UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44-AR73.17
29th May 2009
{2786/H – 2777/H}

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Iain Bonomy

Registrar: **Mr. Adama Dieng**

Decision of: **29 May 2009**

ICTR Appeals Chamber
Date: 29th May 2009
Action: R. Jurno
Copied To: Concerned Judges, SLOs, LOs, ALOs, CMS, LSS, Parties.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA
v.
THE PROSECUTOR

Case No. ICTR-98-44-AR73.17

JUDICIAL RECORDS/ARCHIVE
RECEIVED
2009 JUN -1 A 9:57

DECISION ON JOSEPH NZIRORERA'S APPEAL OF DECISION ON ADMISSION OF EVIDENCE REBUTTING ADJUDICATED FACTS

Office of the Prosecutor:
Mr. Hassan Bubacar Jallow
Mr. Don Webster
Mr. Saidou N'Dow
Mr. Arif Virani
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: KOFFI KUMELIO A. ADANOE
SIGNATURE: DATE: 29 May 2009

Counsel for the Defense:
Ms. Dior Diagne Mbaye and Mr. Félix Sow for Mr. Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mr. Matthieu Ngirumpatse
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Mr. Joseph Nzirorera

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of "Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts", filed on 30 March 2009 ("Appeal") by Joseph Nzirorera ("Nzirorera").

A. Background

2. On 11 December 2006, pursuant to Rule 94(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), Trial Chamber III ("Trial Chamber") took judicial notice of a series of adjudicated facts from various trial judgements, including that of Elizaphan Ntakirutimana ("Ntakirutimana").[1] Among the facts judicially noticed from the *Ntakirutimana* Trial Judgement[2] was Adjudicated Fact No. 116:

> 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."[3]

3. On 18 August 2008, Nzirorera moved the Trial Chamber to admit a portion of the testimony of Ntakirutimana from his trial into the current proceedings under Rule 92*bis*(D) of the Rules in order to rebut Adjudicated Fact No. 116.[4] By decision of 10 November 2008, the Trial Chamber denied Nzirorera's motion on the ground that Nzirorera had not established the relevance and probative value of the testimony at issue to his defence.[5]

4. On 12 November 2008, Nzirorera filed a motion seeking certification to appeal the Decision Denying Admission pursuant to Rule 73(B) of the Rules, arguing that the Trial Chamber had erred in preventing him from rebutting adjudicated facts regardless of which accused, if any, the acts

---

[1] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Appeals Chamber Remand of Judicial Notice, 11 December 2006 ("Judicial Notice Decision"), para. 70 and Disposition, p. 17.
[2] *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement").
[3] Judicial Notice Decision, para. 70 and Annexure A – Adjudicated Facts Judicial Noticed, p. 22. Adjudicated Fact No. 116 is extracted from para. 594 of the *Ntakirutimana* Trial Judgement.
[4] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana, 18 August 2008. The Appeals Chamber notes that Elizaphan Ntakirutimana died on 22 January 2007.
[5] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana, 10 November 2008 ("Decision Denying Admission"), para. 7.

pertained to.[6] In response, the Prosecution stated that while it agreed with the disposition of the Decision Denying Admission, it also agreed with Nzirorera that the Trial Chamber's reasoning was in error and therefore invited the Trial Chamber to modify its reasoning.[7] In the alternative, the Prosecution requested to join Nzirorera's application for certification.[8]

5. The Trial Chamber ruled on Nzirorera's application for certification on 24 March 2009.[9] In its decision, the Trial Chamber found that it had erred in preventing Nzirorera from rebutting Adjudicated Fact No. 116 on the ground that such fact was not relevant and probative to his own defence.[10] As a result, the Trial Chamber withdrew its previous reasoning and reconsidered the Decision Denying Admission.[11] The Trial Chamber reasoned that evidence which has already been considered and rejected by another Trial Chamber in making a finding of fact should not be admissible in a later proceeding to rebut that same finding of fact.[12] On this basis, the Trial Chamber found that Ntakirutimana's testimony was not admissible to rebut Adjudicated Fact No. 116.[13] Considering that Nzirorera's application for certification to appeal the Decision Denying Admission was now moot, the Trial Chamber granted Nzirorera certification to appeal the revised reasons for the Decision Denying Admission.[14]

