Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-41-AR73
18.09.2006
(670/H – 652/H)

P.T.

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 18 September 2006

ICTR Appeals Chamber
Date: 18 September 2006
Action: P.T.
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THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-AR73

DECISION ON ALOYS NTABAKUZE'S INTERLOCUTORY APPEAL ON QUESTIONS OF LAW RAISED BY THE 29 JUNE 2006 TRIAL CHAMBER I DECISION ON MOTION FOR EXCLUSION OF EVIDENCE

Office of the Prosecutor:
Ms. Barbara Mulvaney
~~Mr. James K. Stewart~~
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Mr. Rashid Rashid
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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 Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of the "Ntabakuze Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I 'Decision on Ntabakuze Motion for Exclusion of Evidence'", filed by Aloys Ntabakuze on 20 July 2006 ("Interlocutory Appeal" and "Appellant", respectively).

I. PROCEDURAL HISTORY

2. On 28 March 2006, the Appellant filed a "Motion for the Exclusion of Evidence of Allegations falling outside the Scope of the Indictment" ("Motion"),[1] requesting that Trial Chamber I exclude from its consideration seventeen categories of evidence as irrelevant to the Indictment. On 29 June 2006, the Trial Chamber granted the Motion in part, partially excluding three of the challenged categories of evidence, but denying the request for exclusion in respect of the remaining fourteen categories.[2]

3. On 6 July 2006, the Appellant requested leave to file an interlocutory appeal from the Impugned Decision.[3] On 14 July 2006, the Trial Chamber granted in part the Motion for Certification.[4]

4. The Appellant filed his Interlocutory Appeal on 20 July 2006. The Prosecution responded on 31 July 2006,[5] and the Appellant replied on 4 August 2006.[6]

[1] An addendum to the Motion was filed on 7 April 2006.
[2] "Decision on Ntabakuze Motion for Exclusion of Evidence", 29 June 2006 ("Impugned Decision"), Disposition. The Trial Chamber also observed that the Prosecution conceded the partial exclusion of a fourth category. *Id.*, para. 25.
[3] "Ntabakuze Motion for Certification of the 'Decision on Ntabakuze Motion for Exclusion of Evidence' of 29 June 2006, pursuant to Rule 73(B)", 6 July 2006 ("Motion for Certification").
[4] "Decision on Request for Certification of Decision on Exclusion of Evidence", 14 July 2006 ("Certification Decision"), p. 5.
[5] Prosecutor's Response to 'Ntabakuze Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I 'Decision on Ntabakuze Motion for Exclusion of Evidence'", 31 July 2006 ("Response").
[6] Ntabakuze Reply to "Prosecutor's Response to 'Ntabakuze Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I 'Decision on Ntabakuze Motion for Exclusion of Evidence'", 7 August 2006 ("Reply"). The Reply was received by the Tribunal in time on 4 August 2006 but due to a fire in the Tribunal premises, the Reply could not be filed before 7 August 2006. In the circumstances, the Appeals Chamber will consider the Reply as validly filed.

II. SCOPE OF THE APPEAL

5. The Interlocutory Appeal is limited by the Certification Decision to questions relating to "the propositions of law articulated in paragraphs 7 and 10" of the Impugned Decision.[7] These paragraphs read as follows:

> 7. Objections play an important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against the accused. The failure to voice a contemporaneous objection does not waive the Accused's rights, but results in a shifting of the burden of proof:
>
> > In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.
> >
> > ...
> >
> > [A]n accused person who fails to object at trial has the burden of proving on appeal that his appeal [sic] that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired.
>
> This standard applies whenever the objection is not raised contemporaneously with the introduction of the evidence.[8]
>
> 10. The Chamber's approach in the sections which follow may be summarized as follows. Where a material fact cannot be reasonably related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment. Material facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. Other forms of disclosure, such as witness statements or potential exhibits, are generally insufficient to put the Defence on reasonable notice. The Chamber recognizes two exceptions to this principle: first, where the Prosecution filed a motion for the addition of a witness, which was subsequently granted by the Chamber, and which stated the material facts on which the witness would testify (Witness AAA); second, where a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts (Witness DBQ).[9]

6. In his Interlocutory Appeal, the Appellant submits that the Trial Chamber erred in its enunciation of the legal principles in both paragraphs. The Appeals Chamber will consider first the principles outlined in paragraph 10 of the Impugned Decision.

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[7] Certification Decision, p. 5.

[8] Impugned Decision, para. 7, citing *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement of 9 July 2004 ("*Niyitegeka* Appeal Judgement"), paras 199-200, and referring to *The Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-T, Judgement and Sentence of 15 July 2004 ("*Ndindabahizi* Trial Judgement"), para. 29.

