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SCSL-03-01-T
(26530-26564)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

Before: Justice Richard Lussick, Presiding
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Acting Registrar: Ms. Binta Mansaray

Date filed: 17 November 2009

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION MOTION IN RELATION TO THE APPLICABLE LEGAL STANDARDS GOVERNING THE USE AND ADMISSION OF DOCUMENTS BY THE PROSECUTION DURING CROSS-EXAMINATION

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I. INTRODUCTION

1. Pursuant to the oral direction of the Presiding Judge during proceedings on 11 November 2009, the Prosecution files this Motion outlining the well-established principles of international criminal procedure relating to the use and tendering of "fresh evidence"[1] during cross-examination of the Accused and Defence witnesses.
2. The established procedure derives from both appellate and trial level jurisprudence at the ad hoc tribunals and is fully consistent with the prior practice of this Trial Chamber. A Trial Chamber has a duty to ensure that the trial is both fair and expeditious, and "in view of establishing the truth, this principle requires that there be no excessive infringement on the rights of the Prosecution, *inter alia*, the right to conduct an effective cross-examination of the Defence witnesses."[2] The use of fresh evidence to contradict assertions made by Defence witnesses is permissible and is designed to ensure the truth-finding function of cross-examination. It is the Prosecution's submission that there is no reason to depart from the jurisprudence and prior practice before the Special Court in this case.

II. BACKGROUND

3. During proceedings on 11 November 2009, the Presiding Judge inquired whether the Prosecution intended to introduce additional documents during cross-examination of the Accused.[3] The Principal Trial Attorney explained that the Prosecution had documents that it intended to put to the Accused during cross-examination, not all of

[1] The term is used to refer to evidential material that was not intended to be used as evidence in the Prosecution's case-in-chief but which may be used and tendered when cross-examining the Accused and Defence witnesses. The terminology is derived from *Prosecutor v. Prlic*, IT-04-74-AR73.14, "Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 26 February 2009 ("***Prlic* Appeal Decision**"), para. 15. In accordance with the *Prlic* Appeal Decision, the term is not limited to the material that was not available to the Prosecution in its case-in-chief.
[2] *Prosecutor v. Blaskic*, IT-95-14, "Decision on Defence Motion for Protective Measures for Witnesses D/H and D/I", 25 September 1998. This point is cited in Archbold International Courts Practice, Procedure and Evidence paragraph 8-48a and cited by this Trial Chamber in *Prosecutor v. Brima* et al., SCSL-04-16-T-307, "Decision on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227," 15 June 2005, para. 17.
[3] *Prosecutor v. Taylor*, Transcript, 11 November 2009, p. 31619.

which had previously been admitted, in order to challenge the credibility and reliability of the Accused's testimony and to address issues raised during the Accused's evidence. The Principal Trial Attorney submitted that the question as to whether individual documents would be admitted and if so, for what purpose, should be addressed at the stage of tendering the document for admission into evidence.[4] Lead Defence Counsel then raised an objection stating that he was unaware of the existence of a category of "impeachment material"[5] to which the Principal Trial Attorney responded citing the decision of Trial Chamber II on the same issue in the AFRC trial ("**AFRC Decision**").[6] The Presiding Judge, noting the Defence objection, and observing the there has been additional relevant jurisprudence since the AFRC Decision, called upon the Prosecution to file submissions to justify the use of fresh evidence, whether for impeachment and/or other purposes, by way of formal submissions.[7]

III. PREVIOUS PRACTICE OF TRIAL CHAMBER II

4. The correct standard for the use of fresh evidence during the Prosecution's cross-examination of Defence witnesses is that utilized by this Trial Chamber during the AFRC trial. The decision to allow the Prosecution to make use of fresh evidence to impeach defence witnesses, including the Accused, did not violate the fair trial rights of the Accused in that case. The AFRC Decision is consistent with both preceding and all subsequent international case law and fulfilled the Trial Chamber's responsibility "to utilize all its powers to facilitate the truth-finding process in the impartial adjudication of the matter between the parties".[8]

5. In the AFRC proceedings this Trial Chamber addressed the issue of fresh evidence which was presented and used by the Prosecution during the cross-examination of the First Accused. The First Accused had testified and denied that his name was Alex

[4] *Prosecutor v. Taylor*, Transcript, 11 November 2009, pp. 31619, 31621, 31622.
[5] *Prosecutor v. Taylor*, Transcript, 11 November 2009, p. 31620.
[6] *Prosecutor v. Taylor*, Transcript, 11 November 2009, p. 31621.
[7] *Prosecutor v. Taylor*, Transcript, 11 November 2009, p. 31623.
[8] *Prosecutor v. Delalic*, IT-96-21-T, "Decision on Confidential Motion to Seek Leave to Call Additional Witnesses", 4 September 1997, para. 7.

Tamba Brima, that he was called "Gullit" and that he had participated as one of the seventeen army personnel who initiated the coup against the elected government of President Kabbah on 25 May 1997. During the cross-examination of the First Accused, the Senior Trial Attorney indicated that he planned to confront the Accused by reading to him portions of a statement of "Zagalo", purportedly another member of the group of seventeen who had been executed for his role in the coup. The Defence objected, noting that this statement was a new document that had not previously been used in the trial and not previously disclosed to the Defence.[9] The Presiding Judge overruled the objection, ruling that: "There is no possible way that the Prosecution would have known in advance that they were going to introduce these documents until such time as the accused in the witness box gave evidence. These documents are being used in cross-examination, not to introduce new evidence, but to challenge evidence of the witness that is already on the record. I do not see any objection to the use of those documents to challenge the witness's evidence."[10]

6. Later in the proceedings, as the Senior Trial Attorney continued to read portions of the statement to the Accused asking him if he agreed with the facts in the statement, the Defence objected that this was improper since this was a new document which had not yet been admitted into evidence.[11] Again the Presiding Judge overruled the objection, ruling that "I find that [the Senior Trial Attorney] has not been making any improper use of this statement. He is simply asking the witness if he agrees with certain allegations that are mentioned in the statement. It is up to the witness to answer yes or no; whether he agrees or not."[12]

7. Subsequently, the Prosecution moved to admit the document into evidence and the Defence for the three Accused objected on a variety of grounds. After deliberating on the matter, the Trial Chamber ruled the statement admissible, noting that "Rule 89(C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules often devised for jury trial which prevent judges from

[9] *Prosecutor v. Brima* et al., Transcript, 29 June 2006, p. 47.
[10] *Prosecutor v. Brima* et al., Transcript, 29 June 2006, p. 48.
[11] *Prosecutor v. Brima* et al., Transcript, 29 June 2006, p. 68.
[12] *Prosecutor v. Brima* et al., Transcript, 29 June 2006, p. 69

having access to information which is relevant" and that the Chamber "would give the document the appropriate weight in the light of the evidence as a whole at the end of the trial."[13]

IV. JURISPRUDENCE OF OTHER INTERNATIONAL TRIBUNALS

8. Jurisprudence from other international tribunals, both preceding and subsequent to the AFRC Decision, unambiguously upholds the principle that the Prosecution can use documents which were not admitted during the Prosecution case-in-chief to refute evidence in Defence witness's testimony and that such documents can be admitted into evidence by a Trial Chamber.

9. A distinction can be observed in the jurisprudence between what might be termed the "presentation stage" of fresh evidence during cross-examination and what might be termed the "admissibility stage". The bulk of the relevant jurisprudence is concerned with the admissibility stage and the purpose for which the document will be admitted as it is not controversial that new documents may be used during cross-examination to impeach on matters raised in the Defence witness's testimony.

a. It is established practice in international criminal procedure that fresh evidence can be put to an Accused or a Defence witness during cross-examination by the Prosecution to elicit a response from the witness

10. It is established practice in international criminal procedure that in order to challenge evidence adduced by the Defence, the Prosecution may put material to a Defence witness so as to elicit a response from the witness, without that material necessarily

[13] *Prosecutor v. Brima* et al., Transcript, 29 June 2006, p. 78. As regards the approach of Trial Chamber I of the Special Court, see for example the CDF proceedings which also permitted the use and admission of new documents presented by the Prosecution during the cross-examination of defence witnesses in order to elicit responses from Defence witnesses or to refresh the recollection of a witness. See *Prosecutor v. Norman* et al., Transcript, 9 February 2006, pp. 26, 32, 65-66, 68-70 (public source material used in cross-examination *inter alia* to refresh memory of witness and subsequently admitted into evidence); Transcript, 7 February 2006, pp. 18-27, especially p. 26, lines 1-24 (Prosecution used a document to elicit a response from one of the Accused but did not seek to tender it).

being admitted into evidence. The witness's response to the questions put forms part of the evidence in the case.[14]

11. The ICTY Trial Chamber in the *Hadzihasanovic* case affirmed in an oral decision that "the Prosecution may present, in the course of cross-examination, any documents that have not already been admitted in order to test the credibility of a witness or to refresh such a witness's memory. In each of these two cases, the Prosecution may present a document that has not already been admitted and which it had in its possession before or after the presentation of its case".[15]

12. In the *Prlic* Trial Chamber decision on guidelines for the use of new prosecution documents during the defence case it was stated that: "the Prosecution may present documents during the cross-examination of defence witnesses primarily for the purpose of testing the credibility of the witness or refreshing his/her memory".[16] Notably, even the Partially Dissenting Opinion recognized that a "new document" could be used in the context of testing the credibility of a witness (albeit without requesting the admission of that document).[17]

b. It is established practice at the ad hoc international criminal tribunals that fresh evidence used during cross-examination by the Prosecution for the

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[14] *Prosecutor v. Popovic*, IT-05-88-T, "Decision on Defence Request for Guidelines Concerning the Use of Statements Not in Evidence and the Admissibility of Evidence During Cross-Examination", 17 December 2008, p. 2: "Considering that a statement not in evidence that is put to a witness on cross-examination does not become evidence before the Trial Chamber, but is simply in the record as a statement put to the witness for the purpose of adducing the witness's response to it, and that only the comments of the witness upon the statement form part of the evidence in this case". See also *Prosecutor v. Milosevic*, IT-02-54-T, "Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovxki and Decision *Proprio Motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy", 17 May 2005 ("**Milosevic Trial Chamber Decision**"), para. 9.

