

ICTR-98-44-T
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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: 10 November 2008

JUDICIAL RECORDS ARCHIVE
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J. J. Snow

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S MOTION TO ADMIT TESTIMONY OF
ELIZAPHAN NTAHIRUTIMANA**

Rules 92 bis (D) and 94 (B) of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 11 December 2006, the Chamber took judicial notice of the following adjudicated fact from the judgement in Elizaphan Ntakirutimana's trial:¹

"Elizaphan Ntakirutimana brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill one day in the middle of May 1994, and the group was searching for Tutsi refugees and chasing them. Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests."

However, Elizaphan Ntakirutimana testified in his own trial that he never went to the Nyarutovu Hill, that he did not know the sole witness of this event (CC), and that he actually warned people not to go to Biseseo.²

2. Joseph Nzirorera now moves the Chamber to admit this portion of Elizaphan Ntakirutimana's testimony under Rule 92 *bis* (D) of the Rules of Procedure and Evidence because he claims that it contradicts the judicially noticed fact mentioned above.³ The Prosecution opposes the motion in its entirety.⁴

DELIBERATIONS

3. Rule 92 *bis* (D) of the Rules of Procedure and Evidence states that "[a] Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused." In addition, the Chamber must be satisfied that the transcripts at issue are relevant and have probative value under Rule 89(C).⁵ Under Rule 92 *bis* (E), the Chamber has the discretion to admit, in whole or in part, the evidence of a witness in the form of a transcript *in lieu* of oral testimony, and to decide whether or not to require the witness to appear for cross-examination.⁶

4. The Prosecution contends that Joseph Nzirorera's motion is illogical because the fact at issue cannot be rebutted, as it comes from a judgment where the Chamber saw live testimony from Witness CC and Elizaphan Ntakirutimana, and ultimately chose Witness CC as the credible witness. The Chamber notes that it took judicial notice of the fact at issue under Rule 94 (B);⁷ furthermore, the Chamber recalls that facts noticed under Rule 94 (B) are merely presumptions that may be rebutted by the defence with evidence at trial.⁸

¹ *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et al.*"), Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006.

² Annex "A" to Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana ("*Nzirorera's Motion*"), filed on 18 August 2008.

³ Nzirorera's Motion; Reply Brief: Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana, filed on 21 August 2008.

⁴ Prosecutor's Response to Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana, filed on 20 August 2008.

⁵ *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Admission of Transcript of Prior Testimony of Antonius Maria Lucassen (TC), 15 November 2005, para. 3.

⁶ *Ibidem*, para. 4.

⁷ *Karemera et al.*, Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006.

⁸ *Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, para. 42.

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Accordingly, the Chamber concludes that Nzirorera's motion is not illogical because the fact at issue is clearly rebuttable.

5. The Prosecution further asserts that the issue is *res judicata* between the Prosecution and Elizaphan Ntakirutimana because Ntakirutimana's case has already been appealed, and his sentence has been served. The Chamber finds that the Prosecution has misapprehended the *res judicata* doctrine. The doctrine of *res judicata* bars re-litigation of cases or issues between the *same parties*. Joseph Nzirorera was not a party to the *Ntakirutimana* case, so that doctrine is not applicable here.

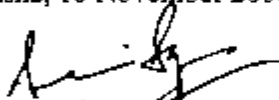
6. The Chamber now turns to the admissibility of the testimony at issue under Rule 92 *bis* (D). The Chamber finds that Elizaphan Ntakirutimana's testimony does not relate in any way to Joseph Nzirorera's acts or conduct because it merely rebuts Witness CC's testimony concerning Ntakirutimana's acts and conduct.

7. However, the Chamber finds that Joseph Nzirorera has not established the relevance and probative value of the testimony at issue to his defence beyond the mere assertion that it contradicts a judicially noticed fact. Because Nzirorera is standing trial with two co-accused, the Chamber cannot accept that testimony is categorically admissible under Rule 89(C) simply because it rebuts a judicially noticed fact. The applicant must demonstrate how rebuttal of the specific fact at issue would be relevant and probative for *his* defence. Accordingly, the Chamber denies Nzirorera's motion.

FOR THESE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's motion in its entirety.

Arusha, 10 November 2008, done in English.



Dennis C.M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge



Vagn Joensen

Judge

[Seal of the Tribunal]

