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UNITED
NATIONS

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

Case No.: IT-95-14-AR 108 *bis*

Date: 29 October 1997

Original: English and French

IN THE APPEALS CHAMBER

Before: **Judge Antonio Cassese, Presiding**
Judge Adolphus G. Karibi-Whyte
Judge Haopei Li
Judge Ninian Stephen
Judge Lal Chand Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **29 October 1997**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

SEPARATE OPINION OF JUDGE ADOLPHUS G. KARIBI-WHYTE

To: The Office of the Prosecutor
Ms. Louise Arbour, Prosecutor **Mr. Mark Harmon**

To: The Republic of Croatia
Ambassador Ivan Šimonović **Mr. Ivo Josipović**
Mr. David B. Rivkin Jr. **Mr. Lee A. Casey**

To: Defence Counsel for Tihomir Blaškić
Mr. Russell Hayman
Mr. Anto Nobilo

I. DISCUSSION

1. I have had the privilege of reading in draft form the Judgement in this appeal. I agree with all but one of the issues addressed namely, the modalities suggested for determining whether a claim by a State for non-disclosure of relevant evidence based on the protection of its national security interests is valid. My understanding of the relevant provisions of the International Tribunal's Statute ("Statute") and Rules of Procedure and Evidence ("Rules") makes it difficult for me to reconcile my views with that of the majority.

2. The Judgement was triggered by the contention of the Republic of Croatia ("Croatia") that the International Tribunal lacks the requisite jurisdiction to judge or determine its claims of national security interests. Croatia contends that the determination of its national security interests is a fundamental attribute of its sovereignty which is not justiciable. For this contention, Croatia relies upon the immunity from process accorded to sovereign States under customary international law. The Judgement rejects the contention, first, on the ground that the *Corfu Channel Case*[1], upon which Croatia relies, is inapplicable and inapposite. Secondly, the applicable provision, Article 29 of the Statute, which is mandatory in its terms, is different from the hortatory provisions of Article 49 of the Statute of the International Court of Justice on which the *Corfu Channel Case* was decided. Thirdly, acceptance of the contention of the Republic of Croatia will be tantamount to granting States a *carte blanche* right to withhold, on grounds of national security, documents necessary for trials before the Trial Chamber. I entirely agree.

3. However, the Judgement does not stop there. It goes on to suggest the modalities for determining an application by a sovereign State for the exclusion of evidence, the disclosure of which will jeopardise its national security interests. In considering the requisite modalities, the Judgement suggests that (1) the State concerned must demonstrate that it has acted and is acting bona fide in the making of the application; (2) the State at issue may be invited to submit the documents allegedly affecting national security for scrutiny by either the Trial Chamber's Presiding Judge or a Judge of the Trial Chamber designated by him or her; (3) the scrutiny of the documents should be made by the Judge during *in camera, ex parte* proceedings, and no transcripts should be made of the proceedings; (4) the State concerned might be allowed to redact part or parts of the documents, for instance, by blacking out part or parts, however, a senior State official should attach a signed affidavit briefly explaining the reasons for such

[1] ICJ Reports (1944) 18.

redaction(s); (5) if documents are in a language other than one of the two official languages of the International Tribunal, the State concerned should provide in addition to the original documents, certified translations; and (6) documents regarded as irrelevant to the proceedings, as well as relevant documents, which in the appraisal of the Judge should be safeguarded on grounds of national security interests, should be returned to the State concerned. There is also provision for exceptional cases where a State, acting bona fide, considers particular documents to be so delicate from the national security point of view, and of little relevance to the trial proceedings, that it would prefer not to submit such documents to the Judge.

4. This Opinion is not concerned with this latter expedient which is not by way of hearing before the Trial Chamber or a single Judge of the Trial Chamber. The Opinion is concerned only with the second and third conditions prescribed by the suggested modalities which provide for proceedings before the Presiding Judge, or a Judge of the Trial Chamber designated by him or her, hearing the substantive action. It is with these two conditions that I join issue.

