UNITED
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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 AND DISSENTING OPINION OF JUDGE McDONALD 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

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

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I. Introduction

1. The issue presented to the Trial Chamber is whether the Trial Chamber has the power to order the Defence to disclose to the Prosecution a witness's prior statement, taken by or on behalf of the Defence in anticipation of litigation, after the witness has testified. The majority of the Trial Chamber has determined that such statements are protected by a legal professional privilege and thus not subject to disclosure to the Prosecution on order of the Trial Chamber. For the reasons that have been set forth below, I respectfully dissent from the majority Decision. I conclude that the Trial Chamber has both the explicit and inherent power to order the production of the prior witness statement and that the exercise of that power does not violate any rights or privileges of the accused or his legal counsel.

2. The question under consideration arose during the presentation of the Defence's case. After the Defence completed its direct examination of a witness, who pursuant to protective measures granted by the Trial Chamber was referred to by the pseudonym "W", the Prosecution questioned the witness on a prior statement he made several months prior to his appearance in court. The witness testified that while accompanied by an attorney some five or six months ago, he had made a prior statement regarding the accused and the conditions in Kozarac "before the war and during the war". When the Prosecution asked the witness about the content of the statement, the Defence objected on the basis that the statement is protected by "the client professional privilege". In response, the Prosecution asserted that there is no privilege that attaches to such communications and that in any case, once the witness testifies in court, any justification in this regard no longer exists for the witness's credibility is in issue and his prior statements are relevant. *Official Trial Transcript* at pp. 4131-32. The Judges conferred and the Trial Chamber made a provisional decision during the court session overruling the Defence objection. This decision was later withdrawn pending the submission of authorities and oral arguments of the parties on the issue.

3. In support of its request for the prior statement, the Prosecution argues that the Rules of Procedure and Evidence of the International Tribunal ("Rules") empower the Trial Chamber to

order the production of a document during the trial. Although the Prosecution recognises that the Rules provide protection to the work product of an accused and his legal advisors, it finds no basis for concluding that witness statements of one who has already testified are covered by this protection. Nor does the Prosecution agree that its access to the statement is blocked by a privilege or the accused's right to remain silent. The Prosecution asserts that in common law jurisdictions, the court's power to call for the production of documents is well established. Finally, the Prosecution contends that pursuant to the reciprocal discovery provision in the Rules, the Defence would have been compelled to produce witness statements if it had requested similar information from the Prosecution, and therefore this information cannot be considered unequivocally privileged from disclosure.

4. The Defence does not assert that the statements are protected by the lawyer-client privilege articulated in Rule 97. However, the Defence maintains that Sub-rule 70(A) provides for a legal professional privilege which absolutely and under all circumstances prohibits the disclosure of statements of its witnesses. This protection, asserts the Defence, continues even after the witnesses testify at trial. The Defence denies that the reciprocal discovery provision of Sub-rules 66(B) and 67(C) in any way compels it to produce witness statements and notes that in any event, the relevant provision was not triggered in this case. In sum, the Defence argues that (1) the accused's right not to be compelled to testify against himself includes the disclosure of any evidence which might be used to impeach witnesses on his behalf; (2) the legal professional privilege protects from disclosure statements of Defence witnesses, made to Defence representatives in furtherance of its preparation, in all adversarial systems except the United States; (3) the Rules have no provisions specifically allowing this disclosure; (4) the Defence has the right to know the procedures which the Trial Chamber will follow in advance of its preparation of the case and the 7 May 1996 Decision of the Trial Chamber in regard to a similar issue indicated that there would be no such disclosure (*see Prosecutor v. Tadic,* Decision on the Prosecution Motion to Compel Disclosure of Statements Taken by the Defence of Witnesses Who Will Testify (No. IT-94-1-T, Tr. Ch. II, 7 May 1996) (*"Pre-trial Decision"*)); and (5) an order for disclosure would breach the privacy of those who spoke to the Defence under assurances of confidentiality, in violation of Article 8(2) of the European Convention on Human Rights ("ECHR") and Article 17 of the International Convenant on Civil and Political Rights ("ICCPR").

5. The majority of the Trial Chamber agrees with the position of the Defence that the statements are privileged and not subject to disclosure. Finding that neither the Statute of the International Tribunal nor the Rules deal specifically with the issue presented, the majority concludes that because the Prosecution has the burden of proof in criminal cases, the Rules place less onus on the Defence to produce information for the use of the Prosecution. The majority asserts that although our Rules contain a reciprocal discovery provision, the provision indicates that the range of discovery for the Prosecution is not as extensive as that for the Defence and would exclude disclosure of Defence witness statements. Finally, the majority concludes that the Trial Chamber may not order the production of Defence witness statements because the statements are subject to a legal professional privilege, acknowledged by all major common law jurisdictions except the United States, which therefore amounts to a "general principle of law" that the Trial Chamber should recognise pursuant to Sub-rule 89(B). In his separate opinion, Judge Vohrah finds that it would be unfair to hold the Defence subject to rules that it had no reason to anticipate given the adversarial nature of the proceedings and that most countries that have adversarial trials keep witness statements privileged from discovery. He also concludes that the equality of arms concept was created not to allow the Prosecution additional procedural advantages, but to bring the Defence to a level equal to that of the Prosecution given the Prosecution's more extensive resources.

6. I agree with the majority that the Rules do not specifically address the issue presented to the Trial Chamber. However, I find that because the Rules do not recognise a legal privilege prohibiting the disclosure of materials prepared in anticipation of trial, the Trial Chamber may order the production of the statement pursuant to Rule 54 and by virtue of its inherent authority to govern the conduct of the trial after a witness testifies. Although I think it is inappropriate to tally national legal systems' treatment of such evidentiary matters, I have reviewed the systems referred to in the majority Decision, and have found that in those systems, notions about how trials should be conducted are changing. The modern approach, and one embraced by the Rules of the International Tribunal, is to facilitate full disclosure of all relevant facts to enhance the truth-finding process that is at the core of all criminal justice systems. This approach does not contravene the equality of arms principle contained in the ICCPR and the ECHR.

II. APPLICABLE PROVISIONS

7. The Rules were adopted in plenary session of the Judges in February 1994. Although the eleven Judges who participated in the creation of the Rules come from both civil and common law systems, in drafting the Rules they followed the design of the Statute of the International Tribunal which adopts a largely adversarial approach to its procedures. Trials before the International Tribunal are conducted by a Trial Chamber consisting of three Judges, with no provision for jury trials. Therefore, it was considered that there was no need for the Tribunal "to shackle itself to restrictive rules which have developed out of the ancient trial-by-jury system. As at Nuremberg and Tokyo, there are no technical rules for the admissibility of evidence." *The Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, International Criminal Tribunal for the former Yugoslavia 1994 Yearbook at p. 99 (1994) (*"First Annual Report"*).

