SPECIAL COURT FOR SIERRA LEONE

BEFORE THE APPEALS CHAMBER

Case No. SCSL-2004-16-AR73(B)

Before:	Justice Raja Fernando, Presiding Justice Geoffrey Robertson Justice Emmanuel Ayoola Justice George Gelaga King Justice Renate Winter
Registrar:	Lovemore Munlo
Date filed:	27 October 2005

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

JOINT DEFENCE RESPONSE TO PROSECUTION APPEAL AGAINST DECISION ON ORAL APPLICATION FOR WITNESS TF1-150 TO TESTIFY WITHOUT BEING COMPELLED TO ANSWER QUESTIONS ON GROUNDS OF CONFIDENTIALITY

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I INTRODUCTION

1. On 19 October 2005, the Prosecution filed its "Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality" ("**Appeal**")[1] against the "Decision on the Prosecution's Oral Application for Leave to Appeal to Be Granted to Witness TF1-150 to Testify without Being Compelled to Answer Any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality Pursuant to Rule 70(B) and (D) of the Rules" ("**Decision**").[2] The Defence herewith files its "Joint Defence Response to Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality" ("**Response**") to the Prosecution Application.

2. The Defence refers to the summary of the proceedings as set out in paras. 2 – 7 of the Appeal.

II PRELIMINARY REMARK

3. The Prosecution attached to its Appeal an Index of Authorities.[3] All case law not from the Special Court for Sierra Leone is referred to by URL address. However, for three of those, passwords are necessary for access to those specific documents.

4. Article 7(D)(i) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone indicates that for jurisprudence, "the entire document shall be filed unless the authority is readily available on the internet."[4] The Defence

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[1] SCSL-2004-16-AR73(B)-419; the document was served by Court Management on 20 October 2005.
[2] SCSL-2004-16-T-389. Justice Doherty wrote a Dissenting Opinion of Justice Doherty on the Prosecution's Oral Application for Leave to Be Granted to Witness TF1-150 to Testify without Being Compelled to Answer Any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality pursuant to Rule 70(B) and (D) of the Rules, 22 September 2005 ("**Dissenting Opinion**"), Case No. SCSL-04-16-T-394.
[3] Appeal, p. 23 – 26.
[4] Adopted on 27 February 2003, and lastly amended on 10 June 2005.

contends that documents which need login names and passwords before providing access to the particular document, are not "readily available on the internet." The Defence, operating not only from the jurisdiction of the Special Court for Sierra Leone, is restricted in its access of websites such as used by the Prosecution in its Appeal.[5]

5. The Defence is unable to access these documents,[6] and is of the opinion that the Prosecution, by not attaching those documents to the Appeal, has breached Article 7(D)(i) of the aforementioned Practice Direction on Filing Documents, resulting in the fact that the Defence cannot check these three particular authorities on which the Prosecution Appeal is based.

6. For this reason, the Defence respectfully prays the honorable Trial Chamber to rule that these authorities of the Prosecution Appeal shall be disregarded, as the Defence has not been provided the opportunity to take notice of the contents of those authorities, and to react on the substance thereof.

7. The Defence contends that the Decision represented by a majority of the Trial Chamber does not amount to errors in law or fact, as argued by the Appeal, and thus opposes the Prosecution Appeal, on the basis of the following arguments.

III GROUNDS 1 AND 2 – INTERPRETATION OF SUB-RULES 70(B) AND 70(D) AND APPLICABILITY OF THE MILOSEVIC DECISION

8. Although the Prosecution made three separate grounds in its Notice of Appeal, the first and second ground are combined in the submissions. In response thereto, the arguments below will therefore also not separately deal with the second ground of appeal.

[5] The Prosecution used Westlaw for its authorities nrs. 14, 15, and 23; Westlaw is not accessible unless you have a login name and password.
[6] In order to access Westlaw, you need a license to which the Defence does not have access.

3.1 Interpretation of Rule 70(B)

3.1.1 No 'Information'

9. In the **first place**, the Defence is of the opinion that Rule 70(B) does not apply, because the material at stake, i.e. the sources of Witness TF1-150's evidence which he does not want to reveal, do not qualify as 'information' in the sense of Rule 70(B).

10. Rule 70(B) provides that "[i]f the Prosecutor is in possession of information which has been provided to him on a confidential basis (...)." The Defence contends, and is in this respect supported by the Decision, that the withholding of sources as such of one's information does not fall under the provision of Rule 70(B), which Rule speaks about the 'information' itself. The Defence understanding of this provision is that it relates to *substantial* information, rather than to its actual sources.

11. The issue at stake here is what the *source* is of the information of Witness TF1-150, which is distinctive from the actual substance thereof. The source of the information is essential to the Defence in this particular case, as it goes to the credibility of the witness and control on his hearsay evidence. As indicated in first instance, the Defence has reasons to assume that certain parts of the witness's testimony do not reflect the truth,[7] and if the witness would be allowed to withhold the source thereof, the Accused are effectively barred from their right to examine the evidence against them, as laid down in Article 17(4)(e) of the Statute.

12. The Prosecution in para. 17 of its Appeal argues that, since the ICTY Appeals Chamber in the Milosevic Decision ruled that 'information' also extends to testimony provided by a witness, it would thus also trigger the application of the Rule in its entirety. The Defence opposes that Rule 70(B)'s application extends to

[7] See *inter alia* Transcript 14 September 2005, p. 4, lines 8 – 11.

the protection of a witness's sources in isolation, but to the contrary, the Defence holds that this provision is meant to protect confidential substantial information from being disclosed. This also relates to the reliability of the evidence, which will be dealt with more extensively under section 5.2 below.[8]

13. With regard to the definition of 'information' in Rule 70, the ICTY Appeals Chamber stated *Prosecutor v. Milosevic,* that "not only the informant's identity and the general subject of his knowledge constitute the 'information' shielded by Rule 70, but also the substance of the information shared by the person (...)."[9] The substance of the witness statement is not at stake here, but the source thereof, which should thus not be protected by Rule 70 and falls outside the scope of the Milosevic decision.

14. In para. 20 of the Appeal, the Prosecution sets out that there can be no doubt that this witness's testimony was provided on a confidential basis. The Defence holds that a distinction should be made between on the one hand substantial evidence provided by the witness in his pre-trial statements (which has already been disclosed to the Defence under Rule 66), and on the other hand, the sources of his information, which have not been disclosed to the Prosecution.

15. In conclusion, the substantial evidence already disclosed to the Defence is not at stake here. What is at stake is the sources underlying this substantial information, and this is the sole material the witness wishes to withhold and which he refuses to disclose, even to the Prosecution. Therefore, the Defence holds that Rule 70(B) is not applicable to the Prosecution request, given the fact that it is not 'information' in the sense of Rule 70(B) that the Prosecution wants not to be disclosed, but the sources underlying that particular information.

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[8] The argument being that if a witness provides evidence to a Chamber, and the Defence is withheld from verifying the actual sources of the evidence, this results in a violation of the rights of the Accused under Article 17(4)(e) of the Statute.

[9] *Prosecutor v. Milosevic,* Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 23.

16. For this reason, the Defence submits that the Appeal should be dismissed.

3.1.2 Information Has Not Been Provided to the Prosecution

17. In the **second place**, as an alternative to the first argument, and in case the honorable Appeals Chamber would find that the sources of the witness's evidence do qualify as 'information' under Rule 70(B), the Defence submits that the information has not been provided to the Prosecution, and thus Rule 70(B) does not apply.

18. The Defence argument in this respect consists of two limbs: (i) the request made by the Prosecution falls outside of the scope of Rule 70(B), and (ii) the Defence holds that this specific wording of Rule 70(B) is not a coincidence, but there is a reason underlying the particular wording, which, if overlooked as proposed by the Prosecution, leads to a breach of the Accused's right to a fair trial as guaranteed by the Statute of the Special Court for Sierra Leone ("**Statute**"), which would be the case if the OTP Appeal would be granted.

Ad (i) – *Request Does Not Fall under Rule 70(B)*

19. Rule 70(B) of the Rules, insofar as relevant, reads as follows: "[i]f the Prosecutor is in possession of information which has been provided to him on a confidential basis (...)." This Rule clearly and unambiguously provides that the Prosecutor must be in possession of the confidential material in order to obtain the protection of this Rule.

20. In para. 20, the Appeal seems to suggest that the Prosecution is in fact in possession of the material the witness wishes to withhold. However, a distinction needs to be made between the information provided by this witness in the pre-trial phase and disclosed to the Defence, and the sources of his information which the witness now wishes to withhold, which have not been disclosed at all, not even to

the Prosecution. Therefore, the Prosecution statement that "[t]here can be no doubt that this witness' testimony was provided as a confidential information to the Prosecution in the first instance whether by or on behalf of himself (...) or his employer, the UN" cannot be sustained. It is not the sources of his information that were revealed to the Prosecution, and it is this specific material the Prosecution now wishes its witness not to reveal.

21. Also the Trial Chamber held that: "we are of the view that the provisions of Rule 70 upon which the Prosecution seeks to rely are not applicable to Witness TF1-150 or his testimony. The Rule applies only where the Prosecutor 'is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence...' That has not been shown to be the case here. We might add that it is that initial information together with its source that may not be disclosed by the Prosecutor without the prior consent of the source. In this case the Prosecution has not shown that they are in possession of that initial information."[10]

22. This interpretation is supported by the ICTY Appeals Chamber in the Milosevic case, where it is indicated with regard to the interpretation of Rule 70 that "[a]ll that Rule 70 requires is that the information 'was provided to the Prosecution on a confidential basis.'"[11]

23. The Prosecution is requesting application of this Rule beyond its scope: the Prosecution requests that the witness is allowed to withhold information which is not even in the possession of the Prosecution.