[9] References omitted. In footnote 22 of the Impugned Decision, the Trial Chamber adds that, in one case, it will also rely on the material supporting the Indictment itself to determine whether notice of the material fact was given so as to cure the vagueness in the Indictment

III. CURING DEFECTS IN THE INDICTMENT (PARAGRAPH 10 OF THE IMPUGNED DECISION)

A. Submissions of the Parties

7. The Appellant submits that the Trial Chamber erred in eight respects in paragraph 10 of the Impugned Decision in its description of the standards to apply in determining whether or not to exclude evidence on the basis of lack of notice of the material facts to which the evidence relates:[10]

> -First, the Trial Chamber failed to take into account the exceptional nature of "curing" the indictment, essentially transforming the exception into the rule;[11]
>
> -Second, the Trial Chamber failed to consider that the admission of large amounts of evidence outside the indictment could render the trial unfair since this has the effect of replacing the case in the original indictment with a completely different one, and since the accused never knows precisely the case he has to meet;[12]
>
> -Third, the Trial Chamber failed to define the degree of specificity required in the indictment, in particular with respect to the mode of liability and the locations where the crimes were committed;[13]
>
> -Fourth, the Trial Chamber failed to recognize that evidence of a material fact should be excluded if the latter is not mentioned in the indictment in any form; contrary to what the Trial Chamber found, it is not sufficient that the material fact be "reasonably related to the indictment";[14]
>
> -Fifth, the Trial Chamber "understat[ed] th[e] imperative" that material facts which concern the personal actions of the accused be specifically and clearly pleaded in the indictment;[15]
>
> -Sixth, the Trial Chamber erroneously considered that the Prosecution could include new material facts in the charges against the accused through the filing of a motion for the addition of a witness rather than by seeking to amend the indictment;[16]
>
> -Seventh, the Trial Chamber erred in finding that a lengthy adjournment could be sufficient to allow the Defence to meet newly discovered material facts because, although the adjournment may permit the Defence to better prepare for cross-examination of the witness, "it does not permit the Defence to know whether the Prosecution also intends to add new charges to the indictments [sic]; the Defence is still left in the dark as to the potential use of the newly discovered evidence";[17]
>
> -Eighth, while the Trial Chamber correctly stated that vagueness in the indictment may be cured when additional information is provided in the pre-trial Brief or the opening statement

[10] Interlocutory Appeal, para. 18 (1st para. 18, at p. 7)
[11] Interlocutory Appeal, paras 18 (2nd para. 18, at p. 8) and 19.
[12] Interlocutory Appeal, paras 20-22. *See also* Reply, paras 7-8, 14
[13] Interlocutory Appeal, paras 23-24.
[14] Interlocutory Appeal, paras 25-26.
[15] Interlocutory Appeal, paras 27-28.
[16] Interlocutory Appeal, para. 29.
[17] Interlocutory Appeal, para. 30.

and that other forms of disclosure such as witness statements and potential exhibits are generally insufficient to put the Defence on reasonable notice, it erred in its application of these principles in the case at hand.[18]

8. The Prosecution responds that most of the arguments made by the Appellant fall outside the scope of the issues for which certification was granted.[19] The Prosecution also contends that the Trial Chamber has discretion in determining which evidence to admit and in deciding on the general conduct of the proceedings, but that the Appellant has not identified any discernable error or abuse in the Trial Chamber's exercise of its discretion.[20] The Prosecution submits that the guiding principles identified by the Trial Chamber at paragraph 10 of the Impugned Decision are consistent with the jurisprudence of the Appeals Chamber and were properly applied.[21]

9. In the Prosecution's view, "[t]he Appellant's erroneous arguments appear to stem from the fact that he equates or mischaracterizes material facts with new charges, claiming that they are allegations outside the scope of the indictment and necessarily cause him material prejudice."[22] The Prosecution recalls that the count or charge is the alleged legal prohibition infringed whereas the materials facts are the acts and omissions of the accused that give rise to that allegation of infringement of a legal prohibition.[23] The Prosecution argues that while communication of timely information cannot cure the omission of a charge in an indictment, it is settled law that it can cure vagueness or imprecision respecting a charge that appears in the indictment.[24] Thus, the failure to plead a material fact in the indictment does not necessarily mean that the Prosecution must seek an amendment to the indictment; the omission of material facts from the indictment can be cured by the provision of timely, clear and consistent information to the Defence.[25] The Prosecution maintains that the Trial Chamber's framework in paragraph 10 of the Impugned Decision follows these principles: when the Trial Chamber required that the material facts be reasonably related to the indictment, it simply required that the material fact be related to a charge in the indictment, as opposed to a charge omitted from it.[26]

[18] Interlocutory Appeal, para. 31.
[19] Response, para. 2.
[20] Response, paras 8-9.
[21] Response, para. 11.
[22] Response, para. 12.
[23] Response, para. 12, quoting *The Prosecution v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, "Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005", 12 May 2005 ("*Muvunyi* Decision"), para. 19.
[24] Response, para. 13, referring to *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement of 7 July 2006 ("*Cyangugu* Appeal Judgement"), para. 32.
[25] Response, para. 13, referring to *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement of 23 October 2001 ("*Kupreškić et al.* Appeal Judgement"), paras 117-121, and *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement of 13 December 2004 ("*Ntakirutimana* Appeal Judgement"), para. 27.
[26] Response, para. 13. At paragraph 12 of the Response, the Prosecution also argues that, in the case at hand, the Trial Chamber did not consider that the new material facts (*i.e.*, those not mentioned in the Indictment but found to have been

10. The Prosecution also submits that the Appellant's argument regarding the "exceptional nature of curing" is unconvincing because, even in cases where some of the material facts at issue were known at the time the indictment was filed (and in the present case, this has not been demonstrated), vagueness in the indictment can still be cured by subsequent communications to the Defence.[27] In response to the Appellant's argument that the defects in this case were too numerous to be cured, the Prosecution responds that the essential question is not the number of alleged defects that have been cured, but whether the Defence had clear and unambiguous notice that the material facts would be relied upon as part of the Prosecution's case, and had sufficient opportunity to respond to the charge, so that the fairness of the trial is preserved.[28] Finally, to the Appellant's contention that the Trial Chamber ignored the requirement that material facts which concern the personal actions of the accused be specifically and clearly pleaded in the indictment, the Prosecution responds that the Impugned Decision leaves no doubt that physical perpetration of a criminal act by an accused must be pleaded in the indictment, and that when it was not, the Trial Chamber ruled the evidence inadmissible.[29]