8. The specific procedure for conducting pre-trial discovery is described in Part V of the Rules, which is entitled *Pre-Trial Proceedings*. Rule 66 governs disclosure by the Prosecution; Rule 67 deals with notification and reciprocal discovery between the Prosecution and the Defence; Rule 68 requires the disclosure by the Prosecutor of exculpatory evidence; and Rule 70 sets forth matters not subject to disclosure. The relevant provisions of these Rules provide:

Rule 66
Disclosure by the Prosecutor

> (A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.
>
> (B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.
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> . . . .

Rule 67
Reciprocal Disclosure

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-rule (ii) below;

(ii) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

. . . .

(C) If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be entitled to inspect any 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.

. . . .

Rule 70
Matters not Subject to Disclosure

(A) Notwithstanding the provisions of 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, are not subject to disclosure or notification under those Rules.

. . . .

These Rules give effect to the principle that the burden of proof in a criminal case rests with the Prosecution and the accused is not compelled to give evidence against himself. However, they also provide for reciprocal discovery if the Defence seeks the additional discovery available under Sub-rule 66(B).

9. Part Six of the Rules governs the evidentiary procedures before the Trial Chambers. The first of these ten rules provides:

Rule 89
General Provisions

(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.
(C) A Chamber may admit any relevant evidence which it deems to have probative value.
(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

Only two privileges are recognised by the Rules. Sub-rule 90(E) provides for a privilege against self-incrimination, and Rule 97, which addresses lawyer-client privilege, holds:

> 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.

Finally, in general terms, the Trial Chamber's inherent power to govern the conduct of proceedings is explicitly recognised in Rule 54, which provides that "[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". Rule 98 supplements this power, authorising the Trial Chamber to "order either party to produce additional evidence" and to "summon witnesses and order their attendance".

10. These Rules are well suited for an international tribunal which is called upon to try persons charged with the commission of serious violations of international humanitarian law whose subject-matter jurisdiction is not founded in national laws but rather is based in international conventional and customary law. They provide the Judges with the flexibility to conduct the trial proceedings in a way that transcends the vagarious rules of some national systems, enabling the Judges to discharge their responsibility by reaching a judgement with the benefit of all relevant facts.

III. DISCUSSION

A. Selected Common Law Jurisdictions

11. The majority finds that the Rules do not address the issue under consideration and that the Trial Chamber should recognise a legal professional privilege against the production of Defence witness statements because "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 Rule 89(B)". *Separate Opinion of Judge Stephen* at p. 6. Judge Stephen in his separate opinion cites Canada, England, Australia, Malaysia and South Africa as examples of national legal systems that offer a solution to the issue presented to the Trial Chamber. The majority notes that only in the United States would the Defence be required to disclose witness statements it had acquired in its preparation for trial. My esteemed colleagues are from Australia and Malaysia; I am from the United States. Therefore, it is with a great deal of reluctance that I challenge the applicability of their national systems to this issue. However, because the Rules of the International Tribunal permit reciprocal discovery of materials considered to be privileged in the national systems upon which the majority relies, these systems are inapposite since the very foundation of those procedures rests on a privilege that the International Tribunal explicitly does not recognise. Thus, although reliance on the evidentiary practices of our own national systems is natural, it should not be done when doing so would invalidate the very Rules of the International Tribunal. A review of these

national systems is helpful to determine their relevance to the issue presented to the Trial Chamber.

1. England

12. In England, the legal professional privilege consists of two branches: the legal advice privilege and the litigation privilege. The legal advice privilege focuses on confidential communications passing between the legal advisor and client with a view to giving or securing legal advice, and provides that such communications are privileged as far as the client is concerned. However, if there is any claim to protection against compulsory pre-trial disclosure of defence witness statements in England, it is found in the litigation privilege. One well-known commentator states that "while no means identical, this head of privilege resembles that isolated in the United States as 'lawyer's work product', see *Hickman v. Taylor,* 329 U.S. 495 (1946)". Colin Tapper, *Cross & Tapper on Evidence* at p. 483, fn. 8 (8th ed. 1995) ("*Cross & Tapper*"). The explanation of the genesis of this privilege, as well as an acknowledgement that its continued viability is suspect, is so well described by *Cross and Tapper* that I will set out the explanation in its entirety:

> The traditional position at common law was that litigation was conducted in a wholly adversary fashion, with nothing revealed to an opponent except the statement of claim and pleadings. Thereafter, little further disclosure of a party's case took place until witnesses were called to testify to prove the allegations upon which the pleadings were premised. It was axiomatic that law and not evidence was to be pleaded. Inroads were made upon this procedure in the nineteenth century when some incidents of the very different form of trial in Chancery were engrafted on to the old common law system.
>
> It remained the case however that party's 'brief' remained immune from discovery since its revelation would have been completely contrary to the adversarial system of litigation then employed. The strength of this view is encapsulated in the words of James LJ in *Anderson v Bank of British Columbia* that: "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." Thus communications with potential witnesses by lawyer or by client for onward communication to his lawyer, and the lawyer's own documentary preparation for the litigation in prospect remained immune from discovery. Matters have now changed very radically and litigation is conducted to a much greater extent with cards on the table.

Id. at 483-84 (footnotes omitted). This exposition makes it very clear that the once sacrosanct concept of absolute protection of the "lawyer's brief" is quickly becoming an anachronism. Moreover, *Cross and Tapper* declares that "[s]ince there is no property in a witness, the third party is compellable. . . . It is dubious how far the old privilege in respect of witness statements can survive the modern practice of requiring disclosure in advance of trial." *Id.* at p. 474.

13. This statement is given support by virtue of movement in civil cases in the English system toward a policy of reciprocal disclosure. Order 38, Rule 2A of the Rules of the Supreme Court of England and Wales became effective on 1 October 1986 and is applicable to matters in the Chancery Division, the Commercial Court, the Admiralty Court, and those matters that are official referees' business. In relevant part, it provides:

> (2) At any stage in any cause or matter to which this rule applies, the court may, if it thinks fit for the purpose of disposing fairly and expeditiously of the cause or matter and saving costs, direct any party to serve on the other parties, on such terms as the court shall think just, written statements of the oral evidence which the party intends to lead on any issues of fact to be decided at the trial. . . . (7) Where a party fails to comply with a direction given under paragraph (2) he shall not be entitled to adduce evidence to which such direction related without the leave of the court.

This rule also provides that it does not "deprive any party of his right to treat any communication as privileged or make admissible evidence otherwise inadmissible". The Supreme Court Practice 1988 clearly approved of this rule, describing it as

> *an outstanding and far-reaching change* in the machinery of civil justice. . . It embodies a *fundamental innovation in the law* and practice relating to the identity of the intended trial witness of the parties and relating to the confidentiality of their statements or 'proofs' of evidence.