24. Also for this reason, The Defence submits that the Prosecution Appeal should be dismissed.

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[10] Decision, para. 19.
[11] *Prosecutor v. Milosevic*, Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 25.

Ad (ii) – *Reason for Specific Wording of Rule 70(B)*

25. The second limb of this argument relates to the Defence contention that the wording of Rule 70(B) is not coincidental. The Defence is of the opinion that there is a reason that the provision requires that the Prosecution should be in possession of any material the witness is allowed to withhold, or at least that this forms an argument for a literal interpretation of this Sub-rule.

26. The Prosecution is an organ of the Special Court, and its members are bound by the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone.[12] This Code provides in Article 6 that "[c]ounsel shall not introduce evidence which he knows to be false or which he reasonably believes was obtained through recourse to unlawful methods (...)." This provision is only applicable to counsel before the Special Court, be it Prosecution and Defence, but not to the witnesses.

27. The problem consists of the fact that the Defence can in no way control the evidence and knowledge of the witness, but in the underlying case, neither can the Prosecution. The Prosecution is simply *trusting* that the witness has in fact reliable sources to corroborate his statements, which statements are then unverifiable for the Defence. Of course, the witness testifies under oath, which is first not a guarantee for absolute honesty, but moreover a witness who is not a lawyer cannot be trusted to assess the reliability of a certain statement made to him. Under normal circumstances these sources can be checked and verified through cross-examination and further investigation into the matter. However, if the witness cannot be compelled to answer certain questions and reveal the sources of his information, the witness cannot be cross-examined on this matter, and the truth might never be revealed.

[12] Adopted on 14 May 2005.

28. It is exactly for this reason that the proposed admission of this evidence should be denied, for the truth of certain statements can in no way be verified. Stating that it then goes to the weight of the evidence is insufficient, simply because one cannot know what the actual value of the evidence is.

29. In this particular case, the Defence opposes certain parts of the evidence as presented in the statements by Witness TF1-150, and if he could not be compelled to answer those questions of the Defence about his sources, and the Prosecution is not in possession of that particular information, the Accused's right to a fair trial has been violated in that the right "[t]o examine or have examined, the witnesses against him or her," as embedded in Article 17(4)(e) of the Statute.

30. For these reasons, the Defence holds that first the Prosecution Appeal falls not within the ambit of Rule 70(B) and should thus be denied, and secondly, that there is no reason to extensively interpret the Rule 70(B) provision because if the sources of the information are not known to the Prosecution, the information is not in the hands of a Special Court organ, thus no one who is bound by the aforementioned Code for Professional Conduct has possession of the relevant evidence.

31. Also for this reason, the Defence submits that the Prosecution Appeal should be dismissed.

3.1.3 Insufficient Guarantees Fair Trial Rights of the Accused

32. The Prosecution states in para. 13 of its Appeal that Rules 70(B) and (D) of the ICTY Rules of Procedure and Evidence are identical to the Special Court's Rules 70(B) and (D). Although it cannot be denied that these Sub-rules are indeed identical, it needs to be observed that the remaining Sub-rules of those provisions are not identical, and this must be reflected in the interpretation of Sub-Rules 70(B) and (D) of the Special Court Statute.

33. ICTY Rule 70 on two instances differs from the corresponding Special Court provision. Sub-rule (F) of the ICTY Rules is not inserted in the Special Court Rules,[13] and furthermore, Rule 70(G) varies from its Special Court replica, insofar as it provides: "Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89(D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." These two provisions offer additional protection to the Defence, and especially the latter Rule (G) of the ICTY Rules provide an additional safeguard for the Defence in case the probative value of the admitted evidence under Rule 70 is substantially outweighed by fair trial interests. This additional safeguard is not embedded in the Special Court Rules, and this should be taken into account when assessing the Prosecution Appeal.

34. In the aforementioned Milosevic Decision, the ICTY Appeals Chamber holds that one of the safeguards preventing misuse that might deprive accused persons of their rights to challenge the evidence against them and to receive a fair trial, lies in Sub-rule 70(G), "which expressly empowers the Trial Chambers to 'exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.'"[14] This specific safeguard thus lacks in the Special Court Rules, and thus the Special Court Rules should not necessarily be interpreted in the same way as the ICTY Rules. At least, the Special Court's Rule 70 provision offers less protection to the accused than the ICTY Rules do.

35. This line of reasoning supports the Trial Chamber's view that "[f]urthermore, the ICTY authorities cited by the Prosecution in support of their arguments, including *The Prosecutor v. Slobodan Milosevic* and *The Prosecutor v. Radoslav Brdjanin*

[13] Sub-rule 70(F) of the ICTY Rules provides: "The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused."
[14] *Prosecutor v. Milosevic*, Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 26.

and Momir Talic, are persuasive but distinguishable and therefore not pertinent to the case."[15]

36. Therefore, the interpretation of Rule 70(B) offered by the Prosecution insufficiently takes into account the delicate position of the Accused towards the non-disclosure of certain crucial parts of Prosecution – mainly – hearsay evidence. For this reason, the Prosecution request as set out in the Appeal, should be dismissed.

3.1.4 Conclusion

37. For the reasons set out above, the Defence contends that Rule 70(B) is not applicable to the request relating to the envisioned testimony of Witness TF1-150, and thus the Prosecution Appeal should be dismissed.

3.2 Interpretation of Rule 70(D)

3.2.1 Wording of Rule 70(D)

38. Rule 70(D) reads as follows: "If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality."

39. In the first place, given the fact that under section 3.1 above, it was argued that Rule 70(B) was not applicable to the current situation, in that same line of reasoning Rule 70(D) is deemed inapplicable, for this provision assumes applicability of Rule 70(B), where it is stated that the Prosecutor calls a witness "providing information under this Rule."

[15] Decision, para. 19 (footnotes omitted).

40. However, in case the honorable Appeals Chamber finds that, in spite of the above arguments, Rule 70(B) is in fact applicable to the current situation, the Defence argues that Rule 70(D) in itself is not applicable, and the Appeal should be dismissed for this reason.

41. The Trial Chamber considered that only the actual source providing the confidential information should enjoy the protection of Rule 70(D), where it stated that: "the Prosecution has not satisfied the criteria envisaged under Rule 70(D) of the Rules. In our view Rule 70(D) applies where 'the person or representative of the entity providing the initial information' (i.e. the informant himself) has been called upon to testify. In this case Witness TF1-150 is not the originator of the initial information nor 'the person or representative of the entity providing the initial information' but is merely a recipient thereof. As such he cannot rely on the protection offered by Rule 70(D) of the Rules."[16]

42. The Trial Chamber thus indirectly stated that Rule 70 cannot be applied to witnesses who provide hearsay evidence.

43. Given the above reasons, the Defence submit that the Trial Chamber did not err in law in deciding the above, and that the wording of Rule 70(D) indicates that the Prosecution request falls outside the scope of that provision. Consequently, the Prosecution Appeal should be denied.

IV GROUND 3 – BALANCING ACT BETWEEN PUBLIC INTEREST AND ACCUSED'S RIGHT TO A FAIR TRIAL

4.1 Balancing Act – Rights of the Accused Should Be Taken into Account

44. The Prosecution suggests in paras. 25 – 26 of its Appeal not to balance the public interest represented by the human rights workers against the rights of the

[16] Decision, para. 19.

Accused, but to balance the public interest that attaches to the work of human rights officers against the public interest in having all relevant information before the Chamber. The Prosecution does not provide any source or authority of this, according to the Defence, peculiar interpretation, neither is an explanation provided as to why the rights of the Accused should not be taken into account in this balancing act. The Defence submits that this argument is thus insufficiently argued, and should for that reason be dismissed.

45. As will be set out in Section V below, the rights of the Accused should be taken into account in balancing the importance of the work of human rights workers.

46. The Prosecution emphasizes the fact that the underlying issue at stake here is that human rights officers should be encouraged to testify, and the issue of immunity from testimony. However, in arguing this, the Prosecution presents case law which in fact does refer to immunity from testimony.

47. In *Prosecutor v. Brdjanin et al.*, the ICTY Appeals Chamber held that, in determining whether war correspondents can be subpoenaed to testify before the Tribunal, the public interest in accommodating the work of war correspondents needs to be balanced against the public interest in having all relevant evidence available to the court.[17] The Prosecution Appeal seems to refer to this balancing act in determining whether a witness can be compelled to answer certain questions relating to the sources of his information.[18]

48. Also in the case of *Prosecution v. Simic*, the ICTY Trial Chamber balanced the different interests in the determination of the question whether a representative of the International Committee of the Red Cross ("**ICRC**") could be called as a

[17] *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.
[18] See mainly para. 25 of the Appeal.

witness at all,[19] and not whether the Defence could be restricted in the cross-examination of a Prosecution witness called at trial.

49. However, the *Brdjanin* Decision balances two public interests; the rights of the accused are not taken into account there, because the question there is whether a Prosecution witness should testify at all, which is of course of no direct interest to the Defence. However, once a witness has been called, the question whether or not the witness is allowed to refuse certain kinds of questions is of course of *direct* interest to the accused, and a possible infringement of Article 17 of the Statute because the cross-examination is then restricted.