5. The critical issue and overriding concern of States is to ensure the utmost secrecy with regard to documents, the exposure of which is most likely to affect prejudicially their vital national security interests. Hence the conditions circumscribed around the determination of the application such as the requirement of good faith on the part of the applicant State, and the observance of very strict confidentiality in the proceedings before and after the determination of the application, sufficiently endorse the feelings of States about their national security interests.

6. The Judgement suggests that the application by the State for withholding a document relevant to a trial before the Trial Chamber should be submitted for scrutiny either to the Presiding Judge or a Judge of the Trial Chamber designated by him or her. The scrutiny of the document shall be made *ex parte* and *in camera.* The determination, which is a proceeding in the decision of the substantive action, will be binding on the Trial Chamber and relevant in the determination of the substantive action. It is important to advert to the fact that such applications would in all cases be made during the hearing of the substantive action affecting the applicant State. It repays analysis to make a careful consideration of the relevant provisions of the Statute and the Rules.

7. Article 12 of the Statute, which prescribes the composition of the Chambers, provides as follows:

Article 12
Composition of the Chambers

> The Chambers shall be composed of eleven independent judges, . . . , who shall serve as follows:
>
> (a) Three judges shall serve in each of the Trial Chambers;
> (b) Five judges shall serve in the Appeals Chamber.

A Trial Chamber, in accordance with Article 12 is, therefore, only properly constituted when it consists of three Judges. The commencement and conduct of trial proceedings is assigned to the Trial Chambers by virtue of Article 20, paragraph 1, of the Statute which provides that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." The functions of Judges are stated in Articles 18, paragraph 4, and 19, paragraph 1, of the Statute. Both provisions relate to the function of a single Judge with respect to the confirmation of indictments. The Judges, in the exercise of their rule-making powers under Article 15, have complied with these statutory requirements. In no provision of the Statute or the Rules is the determination of a matter in the *lis* vested in a single Judge. For instance, Rule 54, which vests in a Judge the power to issue orders, summons, subpoenas and warrants, does not involve a determination of an issue in a dispute. The procedure under Rule 61, which is *stricto sensu* not a trial within the meaning of Article 20, is consistent with the statutory requirement. Sub-rule 15(E), which enables the President to authorise less than the three members of a Trial Chamber to conduct routine matters, such as initial appearance under Rule 62 or delivery of judgements, does not include the determination of issues in dispute before the Trial Chamber.

8. The procedure suggested in the Judgement creates a situation whereby the nature of the material, the disclosure of which is claimed to be detrimental to a State's national security interests, will be determined by one Judge because it is deemed that to allow all the Judges of the Trial Chamber access to the documents relied upon would be subversive of the protection of vital information about national security contained therein.

9. The Judgement appears to proceed on the assumption that either the existing procedure under Rule 66 does not cover the situation or it is inappropriate. Sub-rule 66(C) contemplates the situation even if its provisions are limited to applications by the Prosecutor.

Rule 66
Disclosure by the Prosecutor

. . . .

> (C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

This Sub-rule would appear from its *ipsissima verba* to cover non-disclosure of information contrary to public interest or which affects the security of the interests of the State. The procedure prescribed herein for effecting non-disclosure is by application *in camera* before the Trial Chamber. There is no doubt, therefore, that applications to a single Judge *in camera* will amount to a violation of the Sub-rule. It seems to me necessary to amend Sub-rule 66(C) to provide for applications by the State where it is interested.

10. At the expense of tedious repetition *ad nauseaum,* I have to emphasise the imperative nature of the requirement of Article 20 of the Statute that a Trial Chamber, to be properly constituted for the commencement and conduct of trial of cases before it, must consist of three Judges. This includes the hearing and determination of all issues in the case. There is no provision of the Statute or Rules which enables less than three members of the Trial Chamber to conduct all or any part of the proceedings. It seems to me logical, and follows inevitably, that all the members of the Trial Chamber must be involved in every decision in the proceedings before the Trial Chamber. Hence, I am inclined to regard any decision of the Trial Chamber made by less than three Judges as of doubtful validity. I have no doubt that such a decision is a violation of the enabling Statutory requirements. In my respectful opinion, where a Statute vests jurisdiction in a body, to be exercised as such a body without limitation or qualification, the exercise of such jurisdiction can only be by such body as constituted. The exercise of the powers vested in the body is not delegable to any member or part of the constitutive body without express authorisation. There is no doubt that the exclusion of material prejudicial to national security interests is a relevant consideration in the trial before