11. The Appellant replies that the question before the Appeals Chamber is not whether the Trial Chamber properly exercised its discretion in admitting or excluding evidence, but rather whether the Trial Chamber correctly formulated the standards to apply in the exercise of that discretion.[30] He adds that if the Appeals Chamber were to find that the Trial Chamber erred in its articulation of these standards, then the Trial Chamber would have to reconsider its previous decision.[31]

12. The Appellant notes the admission of the Prosecution that the Indictment in this case lacked specificity, and submits that in light of this admission, the Prosecution "had an absolute obligation to rectify the lack of 'specificity' regarding the Accused Ntabakuze before the Defence was put to its case," something which it failed to do.[32]

13. The Appellant denies having confused material facts with new charges,[33] and submits that "many of the new *specific events* that emerged in the evidence, which were *never mentioned* in any

sufficiently disclosed to the Defence) added new charges or changed the nature of the existing charges; rather, the new material facts were reasonably related to existing charges, were relevant, and evidence thereon was admissible.

[27] Response, paras 14-15.
[28] Response, para. 15.
[29] Response, para. 16.
[30] Reply, paras 1-3, 5-6, 9, 15.
[31] Reply, para. 6.
[32] Reply, para. 7.
[33] Reply, paras 10-11

form in the Indictment, do, indeed, constitute new 'charges', and are not merely 'material facts' underpinning broad generalities already in the Indictment."[34]

B. Analysis

14. The Appeals Chamber will briefly recall the general principles of admissibility of evidence and sufficiency of the indictment. It will then consider each of the errors alleged to have been committed by the Trial Chamber except the eighth error alleged by the Appellant – that although the Trial Chamber correctly outlined certain relevant principles, it erred in its application of them – as this clearly goes beyond the scope of the certification.

1. Preliminary Question: Standard of Review

15. The Prosecution submits that "[t]he reconsideration envisaged in the Interlocutory Appeal is unwarranted and amounts to an impermissible attempt to overcome the Trial Chamber's discretionary power to admit evidence, during the course of the trial."[35]

16. The Appeals Chamber disagrees. The present appeal does not concern the Trial Chamber's exercise of its discretion in admitting particular categories of evidence, but rather the correctness of the legal principles which it identified as applicable to the exercise of its discretion to admit the disputed evidence. As the final arbiter of the law, the Appeals Chamber will overturn a Trial Chamber's decision if it is established that the Trial Chamber committed an error of law.[36]

2. Admissibility of Evidence of Material Facts Insufficiently Pleaded in the Indictment

17. It is well established that an accused has a right to be informed in detail of the charges against him or her, and that as a corollary the Prosecution is obliged "to state the material facts underpinning the charges in the indictment, but not the evidence by which material facts are to be proven."[37] No conviction against the accused can be entered on the basis of material facts omitted from the indictment or pleaded with insufficient specificity, unless the Prosecution has cured the

[34] Reply, para. 12 (emphasis in original).
[35] Response, para. 9 (references omitted).
[36] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement of 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 15; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement of 28 February 2005 ("*Kvočka et al.* Appeal Judgement"), para. 17; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" & Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Judgement of 3 May 2006 ("*Naletilić & Martinović* Appeal Judgement"), para. 10. *See also Prosecutor v. Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović's Contempt Proceedings, 29 August 2005, para. 40 & fn. 43.
[37] *Kupreškić et al.* Appeal Judgement, para. 88. *See also Niyitegeka* Appeal Judgement, para. 193; *Blaškić* Appeal Judgement, paras 208-209; *Ntakirutimana* Appeal Judgement, para. 25; *Kvočka et al.* Appeal Judgement, para. 27; *Naletilić & Martinović* Appeal Judgement, para. 23; *Cyangugu* Appeal Judgement, para. 21.

defect in the indictment by provision to the accused of "timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[38]

18. When the Defence is of the view that the Prosecution introduces evidence of material facts of which it had no notice, it can make an objection to the admission of such evidence for lack of notice.[39] If the Trial Chamber agrees with the Defence that insufficient notice has been given, it should exclude the challenged evidence in relation to the unpleaded material facts,[40] require the Prosecution to amend the indictment, grant an adjournment to allow the Defence adequate time to respond to the additional allegations,[41] or take other measures to preserve the rights of the accused to a fair trial.[42]

3. Alleged Failure to Recognize Relevant Principles

19. The Appellant alleges that the Trial Chamber erred in its articulation of the applicable legal standard at paragraph 10 of the Impugned Decision because it failed to recognize certain relevant principles (first, second and third errors alleged). However, the mere fact that the Trial Chamber did not expressly mention all the applicable principles in paragraph 10 of the Impugned Decision does not necessarily mean that it ignored them. As the first sentence of paragraph 10 explains, the paragraph is merely a summary of the approach the Trial Chamber will take in the rest of its decision. The Trial Chamber was under no obligation to repeat word for word all the statements made by the Appeals Chamber on the subjects of the specificity required in an indictment and the circumstances in which a defective indictment will be deemed cured. Further, the fact that the Trial Chamber was clearly aware of the extent of the jurisprudence established by the Appeals Chamber is demonstrated by its numerous references to the relevant case law in the paragraphs prior to

[38] *Kupreškić et al.* Appeal Judgement, para. 114; *Kvočka et al.* Appeal Judgement, para. 33; *Naletilić & Martinović* Appeal Judgement, para. 26; *Cyangugu* Appeal Judgement, paras 28 & 30.