50. The Defence therefore contends that the Prosecution applies the wrong test in the underlying matter, and that, in determining whether the Defence should be restricted in its cross-examination of a certain witness, the rights of the Accused as enshrined in Article 17(4) should certainly be taken into account in the balancing act.

4.2 The Function of Human Rights Officers

51. In its arguments, the Prosecution makes comparisons to several other professions, and the immunities and privileges provided to those professionals under national and international law. The Defence opposes each of these comparisons below.

4.2.1 No Equation with ICRC

52. In the **first place**, a comparison is drawn between ICRC workers and the question at hand. In footnote 26 of the Appeal, the case of *Prosecutor v. Simic* is mentioned, in which case the question arose "whether an employee of the

[19] *Prosecutor v. Simic et al.*, Case No. IT-95-9, (public version of the) Ex Parte Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 1.

International Committee of the Red Cross (ICRC) may be called as a witness."[20] The Defence submits that Witness TF1-150 is not a representative of an organization comparable to the ICRC, and is thus not entitled to protection in the sense requested by the Prosecution.

53. First of all, the ICRC in that case opposed the Prosecution motion to have the witness being called at trial.[21] In the present case, the United Nations Office for the High Commissioner for Human Rights ("**UNHCHR**") explicitly waived the Witness TF1-150's immunity, and allowed him to testify in closed session.

54. In the second place, the ICTY Trial Chamber found that the ICRC "has a right under customary international law to non-disclosure of the Information."[22] It also ruled that the ICTY is bound by customary international law, not least because the Statute applies international humanitarian law, which consists of both conventional and customary rules.[23]

55. In the third place, also the provisions of the International Criminal Court ("**ICC**") make clear that the special position regarding human rights work only refers to employees of the ICRC. The ICC Rules of Procedure and Evidence elaborate in Rule 73(4) to (6) on the special position of the ICRC. The fact that the ICRC is the only organization mentioned in this regard in the ICC Rules, is indicative of the fact that thus the ICRC is the *only* organization endowed with such rights. Any comparison in this regard made between 'a' human rights worker and an ICRC employee should thus be dismissed.

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[20] *Prosecutor v. Simic et al.*, Case No. IT-95-9, (public version of the) Ex Parte Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 1.
[21] *Prosecutor v. Simic et al.*, Case No. IT-95-9, (public version of the) Ex Parte Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 9.
[22] *Prosecutor v. Simic et al.*, Case No. IT-95-9, (public version of the) Ex Parte Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 74.
[23] *Prosecutor v. Simic et al.*, Case No. IT-95-9, (public version of the) Ex Parte Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 42.

56. Moreover, Stephane Jeannet, in an article in the International Review of the Red Cross, explains the drafting of this Rule 73 provision. He states: "Contact was therefore taken up with key government representatives. Their views were unanimous: there was indeed a need to protect information obtained in certain categories of professional relationships. While there was no objection to placing the work of the ICRC under such protection, it appeared that a provision of a general nature would be unacceptable, since it would, in their view, open a floodgate: the Court would be blocked by all kinds of requests for nondisclosure by any organization or individual."[24]

57. From the above, the Defence respectfully concludes that no reasonable comparison between Witness TF1-150 and ICRC employees can be made. On the contrary, from the way the *Simic* Trial Chamber and the ICC Rule 73 are formulated, it can be derived that apart from ICRC employees, no human rights worker can have the same privileges ICRC workers have.

58. Therefore, the Defence is of the humble opinion that the principle request made by the Prosecution in its Appeal should be dismissed.

4.2.2 National Case Law: No Equation with Police Informants

59. In the **second place**, the Appeal in paras. 39 – 43 draws a comparison between national domestic systems and their privileges to informants, from which, according to the Prosecution, analogy to the issue of compelling witnesses to answer questions while being called to testify in court, can be drawn.[25] The

[24] S. Jeannet, Testimony of ICRC Delegates before the International Criminal Court, International Review of the Red Cross No. 840, p. 993 – 1000 (attached as **Exhibit 1**).
[25] See para. 44 of the Appeal.

mentioned case law referred to in the Appeal relates to the special status of (police) informants.[26]

60. The Defence wishes to rebut this comparison by presenting three arguments: (i) the evidence of Witness TF1-150 is not used to generate new evidence; (ii) the testimony of Witness TF1-150 will contain hearsay evidence; (iii) there is a difference between national common law systems and international tribunals in procedural rules on hearsay evidence; and (iv) the case law of the European Court of Human Rights on Article 6(3)(d) of the European Convention on Human Rights.

Ad (i) – *The Evidence Is Not Used to Generate New Evidence*

61. In the first place, some case law from the United States is mentioned. However, the Defence in this respect refers to Section II above, where it is explained that the Defence does not have access to the case law mentioned in support of this argument. However, only referring to the reflection of this case law as mentioned in the Appeal, the Defence is of the opinion that from the case law quoted, where disclosure of the witness's identity was at stake, no analogy can be drawn to the underlying issue.

62. The Canadian cases quoted also refer to the confidentiality of the informants, and that these should be protected under all circumstances. However, the Defence submits, that the situation of a police informant not willing to testify is exactly the situation Rule 70(B) envisions. The person provides confidential information to the Prosecution, and the Prosecution uses that information to generate new evidence. However, this case law does *not* envision the situation where a witness obtains information from other persons on a confidential basis, promises them not

[26] The quoted case of the British House of Lords in para. 42 of the Appeal refers to an extension of the immunity police officers obtain to informers about neglect or ill-treatment of children.

to reveal that information either to the Prosecution or the Trial Chamber and indeed refuses to do so when called upon in cross-examination.

Ad (ii) – *Testimony of Witness TF1-150 Will Contain Hearsay Evidence*

63. In national law, names of informants are not necessarily revealed in court, because it is not the evidence of these informants itself the Prosecution relies on. The evidence is then used to start a case, and further evidence was generated from the initial evidence. In the underlying case, however, the Prosecution wants to bring in the evidence of Witness TF1-150, and wants to allow him to conceal his sources. Therefore, the Prosecution uses the (mainly) hearsay evidence as evidence in court.

64. This is a fundamental difference the Prosecution easily steps over, but the main difference is that the Defence in our case is unable to cross-examine a Prosecution witness on crucial parts of his hearsay evidence, which hearsay evidence is used to prove the case against the Accused. If the information would only relate to Prosecutor investigators who had spoken to persons, and had promised them confidentiality, and that information was solely used for generating new evidence, i.e. not brought as evidence in court, this could perhaps be considered analogous to the situation created in the common law cases cited by the Prosecution.

Ad (iii) – *Difference between Common Law Systems and Tribunals*

65. In several common law systems, hearsay evidence is not admitted as a matter of principle.[27] The procedural law of the international tribunals relating to hearsay evidence is different from that of national common law systems. Therefore, to use case law from national common law systems, which admittance of hearsay evidence varies from the tribunals, seems inappropriate to the Defence.

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[27] See *Prosecutor* v. *Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, para. 9 (attached as **Exhibit 2**).

Ad (iv) – *ECHR Case Law on Article 6(3)(d) of the European Convention*

66. With regard to the alleged equation between informants and Witness TF1-150, the Prosecution seems to interchange the concepts of anonymity of informants and anonymity of witnesses.

67. European Court of Human Rights case law indicates that Article 6(3)(d) of the European Convention on Human Rights provides that if a witness statement is used in the evidence against the accused, the accused must be in a position to cross-examine that witness.[28] The European Court provides three tests in order to determine whether a violation of Article 6 took place, these are: (i) were there sufficient reasons not to reveal the witness's identity?; (ii) have adequate measures been taken that the defence is put in a position to verify the reliability and credibility of the witness?; and (iii) is the conviction not solely or largely based on the statement of the anonymous witness?

68. However, in those cases, and also the national cases referred to by the Prosecution Appeal, do not refer to the situation where a witness is called to give evidence, and the cross-examination by the Defence of that witness is restricted.

69. In conclusion, the Defence therefore argues that the mentioned national case law is irrelevant in the determination of the Appeal, and moreover, that it is incorrectly represented in the Prosecution arguments.

[28] See for instance *Kostovski v. the Netherlands*, European Court of Human Rights, 20 November 1989, para. 41.

4.2.3 No Equation with War Correspondents or Journalists

70. In the **third place**, the Prosecution equates the position of this human rights officer to the privileged position of a war correspondent/journalist, and the importance of protection of newsgathering.

71. The Defence submits that the protection to war correspondents relates to a different field, namely the protection of freedom of speech. To insert the discussion whether or not Witness TF1-150 should be compelled to reveal confidential sources under the umbrella of protection of freedom of speech, would be an attempt to circumvent the specific legislation and case law on the particular matter of protection of confidential information of human rights officers, which, under international law as it has developed to date, only protects the privileged position of ICRC employees, because of their fundamentally different and codified position under international humanitarian law.

4.2.4 Organization Waived Immunity/Privilege

72. The fact that the Prosecution mentions (in para. 29 of the Appeal) the Manual of the Office of the High Commissioner for Human Rights ("**OHCHR**")[29] is indicative – this Manual indeed mentions confidentiality and credibility. However, in the first place, as recognized by the Prosecution, this Manual dates from after the time the witness is to testify about. The Prosecution has not presented any document supporting the view that at that time, the witness was bound by any specific form of confidentiality.

73. In the second place, the OHCHR itself waived the immunity in this case, and allowed Witness TF1-150 to reveal his confidential sources in closed session.[30]

[29] This Training Manual is attached as Attachment 2 to the Prosecution Appeal.
[30] See letter of the UN of 23 May 2005, attached to the Appeal as Attachment 1, p. 2.