the Trial Chamber, hence the strenuous effort for exclusion to avoid publicity. It seems to me paradoxical to hold that the decision of only one of the three Judges of the Trial Chamber should constitute such a decision, binding on the Trial Chamber. It is difficult to understand why the other members of the Trial Chamber should be ignorant of the details of the reasons and grounds for exclusion. There is no doubt that no problem arises when the claim of national security interests is rejected.

11. The implications of the position suggested in the Judgement seem to me a serious indictment on the credibility and integrity of the Trial Chamber in the consideration of issues affecting national security interests. An extreme inference is that the Judge designated for the determination of the issue is the only member of the Trial Chamber to be trusted for such a sensitive and delicate decision involving protection of national security interests. Indeed, this is why the unwillingness of States to release such documents to Judges in a trial may be regarded as justified. The modality suggested has not given due consideration to the protection of the rights of the accused who is an essential part of the *lis*. The protection of the rights of the accused is an essential function in the hearing and determination of a matter before the Trial Chamber[2].

12. I view with trepidation and shudder with apprehension should there be any validity in any of the above inferences. It is mandatory for every Judge to take the judicial declaration, and to observe the same obligation of absolute secrecy in matters before the Trial Chamber. The provisions of Article 20 of the Statute enjoin the Trial Chamber, that is the Judges acting collectively, to "ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused . . . ." It seems to me preposterous to accept that the rights of the accused have been protected and that there has been a fair trial, where on the grounds of national security interests, exculpatory material has been validly withheld by an order of one, only one, Judge of the Trial Chamber hearing the substantive application. One may venture to question how the rights of the accused have been respected in such circumstances?

13. I remain uncompromising in my rejection of the proposition that a single member of a Trial Chamber should be allowed to bind the Trial Chamber by his or her decision to grant the application for the exclusion of evidence based on the protection of the national security interests of the applicant State. The procedure is hardly consistent with the provisions of the

[2] *See* Articles 20, paragraph 1, and 21 of the Statute.

Statute and the Rules. It is also difficult to regard the ultimate decision of the Trial Chamber in such a situation, inevitably affected by the *ex parte, in camera* decision of the single Judge, as a collegiate decision of the Trial Chamber. If such evidence should constitute a consideration in the trial before the Trial Chamber, it seems paradoxical and inconsistent with the provisions of the Statute that jurisdiction for its admissibility can properly vest *vel non* on only one of the Judges of the Trial Chamber. It seems to me paradoxical to the accepted principles of determination of matters before a collegiate judicial body.

II. CONCLUSION

14. The Trial Chamber is the only body vested with jurisdiction to conduct trial proceedings. Accordingly, every issue constitutive of the ultimate decision in the trial of a matter before it must involve the participation of all the members of the Trial Chamber. The suggested modality will result in a conflict between the right of the individual and the protection of national security interests. The modality suggested is an expedient sacrificing the principle of the protection of the rights of the individual on the altar of political expediency of the protection of national security interests. Transparency in the conduct of public affairs is the ideal. It is undoubtedly the most enduring character of the administration of justice. Accordingly, a justified accusation of bias and partiality cannot be discounted or ignored if the procedure of an *ex parte, in camera* application by a single Judge in a trial before the Trial Chamber is adopted in the determination of a claim of national security interests. The aphorism that justice should not only appear to be done but should also be manifestly seen to have been done is still the current universal opinion of purity of the administration of justice.

Done in both English and French, the English text being authoritative.

Adolphus Godwin Karibi-Whyte
Judge

Dated this twenty-ninth day of October 1997
At The Hague,
The Netherlands.

[Seal of the Tribunal]