[39] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement of 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 61.

[40] In this connection, the Appeals Chamber recalls that a Chamber can find the particular evidence inadmissible to prove a material fact of which the accused was not on notice, but admissible with respect to other allegations sufficiently pleaded: *Arsène Shalom Ntahobali & Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-97-21-AR73, "Decision of the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible'", 2 July 2004, para. 15; *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73, "Decision on Pauline Nyiramasuhuko's Request for Reconsideration", 27 September 2004, para. 12; *Muvunyi* Decision, para. 55 ("If evidence is relevant to a charge in the current indictment and is probative of that charge, then subject to any other ground for exclusion that may be advanced by the Defence, that evidence should be admissible.").

[41] *Kupreškić et al.* Appeal Judgement, para. 92; *Kvočka et al.* Appeal Judgement, para. 31; *Naletilić & Martinović* Appeal Judgement, para. 25.

[42] For instance, in certain circumstances, the Trial Chamber could allow the Defence to recall witnesses for cross-examination after the Defence has completed further investigations: *see The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment", 19 December 2003 ("*Karemera* Decision"), para. 28.

paragraph 10 in the Impugned Decision.[43] Accordingly, the Appeals Chamber is not persuaded that the Appellant has shown that the Trial Chamber erred simply by failing to comprehensively mention all of the relevant jurisprudence of the Appeals Chamber at paragraph 10 of the Impugned Decision. With this in mind, the Appeals Chamber now considers the specific arguments raised by the Appellant.

(a) First Error Alleged

20. The Appellant submits that the Trial Chamber failed to take into account the exceptional nature of "curing" the indictment, essentially transforming the exception into the rule.

21. The ICTY Appeals Chamber has explained that

> in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[44]

Thus, "curing" is likely to occur only in a limited number of cases. In this connection, the Appeals Chamber is not convinced by the Trial Chamber's suggestion, at paragraph 4 of the Impugned Decision, that a distinction should be made between cases "where the Prosecution knows of material facts at the time the indictment is filed, but fails to plead them" (in which cases curing would be exceptional) and cases where the material facts "are subsequently discovered" (in which cases curing would not be characterized as exceptional). Indeed, the risk of prejudice to the accused is the same in both types of cases.[45] In both types of cases, the defect in the indictment may be deemed cured only by the provision of timely, clear and consistent information to the accused.

22. This being said, the Appeals Chamber notes that, at paragraphs 2, 3 and 6 of the Impugned Decision, the Trial Chamber referred at length to the jurisprudence of the Appeals Chamber and correctly identified the relevant legal principles in determining whether the defects in the indictment have been cured: the Trial Chamber properly stated that a defect in the indictment can only be deemed cured if the Prosecution has provided timely, clear and consistent information to the accused, which puts him or her in a reasonable position to understand the charges against him or her. Thus, the Appeals Chamber is not persuaded that the error made by the Trial Chamber in paragraph 4 of the Impugned Decision led it to "transform the exception into the rule" or to misapply the relevant legal principles.

[43] *See* Impugned Decision, paras 2-7 and corresponding footnotes
[44] *Kupreškić et al.* Appeal Judgement, para. 114. *See also Cyangugu* Appeal Judgement, para. 114.
[45] The only difference concerns the "level of blame" on the Prosecution: As stated in the *Ntakirutimana* Appeal Judgement (para. 125), "the practice of failing to allege known material facts in an indictment is unacceptable."

23. The Appeals Chamber also emphasizes that, "if the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber *must* consider whether the accused was nevertheless accorded a fair trial."[46] Thus, the mere fact that a Trial Chamber considers in a number of instances, as the Trial Chamber did here, whether defects in the indictment have been cured, is not contrary to the principle that there are a limited number of cases wherein a defective indictment will actually be considered to have been cured.

(b) Second Error Alleged

24. The Appellant also contends that the Trial Chamber failed to consider that the admission of large amounts of evidence outside the indictment could render the trial unfair. In the words of the Appellant:

> even if individual defects in the indictment might be said to be "cured" by disclosure, a vast number of such instances in a single trial would render such a "cure" meaningless, because the sheer volume of evidence outside the indictment, which has the effect of replacing one Prosecution case with a completely different case than that set out in the indictment, makes the trial inherently unfair.
>
> [...] the Trial Chamber thus erred [in] applying a standard which permits the Prosecution to argue a completely different case than that in the indictment, inasmuch as the allegations falling outside the scope of the indictment significantly outnumber those that are actually mentioned therein. To permit those allegations to stand, without formal amendment of the indictment, by only engaging in an incident by incident analysis without taking into account the totality of new evidence, is to allow the Prosecution to utterly transform the indictment by stealth and stages through the trial, so that the Accused can never really know with any assurance exactly what case he has to meet.[47]

25. In support of this argument, the Appellant refers to paragraph 114 of the *Cyangugu* Appeal Judgement. There, the Appeals Chamber expressed its concern as to the extent of the defects in the indictment that the Prosecution argued had been cured by post-indictment submissions. The Appeals Chamber explained that, even if all defects in the indictment had been deemed cured, it would have had to consider whether the extent of the defects in the indictment, in itself, did not lead to an unfair trial.[48]

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[46] *Naletilić & Martinović* Appeal Judgement, para. 26 (emphasis added). *See also Kvočka et al.* Appeal Judgement, para. 33, and *Cyangugu* Appeal Judgement, para. 28.