74. The fact that the witness himself relies on this Manual, while the organization behind him waived his immunity, is indicative of the fact that it is a personal issue of this witness that he does not want to reveal any of his confidential information. The Defence submits that, given the fact that the UN gave its approval to have the confidential information disclosed in closed session, should be sufficient to decide on this matter. What the personal preference of Witness TF1-150 is, should in that case not matter.

75. If the interpretation of Rule 70 would be such, that it would be left to the individual to interpret his organization's aims and goals, and to interpret the organization's Manual in this case, this would create exactly the situation lined out in the article by Stephane Jeannet, that a general provision of non-disclosure of information for people whose work can be equated to the work of the ICRC "would be unacceptable, since it would, in their view, open a floodgate: the Court would be blocked by all kinds of requests for nondisclosure by any organization or individual."[31]

76. Therefore, the Defence argues in this respect that because the UN waived the witness's immunities and privileges, the witness himself cannot rely on this same immunities and privileges, which have been waived by his former employer.[32]

4.3 No Jeopardy for the Effectiveness of Human Rights Work

77. The Defence contends that, unlike the Prosecution argues in para. 36 of the Appeal, by compelling witnesses such as TF1-150 to answer certain questions, this in no way needs to jeopardize the effectiveness of future human rights missions.

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[31] S. Jeannet, Testimony of ICRC Delegates before the International Criminal Court, International Review of the Red Cross No. 840, p. 993 – 1000.
[32] Under the condition of closed session, which had been granted by the Trial Chamber.

4.3.1 Closed Session Is Sufficient

78. For revealing such confidential information could take place in closed session, and this was granted to this particular witness. Rule 79 of the Rules deals with closed sessions, and sub-category (ii) provides that a closed session may be warranted for reasons of "protecting the privacy, security or non-disclosure of the identity of a victim or witness," and sub-category (iii) provides for closed session for the general reason of protecting the interests of justice.

79. The request for closed session for this witness had been granted by the Trial Chamber, and this witness could have revealed his sources in closed session. No jeopardy to future human rights workers could reasonably be derived from this procedure. Protection from all forms of such interference has, as stated above/below, only been granted to workers from the ICRC. If such far-going privilege would be granted to *all* human rights workers, this would greatly affect the fair trial of the accused.

4.3.2 Incentive Is Not Specific to Human Rights Workers

80. Moreover, and in conjunction with the above argument, it is clear that ICRC workers, with their specific task under the Geneva Conventions and Additional Protocols and humanitarian law more in general, need this stimulus to answer questions, because of their very particular, on customary international law based, background. The Prosecution argument that human rights workers need an incentive to testify before international criminal courts, however, goes for all witnesses who are afraid that their information and the fact that they provided it to either of the parties, might leak out. This is exactly why the provision of Rule 79 (on closed session) has been created.

4.3.3 Argument that Assurances Should Be Enforceable

81. Another argument presented in the Appeal is that human rights workers like Witness TF1-150 have assured their sources absolute confidentiality, and that compelling this witness to reveal his sources would break his promise. In the first place, the Defence wonders what this absolute assurance was based on. How can one, not being an ICRC employee, assure a source absolute confidentiality? There is no authority or basis for such absolute assurance. The aforementioned Training Manual explicitly states: "The HRO's credibility is crucial to successful monitoring. HROs should be sure not to make any promises they are unlikely or unable to keep and to follow through on any promise that they make." If now Witness TF1-150 made a promise to all his sources that he would never reveal their names, not even if he would be compelled by an international tribunal in closed session, he was not allowed to make such promise, because at that time he could not know whether he was able to keep such promise. The Manual furthermore states that the HRO should "describe what can and cannot be done by the HRO." The confidentiality should be stressed, states the Manual, but a general promise of confidentiality does not include testimony before an international tribunal in a closed session.[33]

4.3.4 Risk to Security of Informants

82. The Defence submits that the arguments as set forward in the Appeal in paras. 51 – 54 are not relevant for determining the current request to have Witness TF1-150 testify without being compelled to answer certain questions relating to the sources of his information.

83. In para. 51, the Prosecution raises the potential risk of security informants living in post conflict areas, however, as far as the Defence is aware, Witness TF1-150

[33] See Training Manual, attached to the Prosecution Appeal as Attachment 2, p. 90, section I – Credibility.

does not live in Sierra Leone, and this argument is thus irrelevant in the determination of the Prosecution request made in the Appeal.

84. Therefore, the paras. 51 – 54 of the Appeal should be disregarded in assessing the Prosecution request.

V RIGHTS OF THE ACCUSED

5.1 Principle Matter

85. In para. 27, and paras. 48 – 50 of the Appeal, the Prosecution mentions that, as a matter of principle, human rights officers should be allowed to refuse to disclose the identities of their sources. The Defence in this respect refers to its arguments as set out in section 4.2.1 above.

86. A next argument relates to the fact that the Defence is of the opinion that, although the Prosecution presents this matter as a very 'principle' one, the same argument goes for many ordinary witnesses. They are often afraid to testify, if they use hearsay evidence, they are reluctant to share their sources, but the provision of Rule 79 on closed session is designed for situations like this. The fact that the one witness is an international witness doing human rights work for an international organization does not place him in a different situation compared to ordinary witnesses. The argument that humanitarian organizations may be less willing to cooperate with tribunals also goes for any informant who provides information to the Special Court.

5.2 Rights of the Accused Should Outweigh the Public Interest

87. Given the fact that the Prosecution only balanced the public interest rights in its Appeal, the rights of the Accused were hardly addressed. As described in Section 4.1 above, the Defence is of the opinion that the Prosecution applied the wrong

test in assessing the current issue, and the rights of the Accused as laid down in Article 17(4)(e) of the Statute should have been taken into account.

88. In para. 55, the very last paragraph of the Appeal, the Prosecution indicates that the non-disclosure of the identities of sources does not prejudice the rights of the Accused, because the Defence would have more than one avenue, as the Defence would be able to call their own evidence to challenge any information provided by the witness.

89. The Prosecution states that the right to cross-examine is fully and effectively preserved. The Defence vehemently objects to this statement. Witness TF1-150, if called at trial, is expected to rely heavily on hearsay evidence. It is exactly this fact, that the witness in question is going to rely on hearsay evidence, that the Defence *needs* to be able to question him on his sources.

90. The ICTY was confronted with the question of admission of hearsay evidence in the Decision on Defence Motion on Hearsay in the case of *Prosecutor v. Tadic*.[34] In that decision, the Trial Chamber quoted the case of *Delta v. France* of the European Court of Human Rights, which provides, with regard to hearsay evidence and Article 6(3)(d),[35] that: "[a]s a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him."[36] The fact that the accused had been unable to test the witnesses' liability or cast doubt on their credibility made the European Court decide that Mr. Delta had not received a fair trial.

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[34] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996.
[35] Article 6(3) provides, insofar relevant: "Everyone charged with a criminal offence has the following minimum rights: (...) (d) to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."
[36] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, para. 12, quoting *Delta v. France*, European Court of Human Rights, 191-A Eur. Ct. H.R. (A Series) 15 (1990), para. 36 (*Delta* case is attached as **Exhibit 3**).

91. The *Tadic* Trial Chamber furthermore states that "[t]he Trial Chamber is bound by the Rules, which implicitly require that reliability be a component of admissibility. That is, if evidence offered is unreliable, it certainly would not have probative value and would be excluded under Sub-rule 89(C). Therefore, even without a specific Rule precluding the admission of hearsay, the Trial Chamber may exclude evidence that lacks probative value because it is unreliable. Thus, the focus in determining whether evidence is probative within the meaning of Sub-rule 89(C) should be at a minimum that the evidence is reliable."[37] The Defence, however, submits that the reliability, which is central to the admission of hearsay evidence, cannot be verified by the Defence in cross-examination, because exactly this verification process would be blocked in this instance, where the Defence would be barred from cross-examining the witness on his sources and the reliability thereof.

92. There would be no alternative way for the Defence to find out about the reliability of this witness's sources, simply because the Defence does not have access to the relevant information: the actual sources of this witness's hearsay information.

93. In balancing the public interest of human rights workers against the rights of the Accused to verify the evidence against them, the latter should outweigh the public interest. The fundamental fair trial rights of the Accused would be violated if the Prosecution Appeal would be granted.

VI CONCLUSION

94. The Defence prays the honorable Appeals Chamber to dismiss the Prosecution Appeal in its entirety for the reasons set out above.

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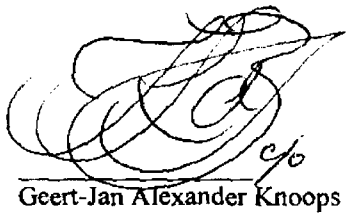
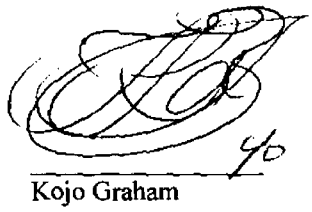
[37] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, para. 15.

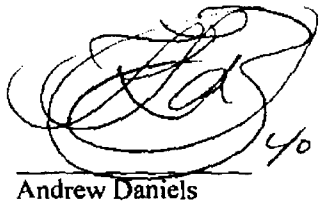
Respectfully submitted,
On 27 October 2005



Geert-Jan Alexander Knoops



Kojo Graham



Andrew Daniels

VII TABLE OF AUTHORITIES

7.1 Case Law

(i) Special Court Documents in *Prosecutor v. Brima, Kamara, and Kanu*

- Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, 19 October 2005 – Case No. SCSL-2004-16-AR73(B)-419.