[15] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Oral Decision of 29 November 2004, Transcript, pp. 12521 – 12528 ("***Hadzihasanovic* Oral Decision**"). It is notable that the Defence in *Delic* accepted that according to the jurisprudence of the ICTY an exception to the general principle that matters probative of a defendant's guilt should be adduced as part of the Prosecution's case is where evidence is introduced by the Prosecution to test the credibility of a witness in cross-examination or to refresh a witness' memory, Prosecutor v. Delic, IT-04-83-AR73.1, "Decision on Rasim Delic's Interlocutory Appeal against Trial Chamber's Oral Decision on Admission of Exhibits 1316 and 1317", 15 April 2008, ("***Delic* Appeals Chamber Decision**"), para. 10, relying upon the *Hadzihasanovic* Oral Decision.

[16] *Prosecutor v. Prlic*, IT-04-74-T, "Decision on Presentation in Cross-Examination of Defence Witnesses", 27 November 2008, ("***Prlic* Trial Chamber Decision**"), para. 10, referring to the "*Hadzihasanovic* Oral Decision".

[17] *Prlic* Trial Chamber Decision, "Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti Regarding the Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 27 November 2008, at page 4.

purpose of impeaching an Accused or a Defence witness's testimony can be admitted into evidence

13. With regard to the admissibility stage, it is settled practice at both the ICTY and the ICTR that fresh evidence introduced during cross-examination, the purpose of which is to challenge the credibility of an accused or a Defence witness or to refresh the memory of an accused or a Defence witness, can be admitted into evidence. At the ICTY, the Trial Chamber in *Prlic* noted that a Trial Chamber would decide at a later stage on the admissibility of such evidence on a case-by-case basis.[18] This approach was endorsed by the Appeals Chamber of the ICTY in the same case.[19]

14. This is also the practice at the ICTR as can be seen, by way of example, in the recent Trial Chamber decision in *Karemera*, in which the Prosecution had introduced various new documents during the course of cross-examination and at the end of the cross-examination, following objections to the admission of these documents by the Defence, the Trial Chamber requested written submissions on the issue and ruled on the same.[20] Likewise this approach has been upheld by the Appeals Chamber of the ICTR in *Ntahobali and Nyiramasuhko*.[21] Further, in a number of decisions at the ICTR various Trial Chambers have been critical of the parties in situations where they have failed to tender new documents that had been used to impeach the credibility of a witness or witnesses during the course of their testimony.[22]

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[18] *Prlic* Trial Chamber Decision, para. 24. Case-by-case in this context may be taken to mean document by document.

[19] *Prlic* Appeals Chamber Decision, para. 28.

[20] *Prosecutor v. Karemera et al.*, ICTR-98-44-T, "Decision on Admission of Documents used in Cross-Examination of Edouard Karemera and Witness 6", 11 November 2009.

[21] *Prosecutor v. Ntahobali and Nyiramasuhuko*, "Decision on "Appeal of Accused Arsene Shalom Ntahobali against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997", especially at para. 18, where the Appeals Chamber held that it found no error in the Trial Chamber's decision to admit portions of the previous statements of a co-accused into evidence for the purpose of testing Ntahobali's credibility during cross-examination.

[22] *Prosecutor v. Karemera* et al., ICTR-98-44-T, "Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T", 29 May 2009, para. 6, referring to *Prosecutor v. Bagosora et al.*, "Decision on Nsengiyumva Motion to Admit Documents as Exhibits", Trial Chamber, 26 February 2007, para. 8, stating that "documents [for impeachment] must be tendered in connection with the testimony of the witness whose evidence is sought to be discredited"; *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, "Decision on Motions to Admit Written Statements of Witnesses Joshua Abdul Ruzibiza, RW2, and RW3", 22 November 2007, especially at para. 9, where the Trial Chamber criticized the Defence for trying to get documents in through Rule 92*bis* in circumstances where they should simply have been put to prosecution witnesses during cross-examination, thus providing an opportunity for re-examination on those

c. *The recent jurisprudence of the Appeals Chamber of the ICTY establishes that fresh evidence introduced during cross-examination which goes to the guilt of the accused can be admitted into evidence in exceptional circumstances and in the interests of justice*

15. During the proceedings in the current case on 11 November 2009, Justice Sebutinde expressed the view, which the Prosecution submits reflects a correct understanding, that there is a difference between evidence used to impeach the credibility of the Accused's prior testimony and fresh evidence that relates to the Accused's guilt.[23] The jurisprudence does not impose a blanket ban on the admission of new evidence going to guilt during the cross-examination of the Accused or Defence witnesses by the Prosecution. It has recently been clarified by the Appeals Chamber of the ICTY in *Prlic* that fresh evidence can be admitted for the purpose of establishing the guilt of the accused in exceptional circumstances and in the interests of justice.[24] In order to understand the *Prlic* Appeal Chamber's Decision it is instructive to look first to the matter as it arose before the Trial Chamber.

16. The *Prlic* Defence filed a Motion asking the Trial Chamber to formulate guidelines for the presentation of "new documents" by the Prosecution in the cross-examination of Defence witnesses.[25] The Defence proposed guidelines which would prohibit the Prosecution from putting "new documents" to a Defence witness during cross-examination in order to establish the guilt of the Accused. The Defence did not propose that the Prosecution be prohibited from presenting "new documents" to witnesses during the course of cross-examination which were for the purposes of impeaching a witness's credibility or refreshing his/her memory.[26]

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documents; and *Prosecutor v. Ndindiliyimana* et al., ICTR-2000-56-T, "Decision on Augustin Bizimungu's Request to Vary His Witness List", 24 October 2007, at para. 6.

[23] *Prosecutor v. Taylor*, Transcript, 11 November 2009, pp. 31626-31627.

[24] *Prlic* Appeals Chamber Decision.

[25] "New documents" were defined as those documents that were not admitted during the Prosecution case or during the Defence cases, whether or not they were on the 65*ter* List of the Prosecution.

[26] *Prlic* Trial Chamber Decision, para 5. See also *Prosecutor v. Prlic*, IT-04-74-T, "Joint Motion of Praljak, Petkovic, Coric and Pusic Defences Requesting Trial Chamber Directions and Guidelines on Presentation and Admission into Evidence of Documents Presented by the Prosecution during Cross-Examination of Defence Witnesses", 10 October 2008, para. 31. In this regard, it is also pertinent to note the distinction drawn between merely "putting" a document to a witness and its later "admission" into evidence.