6. Nzirorera appealed the Impugned Decision on 30 March 2009. The Prosecution responded on 7 April 2009 that Nzirorera's Appeal should be dismissed.[15] Nzirorera replied on 14 April 2009.[16]

---

[6] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Application for Certification to Appeal Decision on Motion to Admit Testimony of Elizaphan Ntakirutimana, 12 November 2008, para. 5.
[7] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Prosecutor's Response to Joseph Nzirorera's Application for Certification to Appeal Decision on Motion to Admit Testimony of Elizaphan Ntakirutimana, 17 November 2008, paras. 2, 7.
[8] *Idem.*
[9] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying His Motion to Admit Testimony of Elizaphan Ntakirutimana, 24 March 2009 ("Impugned Decision").
[10] Impugned Decision, para. 10.
[11] Impugned Decision, para. 10.
[12] Impugned Decision, para. 12.
[13] Impugned Decision, para. 12.
[14] Impugned Decision, para. 18 and Disposition.
[15] Prosecutor's Response to "Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts", 7 April 2009 ("Response"), paras. 2, 20.
[16] Reply Brief: Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 14 April 2009 ("Reply").

B. Standard of Review

7. The Trial Chamber's decision in this case to deny admission of a transcript of evidence under Rule 92*bis*(D) of the Rules to rebut a judicially noticed fact is a discretionary decision to which the Appeals Chamber accords deference.[17] The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error. The Appeals Chamber will only overturn the Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[18]

C. Submissions

8. Nzirorera submits that the Trial Chamber made an incorrect interpretation of governing law in ruling that evidence which has already been considered and rejected by another Trial Chamber in making a finding of fact should not be admissible in a later proceeding to rebut that same finding of fact.[19] He contends that while Ntakirutimana's testimony may not have carried weight at his own trial, it may, when considered in the context of evidence admitted in Nzirorera's case, add weight to the rebuttal of the adjudicated fact.[20] In his view, the Trial Chamber failed to take into account that the evidence at the two trials on the adjudicated fact may be different.[21] Nzirorera also claims that the Trial Chamber erred in excluding Ntakirutimana's testimony for lack of credibility since, as for any other kind of evidence, there is no credibility criterion for the admissibility of evidence rebutting adjudicated facts.[22] He thereby requests the Appeals Chamber to reverse the Trial Chamber's decision to deny admission of the transcript of Ntakirutimana's testimony.[23]

---

[17] As regards the general discretion afforded to Trial Chambers in determining the admissibility of evidence, *see, e.g.*: *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-14-AR73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 ("*Prlić et al.* Appeal Decision"), para. 5; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, para. 31; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007 ("*Simba* Appeal Judgement"), para. 19; *Pauline Nyiramasuhuko v. The Prosecutor*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, Case No. ICTR-98-42-AR73.2, 4 October 2004 ("*Nyiramasuhuko* Appeal Decision"), para. 7.

[18] *See, e.g., Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 8 and references cited therein.

[19] Appeal, paras. 16, 35.

[20] Appeal, paras. 23-25.

[21] Appeal, paras. 32-34, citing Impugned Decision, para. 12.

[22] Appeal, paras. 27-30.

[23] Appeal, para. 35.

9. The Prosecution submits that the Appeal should be dismissed in its entirety.[24] It argues that the Trial Chamber correctly interpreted and applied the binding jurisprudence of the Appeals Chamber according to which "adjudicated facts, of which judicial notice has been taken, may only be rebutted by introducing reliable and credible evidence."[25] Ntakirutimana's testimony having been discredited in his own trial, the Prosecution submits, the Trial Chamber correctly concluded that this evidence could not meet requirements of reliability and credibility.[26] According to the Prosecution, it would be improper for the instant Trial Chamber to re-litigate the credibility of Ntakirutimana because only the original Trial Chamber had the benefit of hearing the witnesses *viva voce* and because such an analysis could result in inconsistent findings of credibility, which would imperil the objective of harmonizing the Tribunal's jurisprudence.[27] It adds that where a judicially noticed fact has already been considered and evaluated by a reviewing court, the standard for introducing rebuttal evidence necessarily varies. According to the Prosecution, Nzirorera ignores the special context of adjudicated facts when he asserts that the credibility criterion has been wrongly inserted into the test for admissibility of rebuttal evidence.[28]

