IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding

Judge Ninian Stephen

Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 27 November 1996

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

**SEPARATE OPINION OF JUDGE STEPHEN
ON PROSECUTION MOTION
FOR PRODUCTION OF DEFENCE WITNESS STATEMENTS**

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Alan Tieger
Ms. Brenda Hollis
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Steven Kay
Mr. Alphons Orie
Ms. Sylvia de Bertodano

The question for decision by this Chamber arises in this way. Early in the cross-examination of a Defence witness by prosecuting counsel, having been told by the witness that he had earlier made a statement to Defence counsel or their representatives and that he had agreed to come to the International Tribunal and give evidence, is the Prosecution then entitled to require the Defence to produce that statement? The Defence claims that the witness statement is subject to legal professional privilege whereas the Prosecution says that it is subject to no such privilege, that, even if it were, that privilege has been waived by the act of the witness in testifying before the Chamber and that the Chamber should require the production of the witness statement.

The witness statement had not been in any way referred to in the witness' evidence in chief nor had anything emerged in cross-examination regarding it other than that, in answer to a question about what the witness had said when he made that statement, which was objected to by Defence counsel but was allowed, the witness said that he had "talked about, how can I put it, the truth and only the truth, how long I have known Du{ko Tadi}".

Neither the Statute of the International Tribunal ("Statute") nor its Rules of Procedure and Evidence ("Rules") deal specifically with this situation, although in argument each party relied upon aspects of both the Statute and the Rules. I will refer to both, and in particular to the Rules, since they do appear to me to be of considerable indirect guidance in resolving the question before us.

As to the Statute, Article 15 (*inter alia*) requires the Judges to adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals and the admission of evidence. Then Article 20 requires that trials be fair and expeditious with full respect for the rights of the accused and by Article 21 an accused is to be entitled to a fair hearing and is not to be compelled to testify against himself.

The Rules deal at some length with "Production of Evidence" in Rules 66 to 70. These particular Rules are principally concerned with but are not limited to pre-trial discovery. *See*, for example, Sub-rules 69(A) and (B) and Sub-rules 70(D), (E), and (F). They impose very different obligations of disclosure on each of the two parties. The Prosecutor is required by Sub-rule 66(A) to disclose to the Defence copies of the material supporting the indictment at the time of its confirmation as well as all prior statements obtained from the accused and from Prosecution witnesses. Sub-rule 67(A)(i) also requires the Prosecutor to notify the Defence of the names of witnesses to be called and Rule 68 requires him to disclose the existence of any exculpatory evidence or evidence that may affect the credibility of Prosecution evidence.

The Defence, in high contrast to the Prosecutor's obligations of disclosure, is not required to make any disclosure whatever, unless it intends to rely on an alibi defence or any special defence. In the present case the Defence relies upon an alibi and accordingly, pursuant to Sub-rule 67(A)(ii)(a), is obliged to and has disclosed the places the accused claims to have been at and the identity of witnesses relied upon to establish his alibi.

The Rules also provide for additional and reciprocal rights of inspection if the Defence requests inspection of "books, documents, photographs and tangible objects in the Prosecutor's custody or control which are material to preparation of the defence or are intended for use as evidence at trial"- Sub-rule 66(B). If such a request is made, the Prosecutor then in turn becomes entitled to inspect a similar but not as extensive a range of material, namely "books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial"- Sub-rule 67(C). The range is not as extensive because it does not extend, as does Sub-rule 66(B), to that which is "material to the preparation" of the Prosecution case.

Rule 70 excludes from disclosure by either party, and notwithstanding Rules 66 and 67, "reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case".

It is to be noted that, with the two exceptions in Sub-rules 66(A) and (B), none of these Rules extends to the disclosure of witness statements. Those two exceptions apply only to the Prosecutor; the exception is specific in Sub-rule 66(A) and it also arises under Sub-rule 66(B) if witness statements in his possession would be "material to the preparation of the defence".

It should be added that, although Sub-rules 66(B) and 67(C) are, like the other Rules relating to the production of evidence, informative as to the general nature of the respective obligations of disclosure of Prosecutor and Defence, they are inapplicable in the present case since the Defence has in this case made no request pursuant to Sub-rule 66(B).

What these passages from the Rules demonstrate is the clear distinction drawn between what the Prosecution must disclose as compared with the Defence which, the reciprocal disclosure provisions apart, will have no disclosure obligation at all unless an alibi or a special defence is sought to be relied upon and then only to a quite limited extent, never involving disclosure of witness statements.