Vol. 1, 328/212A/2, p. 595 (emphasis added). In *Comfort Hotels Ltd. v. Wembley Stadium Ltd., Silkin and Others,* 3 All ER 53 (Chancery Div., 1988), a court specifically considered the question of whether the rule impermissibly infringes on the doctrine of privilege[1]. The court

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[1] In its decision, the court first considered the meaning of a "privilege", then analysed the effect of the rule:

> A privilege operates by way of exception to the normal rules of discovery and evidence under which a party or witness can be compelled to disclose documents or information. It confers on a party or witness a right to refuse to disclose documents or information which fall within the scope of the privilege.

concluded that the privilege preserved by the rule is not infringed by the requirement that the parties serve statements on each other. The judge declared that "the privilege remains intact and the rule merely regulates the practice and procedure of the court relating to the way in which oral evidence may be given"[2]. *Id.* These statements reveal that English courts view this provision for access to prior witness statements as a positive, progressive development that does not affect any litigation privilege of the defence.

14. Despite these progressive civil court rules, it remains true that in English criminal courts, the litigation privilege often protects the lawyer's "brief" and allows him to withhold communications and documentary preparation for litigation. The Defence, supported by two English counsel[3], understandably seeks to apply the criminal court rule to proceedings before the International Tribunal, and contends that Sub-rule 70(A) embraces this privilege. I agree with the majority that this Sub-rule does not apply. I would not, however, import this English rule of privilege at trial. Our Rules have already moved beyond the "adversarial cat-and-mouse" approach that *Cross and Tapper* reports as changing in England. Moreover, litigation in the International Tribunal is conducted "to a much greater extent with cards on the table" than the criminal courts of England. Our rules specifically allow for reciprocal discovery of material that in England would be protected by legal professional privilege in criminal cases. Thus the English criminal procedure is not persuasive authority and its primary importance to the current issue lies in its changing approach toward what it perceives as fair adjudication.

> Ord. 38, r 2A has the effect of empowering the court to make it a condition of a party's ability to lead oral evidence at the trial that he should have given prior notice of such evidence in the form of a written statement served on the other parties. It does not mean that he can be compelled to disclose any document or information. *Anything which he does not wish to disclose he may still keep to himself. It is only if he wants to disclose the information by way of evidence at the trial that he may now be required as a pre-condition to disclose it in written form in advance.* What the rule therefore does is to advance the moment at which a party must examine the information he has gathered for the purposes of the trial and decide what he is going to use and what he is going to withhold.

Id. (emphasis added).

[2] This case was cited with approval in *Youell and Others v. Bland Welch & Co. Ltd. and Others,* 1 WLR 122 (Queen's Bench Div. 1991) and adopted by two judges in the Court of Appeal in *Derby & Co. Ltd. v. Weldon* (No. 9) (unreported) 18 October 1990, Mummery J; The Times, 9 November 1990; Court of Appeal (Civil Division) Transcript No. 878 of 1990.

[3] The Defence also has two lawyers from a civil law system. The Prosecution is represented by counsel from Australia and the United States.

2. Canada

15. In support of their positions, the Defence and the majority rely on the Canadian case of *Stinchcombe v. The Queen (R. v. Stinchcombe)*, [1991] 3 S.C.R. 326 at p. 332-33, a copy of which was provided to the Trial Chamber. Rather than supporting their position, this decision makes apparent the difference in the procedure followed in Canada and that adopted by the International Tribunal. The issue in that case was whether the Crown abrogated its duty to reveal pre-trial a witness statement to the Defence. Writing for the unanimous Supreme Court of Canada, Justice Sopinka discussed production rules in Canadian courts:

> Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. *Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence* [citation omitted].
>
> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. *The suggestion that the duty should be reciprocal may deserve consideration by this court in the future* but is not a valid reason for absolving the Crown of its duty.

Id. (emphasis added). This decision recognises that, as in England, the Canadian concepts of privilege and disclosure have moved toward a more open system in civil proceedings. Moreover, it appears that in criminal cases, a corresponding change may be forthcoming if there were less resistance to reciprocal discovery provisions by defence counsel. Because the Rules of the International Tribunal already have such a reciprocal provision in Sub-rule 67(C), Justice

Sopinka's statements imply that this reciprocity should be extended to cover prior witness statements.

16. A later case relied on both by the Defence and the majority is *R. v. Peruta*, 78 C.C.C. 3d 350 (1992). This case is more directly related to the issue presented to the Trial Chamber, for it discusses the power of a Judge to compel the Defence to disclose its witness statements. Although the court found that the trial court judge improperly granted the Crown access to the defence witnesses' prior statements, this determination was not based a finding that the court did not have power to make such an order. Instead, this decision is a reflection of the fact that Canada still holds that statements and other materials that were collected in anticipation of litigation are privileged for the Defence. I find Justice Proulx's assessment in his separate opinion regarding the inherent power of judges relevant to the presented issue:

> Finally, the trial judge, in the exercise of his discretion and in the superior interest of justice, can allow access to the statement, and even order its production, which can then work in favour of the prosecution. . . . However, I cannot conceive that the power to compel the Crown to produce the statement of a witness is a narrow and isolated power. I conceive it to be but one facet of a wider power to order production that flows from the ability of the Court to control its processes so as to manifestly ensure fundamental fairness and see that the adversarial process is consistent with the interests of justice. Such a power must include the power to order production of the statement of an accused.

This analysis reveals that even when a statement is privileged, the power of the judge is such that it can order the production of the statement. Moreover, as with England, the Rules of the International Tribunal are ahead of the reform movement in Canada and thus Canada's procedural practices should not be applied to the current issue.

3. Australia

17. In Australia, the "legal professional privilege" consists of two privileges that are supported by "quite distinct and separate rationales". Andrew Ligertwood, *Australian Evidence* at p. 209 (2nd ed. 1993). The first, a lawyer-client communications privilege, protects against the disclosure of confidential communications between lawyer and client in the course of giving legal professional advice. The second privilege is a litigation privilege that, according to commentator Andrew Ligertwood, is supported by a strong line of authority that "protects

materials collected by lawyers for the purposes of pursuing adversary litigation". *Id.* at pp. 208-09. This privilege is based on the assumption that an adversary model trial would be undermined if the parties could not take each other by surprise. Ligertwood draws a parallel between this aspect of the legal professional privilege and the work product privilege recognised in the United States legal system first noted in *Hickman v. Taylor*, 329 U.S. 495 (U.S. Sup. Ct. 1947), contending that this type of rule provides incentive to lawyers to seek as much information as possible in preparation for trial. *Id.* at p. 208. Although described as being "quite narrow", this privilege is said to extend to witness statements. *Id.* at p. 217. The treatise goes on to say, however, that this privilege "does not otherwise impinge upon those modern rules of discovery which demand the disclosure of information between parties before trial". *Id.*

18. The majority considers of particular assistance in resolving the issue before the Trial Chamber *Baker v. Campbell*, 153 C.L.R. 52 (1983), and cites a quotation from that case which originated in *Anderson v. Bank of British Colombia,* 2 Ch D 644 at p. 656 (1876):

> As you have no right to see your adversary's brief, you have no right to that which comes into existence merely as the material for that 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.