10. The Prosecution further submits that Nzirorera's right to a fair trial has not been impugned since he may successfully seek to admit in rebuttal other, different or new evidence, not previously considered and rejected by the original Trial Chamber, provided that such evidence is reliable and credible.[29] Finally, it submits that the Impugned Decision promotes judicial economy and asserts that acceding to Nzirorera's request to admit Ntakirutimana's testimony would be tantamount to re-litigating the matter of credibility afresh, which would "subvert the very rationale of taking judicial notice of an already adjudicated fact."[30]

11. Alternatively, in the event the Appeals Chamber concludes that the Trial Chamber erred in denying admission of Ntakirutimana's testimony, the Prosecution submits that the appropriate remedy would be to remand the matter to the Trial Chamber for reconsideration.[31]

12. In reply, Nzirorera reiterates that while the original Trial Chamber may not have credited Ntakirutimana's testimony, the Trial Chamber may well come to a different conclusion when

---

[24] Response, paras. 2, 20.
[25] Response, paras. 3, 7, quoting *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera et al.* Appeal Decision on Judicial Notice"), para. 42.
[26] Response, para. 8.
[27] Response, paras. 3, 9, 10.
[28] Response, para. 11.
[29] Response, paras. 3, 12-15.
[30] Response, paras. 3, 19 (emphasis omitted).
[31] Response, para. 21.

considering the evidence in the context of the other evidence brought in the *Karemera et al.* case.[32] He argues that depriving an accused of the right to use evidence from the original trial as part of his rebuttal of adjudicated facts undermines the reason that taking judicial notice is permitted in the first place, which is that the accused is free to rebut the adjudicated fact.[33]

D. Discussion

13. The Appeals Chamber recalls that facts judicially noticed pursuant to Rule 94(B) of the Rules are merely presumptions that may be rebutted with evidence at trial.[34] The legal effect of judicially noticing an adjudicated fact is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may put the adjudicated fact into question by introducing evidence to the contrary.[35] This Appeal raises the issue of the nature of the evidence that can be introduced in rebuttal in such circumstances.

14. In the *Karemera et al.* Appeal Decision on Judicial Notice, the Appeals Chamber held that the Defence may rebut the presumption by introducing "reliable and credible" evidence to the contrary.[36] The requirement that the evidence be "reliable and credible" must be understood in its proper context, through the lens of the general standard for admission of evidence at trial set out in Rule 89(C) of the Rules: "[a] Chamber may admit any relevant evidence which it deems to have probative value". Only evidence that is reliable and credible may be considered to have probative value.[37]

---

[32] Reply, para. 3.
[33] Reply, para. 6.
[34] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ("*Dragomir Milošević* Appeal Decision"), para. 16, citing *Karemera et al.* Appeal Decision on Judicial Notice, para. 42; *See also Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 ("*Nikolić* Appeal Decision"), para. 11; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 ("*Slobodan Milošević* Appeal Decision"), p. 4.
[35] *Dragomir Milošević* Appeal Decision, para. 16; *Karemera et al.* Appeal Decision on Judicial Notice, paras. 42, 49.
[36] *Karemera et al.* Appeal Decision on Judicial Notice, paras. 42, 49. *See also Dragomir Milošević* Appeal Decision, para. 17.
[37] *See Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement ("*Naletilić and Martinović* Appeal Judgement"), para. 402, citing *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998 ("*Delalić et al.* Appeal Decision"), para. 20: "The implicit requirement that a piece of evidence be *prima facie* credible – that it have sufficient indicia of reliability – is a factor in the assessment of its relevance and probative value." *See also Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecution's Appeal on Admissibility of Evidence, 16 February 1999, para. 15 (dealing with hearsay evidence); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 ("*Kordić* Appeal Decision"), paras. 22-24; *The Prosecution v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 286; *Alfred Musema v. The Prosecution*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema*