[47] Interlocutory Appeal, paras 21-22.

[48] *Cyangugu* Appeal Judgement, para. 114:

> La Chambre d'appel doit se montrer préoccupée par la démarche du Procureur dans la présente affaire. Elle ne saurait trop rappeler que l'acte d'accusation, seul instrument de mise en accusation, doit exposer la thèse du Procureur de manière circonstanciée. Si, dans certains cas, un acte d'accusation vicié peut être réputé « purgé », la Chambre d'appel réitère qu'il ne peut exister qu'un nombre limité d'affaires qui entrent dans cette catégorie. Dans le cas d'espèce, la Chambre d'appel est troublée par l'ampleur avec laquelle le Procureur cherche à recourir à cette exception. Même si les arguments du Procureur selon lesquels les Actes d'accusation avaient été purgés de leurs vices s'étaient révélés prospères dans chacun des cas, il aurait malgré tout été du devoir de la

26. The Appeals Chamber agrees that when the indictment suffers from numerous defects, there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions. In particular, the accumulation of a large number of material facts not pled in the indictment reduces the clarity and relevancy of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence. Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially prejudice an accused's right to a fair trial by hindering the preparation of a proper defence. The Appeals Chamber finds that the Trial Chamber failed to do so in the Impugned Decision and therefore, instructs the Trial Chamber to reconsider the Impugned Decision on this basis.

(c) Third Error Alleged

27. The Appellant submits that the Trial Chamber erred in failing to define the degree of specificity required in the indictment, in particular with respect to the modes of liability and the locations where the crimes were committed. As explained above, the Appeals Chamber is not convinced that the Appellant has shown that the Trial Chamber erred by failing to define at paragraph 10 of the Impugned Decision the requisite degree of specificity required in the indictment.[49] The Trial Chamber was aware of the jurisprudence of the Appeals Chamber on this question. The Appeals Chamber does not consider that it is necessary here to repeat at length this jurisprudence.[50] Nevertheless, to address some of the specific arguments of the Appellant on this point, the Appeals Chamber would like to emphasize the following:

> 1-An indictment that fails to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged" may be ambiguous and could be found defective.[51] In particular, it is essential that the indictment specifies on what legal basis of the Statute an individual is being charged (Article 6(1) and/or 6(3));[52]

Chambre d'appel de considérer si l'ampleur des vices identifiés n'aurait pas rendu le procès inéquitable en soi (no official translation available yet, footnote omitted).

[49] *See supra* para. 19.

[50] For more on the specificity required in an indictment, *see Kupreškić et al.* Appeal Judgement, paras 89-90; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement of 17 September 2003 ("*Krnojelac* Appeal Judgement"), paras 132, 138; *Blaškić* Appeal Judgement, paras 210-219; *Kvočka et al.* Appeal Judgement, paras 28-30, 41-42; *Naletilić & Martinović* Appeal Judgement, para. 24; *Ojangugu* Appeal Judgement, paras 23-26.

[51] *Krnojelac* Appeal Judgement, para. 138; *Blaškić* Appeal Judgement, para. 212; *Kvočka et al.* Appeal Judgement, para. 29.

[52] *Krnojelac* Appeal Judgement, para. 138.

2-The location of the crimes alleged to have been committed should be specified in the indictment. However, the degree of specificity required will depend on the nature of the Prosecution's case.[53] As stated in the *Ntakirutimana* Appeal Judgement, "[t]here may well be situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations. In cases concerning physical acts of violence perpetrated by the accused personally, however, location can be very important."[54]

3-Any vagueness or ambiguity in the above respects may be cured in certain cases by the provision of timely, clear and consistent information to the Defence.[55]

4. Alleged Errors in the Statements made in Paragraph 10 of the Impugned Decision

(a) Fourth Error Alleged

28. The Trial Chamber stated that "[w]here a material fact cannot be reasonably related to the Indictment, then it shall be excluded."[56] The Appellant submits that this is an incorrect standard. The Appellant argues that "[a] material fact should be excluded if it is not mentioned in the indictment at all in any concrete form", and that "the failure to mention an accusation *in the indictment* is a defect that can not be remedied."[57]

29. The Appeals Chamber is not convinced by the arguments of the Appellant on this point. The Appeals Chamber first recalls the distinction between counts or charges ("accusations" in French) and "material facts":

> The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts).[58]

It is clear that the omission of a count or charge from the indictment cannot be "cured" by the provision of timely, clear, consistent information.[59] Indeed, since the indictment is the only charging instrument,[60] the addition of counts or charges is possible only through amendment, as set out in Rule 50 of the Rules. However, it is also clear that the omission of a material fact