- Decision on the Prosecution's Oral Application for Leave to Appeal to Be Granted to Witness TF1-150 to Testify without Being Compelled to Answer Any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality Pursuant to Rule 70(B) and (D) of the Rules, 16 September 2005 – Case No. SCSL-2004-16-T-389.

- Dissenting Opinion of Justice Doherty on the Prosecution's Oral Application for Leave to Be Granted to Witness TF1-150 to Testify without Being Compelled to Answer Any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality pursuant to Rule 70(B) and (D) of the Rules, 22 September 2005 – Case No. SCSL-04-16-T-394.

(ii) Documents from other courts

A – ICTY

- *Prosecutor v. Milosevic,* Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 (URL address: http://www.un.org/icty/milosevic/appeal/decision-e/23102002.htm).

- *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 (URL address: http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm).

- *Prosecutor v. Simic et al.*, Case No. IT-95-9-T, (public version of the) Ex Parte Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 (URL address: http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm).

- *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, printed in A. Klip & G. Sluiter (eds.), Annotated Leading Cases of International Criminal Tribunals, The International Criminal Tribunal for the Former Yugoslavia 1993 – 1998, p. 193 – 198 (attached to this Motion as **Exhibit 2**).

B – European Court of Human Rights

- *Delta v. France*, European Court of Human Rights, 191-A Eur. Ct. H.R. (A Series) 15 (1990) (attached to this Motion as **Exhibit 3**) – para. 36.

7.2 Other Documents

(i) Special Court Documents

- Rules of Procedure and Evidence of the Special Court for Sierra Leone, lastly amended on 14 May 2005.
- Practice Direction on Filing Documents before the Special Court for Sierra Leone, adopted on 27 February 2003, lastly amended on 10 June 2005 – Article 7(D)(i).
- Statute of the Special Court for Sierra Leone, Article 17(4)(e).
- Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone – adopted on 14 May 2005, Article 6.

(ii) Miscellaneous Documents

- Rules of Procedure and Evidence of the International Criminal Court (URL address: http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf) – Rule 73.
- Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (URL address: http://www.un.org/icty/legaldoc-e/basic/rpe/procedureindex.htm) – Rule 70.
- S. Jeannet, Testimony of ICRC Delegates before the International Criminal Court, International Review of the Red Cross No. 840, p. 993 – 1000 (attached as **Exhibit 1**).
- European Convention on Human Rights (URL address: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf) - Article 6(3)(d).

EXHIBIT 1

ICRC International Committee of the Red Cross

31-12-2000 International Review of the Red Cross No. 840, p. 993-1000 *by Stephane Jeannet*

Testimony of ICRC delegates before the International Criminal Court

As Legal Adviser in the ICRC's Legal Division Stéphane Jeannet worked on issues related to protecting the confidentiality of ICRC information. He is now an independent consultant.

In its June 2000 issue the *Review* published a commentary on the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) of 27 July 1999 recognizing the absolute right of the ICRC to nondisclosure of information relating to its own activities [1]. The Tribunal concluded that this right was based on international customary law.

This case set in motion a broader reflection within the ICRC regarding the confidentiality of information before international tribunals, and in particular the future International Criminal Court (ICC). The purpose of this article is to outline the ICRC's endeavours within the framework of the Preparatory Commission for the Establishment of an International Criminal Court (hereinafter the PrepCom) to secure a provision protecting the confidentiality of the organization's information, and the results of those steps.

The ICRC and the International Criminal Court

The ICRC has been mandated to promote respect for international humanitarian law, which includes the development of better implementation mechanisms [2]. Its active participation in the negotiations and its support for the establishment of the ICC are pursuant to this mandate. The ICRC welcomed the text of the ICC Statute as being substantive and enabling the Court to engage in the battle against impunity [3]. The ICRC has been intensively involved in negotiating the Statute, and subsequently the Elements of Crime, with regard to issues directly related to its mandated role as expert on, and guardian of, international humanitarian law [4].

At a time when the ICTY's decision was not yet known, there was much discussion within the ICRC on the best course of action to protect the confidentiality of information within the context of the ICC. A dialogue was also initiated within the International Red Cross and Red Crescent Movement, in particular with the International Federation of Red Cross and Red Crescent Societies and a number of National Societies. Since the Statute of the ICC had already been adopted in Rome in July 1998, it was obviously too late to add a clause to it. Under these circumstances it seemed that the ideal solution would be to obtain the inclusion, in the draft Rules of Procedure and Evidence, of a general clause protecting the confidentiality of certain information collected in the course of the ICRC's activities. It proved difficult, however, to define exactly which information should, or could, be privileged, how, and for whom.

Contact was therefore taken up with key government representatives. Their views were unanimous: there was indeed a need to protect information obtained in certain categories of professional relationships. While there was no objection to placing the work of the ICRC under such protection, it appeared that a provision of a general nature would be unacceptable, since it would, in their view, open a floodgate: the Court would be blocked by all kinds of requests for nondisclosure by any organization or individual. Such a clause would therefore gravely hinder the work of the Court. Consequently, the ICRC was strongly advised against pursuing such a strategy. It was told that only a very tightly drafted clause referring specifically and solely to the ICRC would have a chance of being accepted by States represented in the PrepCom; other avenues would have to be envisaged for other entities (including other components of the Movement), for example through witness protection measures.

In accordance with this advice, the ICRC requested that a specific provision be included in the Rules of Procedure and Evidence during the PrepCom's second session, which took place in New York from 26 July to 13 August 1999. Following the same line of thinking as in the case before the ICTY, the ICRC argued that there is a similar need for the work of the organization to be

protected within the framework of the ICC as well. Indeed, for a Court to request (or admit) such confidential information or documents or to require (or accept) testimony from ICRC staff would seriously undermine the role of the ICRC under international humanitarian law and the manner in which it discharges its mandate under the 1949 Geneva Conventions for the protection of war victims, the two 1977 Additional Protocols, and the Statutes of the International Red Cross and Red Crescent Movement. This is because warring parties are likely to deny or restrict access of the ICRC, in particular to prison and detention facilities, if they believe that its delegates may be collecting evidence for use in future criminal proceedings.

The proposed solution was that such a clause would make it necessary for the Court to obtain the ICRC's consent before requiring or permitting any present or former ICRC official or employee to testify about, or before considering admitting as evidence, or permitting the disclosure of, documents, information or other evidence which came into the possession of the ICRC in the course, or as a consequence, of the performance of its functions.

As indicated above, the arguments supporting the inclusion of a specific provision were essentially the same as that which the ICRC presented in its submission before the Trial Chamber of the ICTY [5]. They can be summarized as follows:

- in discharging its mandate, the ICRC obtains information on the basis of a relationship of confidence;
- the element of confidentiality is essential to the maintenance of the relationship between the ICRC and warring parties;
- it is universally accepted (in particular in the Geneva Conventions and their Additional Protocols) that it is in the international interest to foster this relationship;
- the disclosure of information, in breach of the ICRC's confidentiality rule, would cause irreparable damage to the ability of the ICRC to perform the functions allotted to it and thus to the international public interest.

The confidentiality rule is a working principle derived from the general practice of the ICRC and from international humanitarian law,
and is accepted and expected by States and victims of armed conflict. It is the hallmark of the ICRC.

Finally, the respective mandates of the ICC and the ICRC are separate but complement one another in the endeavour to ensure
respect for international humanitarian law. They both form part of the international *ordre public*. Differences between the work of the
ICC and that of the ICRC should therefore not be regarded as contradictory.

The rule adopted by the PrepCom

After much negotiation, the PrepCom on 30 June 2000 adopted by consensus the Rules of Procedure and Evidence of the ICC. Rule 73, entitled "Privileged communications and information", deals with the issue of the confidentiality of several categories of professional relationships. Sub-rule 73.1 stipulates that communications between a person and his or her lawyer are privileged and therefore not subject to disclosure. Sub-rules 73.2 and 73.3 provide that the Court may recognize communications within other professional or confidential relationships as privileged. In this context, particular regard is to be given to such relationships between patient and medical doctor, psychiatrist, psychologist or counsellor, or between a person and a member of a religious clergy. Finally, sub-rules 73.4 to 73.6 specifically deal with the case of the ICRC:

> "4.The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:
>
> (a) After consultations undertaken pursuant to subrule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or
>
> (b)Such information, documents or other evidence is contained in public statements and documents of ICRC.

5.Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials and employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions." [6]

Comments on sub-rules 73.4 to 73.6

This provision in effect bars the Court from using any confidential ICRC information (including by requesting or accepting testimony by ICRC delegates, past or present), unless the organization has specifically waived its privilege. Naturally, this does not concern all information, but only that having to do with the ICRC's official functions. Three qualifiers were nevertheless added in order to avoid blocking access by the Court to information that is essentially public. Therefore, the Court can admit evidence if:

- after consultation with the Court (see below) the ICRC does not object to disclosure (sub-rule 4(a));
- the ICRC has already made the information public (sub-rule 4(b)); or
- the same information has also been collected by another source (e.g. by another organization also present in the field), independently from the ICRC (sub-rule 5).