15. It follows that, as for any other evidence for which no additional requirements have been specified in the Rules, the threshold for admission of this type of rebuttal evidence is relatively low: what is required is not the definitive proof of reliability or credibility of the evidence, but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia.[38] The final evaluation of the reliability and credibility, and hence the probative value of the evidence, will only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it.[39]

16. In the present case, the Trial Chamber found that "evidence which has already been considered and rejected by another Trial Chamber in making a finding of fact should not be admissible in a later proceeding to rebut that same finding of fact".[40] In support of its finding, the Trial Chamber reasoned that the original Trial Chamber "was in a much better position to make determinations regarding reliability and credibility than [it], having heard the evidence *viva voce*".[41] The Appeals Chamber considers that, in stating so, the Trial Chamber disregarded the fact that the assessment of admissibility criteria must be done on a case-by-case basis,[42] in light of the specific circumstances of each case. It overlooked the fact that the probative value of a piece of evidence may be assessed differently in different cases, depending on the rest of the evidence and other relevant circumstances.[43] While the prior assessment of the evidence by another Trial Chamber is a factor that may be taken into account in the assessment of its probative value, it does not relieve the Trial Chamber of its obligation to assess the admissibility of the evidence in the context of the case before it.

Appeal Judgement"), para. 46; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 ("*Popović et al.* Appeal Decision"), para. 22; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, para. 31; *Prlić et al.* Appeal Decision, para. 15. In this respect, the Appeals Chamber repeatedly held that a piece of evidence may be so lacking in terms of the indicia of reliability that it is not probative: *Prlić et al.* Appeal Decision, para. 15; *Nyiramasuhuko* Appeal Decision, para. 7; *Georges Rutaganda v. The Prosecution*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement"), paras. 33, 266; *Musema* Appeal Judgement, para. 46; *Akayesu* Appeal Judgement, para. 286; *Kordić* Appeal Decision, para. 24

[38] *Naletilić and Martinović* Appeal Judgement, para. 402; *Delalić et al.* Appeal Decision, paras. 17, 20. *See also Prlić et al.* Appeal Decision, para. 15; *Popović et al.* Appeal Decision, para. 22; *Nyiramasuhuko* Appeal Decision, para. 7; *Rutaganda* Appeal Judgement, paras. 33, 266; *Musema* Appeal Judgement, para. 47; *Akayesu* Appeal Judgement, para. 286. The Appeals Chamber notes that the large majority of the appeal decisions on the issue of admissibility of evidence at trial only refer to the requirement of "reliability", without explicitly mentioning the requirement of "credibility". Given the large meaning of the term "reliability", the Appeals Chamber considers that the requirement of *prima facie* reliability indisputably encompasses the requirement of *prima facie* credibility.

[39] *See, e.g., Popović et al.* Decision, para. 21; *Nyiramasuhuko* Appeal Decision, para. 7; *Rutaganda* Appeal Judgement, fns. 63, 425.

[40] Impugned Decision, para. 12.

[41] Impugned Decision, para. 12.

[42] *Prlić et al.* Appeal Decision, paras. 15, 25; *Popović et al.* Appeal Decision, para. 21.

[43] *Simba* Appeal Judgement, para. 132.

17. In the *Karemera et al.* Appeal Decision on Judicial Notice, the Appeals Chamber held that adjudicated facts:

> are facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding. For this reason, they cannot simply be accepted, by mere virtue of their acceptance in the first proceeding, as conclusive in proceedings involving different parties who have not had the chance to contest them.[44]

This is also the case for credibility findings in another case: the finding on the credibility and reliability of Ntakirutimana's testimony in his own trial cannot be accepted as conclusive in the present proceedings by the mere virtue of the fact that it was reached by the *Ntakirutimana* Trial Chamber.