However, because *Baker v. Campbell* relies on the existence of a legal professional privilege that is rejected by the Rules of the International Tribunal, it offers no solution to the issue presented to the Trial Chamber. The Rules of the International Tribunal allow for reciprocal discovery of the "adversary's brief". Therefore, this century-old statement bears little relevance to the current issue.

Baker v. Campbell is also distinguishable on the facts. It involved a challenge to the seizure of documents in a lawyer's office, some of which were prepared in anticipation of litigation on behalf of its client. The court found that the seizure violated the legal professional privilege. In this case, if the Trial Chamber were to order the disclosure of a defence witness's prior statement after the witness testifies, that would not constitute a seizure but would only be conditioning the right of the Defence to call witnesses on compliance with disclosure of the relevant parts of the statement after that witness testifies, for cross-examination purposes. Such an order keeps the decision regarding disclosure within the

hands of defence counsel because it can decide not to call a witness whose statement he does not want exposed. In *Baker v. Campbell,* the attorney had no choice - his office was searched and the materials seized pursuant to a search warrant. Finally, Chief Justice Gibbs, in his dissenting opinion, makes an important observation. He notes that he is "strengthened in his view by the consideration that the privilege is in conflict with another principle of equal importance, namely, that *all evidence which arrives at . . . the truth should be available for presentation to the court . . . .*" *Id.* By this statement, the Chief Justice of the High Court of Australia reveals his predisposition toward the production of all relevant evidence that will aid the court in arriving at the truth. This concept lies at the heart of my decision.

4. Malaysia

19. In Malaysia a privilege is recognised in Rule 126, the Laws of Malaysia, Act 56, Evidence Act, 1950 (rev 1971). It provides:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment . . .
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

This Rule, while focusing on the lawyer-client relationship, includes a prohibition against disclosure of any communication or documents that the attorney comes into possession of during the course of his employment. It is more expansive than the lawyer-client privilege recognised by the International Tribunal in Rule 97 and broader than a litigation privilege that is limited to documents prepared in anticipation of litigation.

20. Notwithstanding Rule 126, once a person testifies as a witness, he may be compelled to disclose any confidential communication between him and his lawyer. Rule 129 of the Malaysia Evidence Act provides:

> No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser *unless he offers himself as a witness, in which case*

> *he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.*

(Emphasis added.) The privilege recognised by Rule 129 seemingly is considered to have been waived or at least not subject to protection once the witness testifies. This rule demonstrates that privilege notwithstanding, once a witness offers himself to the court, the court's power to control the conduct of the proceedings and obtain all relevant facts supersedes any privilege he would have had if he had not offered himself as a witness.

5. South Africa

21. Like most common law jurisdictions, South Africa jurisprudence holds all confidential communications between an accused and his legal counsel made for the purpose of giving or obtaining legal advice subject to a lawyer-client privilege. The South African "witness statement privilege" doctrine holds that written statements acquired by the police from possible witnesses are privileged until after the completion of the trial. *See, e.g., Ex parte Minister of Justice: In re S v. Wagner,* (4) SA 507(A) (1965); *Zweni v. Minister of Law and Order,* (1) 1991 (4) SA 166 (W). Because it is the prosecutor's privilege, he can waive it; indeed, he *must* waive it and give the defence the written statement if it contains a serious inconsistency from the witness's oral testimony. *Van den Berg v. Streeklanddros, Van der Bijlpark,* (1985) (3) SA 960 (T); *S v. Kamte*, 1992 (1) SACR 677 (A). Similarly, statements of prospective defence witnesses are also privileged when obtained by the defence. *See* Kluwer, International Encyclopaedia of Laws, Vol. 2, ¶ 484 (Supp. 1 Dec. 1993) (*citing* S.J. van Niekerk, S.E. van der Merwe and A.J. van Wyk, *Privilegies in die Bewysreg* at pp. 222-23 (Butterworths, Durban 1984)).

22. The majority finds the South Africa procedure to be *sui generis* and certainly not dispositive of our issue. However, South Africa's recognition of a privilege in police statements used by the prosecution, while providing a duty to disclose to the defence inconsistent statements, demonstrates that privilege cannot be used to shield access to evidence which bears on the credibility of a witness.

6. United States

23. I have already discussed the manner in which those national systems that the majority considers persuasive hold as privileged materials of the Defence collected in anticipation of litigation. Since the Rules of the International Tribunal, to the contrary, do not recognise this privilege, those national systems' treatment of the issue presented to the Trial Chamber is not persuasive authority. In contrast, the United States rules, like those of the International Tribunal, do not regard all materials created in anticipation of litigation as privileged and not subject to discovery. Therefore, I will refer to various rules of criminal procedure governing proceedings before the Federal Courts in the United States, not because they are from the national system from which I come, but because they are in important respects identical to the Rules of the International Tribunal. In this section, I will discuss the United States' approach to the work product doctrine and rules allowing reciprocal discovery and the production of witness statements by the Defence after a witness testifies. Here I find support for the disposition of the issue presented to the Trial Chamber because of the important similarities between such United States rules and those of the International Tribunal.

24. In the United States, materials gathered in anticipation of litigation are not protected by a legal professional privilege. These materials, considered the work product of the attorney, are largely subject to disclosure under appropriate circumstances. This work product immunity was first recognised in United States jurisprudence in *Hickman v. Taylor*, 329 U.S. 495 (U.S. Sup. Ct. 1947), where the United States Supreme Court determined that materials prepared "with an eye towards litigation" were not freely discoverable without some showing of necessity. *Id.* at p. 511. A "certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," was balanced against the societal interests in ensuring that parties obtained "mutual knowledge of all the relevant facts gathered". *Id.* at pp. 507, 510-511.

25. Subsequent cases have confirmed that the work product principle is not a privilege, although it is often confused with one. Instead, it is more akin to a privileged immunity from discovery, simply requiring the adverse party to show very good cause before gaining access to these types of items. *See, e.g., E.I. Du Pont De Nemours & Co. v. Phillips Petrol. Co.,* 24 F.R.

D. 416 (Fed. Dist. Ct. Del. 1959); *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (Fed. Dist. Ct. Pa. 1962). As one commentator noted,

> the 'work product" protection is not so absolute that disclosure can never be justified, since, unlike the case of a trade secret, erroneous disclosure of 'work products' does not make almost certain the immediate destruction of a protected property right; the interest protected is not only qualified but intangible and difficult to relate to immediate harm. The protection given to an attorney's "work product" is therefore a qualified privilege or immunity.