From the beginning of negotiations at the PrepCom, there was very little opposition to the idea that there should be a provision protecting ICRC information [7]. There were, however, some doubts about who should have the last word in deciding whether or not particular evidence could be disclosed: the Court or the ICRC. Some government representatives indeed considered that the ICRC should not be "above" the ICC; others believed that if evidence that a particular State considered to touch on its national security could be disclosed without its consent, the ICRC should not benefit from a more favourable treatment. But finally, with the support of an increasing number of delegations, the fact that it would be up to the ICRC to decide whether information could be disclosed was not challenged when the Rules of Procedure and Evidence were adopted on 30 June 2000. [8]

To achieve this result an additional provision had to be added, namely sub-rule 6, which provides for a dialogue between the ICC and the ICRC, "if the Court determines that ICRC information, documents or other evidence are of great importance for a particular case". The clause draws its inspiration from Article 72 of the Rome Statute, which deals with the disclosure of information pertaining to national security [9]. There is, however, a significant difference between the two provisions, since Article 72 leaves the last word to the Court. Here, on the other hand, the ICRC's privilege remains untouched.

Conclusion

The ICRC insisted on obtaining a very clear and absolute rule, because anything less, i.e. any uncertainty as to whether ICRC evidence may be used by the Court without the organization's consent, would cast a shadow on the ability of the ICRC to establish or maintain a relationship of trust with the parties to armed conflicts and the victims of such situations. Such uncertainty may result in denial or restriction of ICRC access. The perception of the ICRC by its interlocutors is of crucial importance here. In certain circumstances Rule 73 will therefore be a useful operational tool to negotiate that access.

Notes

1. Stéphane Jeannet, "Recognition of the ICRC's long-standing rule of confidentiality: An important decision by the International Criminal Tribunal for the former Yugoslavia", *IRRC*, No. 838, June 2000, pp. 403-425.

2. The tasks incumbent upon the ICRC under the Statutes of the International Red Cross and Red Crescent Movement (1986), Arts 5.2c) and g) include "to undertake the tasks incumbent

upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law" and "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any developments thereof". It should be noted that the Statutes have been unanimously adopted by the States party to the 1949 Geneva Conventions and the components of the International Red Cross and Red Crescent Movement.

3. Marie-Claude Roberge, "The new International Criminal Court", *IRCC*, No. 325, December 1998, pp. 671-677.

4. Knut Dörmann, "Preparatory Commission for the International Criminal Court: The Elements of War Crimes", *IRRC*, No. 839, September 2000, pp. 771-796.

5. See Jeannet, *op. cit.* (note 1), pp. 406-408.

6. Doc. PCNICC/2000/INF/3/Add.1. p. 39.

7. See also Knut Dörmann and Claus Kress, "Verfahrens- und Beweisregeln sowie Verbrechenselemente zum Römischen Statut des Internationalen Strafgerichtshofs: Eine Zwischenbilanz nach den ersten zwei Sitzungen der Vorbereitungskommission für den Internationalen Strafgerichtshof", *Humanitäres Völkerrecht – Informationsschriften*, Heft 4, 1999, p. 202.

8. The ICTY decision was taken on 27 July 1999. The fact that it recognized the ICRC an absolute right to nondisclosure based on customary international law would undoubtedly have been extremely helpful in convincing the diplomats who had doubts about the draft rule. However, it was not until 8 October 1999 that this decision was made public, tha t is several weeks after the end of the second session of the PrepCom. Therefore, the ICRC did not use this information until the next session (29 November-17 December 1999), during which discussion on the draft rule was not reopened.

9. See: Donald P. Piragoff, "Protection of National Security Information", in Roy S. Lee (Editor), "The International Criminal Court, The Making of the Rome Statute", Kluwer Law International, The Hague, 1999, pp. 270-294.

Abstract in French

31-12-2000

Section: Info resources > International Review > 2000 - No. 840

EXHIBIT 2

[redacted]

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: 5 August 1996

Original: English & French

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: **5 August 1996**

PROSECUTOR

v.

DUŠKO TADIĆ a/k/a "DULE"

DECISION ON DEFENCE MOTION ON HEARSAY

The Office of the Prosecutor:
Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. Michael Keegan

Counsel for the Accused:
Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Steven Kay
Ms. Sylvia De Bertodano

I. INTRODUCTION

Pending before the Trial Chamber is the Motion on Hearsay ("Motion") filed by the Defence on 26 June 1996 pursuant to Rule 54 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Prosecution filed its response on 10 July 1996. Oral argument was heard on 16 July 1996.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

[page 2] II. DISCUSSION

A. The Pleadings

1. This Motion raises the issue of the admissibility of hearsay evidence during trial before 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 Tribunal"). In bringing this Motion, the Defence contends that the admission of hearsay evidence would violate the right of the accused to examine the witnesses against him provided by in Article 21(4)(e) of the Statute of the International Tribunal ("Statute"). On this basis, the Defence avers that the International Tribunal should refuse to admit evidence directly implicating the accused in the crimes charged unless it first finds that the probative value of this evidence substantially outweighs its prejudicial effect. Further, the Defence asserts that the Trial Chamber should rule on the admissibility of such statements without hearing its content. Instead, the Defence requests that the Trial Chamber make such a ruling only after a review of the circumstances under which the evidence was received.

2. While acknowledging that the International Tribunal is not bound by any national rules of evidence, the Defence asserts that the Rules are more akin to the adversarial common law system and that most such systems contain a general exclusionary rule against hearsay. Even accepting that there are exceptions to this general rule because some types of hearsay may have sufficient probative value to be admissible - for example, instances of excited utterances and dying declarations - the Defence argues that the Trial Chamber should not admit any hearsay evidence unless the Prosecution first demonstrates that the evidence has substantial probative value that outweighs any prejudicial effect on the accused.

3. In opposition to the Defence, the Prosecution argues that the International Tribunal's omission of a Rule excluding hearsay evidence was clearly deliberate and is consistent with both the International Tribunal' s procedure of trials in which judges are the finders of fact, and with the civil law system in which the basic rule is that all relevant evidence is admitted. The Prosecution contends that the Judges of the International Tribunal are fully capable of determining the weight that should be afforded to such evidence. In the Prosecution's view, the [page 3] position of the Defence extends beyond even most common law systems in that these systems allow the admission of hearsay evidence that meets certain exceptions without requiring a further showing. Finally, the Prosecution maintains that the Defence's arguments run contrary to the spirit and intent of the Rules and that adoption of its requests would necessitate a formal amendment requiring approval of the Judges of the International Tribunal.

B. Analysis

4. The power of the Trial Chamber to regulate the conduct of the parties and the presentation of evidence during trial arises from the provisions of the Statute and the Rules. Relevant to the Motion

nder review is Article 21 of the Statute, which provides for the rights of the accused. The relevant portion states:

> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> . . .
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> . . .

5. The International Tribunal's Rules, originally adopted in February 1994, govern the admission of evidence. *See generally* Rules 89-98. Despite the adoption of several amendments to the Rules since their creation, there is no Rule that calls for the exclusion of out-of-court, or hearsay, statements.

6. Rule 89, entitled *General Provisions*, reads as follows:

> (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.
>
> **[page 4]** (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.

Rule 95 provides additional guidance regarding the admissibility of evidence. This Rule, entitled *Evidence Obtained by Means Contrary to Internationally Protected Human Rights*, declares:

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

7. It is clear from these provisions that there is no blanket prohibition on the admission of hearsay evidence. Under our Rules, specifically Sub-rule 89(C), out-of-court statements that are relevant and found to have probative value are admissible. Although Sub-rule 89(A) clearly provides that the Trial Chamber is not bound by national rules of evidence, in determining the validity of the Defence Motion, it is instructive to review the practice regarding admissibility of evidence in civil and common law systems.

8. In common law systems, evidence that has probative value is generally defined as "evidence that tends to prove an issue." Henry C. Black, *Black's Law Dictionary* 1203 (6th ed. 1991). Relevancy is often said to require implicitly some component of probative value. For example, the Supreme Court of Canada, in *R.v. Cloutier*, relied on the following statement of Sir Rupert Cross:

> "For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."

R.v. Cloutier, 2 S.C.R. 709, 731 (Canada Sup. Ct. 1979) (*quoting* Sir Rupert Cross, *Cross on Evidence* 16 (4th ed. 1974)). Another commentator, in a discussion of United States law, expressed a similar opinion:

> **[page 5]** There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case.... The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove.

Charles T. McCormick, *McCormick on Evidence* 339-40 (4th ed. 1992).

9. Thus, it appears that relevant evidence "tending to prove an issue", must have some component of reliability. In some common law systems, the general exclusion of hearsay evidence is based upon its presumed lack of reliability. However, this is not an absolute rule. For example, the United States Federal Rules of Evidence provides for twenty-seven specific situations in which hearsay evidence is admissible. *See* U.S. FED. R. EVID. 803-04. In addition to the circumstances explicitly provided for, the United States rules allow for the admission of statements

> not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

U.S. FED. R. EVID. 803(24); *see also* U.S. FED. R. EVID. 804(b)(5). The Evidence Act of the Laws of Malaysia, while not explicitly defining hearsay, also stipulates the circumstances in which statements by persons who are unavailable to be called as witnesses are declared relevant and thus admissible. *See* Malay. EVID. ACT, 1950 § 32 (rev. 1971).

10. Despite these relatively strict limitations on the admission of hearsay, judges in non-jury common law cases often take a slightly different approach:

> Where the admissibility of evidence is ... debatable, the contrasting attitudes of the appellate courts towards errors in receiving and those excluding evidence seem to support the wisdom of the practice adopted by many experienced trial judges in non-[**page 6**]jury cases of provisionally admitting debatably admissible evidence if objected to with the announcement that all questions of admissibility will be reserved until the evidence is all in.

McCormick on Evidence 86-87.