17. The Trial Chamber Decision was therefore chiefly concerned with whether "new documents" which went to the guilt of the Accused could be introduced by the Prosecution during cross-examination. As regards the principal issue the majority of the Trial Chamber recognized that "in principle, all of the documents essential to a Party's case must be tendered into evidence during the presentation of its case-in-chief. Consequently, if after the conclusion of its case-in-chief the Prosecution seeks to tender "new documents" into evidence in order to establish the guilt of one or several Accused, it must justify its request by providing exceptional reasons in the interests of justice to admit these documents".[27] The Trial Chamber also elaborated upon the considerations that the Trial Chamber would take into account in determining whether such exceptional circumstances arise.[28]

18. The Appeals Chamber upheld the approach of the majority of the Trial Chamber in relation to the assessment of whether fresh evidence aimed at establishing the guilt of the accused would be admitted.[29] The Appeals Chamber made it clear that there is no absolute ban for the Prosecution to tender evidence once its case presentation has closed (leaving aside rebuttal and re-opening) and that the Trial Chamber has a discretion to admit such evidence taking into account both the probative value of the evidence and the need to ensure a fair trial and that "the Trial Chamber may exercise its discretion to admit the evidence only where it is in the interests of justice".[30]

19. Notably, the Appeals Chamber stated that it considered there to be a distinction between "the risk of prejudice caused by the admission of fresh evidence probative of guilt" and "fresh evidence admitted with the sole purpose of impeaching the witness" because the risk of prejudice potentially caused by the admission of the former was greater as compared to the latter.[31] In this regard, the Appeals Chamber upheld the approach of the Trial Chamber in its determination that fresh evidence probative of guilt could only be admitted in exceptional circumstances and that a more lenient

[27] *Prlic* Trial Chamber Decision, para. 23 and also para. 17.
[28] *Prlic* Appeals Chamber Decision, para. 24, referring to the *Prlic* Trial Chamber Decision at para. 25.
[29] *Prlic* Appeals Chamber Decision, paras 23 - 24.
[30] *Prlic* Appeals Chamber Decision, para. 23.
[31] *Prlic* Appeals Chamber Decision, para. 27.

approach applied in relation to fresh evidence the sole purpose of which was to impeach the credibility of a witness or refresh his/her memory.[32]

20. Notably, the approach taken by the Trial Chamber in the AFRC Decision is consistent with the decisions in *Prlic* in that the statement of "Zagalo" was admitted as a document relevant both to impeachment and the guilt of the Accused.[33]

21. The *Krstic* case assists in defining the boundaries of where fresh evidence should not be admitted during the Defence case. General Krstic was charged with genocide and other crimes for his role in the massacres at Srebrenica in July 1995. During the testimony of the accused Krstic, the prosecution played a recording of a radio intercept made by Bosnian forces in which General Krstic could be heard to say "kill them all." The Prosecution made the tactical decision to withhold this evidence to use during cross-examination although it was available during the case-in-chief. The ICTY Trial Chamber noted that the Prosecution must have intended that should the intercept be admitted in to evidence, it would be used for more than the purpose of testing the credibility of the accused since it would inevitably be viewed as going to the accused's *mens rea*. The evidence was found to be inadmissible in rebuttal as it was obviously highly relevant to a core element of the crime and should have been presented during the prosecution case.[34]

V. APPLICATION OF ESTABLISHED PRINCIPLES IN THE CURRENT CASE

22. As regards the application of the applicable legal standards, the procedure subsequently adopted has been that at the presentation stage, the Prosecution is permitted to present or introduce a document and to put questions to a witness on the basis of that document. Then at a later stage (the admissibility stage), when the Trial Chamber considers whether the document ought to be admitted into evidence as an exhibit, the Prosecution must explain the purpose for which it is seeking to have the document admitted into evidence and the Trial Chamber conducts the appropriate

[32] *Prlic* Appeals Chamber Decision, para. 28.
[33] *Prosecutor v. Brima* et al., Transcript, 29 June 2006, 75-76.
[34] *Prosecutor v. Krstic*, IT-98-33-T, "Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance", 4 May 2001, paras 25-26.

analysis of whether that document ought then to be formally admitted and if so whether it will be considered only as to the reliability of the witness's evidence or considered also as to the truth of the charges.

23. Examples of the application of this procedure can be found in some of the transcripts of proceedings in *Prlic* after the appellate decision was issued. For example, in the transcript of proceedings on 7 September 2009 prosecution counsel sought to put a document to a defence witness during the course of cross-examination and defence counsel objected to this resulting in an oral ruling on the issue by Judge Antonetti. The Judge reminded the parties of the decision rendered on 27th November 2008 and held that:

> at this stage of the procedure, the Trial Chamber believes that the Trial Chamber is not right now facing the admission of the document by the authorization, given by the Prosecutor, to put questions by using the document. Therefore the Trial Chamber authorizes the Prosecutor to put questions through this document or on the basis of this document, and if later on the Prosecutor requests the filing of this document into evidence, the Trial Chamber will, of course, examine at that time the observations presented by the Defence on the question of the admissibility of the document. And to conclude, the Trial Chamber authorizes Mr. Stringer to put questions to Mr. Praljak based on the document.[35]

24. As regards disclosure, jurisprudence from Appellate and Trial Chambers of the ICTR and ICTY makes it plain that the Prosecution is not under any obligation to disclose any or all documents relevant to cross-examination.[36] It is permissible for fresh evidence to be used when the cross-examination commences, in order to maintain the element of surprise,[37] and such a procedure does not amount to "trial by ambush".[38]

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[35] *Prosecutor v. Prlic*, Trial Transcript, 7 September 2009, pp. 44422-44433, especially at 44433.

[36] *Prosecutor v. Bagosora* et al., ICTR-98-41-AR73 "Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence", Appeals Chamber, 25 September 2006, para. 10, upholding the decision of the Trial Chamber in this regard at para. 6: *Prosecutor v. Bagosora* et al., ICTR-98-41-T, "Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", 27 September 2005 ("***Bagosora* Trial Chamber Decision**"). *Prosecutor v. Karera*, ICTR-01-74-T, Trial Transcript, 16 August 2006, pp. 26-27: "The Chamber recalls that...[d]uring the examination of the witness, the other party cross-examining the witness has the right to impeach that witness. It may use any document without any prior disclosure to the party that is presenting that witness. This is part of the general credibility exercise which any party would wish to perform; there is no disclosure obligation there". *Prosecutor v. Kalimanzira*, ICTR-05-88-T, "Judgment", 22 June 2009, para. 38. *Prosecutor v. Rutuganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003, paras 280-290. *Prlic* Trial Chamber Decision, para. 25, where in relation to the issue of notice, the majority of the Trial Chamber explained that "the Prosecution cannot know whether and on what basis it will seek to rebut evidence until the time when the witness testifies. There is no justification therefore to impose a notice period on the Prosecution".

[37] *Bagosora* Trial Chamber Decision, para. 12. See also *Prosecutor v. Prlic*, IT-04-74-T, "Order Clarifying the Relationship between Counsel and an Accused Testifying within the Meaning of Rule 85(C) of the Rules", 11 June

25. While the Prosecution has an obligation to present the evidence on which it intends to rely to prove guilt during its case-in-chief, it is also obligated to select the most relevant and probative evidence so that the trial can proceed expeditiously and be completed in a reasonable amount of time. The Accused was at the highest level of responsibility and the evidence of his responsibility for the crimes spans a period of many years and several countries. The obligation for the Prosecution to present a focused case is particularly important in a case of this complexity and magnitude.

26. The Prosecution could not possibly have anticipated all of the testimony that Mr. Taylor eventually gave between 14 July and 10 November of this year covering 7,230 pages of transcript. The main points in his testimony were not revealed in the Defence Pre-Trial Brief, nor had they been put to Prosecution witnesses. Even the five-page witness summary provided for the Accused consisted of general denials and descriptions of topics he would discuss rather than details of his account. For example, neither the Defence Pre-Trial Brief nor the witness summary discussed central assertions, such as: 1) The NPFL forces that participated in the invasion and fighting in Sierra Leone from March 1991 to August 1991 were renegades who were part of a conspiracy to kill Mr. Taylor that originated in Libya in the 1980's; 2) Mr. Taylor did assist the RUF but only from about August 1991 to May 1992; and 3) Mr. Taylor brought Sam Bockarie to Monrovia on three occasions in 1998 in order to discuss peace after informing and getting the consent of ECOWAS and the United Nations.

27. On certain points, the Accused's evidence even conflicts with the limited information provided in the Pre-Trial Brief and the witness summary. Both of these documents for example, acknowledge to some degree the presence of child soldiers in the NPFL (but the witness summary denies they participated in combat),[39] while the Accused testified that the NPFL had a policy to accept no one under 18 and there were no

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2009, Separate Opinion of Judge Trechsel, para. 3, where Judge Trechsel observes, in discussing the purpose of cross-examination, that "it allows for the testing of the credibility of the witness. This second aspect is mostly what makes cross-examination unique. Cross-examination is unique in that it allows for surprises."

[38] *Bagosora* Trial Chamber Decision, para. 8.

[39] *Prosecutor v. Taylor*, SCSL-2003-01-PT-229, "Rule 73bis Taylor Defence Pre-Trial Brief", 26 April 2007 ("**Defence Pre-Trial Brief**"), para. 13; *Prosecutor v. Taylor*, SCSL-2003-01-PT-784, "Defence Rule 73ter Filing of Witness Summaries with a Summary of the Anticipated Testimony of the Accused, Charles Ghankay Taylor", 29 May 2009, "Summary of the Anticipated Testimony of Charles Taylor", para. 5.

children in the NPFL.[40] The witness summary also denies that any assistance was ever given to the RUF[41] while the Accused testified that he gave military assistance to the RUF, including by providing ammunition, from about August 1991 to May 1992.[42]

28. Many other aspects of the Accused's testimony touch on issues that are either only tangentially relevant or completely irrelevant to the charges, such as his role in the Doe coup in 1980 and his escape from a Massachusetts jail in 1985. While this testimony may bear little relation to the charges that are the subject of this trial, evidence that the Accused has intentionally lied to the court on these peripheral issues is still highly relevant to determining the credibility of his testimony as a whole.