18. In this case, the Trial Chamber denied the admissibility of Ntakirutimana's testimony into evidence on the basis that the *Ntakirutimana* Trial Chamber had found it to be less reliable than another testimony.[45] That is, instead of examining for itself whether Ntakirutimana's testimony was *prima facie* reliable and credible, the Trial Chamber erroneously relied on the final evaluation of its reliability and credibility by another Trial Chamber and accepted that negative assessment as determinative of the admissibility of the evidence.

19. The Trial Chamber further reasoned that to re-engage in an assessment of the reliability and credibility of Ntakirutimana's testimony "would essentially be acting in review of another Chamber, and therefore outside of its jurisdiction".[46] The Appeals Chamber disagrees. As noted above, the final assessment of the weight of a piece of evidence is based on the totality of the evidence in a given case. Naturally, the same piece of evidence can be assessed differently in different cases because of other evidence on the record therein. Therefore, a Trial Chamber's assessment of a piece of evidence from another case does not involve a review of a decision of another Trial Chamber. Moreover, in this respect, the Appeals Chamber recalls that "the final adjudication of facts in judicial proceedings is treated as conclusively binding only, at most, on the parties to those proceedings".[47]

20. Lastly, the Trial Chamber reasoned that "the very purpose of admitting adjudicated facts would be undermined by permitting a party to admit such evidence" because "[j]udicial economy would not be achieved if parties were entitled to challenge adjudicated facts with evidence that has

[44] *Karemera et al.* Appeal Decision on Judicial Notice, para. 40.
[45] Impugned Decision, paras. 12, 13.
[46] Impugned Decision, para. 12.
[47] *Karemera et al.* Appeal Decision on Judicial Notice, para. 42.

already been rejected in relation to that finding."[48] In this respect, the Appeals Chamber underscores that the principle of judicial economy must yield to the fundamental right of the accused to a fair trial. A Trial Chamber cannot deny the Defence its right to put the adjudicated fact into question by introducing evidence to the contrary simply because it would frustrate judicial economy. Further, the Appeals Chamber emphasizes that Rule 94(B) of the Rules fosters judicial economy by avoiding the need for evidence in chief to be presented in support of a fact already previously adjudicated. Hence, the purpose of judicial economy underlying Rule 94(B) of the Rules is not frustrated by the admission of rebuttal evidence.

21. Similarly, the fact that the judicial notice mechanism was also created to favour consistency and uniformity of the case-law cannot be a matter that weighs against the admissibility of rebuttal evidence. In this respect, the Appeals Chamber stresses that adjudicated facts that are judicially noticed by way of Rule 94(B) of the Rules remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them when considered together with all the evidence brought at trial. The Rule 94(B) mechanism does not allow a Chamber to simply defer to the assessment of the evidence by another Chamber on the ground that this mechanism was fashioned to favour consistency and uniformity in the Tribunal's case-law.

22. The Appeals Chamber concludes that the Trial Chamber incorrectly applied the governing law in finding that "evidence which has already been considered and rejected by another Trial Chamber in making a finding of fact should not be admissible in a later proceeding to rebut that same finding of fact".[49] This approach would have the effect of denying to the opposite party its fundamental right to contest the material admitted by rebutting the presumption created by the admission of the adjudicated fact. In deferring to the assessment of the reliability of Ntakirutimana's testimony by the *Ntakirutimana* Trial Chamber, the Trial Chamber not only failed to fulfil its obligation to examine whether the evidence may have probative value in the circumstances of the case before it, but also misapplied the standard for admission of evidence which only requires *prima facie* indicia of reliability and credibility.

23. Nevertheless, because the decision as to whether Ntakirutimana's testimony should be admitted into evidence depends upon the circumstances of the present case which the Trial Chamber is best familiarised with, the Appeals Chamber remands the matter to the Trial Chamber for proper determination.

[48] Impugned Decision, para. 12.
[49] Impugned Decision, para. 12.

E. Disposition

24. For the foregoing reasons, the Appeal Chamber **GRANTS** the Appeal and **REMANDS** the matter for determination to the Trial Chamber.

Done this twenty-ninth day of May 2009,
at The Hague, The Netherlands.

[Seal of the Tribunal]

Judge Patrick Robinson
Presiding