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UNITED NATIONS
NATIONS UNIES

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
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Mr. Gregory Townsend, Trial Attorney
Mr. Althea Alexis-Windsor, Trial Attorney
Mr. Michael Adenuga, Legal Advisor
Ms. Astou Mbow, Case Manager

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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 á "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 á 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.

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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 ? the g 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.

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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.

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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").

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> 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.

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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.

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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

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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.