29. The ability to challenge the veracity of any witness's evidence lies at the heart of cross-examination; which is ultimately an exercise aimed at discerning whether a witness is telling the truth. The Trial Chamber must be in a position not only to make determinations about the credibility of the Prosecution witnesses but also about the truthfulness of the Accused in this case and the witnesses called by the Defence. To be effective, the cross-examining party must be given latitude to challenge the accused on all aspects of his account using available evidence. The truth-seeking function of a trial would be severely compromised if an accused, having heard the Prosecution case, were allowed to simply tailor his testimony around this evidence knowing that nothing he said could be contradicted by anything not already in evidence in the Prosecution case. There is no justification to depart from the settled jurisprudence and practice detailed in this motion which supports this contention.

30. The Prosecution therefore requests the adoption of the established two-stage procedure whereby a document is first presented and used to challenge the credibility of the witness or his evidence and secondly, tendered for admission as an exhibit. In order to maintain the pace of the cross-examination and to avoid arguments where the Accused could receive information as to the purpose for which the Prosecution intends to use the document or suggestions that could influence the Accused's

[40] *Prosecutor v. Taylor*, Transcript, 15 July 2009, pp. 24554-24556 and pp. 24573-24578.
[41] "Summary of the Anticipated Testimony of Charles Taylor", para. 6.
[42] *Prosecutor v. Taylor*, Transcript, 11 November 2009, p. 31594.

testimony, arguments on the admissibility of the documents should be reserved for the point at which a party attempts to tender the document into evidence.

VI. CONCLUSION

31. Accordingly the Prosecution seeks the following guidelines and/or an order consistent with the AFRC Decision and the jurisprudence of other *ad hoc* tribunals permitting the Prosecution to use fresh evidence during cross-examination to challenge the credibility of a witness and permitting that evidence to be tendered and exhibited for the purpose of challenging the credibility and/or in certain circumstances for the purpose of demonstrating the guilt of the Accused:

a) Fresh evidence can be put to the Accused or a Defence witness for the purpose of eliciting a response from that witness; the witness's response becomes the evidence in the case and whether the new document is also admitted into evidence falls to be decided at the end of the Accused or Defence witness's testimony;

b) Fresh evidence which impeaches the testimony of the Accused or a Defence witness can be admitted by the Trial Chamber and its admission will be determined on a case-by-case basis;

c) Fresh evidence going to the guilt of the Accused can be admitted in exceptional circumstances and in the interests of justice and its admission will be determined on a case-by-case basis.

Filed in The Hague,

17 November 2009,

For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

INDEX OF AUTHORITIES

SCSL

Prosecutor v. Taylor

Trial Transcript, 11 November 2009, pp. 31619 – 31627; 31594.
Prosecutor v. Taylor, SCSL-2003-01-PT-229, "Rule 73bis Taylor Defence Pre-Trial Brief", 26 April 2007
Prosecutor v. Taylor, SCSL-2003-01-PT-784, "Defence Rule 73ter Filing of Witness Summaries with a Summary of the Anticipated Testimony of the Accused, Charles Ghankay Taylor", 29 May 2009, "Summary of the Anticipated Testimony of Charles Taylor"
Prosecutor v. Taylor, Transcript, 15 July 2009, pp. 24554-24556 and pp. 24573-24578

Prosecutor v. Brima et al.

Trial Transcript 29 June 2006, 47 – 78
Prosecutor v. Brima et al., SCSL-04-16-T-307, "Decision on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227," 15 June 2005

Prosecutor v. Norman et al.

Trial Transcript 9 February 2006, 26, 32, 65-66 and 68 – 70
Trial Transcript 7 February 2006, 12 - 27

ICTY

Decisions:

Prosecutor v. Delalic, IT-96-21-T, "Decision on Confidential Motion to Seek Leave to Call Additional Witnesses", 4 September 1997,
http://www.icty.org/x/cases/mucic/tdec/en/70904WG2.htm

Prosecutor v Milosevic, "Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovxki and Decision Proprio Motu Reconsidering Admission of Exhiits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy", 17 May 2005
http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/050517-3.htm

Prosecutor v Krstic, IT-98-33-T, "Decision on the Defence Motions to Exclude Exhibits in rebuttal and Motion for Continuance", 4 May 2001, paras 25-26.
http://www.icty.org/x/cases/krstic/tdec/en/10504AE116170.htm

Prosecutor v Popovic, ICTY Trial Chamber II, "Decision on Defence Request for Guidelines Concerning the Use of Statements not in Evidence and the Admissibility of Evidence During Cross-Examination", 17 December 2008

http://www.icty.org/x/cases/popovic/tdec/en/081217b.pdf

Prosecutor v Prlic, IT-04-74-T, "Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 27 November 2008
http://www.icty.org/x/cases/prlic/tdec/en/081127b.pdf

Prosecutor v. Prlic, IT-04-74-T, "Joint Motion of Praljak, Petkovic, Coric and Pusic Defences Requesting Trial Chamber Directions and Guidelines on Presentation and Admission into Evidence of Documents Presented by the Prosecution during Cross-Examination of Defence Witnesses", 10 October 2008
http://icr.icty.org/exe/ZyNET.exe?ZyActionD=ZyDocument&Client=LegalRefE&Index=MotionsE&Query=guidelines&File=E%3A%5CLegal_Ref%5CBatchStore%5CMotions%5CEnglish%5CExportedText%5C0000000U%5C200016F7UU.txt&QField=DocumentId%5E2000262551&UseQField=DocumentId&FuzzyDegree=1&ImageQuality=r85g16%2Fr85g16%2Fx150y150g16%2Fi500&Display=hpfrw&DefSeekPage=f&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results+page&MaximumPages=1&ZyEntry=1&SeekPage=f&User=ANONYMOUS&Password=ANONYMOUS
(available through the ICTY Court Records section of the ICTY website)

Prosecutor v Prlic, IT-04-74-T, "Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti Regarding the Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 27 November 2008
http://www.icty.org/x/cases/prlic/tdec/en/081127c.pdf

Prosecutor v Prlic, IT-04-74-AR73.14, "Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of defence Witnesses", 26 February 2009
http://icr.icty.org/frmResultSet.aspx?e=zyh4hdi5nsz40n3z1y4gm545&StartPage=1&EndPage=10
(available through the ICTY Court Records section of the ICTY website)

Prosecutor v Prlic, IT-04-74-T, "Order Clarifying the Relationship between Counsel and an Accused Testifying within the meaning of Rule 85(C) of the Rules", 11 June 2009, Separate Opinion of Judge Trechsel
http://www.icty.org/x/cases/prlic/tord/en/090611.pdf

Prosecutor v Blaskic, IT-95-14, "Decision on Defence Motion for Protective Measures for Witnesses D/H and D/I", 25 September 1998
http://www.icty.org/x/cases/blaskic/tdec/en/80925PM15080.htm

Trial Transcripts:

Prosecutor v Hadzihasanovic and Kubura, IT-01-47-T, 29 November 2004, 12521 – 12528
http://www.icty.org/x/cases/hadzihasanovic_kubura/trans/en/041129ED.htm

Prosecutor v Prlic, IT-04-74-T, 7 September 2009, 44422 - 44433

http://www.icty.org/x/cases/prlic/trans/en/090907ED.htm

ICTR

Decisions:

Prosecutor v Rutuganda, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003
http://69.94.11.53/ENGLISH/cases/Rutaganda/decisions/030526%20Index.htm

Prosecutor v Bagosora et al., ICTR-98-41-T, "Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", 27 September 2005
http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/270905b.htm

Prosecutor v Bagosora et al., ICTR-98-41-AR73 "Decision on Interlocutory Appeal Relating to Discolsure under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence", Appeals Chamber, 25 September 2006
http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/250906.htm

Prosecutor v. Ntahobali and Nyiramasuhko, "Decision on "Appeal of Accused Arsene Shalom Ntahobali against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997", 27 October 2006 (attached)

Prosecutor v. Bagosora et al., ICTR,"Decision on Nsengiyumva Motion to Admit Documents as Exhibits (TC), 26 February 2007 (not available; however, the relevant passage is quoted at *Prosecutor v Karemera et al.*, ICTR-98-44-T, "Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T", 29 May 2009
(http://69.94.11.53/ENGLISH/cases/Karemera/decisions/080529.pdf)

Prosecutor v. Ndindiliyimana et al., ICTR-2000-56-T, "Decision on Augustin Bizimungu's Request to Vary His Witness List", 24 October 2007
http://69.94.11.53/ENGLISH/cases/Ndindiliyimana/decisions/071024.pdf

Prosecutor v Zigiranyirazo, ICTR-2001-73-T, "Decision on Motions to Admit Written Statements of Witnesses Joshua Abdul Ruzibiza, RW2, and RW3", 22 November 2007
http://69.94.11.53/ENGLISH/cases/Zigiranyirazo/decisions/071122.pdf