That the Rules draw this important distinction suggests that the requirement of the Statute that trials be fair, the accused having a fair hearing with full respect being paid to his rights, has been interpreted as generally requiring substantial prior disclosure by the Prosecution but none by the accused. This is in accord with the general pattern of procedure in common law, adversarial systems of trial. In those systems not only is it the

Prosecution that throughout the trial carries the burden and has the onus of proving guilt beyond reasonable doubt but, for the trial to be a fair one, the Prosecution must inform the accused of what he is accused and, before trial, of what is the evidence against him. The accused, on the other hand, is under no similar duty of disclosure of evidence, there is no reciprocity of obligation. The accused need not afford the Prosecution any assistance in making out the Prosecution case; he may, if so advised, simply remain mute and require the Prosecution to prove its case.

In the light of these wholly conflicting situations in which each of the parties to a criminal trial at common law finds itself, the effect of the Rules of the International Tribunal dealing with production of evidence is very much what might be expected. It is a consequence of the fact that the proceedings of the International Tribunal are basically adversarial, rather than inquisitorial, in character. How this adversarial nature of the proceedings came to be applied to proceedings in the International Tribunal is described in Virginia Morris and Michael P. Sharf, *An Insider's Guide to the Tribunal* at pp. 158 and 181. A consequence is that the adversarial principle is reflected throughout the Rules, although there do occur some relatively minor departures from that usual common law model.

Mention should also be made of those Rules which deal specifically with evidence.

Rules 89 to 98 contain the International Tribunal's very brief "Rules of Evidence". Sub-rules 89(A) and (B) are very general provisions which are best set out verbatim:

Rule 89

General Provision

> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

The only other at all relevant provision is Rule 97, dealing with lawyer-client privilege. It reads as follows:

Rule 97

Lawyer-Client Privilege

> All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:
>
> (i) the client consents to such disclosure; or
>
> (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

Little of direct relevance to the determination of the present question is to be derived from these three extracts. It is clear from Sub-rule 89(A) that national rules of evidence are not to be binding; however such rules of evidence as prove to be very commonly adopted in adversarial systems will necessarily be of strong persuasive authority when it becomes necessary to determine what should be done in instances not legislated for by the International Tribunal's own Rules, as long as they are otherwise consistent with the International Tribunal's Statute and Rules. The present case is just such an instance.

Sub-rule 89(B) with its reference to "the general principles of law" provides additional support for this approach; where a substantial number of well-recognised legal systems adopt a particular solution to a problem it is appropriate to regard that solution as involving some quite general principle of law such as is referred to in Sub-rule 89(B).

There remains for comment Rule 97. It does not, of course, deal with the present case since it is confined in subject-matter to communications between lawyer and client. Within that area it is broad indeed, not being confined to communications in anticipation of or in the course of litigation. The only guidance that it may offer is in relation to the suggestion that privilege for witness statements is waived once the witness gives evidence; in the case of an accused this is clearly not the case, his communications are "not subject to disclosure at trial" unless privilege is waived.

So much for what may be gleaned from the International Tribunal's Statute and Rules. I have spoken of the very different positions of prosecution and defence in adversarial proceedings and which are reflected in our Rules. As applying to the disclosure of material in the hands of counsel, this is examined by Sopinka J., speaking for the Supreme Court of Canada in *R.v. Stinchcombe* (1991) 68 C.C.C.(3d) 1 at p. 7. Discussing the fundamental difference in adversarial systems of the respective roles of the prosecution and the defence, he says:

> the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

What is now suggested is that this Chamber should rule that once the trial stage is reached and a witness for the Defence gives evidence the position as to disclosure, so clearly established in the Rules, changes and a duty to disclose that witness' prior statement, which forms part of Defence counsel's brief, arises, so that the statement can be called for by the Prosecution and must then be produced.

Quite apart from any question of privilege, it might be thought strange in light of our Rules that witness statements, which the Defence was under no obligation to provide to the Prosecution in advance of trial and which form part of the Defence counsel's brief, should become available to the Prosecution once the witnesses in question give evidence. The care with which the Rules provide for extensive pre-trial witness statement disclosure by the Prosecution yet none by the Defence certainly does not aptly pave the way for such an outcome. If there were, in adversary systems generally, some obligation of disclosure of witness statements of defence witnesses once they give evidence, the case might be otherwise. On the contrary, it appears from the material that has been made available to us that, with the exception of United States Federal Courts, there is in such of the common law systems as we have been referred to a clearly expressed privilege against such disclosure and no suggestion that it is temporary only, ending once a witness gives evidence.

