International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-94-1-T
Date: 27 November 1996
Original: ENGLISH

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.

DUŠKO TADIĆ A/K/A "DULE"

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

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis

Mr. Alan Tieger
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie

Mr. Steven Kay
Ms. Sylvia de Bertodano

I agree fully with the views expressed by my brother Judge Stephen, for the reasons he has given, in holding that the doctrine of legal professional privilege applies and protects the Defence from disclosing the prior statement it took from Witness W. His analysis of the doctrine in the light of the Statute of the International Tribunal ("the Statute") and the Rules of Procedure and Evidence ("the Rules") renders it superfluous on my part to embark upon a voyage of repetition. I have, however, a few general observations to make in respect of two subsidiary arguments put forward, one by the Defence and the other by the Prosecution. The argument proffered by Defence is that the fundamental principle of criminal procedural law (*lex certa*) prescribes that the Defendant be cognisant of the charges and case against him and also the procedures to be applied before trial commences in order to enable the Defence to decide upon the presentation of its case with certitude as to the rules to be applied. The other argument, the one put forward by the Prosecution, is that the principle of equality of arms requires the Defence in this case to grant the Prosecution access to prior statements made by its witnesses for purposes of impeachment.

First, although the Statute and the Rules incorporate procedures based on both common law and civil law traditions and the Chambers are not bound by national rules of evidence, the approach, as pointed out by Judge Stephen, that the International Tribunal has adopted, and accordingly the conduct of the trial of the accused by this Chamber, has been largely adversarial in nature. Hence, the Defence has organised the preparation of its case on assumptions based upon the adversarial process. One such assumption, which is extant in the vast majority of common law jurisdictions, is that statements of witnesses for the defence taken by the defence in contemplation of litigation are privileged and therefore not subject to disclosure. *See* Colin Tapper, *Cross & Tapper on Evidence* (8th ed. 1995) 470, 483-489; Laws of Malaysia, Evidence Act 1950, s. 126; *Yeo Ah Lee v. Lee Chuan Meow* [1962] 28 M.L.J. 413; *Public Prosecutor v. Haji Kassim* [1971] 2 M.L.J. 115; *Regina v. Peruta*; *Regina v. Brouillette*, 78 C.C.C. 3d 350; 18 W.C.B. (2d) 142 [1992]. Not surprisingly, the Defence assumed that this rule would apply during the conduct of the trial. This assumption was fortified by the Decision of this Trial Chamber in which the Prosecution's request to compel disclosure of statements of Defence witnesses in the pre-trial phase was denied. *See Prosecutor v. Duško Tadić*, Decision on the Prosecution Motion to Compel Disclosure of Statements Taken by the Defence of Witnesses Who Will Testify (No. IT-94-1-T, T.Ch.II, 7

May 1996) ("the Pre-trial Decision"). According to the Defence, had it been intimated in advance that prior statements of its witnesses would have to be disclosed, it would have taken this requirement into consideration in deciding which witnesses to call. I am of the view that because the vast majority of common law systems adopt the position that these documents are privileged and this Trial Chamber, as has been observed, has adopted a largely adversarial approach, especially when discovery was denied in the Pre-trial Decision, it was natural for the Defence to labour under the apprehension that this situation would prevail and make its determination accordingly as to which witnesses to present at trial. In my opinion, an order to produce at this juncture what Counsel has recorded in his brief would be unjust and in discord with the trend of authorities. To quote just two: as stated by James L.J. in the case of *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644 at 656, "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"; and, as felicitously worded by Jackett P. in *Susan Hosiery Ltd. v. M.N.R.* [1969] 2 Ex. C.R. 27 at 33, "a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared". Any ruling other than the one that has been given by the majority of this Trial Chamber would, in my view, be tantamount to allowing the Prosecution to select items out of the Defence's brief.

Further, in my judgement, the consequences for the Defence which would result from a contrary ruling not only involve the possibility of having information thereby published used against its witnesses but also entail the adverse effect on the witnesses themselves of the risk of incrimination and/or loss of confidentiality. The Defence states that on the basis of the Pre-trial Decision it assured potential witnesses that the information they gave was confidential and for the use of the Defence alone. These assurances, according to the Defence, were essential in order to gain the witnesses' confidence and therefore "[i]f any witness had been told that his statement to the Defence given under such conditions would also be supplied to the Prosecution, the Defence has grave doubts as to whether any witnesses would have spoken to them at all". The Defence asserts that a further consequence of an order to produce is that subsequent witnesses are likely to be deterred from testifying. Given the adversarial nature of the proceedings, the Defence would be bound to suffer prejudice if

any intended subsequent witness for the Defence were to refuse to testify because of the possibility that statements they had given to the Defence under the assurance of confidentiality would be disclosed, rendering them vulnerable. In all the circumstances, I consider the Defence was entirely justified in believing that statements given by their witnesses would be privileged and therefore not subject to disclosure to the Prosecution. In any event, I take the view that in a criminal case the Court always has the discretion to exclude even clearly admissible material if such material would operate unfairly against an accused, as in the present case, Rule 89 notwithstanding.