Jeffrey F. Ghent, *Annotation: Development, Since* Hickman v. Taylor, *of Attorney's "Work Product" Doctrine,* 35 ALR 3d 412 (1995) at § 25 (footnotes omitted). Thus, if there is good cause or other justification for discovery, a court may waive the qualified immunity of work product from disclosure. *See also Bifferato v. States Marine Corp.*, 11 F.R.D. 44 (U.S. Dist. Ct. NY 1951). This doctrine was extended to criminal cases in the United States Supreme Court decision in *United States v. Nobles,* 422 U.S. 225 (U.S. Sup. Ct. 1975).

26. In *Nobles,* a defence counsel attempted to impeach the two key prosecution witnesses by examining his investigator regarding statements the investigator had previously obtained from the witnesses and which he had compiled into a report. The trial judge ordered the defence counsel to produce the relevant portions of the report for the use of the prosecution in its cross-examination. The defence refused, and the trial judge consequently refused to allow the investigator to testify. On review, the appellate court found that the ruling was in error, because a constitutional privilege against self-incrimination and Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 16 prohibited the disclosure. When this decision was appealed, the United States Supreme Court rejected this reasoning and agreed with the procedure followed by the trial court judge.

27. In regard to the findings of the appellate court, the Supreme Court found that the privilege against self-incrimination is personal to the defendant and does not extend to the statements or testimony of third parties, because the witnesses, as third parties, were available to both parties. *Id.* at pp. 233-34. The court found that Fed. R. Crim. P. 16, the pre-trial rule similar to the International Tribunal's Sub-rules 66(B), 67(C) and 70(A), addresses only pre-trial discovery and does not constrain in any way the trial court's broad discretion to rule on evidentiary issues during trial and that the appellate court erred in extending the rule to the trial

context. *Id.* at pp. 234-236. The court declared that although courts rely on the adversary system to develop "relevant facts on which a determination of guilt or innocence can be made", "the judiciary is not limited to the role of a referee or supervisor. Its compulsory processes stand available to require the presentation of evidence in court". *Id.* at 230 (*citing United States v. Nixon*, 418 U.S. 683, 709 (U.S. Sup. Ct. 1974) (other citations omitted)). The court also noted that several of its past decisions recognised the federal judiciary's inherent power to require the prosecution to produce the previously recorded statements of its witnesses so that the defence may get the full benefit of cross-examination and the truth-finding process may be enhanced. *See, e.g., Jencks v. United States*, 353 U.S. 657 (U.S. Sup. Ct. 1957); *Gordon v. United States*, 344 U.S. 414 (U.S. Sup. Ct. 1953); *Goldman v. United States*, 316 U.S. 129 (U.S. Sup. Ct. 1942); *Palermo v. United States*, 360 U.S. 343, 361 (U.S. Sup. Ct. 1959). The court saw no reason for a blanket prohibition against the prosecution calling upon that same power for the production of witness statements.

28. Although the majority in *Nobles* treated witness statements as privileged, it found that this privilege was waived because the witness used the report while testifying for the defence. The concurring justices, however, found that the work product doctrine was not a privilege but merely a limitation on pre-trial discovery. They noted that "the injury to the factfinding process is far greater where a rule keeps evidence from the factfinder than when it simply keeps advance disclosure of evidence from a party or keeps him from leads to evidence developed by his adversary and which he is just as well able to find himself." *Id.* at 247-48. In addition, because one of the reasons for disallowing the production of witness statements pre-trial is to avoid the abuse by a party unwilling to do his own work, limiting the disclosure to after a witness testifies would not have a negative effect because the prior inconsistent statements in the hands of an adversary are unique and cannot be obtained through other means, and should thus in the proper circumstances be disclosed. *Id.*

29. The holding of *Nobles* regarding access to prior witness statements was codified in the United States Federal Rule of Criminal Procedure 26.2, which provides in relevant part:

Rule 26.2. Production of Witness Statements

> **(a) Motion for Production.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or

> the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

This rule served as a corollary to Title 18 U.S.C. § 3500, entitled *Demands for production of statements and reports of witnesses*, which was initially enacted prior to the *Nobles* decision. It provides in relevant part as follows:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

Notably, these rules are in force despite the pre-trial provisions protecting internal documents, including witness statements, from disclosure. Fed. R. Crim. P. 16(a)(1)(C) and 16(b)(1)(A), which are contained in the pre-trial section (Arraignment) of the Federal Rules of Criminal Procedure and are nearly identical to Sub-rules 66(B), 67(C) and 70(A) of the International Tribunal, provide for the reciprocal disclosure of documents and tangible objects on request of the defendant. However, Fed. R. Crim. P. 16(a)(2) and 16(b)(2) limit this disclosure as follows:

> **16(a)(2) Governmental Disclosure of Evidence -- Information Not Subject to Disclosure.** . . . this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.
>
> . . . .
>
> **16(b)(2) The Defendant's Disclosure of Evidence -- Information Not Subject to Disclosure.** . . . this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

These rules indicate that different considerations come into play after a witness had testified, and regardless of whether the reciprocal discovery provision of Rule 16(b)(1)(A) was triggered, the

court can order the production of a witness's prior statement for the use of the adverse party. These rules constitute an appropriate balance between the interest an attorney has in not disclosing materials he has gathered in the preparation of his case and the interest the court has in receiving all relevant facts at trial.

B. International Standards

30. As mentioned in Judge Vohrah's separate opinion, international standards of the rights of the accused include certain privileges and procedural guarantees. These include the right to a fair hearing and the accused's guarantee not "to be compelled to testify against himself or to confess guilt". *ICCPR,* Art. 14(1), § 3(g). The commentary to this Article notes that the "most important criterion of a fair trial is the principle of 'equality of arms' between the . . . prosecutor and defendant". Dr. iur. et habil. Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* at p. 246. This commentator further declares that "procedural rights, such as inspection of records or submission of evidence, must be dealt with in a manner equal for both parties." *Id.* This principle is carried out in respect to witnesses:

> The right to call, obtain the attendance of and examine witnesses under the same conditions as the prosecutor is an essential element of "equality of arms" and thus of a fair trial. The right of the accused to obtain the examination of witnesses on his behalf is, however, not absolute. . . [It] is subject to the restriction that this be *"under the same conditions as witnesses against him"* . . . Of principal importance here is that the parties are treated equally with respect to the introduction of evidence by way of interrogation of witnesses.

Id. at p. 261-62 (footnote omitted).

31. The Prosecution has called over 75 witnesses, many of whom have had their prior statements used against them by the Defence in cross-examination. The Defence now contends that it should be able to call witnesses not under the same conditions as witnesses against it, but under different, more favourable conditions. However, although as Judge Vohrah states, many of the decisions revolving around the principle of equality of arms address defendant's rights, the doctrine plainly calls equality for both sides: "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 . . . ." *Jespers v. Belgium*, 27 D.R. 61 Eur. Comm. H.R. Report at ¶ 55.