Prosecutor v Karemera et al., ICTR-98-44-T, "Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T", 29 May 2009
http://69.94.11.53/ENGLISH/cases/Karemera/decisions/080529.pdf

Prosecutor v Kalimanzira, ICTR-05-88-T, "Judgment", 22 June 2009
http://69.94.11.53/ENGLISH/cases/Zigiranyirazo/decisions/071122.pdf

Prosecutor v. Karemera et al., "Decision on Admission of Documents used in Cross-Examination of Edouard Karemera and Witness 6", 11 November 2009 (attached)

Trial Transcripts:

Prosecutor v Karera, ICTR-01-74-T, Trial Transcript 16 August 2006 pages 26-27
http://trim.unictr.org/webdrawer/rec/101549/view/KARERA%20-%20REDACTED%20TRANSCRIPT%20OF%2016082006.DOC
(available through the ICTR court documents system)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

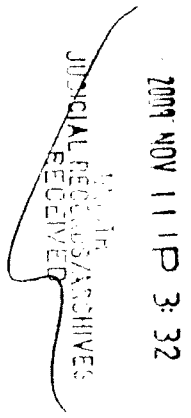
OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 11 November 2009



THE PROSECUTOR

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON ADMISSION OF DOCUMENTS USED IN CROSS-EXAMINATION OF ÉDOUARD KAREMERA AND WITNESS 6

Rule 89 (C) of the Rules of Procedure and Evidence

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Defence Counsel for Édouard Karemera
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Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. During the cross-examination of Édouard Karemera, the Prosecution relied on documents that were not previously admitted during its case-in-chief and sought admission of six of these documents into evidence. The three Accused opposed the admission of three of the documents and the Chamber requested the Parties to file written submissions on the issue.[1] On 2 November 2009 the Prosecution sought admission of a letter sent to the Government of Rwanda by members of a joint commission ("Commission") investigating human rights abuses dated 18 January 1993 ("the FIDH letter") which was used during the cross-examination of Witness 6.[2] The Chamber decided to issue rulings on the admission of all the requested documents in one written decision.[3]

2. At the conclusion of Édouard Karemera's defence, counsel for Karemera agreed with the Prosecution that three of the documents should be admitted into evidence: (i) Karemera's letter to General Augustin Ndindiliyimana dated 24 June 1994; (ii) the Report of the International Commission of Investigation on Human Rights Violations in Rwanda since 1 October 1990 ("Report"); and (iii) *Déclaration du gouvernement rwandais relative au rapport final de la commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1er octobre 1990.*[4] No objections were made as to the admission of these three documents by any other Party. As such, the Chamber will admit these three documents into evidence.

3. The Prosecution now moves the Chamber to admit the remaining three documents for the purposes of impeaching Édouard Karemera's credibility and rebutting his testimony: (i) declassified U.S. State Department document No. 1 – outgoing telegram dated 29 April 1994; (ii) declassified U.S. State Department document No. 2 – fax dated 2 June 1994; and (iii) *préfet* Clément Kayishema's draft letter to the Minister of the Interior.[5] The three Accused

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1 T. 28 May 2009, pp. 31-35.

2 T. 2 Nov. 2009, pp. 13-16, 29-34. This potential exhibit was drafted by the Commission in response to a letter from the Government of Rwanda after reading the Report of the International Commission of Investigation of Human Rights Violations in Rwanda since 1 October 1990, previously marked for identification in this trial as I-P-3.

3 *Ibid.*

4 T. 28 May 2009, pp. 32-33.

5 Prosecutor's Submission Concerning Admission of Documents used in Cross-Examination of Édouard Karemera, filed 5 June 2009 ("Prosecution's Motion"); Prosecutor's Consolidated Reply to Defence Submissions – Admission of Documents used in Cross-Examination of Édouard Karemera, filed 23 June 2009 ("Prosecution's Reply").

persons oppose the Prosecution's Motion.[6] The Prosecution moves separately for admission of the FIDH letter as related to the Report and written by the same Commission members.[7]

DELIBERATIONS

4. Generally, the Prosecution must present all evidence in support of its case during its case-in-chief.[8] This is to protect the fair trial rights of the Accused under Article 20 (4)(b) and (e) of the Statute and allow a fair opportunity to challenge evidence tendered by the Prosecution against him or her.[9] The admission of Prosecution evidence outside of its case-in-chief is not ordinarily in the interests of justice or judicial economy as it requires the Defence to engage in additional investigations and production of evidence in the context of very complex and lengthy trials.[10] This general principle is reflected in Rule 85(A) of the Rules of Procedure and Evidence ("Rules"), which provides for the sequence of evidence presented at trial and also in Rule 90 (G)(i) which enumerates appropriate topics for cross-examination. However, there is no absolute ban on the admission of fresh evidence by the Prosecution after the close of its case. The Chamber notes that it has the discretion to admit fresh evidence under Rule 89 (C) of the Rules, taking into account the relevance and probative value of that evidence and the need to ensure a fair trial.[11]

5. When seeking to assess the potential prejudice suffered by the Accused as a result of the admission of fresh evidence, the Chamber must have particular regard for the purpose for which the admission of this evidence is sought. Indeed, "the risk of prejudice caused by the admission of fresh evidence probative of guilt is potentially greater as compared to fresh

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6 Joseph Nzirorera's Response to Prosecution Motion for Admission of Exhibits Used with Édouard Karemera, filed 8 June 2009 ("Nzirorera's Response"); Réponse de Karemera à la « Prosecutor's Submission concerning Admission of Documents used in Cross-Examination of Édouard Karemera », filed 22 June 2009 ("Karemera's Response"); Réponse de Matthieu Ngirumpatse à la requête du Procureur en admission de documents utilisés lors du contre-interrogatoire d'Édouard Karemera, filed 22 June 2009 ("Ngirumpatse's Response").

7 T. 2 Nov. 2009, p. 34.

8 *See Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. 99-46, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73, and 85 (A) (iii) of the Rules of Procedure and Evidence (TC), 21 May 2003, para. 38; *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41 ("*Bagosora et al.*"), Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda (TC), 11 September 2006, fn. 3 (and sources cited therein) ("*Bagosora* Decision on Testimony of Kambada").

9 *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal against Trial Chamber's Oral Decision on Admission of Exhibits 1316 and 1317 (AC), 15 April 2008, para. 22 ("*Delić* Appeal Decision on Admission of Exhibits").

10 *Bagosora* Decision on Testimony of Kambada, para. 3.

11 *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeals Judgement, para. 222 ("*Kordić and Čerkez* Appeal Judgement").

evidence admitted with the sole purpose of impeaching the witness."[12] Moreover, the Chamber must also consider the various measures available to address the prejudice, including limiting the purpose for which the evidence is admitted, providing more time for re-examination and granting the possibility of recalling the witness.[13]

6. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera argue that documents cannot be admitted without being recognized by the witness. However, the Chamber notes that pursuant to Rule 89 (C), only sufficient indicia of reliability is required to establish that evidence is admissible at a preliminary stage which means there must be some indication that the document is what the moving party says it is and that its contents are reliable.[14] Moreover, the admission into evidence of documents does not constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted, as these factors are to be assessed by the Trial Chamber later when determining the probative weight of the evidence.[15] As a result, the Chamber finds that there is no requirement that a document be recognised by a witness in order to be admitted into evidence.

7. Matthieu Ngirumpatse separately requests that the Prosecution not be allowed to admit these documents during his absence from the proceedings as his consent for the trial continuing in his absence was not meant to extend to a witness as important as Édouard Karemera. The Chamber notes that in March 2009 Ngirumpatse waived his right to be present during trial until the Appeals Chamber had rendered its decision with respect to the Chamber's decision on severance.[16] The waiver explicitly provided that to the extent Édouard Karemera's witnesses could assist Ngirumpatse in his defence, he considered that his counsel could follow their testimony in his absence and in his interest and report back to him on a regular basis.[17]

8. Édouard Karemera's intention to testify in this case was well-known by the Defence for Matthieu Ngirumpatse at the time that the waiver was signed. Furthermore, the terms of the waiver do not refer to any exceptions or qualifications with respect to certain witnesses. Therefore, the Chamber finds that the terms of the waiver would not be breached by the

12 *Delić* Appeal Decision on Admission of Exhibits, para. 22.
13 *Ibid.*, para. 23.
14 *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC), 25 May 2006, para. 4.
15 *Pauline Nyiramasuhuko v. Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7.
16 T. 23 Mar. 2009, pp. 20-24.
17 *Ibid.*

admission of Karemera's testimony or the otherwise fair and proper admission of documents by the Prosecution during his testimony. Had Ngirumpatse sought to modify or revoke his waiver, he could have done so at any stage prior to Karemera's testimony. To allow Ngirumpatse to modify or revoke his waiver on an *ad hoc* or *ex post facto* basis would cast uncertainty as to the entirety of the proceedings that have taken place in his absence.