11. In civil law systems, however, there exists no general rule against the admissibility of hearsay evidence. Out-of-court statements are included in a case file of all evidence, prepared by the investigating magistrate, which is considered fully by the judges during the trial proceeding. This difference in criminal procedure between the civil and common law systems is explained primarily by the inquisitorial nature of the civil system, especially in the pre-trial phase, and the absence of a jury. Procedure in these systems, as one commentator noted when discussing the French legal system, is guided by the principle that "[a]ll forms of evidence are admissible as long as they do not conflict with the ethics of [the] system of criminal procedure." *Criminal Procedure Systems in the European Community* 118 (Christine Van Den Wyngaert et al., eds. 1993). Similarly, in criminal matters in Belgium, "the facts may be proven by all possible means" and the trial judge need only rely on his "intimate conviction" regarding whether a fact has been proven after assessing the weight of the evidence presented. *Id.* at 20-22.

12. Article 6(3)(d) of the European Convention on Human Rights provides for the right of the accused to examine witnesses against him. In interpreting this provision, the European Court of Human Rights has held that while the use of witness statements made out of court does not, in and of itself, violate this provision, "[a]s a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him." *Delta v. France*, 191-A Eur. Ct. H.R. (ser. A) 15 (1990). However, the European Court of Human Rights has not directly addressed hearsay as such, and indeed, has clearly stated that the admissibility of evidence is primarily a matter of regulation under national law. *Schenk v. Switzerland*, 145 Eur. Ct. H.R. (ser. A) 29 (1988).

13. In sum, the prohibition on the admissibility of hearsay that fails to meet a recognized exception is a feature of criminal procedure primarily limited to common law systems. In the [**page 7**] civil law system the judge is responsible for determining the evidence that may be presented during the trial, guided primarily by its relevance and its revelation of the truth.

14. The International Tribunal, with its unique amalgam of civil and common law features, does not strictly follow the procedure of civil law or common law jurisdictions. In view of this, the Trial Chamber recognizes the value to the parties of knowing the standards it will apply in determining whether hear

vidence is admissible. Moreover, in this first trial before the International Tribunal, an analysis of the Rules will further the ever-present goal of transparency of the proceedings.

15. The Trial Chamber is bound by the Rules, which implicitly require that reliability be a component of admissibility. That is, if evidence offered is unreliable, it certainly would not have probative value and would be excluded under Sub-rule 89(C). Therefore, even without a specific Rule precluding the admission of hearsay, the Trial Chamber may exclude evidence that lacks probative value because it is unreliable. Thus, the focus in determining whether evidence is probative within the meaning of Sub-rule 89(C) should be at a minimum that the evidence is reliable[1].

16. In evaluating the probative value of hearsay evidence, the Trial Chamber is compelled to pay special attention to indicia of its reliability. In reaching this determination, the Trial Chamber may consider whether the statement is voluntary, truthful, and trustworthy, as appropriate.

17. The Defence, however, argues that the Trial Chamber should exclude hearsay evidence implicating the accused in one of the crimes charged unless it finds that its probative value substantially outweighs its prejudicial effect. The Trial Chamber is asked to balance hearsay evidence with the possible prejudicial effect on the Defence before ruling on its admissibility. Further, the Defence would require that the Trial Chamber rule on the admission of such evidence without actually hearing its content. This procedure, while possibly appropriate if trials before the International Tribunal were conducted before a jury, is not warranted for the **[page 8]** trials are conducted by Judges who are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight. Thereafter, they may make a determination as to the relevancy and the probative value of the evidence.

18. Moreover, Sub-rule 89(D) provides further protection against prejudice to the Defence, for if evidence has been admitted as relevant and having probative value, it may later be excluded. Pursuant to this Sub-rule, the trial Judges have the opportunity to consider the evidence, place it in the context of the trial, and then exclude it if it is substantially outweighed by the need to ensure a fair trial.

19. Accordingly, in deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability. In doing so, the Trial Chamber will hear both the circumstances under which the evidence arose as well as the content of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognised by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In bench trials before the International Tribunal, this is the most efficient and fair method to determine the admissibility of out-of-court statements.

[page 9] III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence and,

PURSUANT TO RULE 54,

BY MAJORITY DECISION HEREBY DENIES THE MOTION.

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[1] Rule 95, while concerned with the methods by which evidence is obtained, also allows for its exclusion if it is unreliable.

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

Gabrielle Kirk McDonald
Presding Judge

Judge Stephen appends a Separate Opinion to this Decision.

Dated this fifth of August 1996
At The Hague
The Netherlands

[Seal of the Tribunal]

EXHIBIT 3

CASE OF DELTA v[1]. FRANCE

In the Delta case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court***, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr J. Cremona,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr C. Russo,
Mr J. De Meyer,

and also of Mr M.-A. Eissen, Registrar,

Having deliberated in private on 29 August and 20 November 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

* The case is numbered 26/1989/186/246. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

*** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 14 December 1989, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11444/85) against the French Republic lodged with the Commission under

Article 25 (art. 25) by a national of that State, Mr Michel Sophie Delta, on 4 August 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 January 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Sir Vincent Evans, Mr R. Macdonald, Mr C. Russo and Mr J. De Meyer (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr Thór Vilhjálmsson, substitute judge, replaced Mrs Bindschedler-Robert, who was unable to take further part in the consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence on 2 March 1990, the Registrar received the applicant's memorial on 3 May. On 23 May and 8 June the Agent of the Government and the Delegate of the Commission informed the Registrar that they would submit their observations at the hearing.

5. On 8 June the Secretary to the Commission produced the file on the proceedings before the Commission which the Registrar had sought from him on the President's instructions.

6. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 29 June that the oral proceedings should open on 27 August 1990 (Rule 38).

7. The hearing took place in public in the Human Rights

Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr P. Baudillon, Assistant Director,
Department of Legal Affairs, Ministry
of Foreign Affairs, Delegate of
the Agent,

Mr M. Simamonti, magistrat, Department of
Criminal Affairs and Pardons, Ministry of Justice,

Mrs I. Chaussade, magistrat,
Department of Legal Affairs, Ministry of
Foreign Affairs, Counsel;

(b) for the Commission

Mr J.-C. Soyer, Delegate;

(c) for the applicant

Mr P.-F. Divier, avocat, Counsel.

The Court heard addresses by Mr Baudillon for the Government, Mr Soyer for the Commission and Mr Divier for the applicant, as well as their replies to its questions.

8. On 31 August the Registrar received from the applicant's lawyer the documents which the applicant had indicated in his memorial would be filed.

AS TO THE FACTS

I. The circumstances of the case

9. Mr Michel Sophie Delta is a French citizen who was born in Guadeloupe and lives there today after having spent some time in metropolitan France.

A. The police investigation

10. At 6.40 p.m. on 29 March 1983 a girl of 16, Miss Poggi, and a friend of the same age, Miss Blin, were in a Paris underground station when two coloured men accosted them. One of the men snatched a gold chain and crucifix which Miss Poggi was wearing round her neck and ran towards the exit.

11. The two girls immediately went to the central police station of the 12th District, and at 7 p.m., as a result, Mr Delta was arrested by Police Constable Bonci, accompanied by the two girls, in a building by the exit from the underground. The victim and her friend immediately said they recognised him. A search of the applicant and subsequently of the premises yielded nothing, however.

12. The applicant was taken to the central police station of the 12th District and questioned at 8.40 p.m. by Chief Inspector Mercier, an officier de police judiciaire, about his identity and means of subsistence and was then taken into police custody.

13. From 10 a.m. to 10.20 a.m. the following day, Inspector Duban, who was likewise an officier de police judiciaire, took a statement from him about the facts of the case. Mr Delta said that at about 6.30 p.m. he had been set upon by four people who had chased him into the underground and stolen a cigarette lighter and 100 francs from him. He surmised that one of them could have committed the robbery as the two girls went by. He said that he had run away because he had been put in fear by his four attackers.

Subsequently (the exact time is not given in the police report), Inspector Duban interviewed both girls separately, each in the presence of her mother. They confirmed that the person who had been arrested was indeed the person who had committed the offence. The victim lodged a complaint alleging robbery.

Mr Delta was never formally confronted with Miss Poggi and Miss Blin.

14. The Chief Superintendent in charge of the Fourth Area police force forwarded the file to the public prosecutor's office.

B. The judicial proceedings

1. Paris Criminal Court

15. The Paris public prosecutor considered that a judicial investigation was unnecessary and accordingly used the direct committal procedure (Articles 393 to 397-7 of the Code of Criminal Procedure, as amended by the "Security and Freedom" Act of 2 February 1987).

16. On 31 March 1983 Mr Delta appeared before the 23rd Division of the Paris Criminal Court, which made an interlocutory order for a psychiatric report and a social inquiry

report and remanded him in custody.

17. On 5 May the court passed a sentence of three years' imprisonment on him. The judgment contained the following reasons:

"The facts (robbery by snatching a neckchain and crucifix from the victim) [are established], notwithstanding the defendant's denials, by the evidence obtained, in particular by means of the statements of Police Constable Bonci, who gave evidence on oath. The defendant must be convicted and punished very severely, having regard to the nature of the offence committed with the use of violence.

Moreover, in a judgment dated 22 October 1981 Delta ... was sentenced to two years' imprisonment by the Paris Court of Appeal for robbery and consequently is legally a reoffender under Article 58 of the Criminal Code;

..."