32. In his separate opinion, Judge Vohrah implies that this difference in treatment advocated by the Defence is warranted in large part based on *Jespers*, which notes that "the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery and considerable technical resources and means of coercion." However, it is not appropriate to compare the resources and powers of the Prosecution of the International Tribunal with that of many national entities: "Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants; it cannot seize evidentiary material, it cannot compel witnesses to give testimony, it cannot search the scenes where crimes have been allegedly committed." *Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia to the General Assembly of the United Nations, 7 November 1995*, International Criminal Tribunal for the former Yugoslavia 1995 Yearbook at p. 312 (1995). The International Tribunal must rely on the co-operation of State authorities and unfortunately, only a few of the Member States of the United Nations have enacted implementing legislation. Most importantly, two of the entities of the former Yugoslavia have refused to fully co-operate with the International Tribunal. *Id.* at p. 313. Thus, the Prosecutor of the International Tribunal does not have all of the advantages of a State, making *Jespers* less persuasive. For these reasons, the international norms as contained in the ICCPR and the ECHR would not be violated by an order for the disclosure of the relevant portions of prior statements of witnesses called by the defence[4].

[4] Moreover, contrary to the argument of the Defence in this case, the prohibition of self-incrimination noted in the ICCPR and in the International Tribunal's Statute, relates only to the accused. The Defence cites *Funke v. France*, A 256-A (1993), where in regard to an identical right articulated in the ECHR, the European Court of Human Rights held that a state infringed on an accused's right to remain silent by attempting to force him to produce incriminating evidence of bank statements. This case does not support the Defence's argument. The statements in that case were actual evidence in the case, not a witness's recitation of the events as he or she saw them. This evidentiary material is therefore not analogous to witness statements and no that case sheds little light on the dispute before the Trial Chamber.

C. Cognisance of Trial Procedures

33. In his separate opinion, Judge Vohrah concludes that the parties should be cognisant of the trial procedures. He finds that because the Trial Chamber did not make known to the Defence the possibility that it would be compelled to disclose its witness statements to the Prosecution, it would be unfair to so decide at this late stage. Judge Vohrah notes that this potential unfairness is exacerbated by the fact that the Trial Chamber denied the Prosecution's initial request, made during the pre-trial stage, for Defence witness statements. Although I agree with my esteemed colleague regarding the obvious value of knowing the procedures of the court which one is practising before, I can not concur with his conclusion that there is any potential unfairness in this case to the Defence.

34. First, the Rules do not indicate that the statements taken by the Defence of witnesses will not be subject to disclosure at any point during trial. The International Tribunal has ten rules of evidence which are designed only to provide the framework for the conduct of the proceedings. Certainly our Rules could not anticipate every trial procedure that litigants from a variety of countries may expect to utilise and the International Tribunal did not establish hyper-technical detailed rules typical of a jury system to cover every such possibility. In civil law systems technical rules are not available, and all evidence that aids in the search for truth is allowed. Our Rules provide the Judges with the power to review all relevant evidence, and when necessary, to make further rulings to aid in the adjudication before the Trial Chamber. Because of the absence of specific rules, the Trial Chamber has made rulings which it considered would best facilitate the process. For example, although there is no specific provision in Rule 85 for the submission of a motion to dismiss at the close of the Prosecution's case in chief, the Defence filed such a motion and, over the Prosecution's objection, the Trial Chamber allowed the submission. Consideration of such a motion is inherent in the Trial Chamber's power to control the conduct of the proceedings. In addition, throughout the trial, the Trial Chamber has reviewed objections challenging testimony for lacking a foundation, being hearsay, and being beyond the scope of direct examination. The Trial Chamber has done so without reference to a specific provision in our Rules, but has been guided by the overarching standard set forth in Sub-rule 89(C) that it "may admit any relevant evidence which it deems to have probative value". Ordering the production of prior witness statements after the witness statements likewise fits within this

inherent power. Indeed, Rule 98 gives the Judges of the International Tribunal more power than exists in common law systems by permitting them to order a party to produce additional evidence. Because the Rules do not extend an unequivocal privilege in the materials that a party intends to use as evidence at trial, the Defence was on notice that the legal professional privilege is not recognised by the Rules.

35. Second, the *Pre-Trial Decision* denying the Prosecution's request for Defence witness statements does not provide a foundation for the Defence's argument of reliance. Prior to the commencement of the trial, the Prosecution filed a motion requesting that it be provided with all prior statements of the Defence witnesses. The Prosecution contended that it had reached an agreement with Defence Counsel to exchange statements of witnesses it intended to call at trial. In its written response to that motion, the Defence did not deny the existence of any agreement but contended that its witness statements were protected by a legal professional privilege. That motion was denied by the Trial Chamber. In coming to that Decision, the Trial Chamber considered "that the Prosecution has not presented any specific reason in support of its motion" and that the Rules "contain no explicit provision relating to the disclosure of witness statements by the Defence". Because that Decision relates solely to pre-trial discovery, it in no way limits the power of the Trial Chamber to require the production of a prior statement after the witness testifies at trial. At this point, the production of the statement is an evidentiary issue and the Trial Chamber's disposition of an issue regarding pre-trial discovery is not binding.

D. Violation of Confidentiality and Claims of Future Impediment to Witnesses

36. The Defence further contends that an Order by the Trial Chamber compelling it to produce for the use of the Prosecution the prior statement of a Defence witness would violate the Defence's pledge to its witnesses that it would keep their statements confidential as well as the right to privacy contained in the ECHR as well as the ICCPR. In addition, the Defence argues that an order for production by the Trial Chamber would have an adverse effect on the future ability of Defence counsel to acquire witnesses to testify before the International Tribunal. These arguments have no merit. A witness who offers his testimony has no reasonable expectation that the testimony will not be challenged, and should understand that his credibility

becomes an issue when he testifies. Accordingly, there is no basis for a determination that disclosure of the relevant portions of a prior witness statement violates a fundamental freedom as expressed in the ECHR and ICCPR. Any assurances to the contrary made by Defence counsel with no basis in fact should not be enforced by the Trial Chamber.

37. Moreover, there is no basis for a determination that revealing the portion of prior witness statements that contain facts discussed by the witness during examination would hinder defence access to witnesses in the future. In most instances, and certainly in the current situation before the Trial Chamber, only those portions of the statement that relate to testimony given by the witness would be subject to disclosure. As in the United States Fed. R. Crim. P. 26.2, those portions that do not relate to this subject matter of the witnesses' testimony may be excised. Further, Rule 90(E) allows a witness to object to making a statement which might tend to incriminate him. The Trial Chamber would give effect to that right whether it relates to testimony given for the first time before the Trial Chamber or contained in prior statements.

38. The Prosecution's witnesses have been subject to cross-examination on their prior statements relating to their testimony. While the Trial Chamber has no evidence of the effect this had on the Prosecution's ability to get witnesses, indications are that it had little effect given that over the course of the trial, the Prosecution called over 75 witnesses. Many witnesses understandably are reluctant to testify. The International Tribunal has responded to this by extending protective measures to witnesses for both parties. These measures have included the granting of pseudonyms, anonymity, video-conferencing, and closed sessions. In establishing these measures, the International Tribunal has kept in mind that this reluctance must be balanced with the Judges' need to receive truthful and complete testimony. The use of prior inconsistent statements for cross-examination serves this purpose. Accordingly, the Defence's assertion that an order for production would violate confidentiality and serve as an impediment to future accused warrants no further consideration by the Trial Chamber.