Declassified U.S. State Department document No. 1 – outgoing telegram dated 29 April 1994 and Declassified US State Department document No. 2 – fax dated 2 June 1994

9. Declassified U.S. State Department document No. 1 describes a conversation between Deputy Assistant Secretary Prudence Bushnell and Colonel Théoneste Bagosora in which Bushnell told Bagosora to stop the killings of civilians in areas controlled by the Rwandan Army.[18] Declassified U.S. State Department document No. 2 indicates that Cyprien Habimana, the Rwandan Ambassador in Nairobi, called the Interim Government in Marimba twice a day by satellite telephone.[19]

10. The Chamber notes that, with respect to reliability, Édouard Karemera's knowledge of these documents is not required to prove their authenticity as they have been sealed and certified by a State.

11. The Chamber finds that these documents are relevant and have probative value as they aim to be used to rebut Édouard Karemera's evidence that he had no knowledge of the opinion of the international community. The Chamber also finds that the admission of these documents into evidence will not compromise the fair trial rights of the Accused. Édouard Karemera adequately responded to these documents during his cross-examination and it is not likely that he would be in a better position to rebut the Prosecution's claim given more time.

12. The Chamber also finds that the first document is relevant and probative as to the international community's view of the events in Rwanda at that time, although is not probative as truth of that view. Further, document one was previously disclosed to the Defence in November 2007[20] and it relates to evidence previously admitted during the Prosecution's case-in-chief regarding a press conference held by Matthieu Ngirumpatse. Thus, the Defence was aware of the events surrounding this document and of the document itself at least 17 months prior to its use in cross-examination. Consequently, no prejudice is caused by the admission of this document and its use during cross-examination.

18 *See* Annex 1 to Prosecution's Motion (identified in the Prosecution Exhibit Bundle as A-1).
19 *See* Annex 2 to Prosecution's Motion (identified in the Prosecution Exhibit Bundle as E-62).
20 Prosecution's Motion, pp. 4, 5.

13. The Chamber further finds that the second document is relevant and has probative value since it is tendered to rebut Édouard Karemera's testimony that he and other interim ministers could not receive regular updates from their embassies abroad. With respect to document two, although it was first disclosed and used during cross-examination, the prejudice caused to the Accused is minimal as this evidence is admitted for the limited purpose of refuting Édouard Karemera's testimony.

Préfet Clément Kayishema's draft letter to the Minister of the Interior

14. The Chamber notes that *préfet* Clément Kayishema's draft letter to the Minister of the Interior provides an overview of the security situation in Kibuye *préfecture* from April to July 1994, including matters relating to the civilian defence programme, internally displaced persons within the *préfecture*, fighting between and within political parties, hunger among the population, and the resumption of services in the prefecture.[21]

15. The Prosecution avers that this document serves to impeach Édouard Karemera's credibility and rebuts his testimony that: (i) the civil defence programme was not operational; (ii) that Clément Kayishema never prepared a report after the operation of *ratissage*; and (iii) that the victims and objects of those attacks were Rwandan Patriotic Front (RPF) clandestine brigades and combatants. The Prosecution also believes it may serve to prove, when taken with other evidence, that the civil defence programme was operational in Kibuye and that the "fugitives" being protected by *Opération Turquoise* were Tutsi civilians who survived the massacres, thereby serving to reinforce and prove the Prosecution's case-in-chief.[22]

16. The Prosecution submits that this document was publicly available as part of the *Kayishema* case and that the Defence should have reviewed this document as part of its investigations.[23] The Prosecution argues that it used this document during cross-examination and are submitting this document for admission at this time because it could not anticipate that Édouard Karemera would testify to the legality of the civilian defence programme while denying that it was ever implemented, nor that he would testify that Clément Kayishema has never prepared or submitted a report addressed to him as he had been previously instructed.[24]

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21 See Annex 3 to Prosecution's Motion (identified in the Prosecution Exhibit Bundle as S-12). The Prosecution included in Annex I to its Reply a version of this exhibit with highlighting provided by Clément Kayishema to distinguish the handwriting of *sous-préfet* Gashongore.

22 Prosecution's Motion, para. 15; Prosecution's Reply, para. 8.

23 Prosecution's Motion, para. 11; Prosecution's Reply, para 8.

24 Prosecution's Motion, paras. 13-14.

17. The Prosecution first disclosed this document during cross-examination and provided no convincing explanation as to its failure to tender this document into evidence during its case-in-chief. The Chamber finds that Édouard Karemera would need additional time to rebut the document, and accordingly, that it is not in the interests of justice to admit it at this stage of the proceedings as the prejudice to the Accused outweighs the probative value.

FIDH Letter

18. The Chamber notes that the FIDH letter is a follow-up to the Report specifically addressing concerns that the Government of Rwanda raised regarding allegations made in the Report. The Chamber finds that by his counsel's own admission, Édouard Karemera commented extensively on the Report at the time of his cross-examination.[25] Karemera provided the Chamber with the Government's official reply to the Report during his cross-examination, which is being admitted into evidence by the agreement of the parties along with the Report.

[25] T. 28 May 2009, p. 33.

19. The FIDH letter is a response to the Government's reply letter and adds nothing new to the findings of the original Report and therefore covers the same material and events that Karemera discussed extensively in his cross-examination. There were oral objections made by the Accused but they stemmed from an initial belief that the Report was not stipulated to by the Parties during the previous trial session.[26] Accordingly, the Chamber finds that this document should be admitted into evidence by the agreement of the Parties.

FOR THESE REASONS, THE CHAMBER

I. **GRANTS** the Prosector's Motion in part;

II. **ADMITS** into evidence (i) Karemera's letter to General Augustin Ndindiliyimana dated 24 June 1994; (ii) The Report of the International Commission of Investigation on Human Rights Violations in Rwanda since 1 October 1990; (iii) Déclaration du gouvernement rwandais relative au rapport final de la commission internationale d'enquête sure les violations des droits de l'homme au Rwanda depuis le 1er octobre 1990; (iv) U.S. State Department document No. 1 – outgoing telegram dated 29 April 1994; (v) declassified U.S. State Department document No. 2 – fax dated 2 June 1994; and (vi) the FIDH later dated 18 January 1993; and

III. **DIRECTS** the Registry to give these documents exhibit numbers.

Arusha, 11 November 2009, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]

[26] T. 2 Nov. 2009, pp. 31-32.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

BEFORE THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mohamed Shahabuddeen** **Judge Liu Daqun** **Judge Andrésia Vaz** **Judge Wolfgang Schomburg**
Registrar:	**Mr. Adama Dieng**
Decision of:	**27 October 2006**

THE PROSECUTOR

v.

Arsène Shalom NTAHOBALI and Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-AR73

DECISION ON "APPEAL OF ACCUSED ARSÈNE SHALOM NTAHOBALI AGAINST THE DECISION ON KANYABASHI'S ORAL MOTION TO CROSS-EXAMINE NTAHOBALI USING NTAHOBALI'S STATEMENTS TO PROSECUTION INVESTIGATORS IN JULY 1997"

Defence Counsel for Mr. Ntahobali
Mr. Normand Marquis, Lead Counsel
Mr. Louis Huot, Co-Counsel

Defence Counsel for Mr. Kanyabashi
Mr. Michel Marchand, Lead Counsel
Ms. Simone Santerre, Co-Counsel

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Ms. Silvana Arbia, Senior Trial Attorney
Ms. Adelaide Whest, Trial Attorney
Ms. Holo Makwaia, Trial Attorney
Mr. Gregory Townsend, Trial Attorney
Mr. Althea Alexis-Windsor, Trial Attorney
Mr. Michael Adenuga, Legal Advisor
Ms. Astou Mbow, Case Manager

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 Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal filed by Arsène Shalom Ntahobali on 8 June 2006 ("Interlocutory Appeal").[1] The Defence for Mr. Ntahobali requests that the Appeals Chamber reverse the Trial Chamber's Decision rendered on 15 May 2006 ("Impugned Decision"), which allowed the Defence for the co-accused Mr. Kanyabashi to cross-examine Mr. Ntahobali using previous statements of Mr. Ntahobali made to Prosecution investigators in July 1997 ("Previous Statements").[2] The Defence for Mr. Ntahobali requests that the Appeals Chamber find the Previous Statements inadmissible or alternatively order the Trial Chamber to conduct a *voir dire* procedure to determine whether they were freely and voluntarily provided to the Prosecution investigators.[3] The Prosecution and the Defence for Mr. Kanyabashi filed their responses to the Interlocutory Appeal on 16 and 19 June 2006 respectively.[4] Contrary to the submissions of the Defence for Mr. Ntahobali,[5] both responses were timely filed pursuant to the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal ("Practice Direction").[6]

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[1] *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73 (Joint Case No. ICTR-98-42-T), Appel de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée "Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997", 8 June 2006 ("Interlocutory Appeal").

[2] *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Joint Case No. ICTR-98-42-T, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, 15 May 2006 ("Impugned Decision").