In England it has been long established that legal professional privilege extends to communications between a client's legal adviser and third parties having as their dominant purpose that of preparing for pending or contemplated legal proceedings. In the present case we are concerned with a witness statement obtained after the indictment of the accused and for the purpose of preparation of the defence case and it would accordingly qualify for that privilege. It lies, indeed, at the very heart of the privilege. The English position is discussed at length in Colin Tapper, *Cross & Tapper on Evidence* at p. 485 *et seq*. (8th ed. 1995); in Peter Murphy and Judge Eric Stockdale, *Blackstone's Criminal Practice* at p. 1904 *et seq*. (1994) and in Adrian Keane, *The Modern Law of Evidence* at p. 411 *et seq*. (1989). Nowhere is it suggested that this privilege comes to an end or is waived when the witness in question gives evidence.

In such other countries of the common law world other than the United States as I have been able to refer to the position is substantially the same. *See* in Australia, Andrew Ligertwood, *Australian Evidence*, especially at pp. 208, 217, 227 and 231 and cases there cited (2nd ed.), *Baker v. Campbell* (1983) 153 C.L.R.52 especially at pp. 108, 109, 127 and 129, and *Grant v. Downs* (1976) 135 C.L.R. 674 at pp. 677, 685 and 688, (departing from the English position but only to the extent of requiring the relevant purpose in producing the communication to be the sole, and not merely the dominant, purpose); in Canada, *R v Stinchcombe, supra* and *R v. Peruta* (1992) 78 C.C.C. 3d. 350 where the headnote usefully summarises the position in saying (per Tyndale J.A. and Moisan J. concurring): "While there is a common law duty on the Crown to disclose to the defence copies of all statements in its possession, there is no corresponding duty of disclosure by the defence" and again (per Proulx J.A. and Moisan J. concurring):

> Documents prepared in contemplation of litigation are privileged. Since these statements were requested and obtained in order for counsel to prepare their defence, they were privileged. As well, the Crown had no right to production of the statements. Sections 10 and 11 of the Canada Evidence Act govern the procedure for cross-examination of prior statements but do not give the adverse party the right to obtain the prior statement of the witness he wishes to cross-examine. The discovery of evidence in the possession of the Crown is a constitutional guarantee for the accused, but it does not give a corresponding duty to the defence to divulge evidence in favour of the prosecution. *Id*.

In Malaysia, s. 126 of the Evidence Act, 1950, is specific on the matter; in South Africa, although its law is *sui generis*, incorporating, in consequence of its history, aspects both of the inquisitorial and accusatorial systems, statements of prospective defence witnesses are privileged. *International Encyclopaedia of Laws,* Vol. 2 Suppl. 1 at p. 165 (Roger Blanpain ed. 1993). I have had no access to the position in other Commonwealth countries but would be surprised if they differed substantially from the foregoing.

The Prosecution contention does find support in Rule 26.2 of the United States Federal Rules of Criminal Procedure but, so far as I am aware, nowhere else. Rule 26.2 stems from the decision of the Supreme Court in *United States v. Nobles,* 422 U.S. 225 (U.S. Supreme Ct. 1975) which rejected the notion that criminal discovery is "basically a one-way street" and placed the defence under a similar obligation to that of the Prosecution in relation to disclosure of prior statements of witnesses once a particular defence witness has given evidence. It would seem that "several State Courts" have also adopted this approach. *See* Advisory Committee's Notes on United States Fed. Rule Crim. Proc. 26.2.

As to civil law systems, it is clear that they generally give effect to what English law calls legal professional privilege. An illuminating account of the treatment by continental courts of that privilege, albeit in a very different factual situation from that in the present case, is provided in the Opinion of Sir Gordon Slynn, Advocate General of the European Court of Justice in *A M & S Europe Limited v Commission of the European Communities,* [1982] ECR 1575 ("Advocate General's Opinion"). His Lordship concludes that it is correct to say that the differences of treatment of the privilege by the Courts of the various Community countries are "differences of approach or method (made necessary by their fundamentally different legal systems) rather than differences of result". *Id* at p. 20. In that case the Commission sought (as it proved, unsuccessfully) to place limits on that privilege in the case of communications between lawyer and client discovered in a search of the applicant's premises by officials of the Commission. The issue was confined to such communications and did not extend to witness statements. However it is noteworthy that even the defendant Commission conceded that in Community law one acknowledged facet of the general principle of protection of legal confidence was that "documents written to or by a lawyer which deal with the defence of a client in a procedure which has begun may not be used as evidence and may not be disclosed to anyone" except a person appointed to determine whether documents found in a search in fact answered such a description. *Id*. at p. 33.

