with an order made by it under Rule 94 *bis* of the Rules.



**FOR THOSE REASONS**

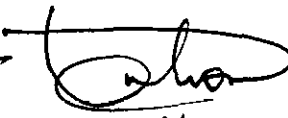
**THE CHAMBER**

**DENIES** Mathieu Ngirumpatse's and Joseph Nzirorera's Motions to Exclude Testimony of André Guichaoua.

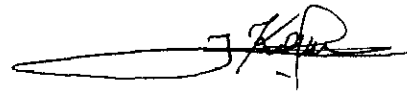
Arusha, 20 April 2006, done in English.



Dennis C. M. Byron  
Presiding



Emile Francis Short  
Judge



Gberdao Gustave Kam  
Judge