[3] Interlocutory Appeal, pp. 11-12.

[4] *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Prosecutor's Response to the "Appel de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997"", 16 June 2006, para. 16 ("Prosecutor's Response"); *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Réponse de Joseph Kanayabashi à "l'Appeal de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée Joseph Kanyabashi's Response to the Appeal by the Accused Arsène Shalom Ntahobali Against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigator's in July 1997", 19 June 2006, para. 5 ("Kanyabashi's Response").

[5] *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Réplique de Arsène Shalom Ntahobali à la Réponse du Procureur Intitulée "Appel de de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée "Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997"", 23 June 2006, paras 4-5 ("Ntahobali's Reply to the Prosecutor"); *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Réplique de Arsène Shalom Ntahobali à la Réponse de Joseph Kanayabashi à l'Appeal de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée "Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali using Ntahobali's Statements to Prosecution Investigators on July 1997", 23 June 2006, paras 2-6 ("Ntahobali's Reply to Kanyabashi ").

[6] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, Section III(8) read together with Section I, permitting ten days from the filing of an interlocutory appeal for the filing of a response.

1. Background

2. During the cross-examination of Mr. Ntahobali, the Defence for Mr. Kanyabashi sought to challenge the credibility of Mr. Ntahobali using the Previous Statements.[7] The Defence for Mr. Ntahobali objected to the admissibility of the Previous Statements, arguing that they were not freely and voluntarily given[8] and that a *voir dire* procedure should be held in order to assess whether the Previous Statements had been obtained in accordance with the Rules of Procedure and Evidence of the Tribunal ("Rules").[9]

3. In the Impugned Decision, the Trial Chamber found the Previous Statements admissible through a "perusal of the transcripts of ?theg interviews as well as through the normal procedure of admissibility of evidence provided under Rule 89(C), and the conditions laid out in Rules 89(D) and 95" on the basis that they fully complied with the requirements of Articles 18 and 20 of the Statute of the Tribunal ("Statute") and Rules 42, 43 and 63 of the Rules.[10] The Trial Chamber limited the admission of the Previous Statements to "cross-examining Ntahobali on issues relating to his credibility" and ruled that the actual admission of each Previous Statement into evidence would be done after the cross-examination of Mr. Ntahobali by each party.[11] In addition, the Trial Chamber granted "any other co-Accused's Motion as well as the Prosecution's Motion to cross-examine the Accused Ntahobali using his interviews to challenge his credibility".[12] The Trial Chamber denied the request of the Defence for Mr. Ntahobali to hold a *voir dire* procedure on the basis that it was not the only method by which the Previous Statements could be assessed for their compliance with the Rules and the Statute.[13] The Defence for Mr. Ntahobali sought leave to appeal the Impugned Decision, which the Trial Chamber granted in its Decision on Certification of 1 June 2006.[14]

2. Arguments of the Parties

4. The Defence for Mr. Ntahobali requests the Appeals Chamber to rule that the Trial Chamber erred in finding the Previous Statements admissible.[15] It argues that the Previous Statements, including signed documents by Mr. Ntahobali stating that he understood his rights

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[7] T. 8 May 2006, p. 77; T. 9 May 2006, pp. 3-14. See also Kanyabashi's Response, para. 5; Impugned Decision, paras 1, 65.
[8] Impugned Decision, paras 27, 30, 31, 43.
[9] Impugned Decision, paras 32-33, 46-56.
[10] Impugned Decision, paras 54-55, 64-72, 73-78, 79-82.
[11] Impugned Decision, para. 81
[12] Impugned Decision, para. 82
[13] Impugned Decision, para. 53.
[14] *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko.*, Joint Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntahobali Using 1997 Custodial Interviews, dated 1 June 2006, filed 2 June 2006 ("Decision on Certification").
[15] Interlocutory Appeal, paras 14-27, 66.

under Rules 42 and 43 of the Rules, are contrary to his assertions during trial that the Previous Statements were not free and voluntary.[16] Upon that allegation, the Defence for Mr. Ntahobali submits that the burden was on the Prosecution to prove the free and voluntary nature of the Previous Statements beyond reasonable doubt, and it failed to do so.[17] The Defence for Mr. Ntahobali also argues that the Trial Chamber erred in not considering the alleged inducements or threats to give the Previous Statements on the basis that they occurred "prior to the Accused's 1997 interviews and his arrest".[18] In the alternative, it requests that the Appeals Chamber find the procedure adopted by the Trial Chamber in assessing the admissibility of the Previous Statements erroneous and order the Trial Chamber to conduct a *voir dire* procedure to properly determine admissibility.[19]

5. The Prosecution responds that the Trial Chamber was correct in concluding that it was not obliged to conduct a *voir dire*[20] and exercised its discretion reasonably in assessing the admissibility of the Previous Statements.[21] It submits that there is no evidence of coercion or inducements attributable to the Prosecution investigators[22] and argues that it is not relevant for the Trial Chamber to consider any subjective motivations held by Mr. Ntahobali.[23]

6. The Defence for Mr. Kanyabashi responds that the Trial Chamber correctly applied objective criteria in deciding there was nothing to suggest Mr. Ntahobali provided the Previous Statements as a result of inducements.[24] According to the Defence for Mr. Kanyabashi, Mr. Ntahobali voluntarily surrendered himself to representatives of the Tribunal upon his own assumption that this would secure his father's release from detention by national authorities.[25] The Defence for Mr. Kanyabashi also objects to the argument of Mr. Ntahobali that it was necessary for the Trial Chamber to hold a *voir dire*[26] and argues that the Trial Chamber's "perusal" assessment of the Previous Statements was sufficient.[27]

7. In its reply to the Prosecution, the Defence of Mr. Ntahobali argues that it was not possible for Mr. Ntahobali to give evidence on the veracity of the Previous Statements whilst he was on the

[16] Interlocutory Appeal, para. 17.
[17] Interlocutory Appeal, para. 18.
[18] Interlocutory Appeal, paras 22-26.
[19] Interlocutory Appeal, paras 3-13, 28-66.
[20] Prosecutor's Response, paras 9-15.
[21] Prosecutor's Response, para. 16.
[22] Prosecutor's Response, para. 18.
[23] Prosecutor's Response, para. 19.
[24] Kanyabashi's Response, paras 20-24.
[25] Kanyabashi's Response, para. 22.
[26] Kanyabashi's Response, paras 25-40.
[27] Kanyabashi's Response, paras 9-16.

stand, as the Previous Statements were only raised during cross-examination and thus it was not open to him to reopen his examination-in-chief to offer evidence on the matter.[28]

8. In its reply to the Defence for Mr. Kanyabashi, the Defence for Mr. Ntahobali further submits that a *voir dire* procedure was necessary to bring forth further evidence on the veracity of the Previous Statements as a perusal of the transcripts of the relevant interviews would not necessarily provide sufficient indication if threats were indeed made.[29]

3. Discussion

9. This Interlocutory Appeal involves two issues: (i) whether the Trial Chamber erred in determining the admissibility of the Previous Statements without holding a *voir dire* procedure; and if the answer to this question is in the negative, (ii) whether the Trial Chamber erred in ruling that the portions of the Previous Statements used in cross-examination to test Mr. Ntahobali's credibility were admissible as evidence. While the Interlocutory Appeal raises these two issues, they will not be addressed separately as they are inextricably linked: the Defence for Mr. Ntahobali argues that a *voir dire* was necessary because there were sufficient indicia to show that the Previous Statements were made by him upon impermissible inducements and threats, which would also render the Previous Statements inadmissible.

10. Decisions relating to the admissibility of evidence and the general conduct of proceedings largely fall within the discretion of the Trial Chamber.[30] An interlocutory appeal challenging the discretion of the Trial Chamber is not a hearing *de novo*.[31] The standard of review on interlocutory appeal for such discretionary matters is therefore not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but whether the Trial Chamber reasonably exercised its discretion in reaching its decision.[32] The Appeals Chamber affirms that:

> a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of

[28] Ntahobali's Reply to the Prosecutor, paras 15, 19.
[29] Ntahobali's Reply to Kanyabashi, paras 14-17.
[30] *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-AR73(C), Decision on Interlocutory Appeal, 29 May 2006, para. 5 ("*Muvunyi* Decision").
[31] *The Prosecutor v. Jefer Halilovic*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 5 ("*Halilovic* Decision").
[32] *The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 3 ("*Bagosora* Appeal").