E. The Trial Chamber's Authority to Order Production

39. Although the Rules follow a largely adversarial approach to procedure, they specifically give the Chambers a significant role in the search for all relevant facts on which to base their judgements. They do this in several ways. First they do not bind the Judge to the hyper-technical rules typical of so many national systems. *First Annual Report* at p. 99. Second, Rule 98 authorises the Trial Chamber to order the production of additional evidence, and Rule 115 allows the Appeals Chamber to receive additional evidence that was not available at trial. Indeed, the search for truth is so paramount that after the proceedings before a Trial Chamber or the Appeals Chamber have been concluded, Rule 119 authorises the parties to file a motion with that Chamber to review its judgement if a new fact has been discovered which was not known to the moving party at the time of the proceeding. Finally, Rule 54 explicitly gives effect to the inherent power of the Chambers to control the conduct of their proceedings by authorising the issuance of such orders as may be necessary for the preparation or conduct of trial.

40. Under the Rules, materials collected in anticipation of litigation before the International Tribunal are protected by a work-product doctrine emanating from the United States that allows disclosure upon a showing of good cause. If the materials were protected by the legal professional privilege recognised in England, Canada and Australia, they would never be available to the Prosecution. However, Sub-rule 67(C) requires their disclosure if the Defence requests similar documents under Sub-rule 66(B). These reciprocal discovery provisions are almost identical with the United States Federal Rules of Criminal Procedure: Sub-rule 66(B) of the International Tribunal tracks Rule 16(a)(1)(c) of the United States, and the reciprocal obligation on the defendant to disclose pre-trial in Rule 16(b)(1)(A) of the Untied States is virtually identical with that found in Sub-rule 67(C) of our Rules. I reference these Rules not because they are dispositive of the issue presented to the Trial Chamber, but because they reveal the validity of the report in the "Insider's Guide" that the Judges chose to include not a legal professional privilege, but only the two most widely recognised privileges; that against self-incrimination (Sub-rule 90(E)) and the lawyer-client privilege (Rule 97). *See* Virginia Morris and Michael P. Scharf, *An Insider's Guide to The International Criminal Tribunal for the Former Yugoslavia ("Insider's Guide")*, Vol. 1 at p. 267 (1995). Sub-rule 70(A) may be read as including Defence witness statements as "internal documents". This sub-rule is very similar

to Rules 16(a)(2) and 16(b)(2) of the United States which protect internal documents and statements of the prosecution and the defence from pre-trial disclosure. Yet Rule 26.2 of the United States allows a Court to order the production of a prior statement of any witness after the witness testifies for use by the opposing party on cross-examination. Similarly, the Trial Chamber should exercise its power under Rule 54 to order the production of the witness statements.

41. The Prosecution contends that witness statements cease to be internal when the Defence makes a decision to call a witness and that certainly once the witness testifies the statement is no longer internal and the Defence waives any protection it has under Sub-rule 70(A). Although Sub-rule 66(A) may seem incongruous to Sub-rule 70(A), such a reading would harmonise the obligations of the Prosecutor under Sub-rule 66(A) with the protection afforded by Sub-rule 70(A), for once the Prosecution discloses the statements to the Judge for confirmation of the indictment, the statements cease to be internal documents and they are no longer afforded the protection of Sub-rule 70(A).

42. Further, although such statements may be protected pre-trial by Sub-rule 70(A), this protection does not rise to the level of a legal professional privilege, for no such privilege is recognised by our Rules. Instead, the statements may only be said to be protected by the work-product doctrine, and that protection vanishes when the witness testifies. This determination is based on the assumption that the aim of the work product doctrine is privacy, and when that privacy ceases to exist, the privilege from disclosure is no longer necessary. Thus, many United States courts have held that this doctrine only bars pre-trial discovery. *See, e.g., Dougherty v. Gellenthin,* 99 N.J. Super. 283, 239 A.2d 280 (1968) (work product protection no longer necessary when need for privacy disappears); *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 275 F. Supp. 146 (Fed. Dist. Ct. PA 1967) (disclosure to third parties destroys work product protection); *United States v. Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461 (Fed. Dist. Ct. Mich. 1954) (documents prepared in anticipation of litigation must presently be part of attorney's work files to retain work product protection benefit); *Shaw v. Wuttke,* 28 Wis. 2d 448, 137 NW2d 649 (Wis. St. Ct. 1965) (after witness takes stand, attorney has had benefit of his work product and protection dissolves); and *State ex rel. State Highway Com. v. Steinkraus,* 76 NM 617, 417 P.2d 431 (New Mex. St. Ct. 1966) (work product protection exists only before

trial)[5]. While in *Nobles*, the court ordered disclosure of the statement because the witness made testimonial use of the statement, the majority did not restrict its holding to such instances, finding that "what constitutes waiver with respect to work-product materials depends of course upon the circumstances." *Nobles,* 422 U.S. at p. 240, fn. 14.

43. Notwithstanding the status of Defense witness statements prior to trial, different considerations obtain at trial. The concurring opinion in *Nobles,* which discusses in greater detail the relationship between a pre-trial protection in witness statements and the power of a court to order their production after the witness testifies, serves as an example. The *Nobles* concurrence reviewed *Hickman v. Taylor,* which first articulated the work product doctrine. Regarding witness statements, the *Nobles* concurrence concluded that *Hickman* denied a request for witness statements because the request fell "outside the arena of discovery", *Nobles,* 422 U.S. at p. 244 (White, J., concurring) (*citing Hickman,* 329 U.S. 495 at p. 510 (1947)), but noted that *Hickman* recognized that "witness statements might be admissible in evidence under some circumstances and might be usable to impeach or corroborate a witness". *Id.* at p. 244. Since *Hickman*, the concurring decision recognized, "the cases and the commentators have uniformly continued to view the 'work product' doctrine solely as a limitation on pre-trial discovery and not as a qualified evidentiary privilege". *Id.* at pp. 246-47. Finally, although out of court statements of witnesses are generally inadmissible hearsay, "such statements become evidence only when the witness testifies at trial, and are then usually impeachment evidence only." *Nobles*, 422 U.S. at 245, fn. 4 (White, J., concurring) (*citing Hickman v. Taylor*, 329 U.S. at 514 (Jackson, J., concurring)). One basic policy reason for the concurring opinion was expressed thus:

> A prior inconsistent statement in the possession of his adversary, however, when sought for evidentiary purposes -- i.e., to impeach the witness after he testifies -- is for that purpose unique. By the same token, the danger perceived in *Hickman* that each party to a case will decline to prepare in hopes of eventually using his adversary's preparation is absent when disclosure will take place only at trial. Indeed, it is very difficult to articulate a reason why statements on the same subject matter as a witness' testimony should not be turned over to an adversary after the witness has testified. The statement will either be consistent with the witness' testimony, in which case it will be useless

[5] The cases listed for this proposition are understandably prior to 1975, the year that *Nobles* was decided by the United States Supreme Court, because subsequent to that decision, in 1979, the Federal Rules of Criminal Procedure were expanded to explicitly cover the disclosure of defence witness statements in Rule 26.2.