Now I come to the Prosecution's argument that the principle of equality of arms operates in this case to enable the Prosecution to have access to prior statements by the Defence's witnesses. It is clear from the authorities submitted that the principle of equality of arms is inherent in the notion of a fair trial which is prescribed by international conventions. The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side. This is implicit in the statement of P. Van Dijk and G.J.H. van Hoof, in their book *Theory and Practice of the European Convention on Human Rights* (2nd ed. 1990) at 319, that "[f]or criminal cases, where the character of the proceedings already involves a fundamental inequality of the parties, this principle of 'equality of arms' is even more important . . .". An even clearer statement in this regard was made by the European Commission of Human Rights when it stated that it "is of the opinion that what is generally called 'the equality of arms', that is the procedural equality of the accused with the public prosecutor, is an inherent element of a 'fair trial'". *Pataki v. Austria* No. 596/59; *Dunshirn v. Austria* No. 789/60, Reports of the Eur. Comm'n H.R., vol. 6, 1963 Y.B. Eur. Conv. on H.R. 714 at 731-732. Thus the European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution. The European Commission of Human Rights expanded on this concept in *Jespers v. Belgium*, No. 8493, Report of the Eur. Comm'n H.R., 27 D.R. [1981] 61 at 87, where it noted that

> in any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is in order to

> establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor's Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. It is also, and above all, to establish that same equality that the 'rights of the defence'. . . have been instituted.

It then explicitly notes that the equality of arms principle could be based on these "rights of defence" as well as the more general requirement of a fair trial. *Id.*, referring to, *inter alia*, *Pataki and Dunshirn, supra* at 732.

This proposition that the equality of arms principle was intended to elevate the Defence to the level of the Prosecution, as much as possible, in its ability to prepare and present its case is evident in the case law arising out of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the ECHR") and the International Covenant on Civil and Political Rights 1966 ("the ICCPR"), both of which incorporate the principle of equality of arms in the concept of a fair trial. *See* Van Dijk and Van Hoof, *supra* at 319-320; *Delacourt v. Belgium*, 11 Eur. Ct. H.R. (ser. A) [1970] 1 at 15; Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (1993) at 244.

Although the language used in describing the equality of arms principle is often broadly expressed so as to cover both the Prosecution and the Defence, in practice where violations of this principle have been found, it is because the Defence was somehow unfairly disabled from preparing or presenting its case. For example, in *Brandsetter v. Austria*, 211 Eur. Ct. H.R. (ser. A) [1991] 1 at 27, the European Court of Human Rights, although stating that "[t]he right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party", nevertheless found that it was the *Defence's* right to equality of arms that had been violated. Whilst in the *Brandsetter* case the violation was caused by the reliance of the Vienna Court of Appeal in its judgments on the submissions of the Public Prosecutor ("*croquis*") that were not communicated to the accused and the existence of which was not known to him, violations of the right of the

Defence to the equality of arms have been found in varied circumstances. For instance, in *Bönisch v. Austria*, 92 Eur. Ct. H.R. (ser. A) [1985] at 15, the European Court of Human Rights found that there was a violation of Article 6(1) of the ECHR, which mandates a fair trial, when it determined that an expert involved in a proceeding was in effect a witness for the Prosecution rather than an expert and that because the accused had not been given the same opportunity to call such an "expert", the principle of equality of arms had been violated. Further violations of the equality of arms principle under the ECHR were ventilated in, *inter alia*, *Pataki and Dunshirn*, *supra* and the *Jespers* case, *supra*. In both these cases the violations were cited by the accused. Similarly, the principle of equality of arms, included in the concept of a fair trial under the provisions of Article 14(1) of the ICCPR as well as other provisions of Article 14, was found to have been violated in cases brought under Article 5(4) of the Optional Protocol to the ICCPR against Zaire (No. 16/1977), Uruguay (No. 74/1980; 92/1981) and Venezuela (No. 156/1983). In every one of these cases it was implicit that the Defence's right to equality of arms that was found to have been violated resulted from the Government's failure to observe the safeguards enshrined in the provisions of Article 14.

Even treaties which do not contain any express mention of the right to a fair trial or of defendants' rights and address matters far removed from the field of human rights have been interpreted to require administrative authorities to grant defending parties equality in preparing and presenting their cases, in circumstances where sanctions can be imposed, as a result of the inherent inequality of the parties. For example, the Court of First Instance of the European Communities held in 1995 that

> [r]espect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings. The proper observance of that general principle requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission.

Case T-30/91, *Solvay SA v. Commission of the European Communities* [1995] ECR-II 1775, 1802, citing the judgment of the Court of Justice of the European Communities in Case 85/76, *Hoffman-La Roche v. Commission of the European Communities*, [1979] ECR 461.

Thus, "[h]aving regard to the general principle of equality of arms", the Court found that the Commission's non-disclosure of certain documents constituted an infringement of the applicant's right of defence. *Id.* at 1812-1813.

It seems to me from the above authorities that the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused. I am, accordingly, of the view that this principle is inapplicable in the present case to compel the Defence to make available to the Prosecution the prior statement, if any, of Witness W, as it would afford the Prosecution the opportunity to peep into the Defence Brief for any incriminating material in breach of the doctrine of privilege which undoubtedly forbids the Prosecution access to the work product of Defence Counsel.

In the event, because of the adversarial nature of these proceedings, I would rule, for the foregoing reasons and for the reasons stated by Judge Stephen with which I have already expressed my full agreement, that Defence Witness W's statement in whatever form contained in the brief of Defence Counsel is not required to be disclosed to the Prosecution.

Judge Lal C. Vohrah

Date: 27 November 1996