> the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited...[33]

11. During cross-examination of Mr. Ntahobali by Defence Counsel for Mr. Kanyabashi, the latter distributed Mr. Ntahobali's Previous Statements to the parties, indicating that he intended to use them in further cross-examination of Mr. Ntahobali.[34] In response to a query raised by Mr. Ntahobali from the witness box,[35] the Trial Chamber gave the parties the opportunity to present submissions on whether there was sufficient basis to the allegation that the Previous Statements were in violation of the Rules such as to require a *voir dire* procedure.[36]

12. The Defence for Mr. Ntahobali argues that this procedure adopted by the Trial Chamber was impermissibly informal[37] since prior statements of an accused should be subject to an inquiry conducted "in accordance with pre-established rules of law which are known to the parties"[38] and not by merely requiring the parties to indicate their views on whether the Rules were complied with in taking the Previous Statements.[39] The Defence for Mr. Ntahobali has not identified any error in the procedure adopted by the Trial Chamber. The *voir dire* procedure originates from the common law and does not have a strictly defined process in this Tribunal.[40] There are no provisions in the Rules which direct Trial Chambers to adopt a formal procedure for determining whether they should conduct a *voir dire*. Instead, Rule 89(B) of the Rules provides that reference may be made to evidentiary rules "which will best favour a fair determination of the matter". This discretion can extend to the conduct of a *voir dire* procedure when it is determined appropriate by the Trial Chamber.[41] The procedure conducted by the Trial Chamber permitted the parties to make submissions as to whether the Prosecution and Co-Accused could use the Previous Statements to impeach Mr. Ntahobali. The Trial Chamber considered the submissions of the parties on whether it was necessary to grant the request for a *voir dire* procedure by the Defence of Mr. Ntahobali, and after finding that it was not necessary, the Trial Chamber determined the admissibility of the Previous Statements on the basis of the submissions made by the parties. At several stages during

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[33] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 10 ("*Milošević* Decision").
[34] T. 8 May 2006, p. 77: the Defence for Mr. Kanyabashi stated "I have distributed the transcripts that we received from the Office of the Prosecutor to the various Defence teams ? ...g".
[35] T. 8 May 2006, pp. 76-77.
[36] T. 9 May 2006, p. 3.
[37] Interlocutory Appeal, para. 5.
[38] Interlocutory Appeal, para. 8.
[39] Interlocutory Appeal, para. 6.
[40] As an example of the flexibility with which the *voir dire* procedure is utilised at trial, *voir dire* examinations have previously been deferred to the cross-examination stage in determining a Witness's qualification as an Expert Witness: *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Decision on the Prosecutor's Motion for Admission of Testimony of Expert Witness Rule 92*bis* of the Rules, 24 March 2005, para. 27. See also *Halilovic* Decision, para. 46 finding that a *voir dire* procedure is not necessarily required for identifying the voluntariness of an interview of an accused, although "there may be certain advantages in doing so."
[41] *Halilovic* Decision, para. 46.

the hearing[42] the Trial Chamber affirmed that this was the procedure to be followed, in particular when it stated:

> We would like to hear the challenge, the basis of the challenge ?to the admissibility of the Previous Statementsg. And in the process, certainly, the Trial Chamber will examine the ?admissibilityg issue, including whether to determine the issue as presently presented, or whether there would be any need for voir – for trial within a trial, voir dire.[43]

13. Therefore, the parties were informed of the procedure the Trial Chamber was adopting and made submissions pursuant to this procedure.[44] Indeed, the procedure adopted by the Trial Chamber, while characterised as one adopted to determine whether a *voir dire* procedure was necessary, was very similar to a *voir dire*. The Trial Chamber heard the parties on the circumstances surrounding the taking of the Previous Statements, admitting a written affidavit from Mr. Ntahobali into evidence on that issue, and decided that no further evidence was required to determine whether the Previous Statements were in accordance with the Rules. The Appeals Chamber does not see any abuse of the Trial Chamber's discretion in the way that it chose to proceed.

14. The Defence for Mr. Ntahobali further asserts that if it were not for the initiative of the Defence for Mr. Ntahobali, the Trial Chamber "would have proceeded" without his opinion on the matter.[45] This argument is mere speculation. There was no prejudice to Mr. Ntahobali regarding the presentation of his opinion to the Trial Chamber on this matter as he was given an opportunity to present submissions in support of his objection, following which he presented a written affidavit[46] and confirmed in the witness box that he had nothing to add to these submissions.[47]

15. The Defence for Mr. Ntahobali also argues that the Trial Chamber erred in law in finding that the conduct of a *voir dire* is confined to jury trials.[48] The Appeals Chamber does not consider it necessary to address this argument on its merits as the Trial Chamber did not base its decision upon this observation in the Impugned Decision. Rather, it merely acknowledged the common law origins of the procedure in jury trials.[49]

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[42] T. 9 May 2006, pp. 3, 16, 42; T. 15 May 2006, p. 16.
[43] T. 9 May 2003, p. 16.
[44] See the full submissions on T. 8 May 2006 pp. 76-78; T. 9 May 2006; T. 15 May 2006.
[45] Interlocutory Appeal, paras 10-11
[46] Impugned Decision, para. 73; T. 15 May 2006, p. 4.
[47] See T. 15 May 2006, pp. 4-5.
[48] Interlocutory Appeal, para. 29.
[49] Impugned Decision, paras 47, 50.

16. The Defence for Mr. Ntahobali further argues that the Trial Chamber erred by distinguishing the Previous Statements (as interviews by the Prosecution investigators) from a confession, in finding that a *voir dire* procedure is inappropriate in this case.[50] The Appeals Chamber notes that a confession does indeed require additional consideration under the Rules as confessions are specially addressed under Rule 92 of the Rules. However, this provision requires the confession to be conducted in strict compliance with Rule 63 of the Rules. Therefore the distinction between confessions and interviews of the accused is not an appropriate basis for deciding when to conduct a *voir dire* because both forms of statements require the same consideration under Rule 63. However, contrary to submissions of the Defence for Mr. Ntahobali, the Trial Chamber did not merely rely upon such a distinction in deciding not to conduct a *voir dire* procedure as the Trial Chamber additionally found that the "circumstances of the case" did not require further investigation.[51]

17. Finally, the Defence for Mr. Ntahobali submits that where there is *prima facie* proof of inducements or threats made to an accused during an interview by representatives of the Prosecution, it should be mandatory to conduct a *voir dire*.[52] In support of this argument, the Defence for Mr. Ntahobali refers to Rule 95.[53] Rule 95 provides for the exclusion of evidence which is "obtained by methods which cast *substantial doubt* on its reliability or if its admission is antithetical to, and would *seriously damage*, the integrity of the proceedings" (emphasis added). The Defence for Mr. Ntahobali alleges that he received inducements and threats from representatives of the Prosecution before the 1997 interviews were conducted. These claims, if substantiated, could fall within the terms of Rule 95.[54] The Trial Chamber considered these allegations and heard the parties' submissions. It concluded, however, that there was nothing to suggest that the interviews had been conducted in an improper manner and thus there was no need for further evidence on the matter – Mr. Ntahobali was informed of his rights and the proceedings contained no evidence of oppressive questioning by the Prosecution investigators.[55] The trial record confirms that this was a reasonable conclusion[56] and the submissions in this Interlocutory Appeal have not demonstrated how this aspect of the Impugned Decision was based upon an incorrect

[50] Interlocutory Appeal, paras 37-39.
[51] Impugned Decision, paras 51, 55.
[52] Interlocutory Appeal, para. 40.
[53] Interlocutory Appeal, para. 47.
[54] Interlocutory Appeal, para. 59. The Appeals Chamber notes that Mr. Ntahobali made more detailed allegations, which were considered in the Impugned Decision, and the review of the trial record conducted by the Appeals Chamber supports the Trial Chamber's conclusions on these more specific points.
[55] Impugned Decision, paras 71-72.
[56] English translation of the transcripts from Mr. Ntahobali's interviews with representatives of the Prosecution, 24 July 1997, pp. 2-10; 26 July 1997. For example, the Defence for Mr. Ntahobali alleged before the Trial Chamber that Mr. Ntahobali was handcuffed whilst sleeping (Impugned Decision, para. 43) whereas the Previous Statements reveal that this was discussed in the initial interviews, and it was explained that this was the national procedure in Kenya which the Tribunal representatives had no authority over (K0153-3798, Tape 1, Side A). The Trial Chamber concluded that this

interpretation of the governing law or resulted in a patently incorrect conclusion of the factual circumstances of the interview.

18. As the above analysis demonstrates, it has not been shown in this Interlocutory Appeal that the Trial Chamber erred in finding that the Previous Statements were not obtained in a manner violating any provision of the Rules or of the Statute. Given the broad discretion afforded to Trial Chambers in evidentiary matters, the Appeals Chamber finds no error in the procedure employed by the Trial Chamber to determine the admissibility of the Previous Statements and in its decision to admit portions of the Previous Statements into evidence for the purpose of testing Mr. Ntahobali's credibility during cross-examination.

4. Disposition

19. For the forgoing reasons, the Appeals Chamber **DISMISSES** the Interlocutory Appeal in its entirety.

Done in English and French, the English text being authoritative.

Fausto Pocar
Presiding Judge

Done this 27th day of October 2006,
At The Hague,
The Netherlands.

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was not a violation of the rights of the Accused by the Prosecutor, *see Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on Mucic's Motion for the Exclusion of Evidence, 2 September 1997, para. 40.