> and disclosure will be harmless; or it will be inconsistent and of unquestioned value to the jury.

Id. at p. 248. This discussion is illuminating because it highlights the difference between the protection afforded witness statements pre-trial and the protection accorded during trial. Because our Rules do not recognise a legal professional privilege in Defence witness statements, but only a pre-trial protection as internal documents, the Trial Chamber, pursuant to Rule 54 of our Rules, should order their production after the witness testifies. Although our Rules do not place an obligation on the Defence to provide the Prosecution with its witness statements prior to trial, production of such statements after the witness testifies is consistent with the purpose of our Rules to put the parties "on the same footing" at trial. *First Annual Report* at p. 99-100. Such an order would be "consonant with the spirit of the Statute" as required by Sub-rule 89(B).

44. Likewise, the production of the prior statements of the Defence witnesses after they testify would "best favour a fair determination of the matter". *See* Sub-rule 89(B). The United States Supreme Court in *Nobles* recognised that:

> While the adversary system depends primarily on the parties for the presentation and exploration of relevant facts, the judiciary is not limited to the role of a referee or supervisor. Its compulsory processes stand available to require the presentation of evidence in court or before a grand jury. . . . As we recently observed in *United States v. Nixon,* [418 U.S. 683 (1974)] at 709:
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> > We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on the full disclosure of all the facts, within the framework of the Rules of Evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence either by the Prosecution or by the Defense.

Nobles, 422 U.S. at pp. 230-231.

45. The assessment of the credibility of witnesses is no easy task. Any relevant evidence that relates to the issues should not be denied the Judges of the International Tribunal. The Defence has frequently utilised the statements of Prosecution witnesses to cross-examine those witnesses. This well accepted practice is designed to point out inconsistencies which may have an effect on the credibility of the witness. I see no reason for categorically denying the Prosecution the same opportunity after the Defence has called and elicited testimony from a witness at trial in regard to the matters contained in the witness statement. When a witness speaks to an attorney and makes a statement regarding the events in controversy, his statement becomes a part of the material in anticipation of litigation and his files should be protected against compulsory pre-trial disclosure, absent a reciprocal obligation. However, once the attorney calls the witness in trial, to the extent that the witness discloses the contents of the statement by his testimony, this protection should be considered waived, for he is revealing the content of what may have been a protected communication to the attorney. Several Rules of the International Tribunal emphasise the need to have all relevant facts and, unlike most common law systems, allow the Chambers to even order the production of evidence. The importance of witness testimony is manifest:

> There are reasons to believe that witness testimony may be of particular importance in the trials before the International Tribunal due to the absence of the kind of detailed documentary evidence or "paper trail" that was available in the trial of major war criminals before the Nuremberg Tribunal. . . . Thus, the powers of the International Tribunal in relation to witness testimony may be viewed as the inherent powers of any criminal court or as implied necessary powers of the Trial Chamber under the Statute.

Insider's Guide, Vol. 1 at pp. 264-65.

46. Witnesses who have appeared before the Trial Chamber during this trial have in most instances spoken in Serbo-Croat. The interpretation received necessarily affects the ability of the Trial Chamber to gauge the demeanour of the witness. Prior statements of the witness used in cross-examination are helpful to reveal any inconsistencies that may affect the Trial Chamber's assessment of the credibility of the witness. The use of such prior statements favours a fair determination of the matter, and it is well within the Trial Chamber's authority to order the production of these statements as necessary.

IV. CONCLUSION

47. Prior statements of a witness may offer valuable evidence which could aid the Trial Chamber in assessing the credibility of witnesses and reaching a judgement. I conclude that our Rules give the Trial Chamber the power to order the production of statements of Defence witnesses after they testify, and find that the objections of the Defence are without merit.

48. The right of the accused not to be compelled to testify against himself does not include the disclosure of prior statements of Defence witnesses, for the right to be free from self-incrimination is personal and does not extend to others. Our Rules include only the two most universally recognised privileges - that against self-incrimination and that protecting lawyer-client communication - and do not extend the legal professional privilege to statements of Defence witnesses. Moreover, the absence of a specific provision requiring the disclosure of Defence witness statements does not limit the inherent power of the Trial Chamber to order their production once the witness testifies. Any protection that exists prior to trial under our Rules vanishes when the witness testifies, and the overriding interest in receiving all relevant and probative evidence justifies an order requiring their production.

49. The International Tribunal's ten Rules of Evidence provide the framework for the conduct of the trial and could not anticipate every trial procedure that litigants from a variety of countries may expect to utilise. Throughout this first trial that has been conducted before the International Tribunal, the Trial Chamber, in the absence of explicit Rules, has made rulings which it considers would best facilitate the process. Requiring disclosure of prior statements of a witness after he testifies is supported by considerations that are different than those that obtain at the pre-trial. The *Pre-Trial Decision* denying access to the Defence witness statements prior to trial in no way limits the power of the Trial Chamber to require the production of a prior statement after the witness testifies at trial. A witness who offers his testimony has no reasonable expectation that the testimony will not be challenged. Indeed, his credibility becomes an issue, and any belief that he may have had that a statement would be confidential is unwarranted.

50. I would not import into our Rules the legal professional privilege recognised by some national systems. To do so would be contrary to the intent of the drafters of the Rules. Additionally, this would ignore the fact that several of the common law jurisdictions cited as recognising this privilege appear to be moving toward more disclosure-oriented procedures. The International Tribunal should not disregard new and progressive rules that aid in the receipt of all relevant facts. As an international tribunal, rather than ignoring trends towards more fair, efficient and effective litigation procedure, it should lead the way. Justice can not be served if every rule and decision must be justified on the basis of a tally of all legal systems. To retreat to a legal professional privilege that is undergoing some challenge, even within the national systems that recognise it, would not be applying a general principle of law, but instead would be applying one that is outmoded and explicitly not recognised by the International Tribunal.

51. Considering the unique circumstances under which the International Tribunal operates to which I have alluded, it should exercise its inherent and explicit authority to order the production of a Defence witness statement after the witness testifies. This would not be an abrogation of any privilege against disclosure, but would only condition the right of a party to call a witness on his production of the witness statement after the witness testifies. Accordingly, I would grant the request of the Prosecution and order the Defence to produce for the purpose of cross-examination the prior statement of witness W.

Gabrielle Kirk McDonald

Date: 27 November 1996