[53] *See Kupreškić et al.* Appeal Judgement, para. 89; *Krnojelac* Appeal Judgement, para. 132; *Blaškić* Appeal Judgement, paras. 210, 212-213, 216-218; *Kvočka et al.* Appeal Judgement, para. 28; *Naletilić & Martinović* Appeal Judgement, para. 24; *Cyangugu* Appeal Judgement, paras 23-26.
[54] *Ntakirutimana* Appeal Judgement, para. 75.
[55] *See supra* footnote 38.
[56] Impugned Decision, para. 10.
[57] Interlocutory Appeal, para. 25 (emphasis in original), referring to *Cyangugu* Appeal Judgement, para. 32
[58] *Muvunyi* Decision, para. 19.
[59] *Cyangugu* Appeal Judgement, para. 32
[60] *Cyangugu* Appeal Judgement, para. 114.

underpinning a charge in the indictment can, in certain cases, be cured by the provision of timely, clear and consistent information.[61]

30. In this connection, the Appeals Chamber stresses that the possibility of curing the omission of material facts from the indictment is not unlimited. Indeed, the "new material facts" should not lead to a "radical transformation" of the Prosecution's case against the accused.[62] The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges,[63] the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.[64]

31. The Trial Chamber statements in paragraph 10 of the Impugned Decision are in conformity with the principles outlined above. Accordingly, the Appeals Chamber finds that the Appellant has not shown an error on the part of the Trial Chamber.

(b) Fifth Error Alleged

32. The Appellant submits that, by stating that "[m]aterial facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct,"[65] the Trial Chamber "understated the imperative" that material facts which concern the personal actions of the accused must be specifically and clearly pleaded in the indictment.[66]

33. The Appeals Chamber agrees with the Appellant that material facts which concern the personal actions of the accused have to be clearly and specifically pleaded in the indictment.[67] However, the Appeals Chamber does not consider that the Trial Chamber suggested otherwise at paragraph 10 of the Impugned Decision. In addition, the statement at paragraph 10 must be read together with paragraph 5 of the Impugned Decision, where the Trial Chamber stated:

> Allegations of physical perpetration of a criminal act by an accused must appear in an indictment. On the other hand, "less detail may be acceptable if the 'sheer scale of the alleged crimes makes it

[61] *Kupreškić et al.* Appeal Judgement, para. 88; *Kvočka et al.* Appeal Judgement, para. 28; *Naletilić & Martinović* Appeal Judgement, para. 23; *Cyangugu* Appeal Judgement, para. 22.
[62] *See Kupreškić et al.* Appeal Judgement, para. 121; *Ntakirutimana* Appeal Judgement, para. 28.
[63] For examples of new material facts which could support separate charges against an accused, *see Muvunyi* Decision, paras 33 and 35.
[64] *Karemera* Decision, para. 28; *Muvunyi* Decision, para. 22. *See also Kvočka et al.* Appeal Judgement, para. 32.
[65] Impugned Decision, para. 10
[66] Interlocutory Appeal, paras 27-28.
[67] *See Kupreškić et al.* Appeal Judgement, para. 89; *Krnojelac* Appeal Judgement, para. 132; *Niyitegeka* Appeal Judgement, para. 193; *Ntakirutimana* Appeal Judgement, para. 32; *Kvočka et al.* Appeal Judgement, para. 28; *Naletilić & Martinović* Appeal Judgement, para. 24; *Cyangugu* Appeal Judgement, para. 23; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement of 7 July 2006 ("*Gacumbitsi* Appeal Judgement"), para. 49.

> impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'". Many acts attributed to an accused fall on the spectrum between these two extremes. Individual actions of an accused which contribute to crimes will require more specific notice than proof of the crimes themselves, where they are physically committed by others. The specificity of the notice required is proportional to the extent of the Accused's direct involvement.[68]

Accordingly, the Appeals Chamber is not satisfied that the Trial Chamber understated the requirement that personal actions of the accused be clearly and specifically pleaded in the indictment. The above passage from the Impugned Decision clearly shows that the Trial Chamber was aware of the applicable legal principles.

(c) Sixth Error Alleged

34. The Trial Chamber found that notice of a material fact not included in the indictment could be given through a Prosecution motion for the addition of a witness "which was subsequently granted by the Chamber, and which stated the material facts on which the witness would testify."[69] The Appellant contends that this is an error because the addition of a witness cannot "*alter the charges* against the Accused *as already judicially ratified* by the reviewing Judge";[70] if the Prosecution wishes to add new material facts in the charges, it must seek to amend the indictment.[71]

35. The Appeals Chamber reiterates that, while the addition of a charge must necessarily be done through an amendment to the indictment, the omission of material facts from the indictment can in certain circumstances be cured without having to amend the indictment.[72] As to whether notice of a new material fact could be conveyed through a Prosecution motion to add a witness, the Appeals Chamber recalls that, as a general rule:

> Whether the Prosecution cured a defect in the indictment depends, of course, on the nature of the information that the Prosecution provides to the Defence and on whether the information compensates for the indictment's failure to give notice of the charges asserted against the accused. *Kupreškić* considered that adequate notice of material facts might be communicated to the Defence in the Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial. The timing of such communications, the importance of the information to the ability of the accused to prepare his defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant in determining whether subsequent communications make up for the defect in the indictment. As has been previously noted, "mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[73]

In determining whether a defective indictment was cured by timely, clear and consistent information, the Appeals Chamber has looked to the Prosecution pre-trial brief (together with its