Counsel for the accused has informed the Chamber that neither in the courts of the Netherlands nor in other European courts with which he was familiar could production be obtained by the prosecution of statements of defence witnesses in the possession of defence counsel since to do so would be compelling defence counsel to open his files to the prosecution. The only exception would be if the defence lawyer were himself accused of involvement in the crime. The Advocate General's Opinion would seem generally to confirm this submission in the course of his survey of the national laws of each of the Community nations as they bear on privilege made by His Lordship at pp. 36 and 37 of the Advocate General's Opinion, although His Lordship necessarily confines his attention to the particular aspect of the privilege in question in that case, which involved the search for and seizure of communications between lawyer and client. The European Court of Justice in substance accepted the views as to privilege expressed in the Advocate General's Opinion.

The Prosecution placed some reliance upon s. 29 of the Evidence Act 1929 of South Australia and s. 5 of the Criminal Procedure Act 1865 of England, on which it is based. *Cross & Tapper on Evidence, supra*, at pp. 321-323 contains a detailed examination of the purpose and function of the English section which shows it to be irrelevant to the present question. These sections are concerned only with how a prior inconsistent statement by a witness and which is in the possession of cross-examining counsel may be put to that witness in cross-examination. As Tyndale J.A. says in *R. v Peruta, supra*, at p. 8 in dealing with the Quebec

equivalent of these sections: "The section gives a right to cross-examine as to a previous statement in writing; it does not give him [the cross-examining counsel] the right to obtain a written statement in possession of the adverse party". Reliance was also placed upon s. 145 of the Evidence Act 1950 of Malaysia. It too derives from s. 5 of that English legislation and is equally irrelevant to the question before this Chamber.

I have derived particular assistance in resolving this question from the reasons for judgement in *Baker v. Campbell, supra*, the decision of a jurisdiction with which I am familiar. There Gibbs C.J. examines the clear conflict that exists between the privilege here sought by the Defence and what he recognises as the undoubted public interest in all relevant evidence being before a court when it makes its decision. His Honour concludes, after a detailed examination of the case law in common law jurisdictions, that the privilege must prevail, it being a "very great change in long established practice if a party were bound to reveal to the court such things as . . . statements taken from witnesses for the purpose of a pending action, and such a change could not be made without the fullest examination of its possible consequences". *Id*. at p. 66.

In my view nothing in the Rules of the International Tribunal encourages me to make such a change in the present case; on the contrary our Rules strongly support the existing inviolate nature of witness statements in the possession of defence counsel.

Again in *Baker v. Campbell,* Brennan J., at p. 108, cites Lord Simon in *Waugh v. British Railways Board* (1980) A.C. at p. 537, who in turn relies upon what was said by James L.J. in *Anderson v. Bank of British Columbia* (1876) 2 Ch. D 644 at p.656, as follows:

> 'as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief.' The adversary's brief will contain much relevant material; nevertheless, you cannot see it because that would be inconsistent with the adversary forensic process based on legal representation.

The judgements of all members of the Full High Court, both majority and minority, are to the same general effect in relation to this privilege; all that divided them was whether or not the privilege was to be confined to judicial and quasi-judicial proceedings or was of wider application.

For the foregoing reasons, and influenced by the form of the International Tribunal's Rules relating to production of evidence, by the fact that the procedure of the International Tribunal is essentially adversarial in character, following the common law model which would uphold the Defence's claim to privilege, and that even in the very different systems of those countries of the European Union which apply the civil law, the contents of defence counsel's brief are not available for inspection by the prosecution, I uphold the objection of the Defence to the production of the witness statement here in question.

I would only add that in my view the fact that the witness in question has given evidence does not have any effect upon the issue. I have been directed to no authority suggesting that to give evidence involves any waiver of the privilege attaching to the prior statement of a witness created in contemplation of litigation.

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Ninian Stephen

Date: 27 November 1996