[68] References omitted.
[69] Impugned Decision, para. 10.
[70] Interlocutory Appeal, para. 29.
[71] Interlocutory Appeal, para. 29.
[72] *See supra* paras 29-30.
[73] *Niyitegeka* Appeal Judgement, para. 197 (references omitted)

annexes and chart of witnesses)[74] or the Prosecution's opening statement.[75] However, the Appeals Chamber never suggested that defects in the indictment could only be cured through the Prosecution pre-trial brief or its opening statement. The Appeals Chamber cannot exclude the possibility that a defect in the indictment could be cured through a Prosecution motion for addition of a witness, provided any possible prejudice to the Defence was alleviated by, for example, an adjournment to allow the Defence time to prepare for cross-examination of the witness. Accordingly, the Appeals Chamber is not convinced that the Trial Chamber erred in stating that although disclosure of witness statements or potential exhibits are generally insufficient to put an accused on reasonable notice, a defect in the indictment could be cured by the information conveyed in a Prosecution motion to add a witness, which clearly states the material facts on which the witness would testify.

(d) Seventh Error Alleged

36. The Trial Chamber found that when a new material fact is discovered at trial, the fairness of the proceedings against the accused may be preserved by granting a lengthy adjournment for the express purpose of allowing the Defence to meet the newly discovered material fact.[76] The Appellant submits that this is in error because simply granting an adjournment does not permit the Defence to know what use will be made of the newly discovered evidence; it is only once the Prosecution seeks an amendment of the indictment that the Defence will have the opportunity to respond and argue the issue.[77]

37. In *Kupreškić*, the Appeals Chamber emphasized that

> the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds. There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.[78]

Thus, when a new material fact is discovered at trial, the Trial Chamber should determine which measure(s) are required in the circumstances of the case to preserve the fairness of the proceedings. If the Trial Chamber decides that an adjournment is warranted, it could also order the Prosecution to

[74] *Kupreškić et al.* Appeal Judgement, para. 117; *Ntakirutimana* Appeal Judgement, paras 46-48; *Kvočka et al.* Appeal Judgement, paras 43-45 ; *Naletilić & Martinović* Appeal Judgement, paras 27, 45; *Gacumbitsi* Appeal Judgement, paras 57-58.
[75] *Kupreškić et al.* Appeal Judgement, para. 118; *Kordić & Čerkez* Appeal Judgement, para. 169; *Kvočka et al.* Appeal Judgement, paras 46-47.
[76] Impugned Decision, para. 10.
[77] Interlocutory Appeal, para. 30.

amend the indictment for greater clarity, but this might not be required in every case. Accordingly, the Appeals Chamber does not find that the Trial Chamber erred in stating at paragraph 10 of the Impugned Decision that the accused was put on reasonable notice of material facts omitted from the indictment where "a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts."

IV. TIMELINESS OF OBJECTIONS TO EVIDENCE FOR LACK OF NOTICE (PARAGRAPH 7 OF THE IMPUGNED DECISION)

38. In paragraph 7 of the Impugned Decision, the Trial Chamber held that, when evidence is adduced that purportedly goes beyond the allegations in the indictment, the Defence must raise an objection "contemporaneously with the introduction of the evidence"; if the Defence raises its objection later during trial, it bears the burden of proving that its ability to prepare its case was materially impaired.[79] The Appellant submits that this is erroneous.

39. At the outset, the Appeals Chamber notes that the Parties made several arguments relating not to the statements made in paragraph 7 of the Impugned Decision but rather to their concrete application.[80] This goes beyond the scope of the certification, and these arguments will not be considered.

A. Submissions of the Parties

40. In the Appellant's view, the Trial Chamber considered, erroneously, that "nothing less than a contemporaneous objection, at or very near the time the impugned evidence is offered is a sufficiently timely form of objection."[81] The Appellant submits that the recent jurisprudence of the Appeals Chamber shows that pre-trial objections, objections in Rule 98*bis* proceedings, and even objections in closing arguments, when taken together, are sufficient to maintain the burden of proof on the Prosecutor to show lack of prejudice to the Defence.[82] In fact, argues the Appellant, it may not always be possible to object to the evidence at the time it is adduced since the purpose in

[78] *Kupreškić et al.* Appeal Judgement, para. 92. *See also Niyitegeka* Appeal Judgement, para. 194; *Blaškić* Appeal Judgement, para. 220; *Nahimana* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, paras 30-31; *Naletilić & Martinović* Appeal Judgement, para. 25; *Cyangugu* Appeal Judgement, para. 27.
[79] Impugned Decision, para. 7.
[80] *See, e.g.*, Interlocutory Appeal, para. 35; Response, paras 20-21; Reply, para. 16.
[81] Interlocutory Appeal, para. 32.
[82] Interlocutory Appeal, paras 33 (1st para. 33 at p. 12), 33 (3rd para. 33 at p. 13), 34, referring to *Naletilić & Martinović* Appeal Judgement, para. 22 and *Gacumbitsi* Appeal Judgement, paras 52-54.

adducing the evidence may become clear only later (for instance, through a motion to amend the indictment or in the Prosecution's closing brief).[83]

41. The Prosecution responds that the statements made in paragraph 7 of the Impugned Decision are consistent with the principles set out in the *Niyitegeka* Appeal Judgement, according to which the Defence must interpose a specific objection at the time the evidence is introduced.[84] The Prosecution submits that blanket objections or generalized claims of lack of notice and prejudice cannot be considered as sufficient and specific.[85] The Prosecution also contends that the determination of whether a timely and appropriate objection has been made is a case-specific exercise, and that the Appellant's reliance on the Appeals Chamber's pronouncements in other cases is thus unhelpful.[86]

B. Analysis

42. In support of its findings at paragraph 7 of the Impugned Decision, the Trial Chamber cited parts of paragraphs 199 and 200 of the *Niyitegeka* Appeal Judgement. It is useful to reproduce the entire discussion in *Niyitegeka*:

> In considering whether a defect in the indictment has been cured by subsequent disclosure, the question arises as to which party has the burden of proof on the matter. Although the Judgement in *Kupreškić* did not address this issue expressly, the Appeals Chamber's discussion indicates that the burden in that case rested with the Prosecution. *Kupreškić* stated that, in the circumstances of that case, a breach of "the substantial safeguards that an indictment is intended to furnish to the accused" raised the presumption "that such a fundamental defect in the … Indictment did indeed cause injustice." The defect could only have been deemed harmless through a demonstration "that [the Accused's] ability to prepare their defence was not materially impaired." *Kupreškić* clearly imposed the duty to make that showing on the Prosecution, since the absence of such a showing led the Appeals Chamber to "uph[o]ld the objections" of the accused.
>
> It is noteworthy, however, that *Kupreškić* specifically mentioned the fact that the accused in that case had made a timely objection before the Trial Chamber to the admission of evidence of the material fact in question. In general, "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party." Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.
>
> The importance of the accused's right to be informed of the charges against him under Article 20(4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the

[83] Interlocutory Appeal, para. 33 (2nd para. 33 at p. 13).
[84] Response, para. 18.
[85] Response, para. 19.
[86] Response, paras 19-20

> burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[87]

43. As the above illustrates, the *Niyitegeka* Appeal Judgement outlined a carefully balanced approach taking into account, on the one hand, the principle that "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of trial, and to raise it only in the event of an adverse finding against that party"[88] and, on the other hand, "the importance of the accused's right to be informed of the charges against him under Article 20(4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial."[89]

44. In *Niyitegeka*, the Appeals Chamber was concerned with the situation of an appellant who had failed to object to the lack of notice at trial, and had raised the issue for the first time on appeal.[90] The present appeal contemplates a different situation: the objection is not raised at the time the evidence is presented, but it is nonetheless raised at the trial stage. This is a crucial difference: the objection is not as late as if it had been raised only on appeal, and there might be more elements militating against a conclusion that the objection was not timely raised. For instance, the objection might not have been raised at the time the evidence was adduced because the purpose for adducing the evidence might have become clear only later.

45. Accordingly, when an objection based on lack of notice is raised at trial (albeit later than at the time the evidence was adduced), the Trial Chamber should determine whether the objection was so untimely as to consider that the burden of proof has shifted from the Prosecution to the Defence in demonstrating whether the accused's ability to defend himself has been materially impaired. In doing so, the Trial Chamber should take into account factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced and whether the Defence has shown that the objection was raised as soon as possible thereafter.

46. In summary, objections based on lack of notice should be specific and timely. The Appeals Chamber agrees with the Prosecution that blanket objections that "the entire indictment is defective" are insufficiently specific.[91] As to timeliness, the objection should be raised at the pre-trial stage (for instance in a motion challenging the indictment) or at the time the evidence of a new

[87] *Niyitegeka* Appeal Judgement, paras 198-200 (footnotes omitted).
[88] *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Reasons for Judgement of 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement"), para. 91.
[89] *Niyitegeka* Appeal Judgement, para. 200.
[90] *See Niyitegeka* Appeal Judgement, paras 199-200, 205-206, 210, 237.

material fact is introduced. However, an objection raised later at trial will not automatically lead to a shift in the burden of proof: the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objection earlier in the trial.

47. The Appeals Chamber finds that the statements made by the Trial Chamber at paragraph 7 of the Impugned Decision must be corrected to the extent explained above. As a consequence, the Trial Chamber should reconsider the Impugned Decision on this basis. This reconsideration will be limited to the instances where the Trial Chamber found that the objection had not been raised at the time the evidence was introduced and therefore concluded that the burden of proof had shifted to the Defence.

V. CONCLUSION

48. The Appeals Chamber finds that even if a Trial Chamber finds that the defects in the indictment have been cured by post-indictment submissions, it should consider whether the extent of the defects in the indictment materially prejudices the accused's right to a fair trial by hindering the preparation of a proper defence. The Appeals Chamber instructs the Trial Chamber to reconsider the Impugned Decision on this basis. In all other respects, the Appeals Chamber is of the view that the Trial Chamber did not err in its articulation of the principles at paragraph 10 of the Impugned Decision. As to paragraph 7 of the Impugned Decision, the Appeals Chamber has outlined the approach that should be taken in deciding whether an objection for lack of notice has been timely raised, and, consequently, who bears the burden of proof on this question. The Appeals Chamber instructs the Trial Chamber to reconsider the Impugned Decision to the extent described above.

VI. DISPOSITION

49 For the foregoing reasons, the Interlocutory Appeal is allowed in part.

Done in English and French, the English text being authoritative

Done this 18th day of September 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

[21] ~~As this falls outside the scope of~~ the appeal, the Appeals Chamber expresses no opinion on the question whether the two motions filed in May and August 2002 by the Ntabakuze Defence constitute sufficiently specific objections.