18. Although they had been duly summoned by the prosecution, the two girls did not attend the trial and gave no reasons for their failure to do so. The court did not take any steps to have them brought before it under Article 439 of the Code of Criminal Procedure (see paragraph 24 below).

The accused, whose defence was in the hands of two trainee barristers who had successively been assigned to him by the court, had not submitted any pleadings suggesting that any witnesses should be examined or asking for any further inquiries to be made into the facts.

2. Paris Court of Appeal

19. Mr Delta appealed, claiming that he was the victim of mistaken identity. Relying on Article 513, second paragraph, of the Code of Criminal Procedure (see paragraph 25 below) and Article 6 para. 3 (d) (art. 6-3-d) of the Convention, he also expressly sought to have the victim, the person who was with her and two witnesses on his behalf called; he asserted that he had himself urged the concierge and a resident in the building where he had taken refuge to alert the police, as he feared for his safety if his pursuers caught up with him.

20. On 28 September 1983 the Paris Court of Appeal (10th Division) upheld the whole of the judgment of the court below after refusing the application for examination of witnesses in the following terms:

"After the defendant's arrest, Miss Poggi formally stated that he was the man who had snatched the chain from her. Miss Blin likewise identified Delta as being responsible for the snatch theft from Miss Poggi.

These statements satisfy the Court that the defendant was guilty of the offences charged and make the requested examination of witnesses unnecessary."

3. Court of Cassation

21. Mr Delta appealed on points of law, alleging a violation of Article 6 para. 3 (d) (art. 6-3-d) of the Convention and Article 513 of the Code of Criminal Procedure.

The Court of Cassation (Criminal Division) dismissed the appeal in a judgment of 4 October 1984 on the following grounds:

"It appears from the impugned judgment of the Court of Appeal that Delta, who was prosecuted for robbery and claimed to be the victim of mistaken identity, asked the Court of Appeal to order an examination of the victim and of witnesses, and that the court below, after studying the statements taken during the investigation from Miss Poggi, the victim, and from the witness Bonci, refused this application on the grounds that those statements satisfied it that the defendant was guilty of the offences charged and made the requested examination of witnesses unnecessary.

In so holding, the Court of Appeal, far from violating the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, gave its decision a legal basis.

The ground of appeal, which does no more than attempt to call in question the appeal court's final assessment of all the evidence adduced at the trial and of whether it was appropriate to order further inquiries into the facts, cannot be accepted.

..."

C. The applicant's release

22. Mr Delta was released on 9 September 1985, after spending a little over two years and five months in prison.

II. The examination of witnesses by criminal courts (juridictions correctionnelles de jugement)

23. In French law the rules governing the examination of witnesses by criminal courts differ according to whether the

court is hearing the case at first instance or on appeal.

A. Examination in the Criminal Court

24. The main provisions of the Code of Criminal Procedure applicable in the Criminal Court are the following:

Article 437

"Anyone called to be heard as a witness shall be required to appear, to take the oath and to give evidence."

Article 438

"A witness who fails to appear or who refuses either to take the oath or to give evidence may, on an application by the public prosecutor, be punished by the court as provided for in Article 109."

Article 439

"If a witness fails to appear and has not put forward any excuse recognised as being valid and legitimate, the court may, on an application by the public prosecutor or of its own motion, order the witness to be brought before it immediately by the police in order to be examined or adjourn the case.

..."

Article 442

"Before proceeding to examine the witnesses, the presiding judge shall question the accused and take statements from him. The public prosecutor and, through the presiding judge, the civil party seeking damages and the defence may put questions to him."

Article 444

"The witnesses shall subsequently give their evidence in turn, either as to the offences with which the accused is charged or as to his personality and morals.

The witnesses called by the prosecuting parties shall be heard first, subject to the presiding judge's discretion to determine himself the order in which the witnesses shall be heard.

With the court's leave, evidence may also be given by persons suggested by the parties and who are present at the beginning of the trial but have not been formally summoned."

Article 452

"Witnesses shall give evidence orally.

Exceptionally, however, they may, with the leave of the presiding judge, make use of documents."

Article 454

"After each witness has testified, the presiding judge shall put to him any questions he deems necessary and, where appropriate, those that are suggested to him by the parties.

A witness may withdraw after testifying, unless the presiding judge decides otherwise.

The public prosecutor, the civil party seeking damages and the accused may request, and the presiding judge may always order, that a witness should temporarily withdraw from the hearing-room after giving evidence in order to be brought back and examined if necessary after other witnesses have given evidence, with or without a confrontation."

Article 455

"During the trial the presiding judge shall, if necessary, have the exhibits shown to the accused or witnesses again and shall hear their comments."

B. Examination in the Court of Appeal

25. The procedure laid down by law for the Criminal Court also applies in principle to the Court of Appeal but subject to an important proviso in the second paragraph of Article 513 of the Code of Criminal Procedure, which reads:

"Witnesses shall be heard only if the court [of appeal] so orders."

26. This provision has given rise to a line of decisions by the Criminal Division of the Court of Cassation, which appears to have departed from these precedents in 1989, that is to say after the events in the instant case.

1. The case-law until 1989

27. The Criminal Division decided very early on that appeal courts were not required to hear afresh witnesses who had already given evidence at the original trial, even where an application had been made for them to be re-examined; it did, however, lay on

them the obligation to hear and determine any applications made and to give reasons for any refusal (30 October and 13 December 1890, Bulletin criminel (Bull.) nos. 212 and 253; 20 October 1892, Recueil périodique Dalloz (DP) 1894, I, p. 140; 13 January 1916, DP 1921, I, p. 63; 20 December 1955, Dalloz 1956, sommaires, p. 29).

Where they considered it useful or necessary, appeal courts could summon witnesses who had not testified in the Criminal Court; but if they refused to call such witnesses, it was sufficient by way of reasons if they stated in their judgment that there was no need for further inquiries into the facts (20 October 1892, Bull. no. 212; 9 February 1924, Bull. no. 70; 5 November 1975, Bull. no. 237, p. 629).

2. The case-law since 1989

28. The Criminal Division's approach seems to have changed markedly in its Randhawa judgment of 12 January 1989:

"By Article 6 para. 3 (d) (art. 6-3-d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 'everyone charged with a criminal offence has the [right] to examine or have examined witnesses against him'. It follows that, unless it is impossible for reasons which they must specify, courts of appeal are bound, on a properly made application, to order the examination in the presence of the parties of prosecution witnesses who have not been confronted with the defendant at any stage of the proceedings.

Sarb Randhawa, who was charged with drug-trafficking and a customs offence, made an application to the Court of Appeal for an examination inter partes of the witnesses Joris Suray and Catherine Guillaume, whom he had had summoned and whose statements provided, he claimed, the sole basis for the finding of guilt. He said that he had not been able to have them examined at any stage of the proceedings.

In support of its refusal of this application, and although it based its finding of the defendant's guilt solely on the statements of the aforementioned witnesses, the court below noted merely that the witnesses whose examination had been sought had been interviewed during the police inquiries and the judicial investigation and that the defendant had been informed of the charges arising from their statements.

But while a refusal to hear evidence from a prosecution witness does not, as such, infringe the aforementioned provisions of the Convention, since the court may take into account any special difficulties entailed by an inter partes examination of a given

witness, for example the risk of intimidation, pressure or reprisals, such a refusal must nevertheless comply with the rights of the defence and the court must explain why a confrontation is impossible.

This was not so in the instant case, and the judgment must accordingly be set aside ..." (Bull. 1989, no. 13, pp. 37-38)

This approach was confirmed in a judgment of 22 March 1989 (case of X, Bull. 1989, no. 144, pp. 369-371).

PROCEEDINGS BEFORE THE COMMISSION

29. In his application of 4 August 1984 to the Commission (no. 11444/85), Mr Delta alleged a breach of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention, claiming that he had not had a fair trial as his conviction was based solely on statements made to the police by witnesses whom neither he nor his counsel had been able to examine.

30. The Commission declared the application admissible on 8 September 1988.

In its report of 12 October 1989 (made under Article 31) (art. 31) the Commission expressed the opinion that there had been a violation of paragraph 1 of Article 6 taken together with paragraph 3 (d) (art. 6-1, art. 6-3-d). The full text of the Commission's opinion, which was unanimous, is reproduced as an annex to this judgment*.

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* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 191 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

31. In his memorial the applicant requested the Court to:

"Hold that in the instant case France violated Article 6 para. 1 taken together with paragraphs 2 and 3 (b) and (d) (art. 6-1, art. 6-2, art. 6-3-b, art. 6-3-d);

Find that there have been these violations and in consequence:

Order France to pay Mr Delta the sum of FRF 156,698.49 ... with interest at the French statutory rate from the date of the Court's decision, in compensation for the pecuniary damage

sustained by Mr Delta;

Order France likewise to pay him the sum of FRF 600,000 ... with interest at the French statutory rate from the date of the Court's decision, in compensation for the non-pecuniary damage sustained by Mr Delta owing both to the violation itself and to the feelings of distress which resulted from it and to the loss of liberty in difficult prison conditions for two years and seven months;

Order it to compensate Mr Divier, of the Paris Bar, direct by way of paying him the sum of FRF 24,000 ..., likewise with interest at the French statutory rate from the date of the Court's decision, in compensation for the loss of earnings he has sustained as a result of defending Mr Delta free of charge (but not under the legal-aid scheme) in both appeal and cassation proceedings;

And lastly, if the Court considers it fair, order France to compensate Mr Divier direct for the loss of earnings sustained by him on account of work done at the European Commission and Court stage but not wholly covered by legal aid, as indicated above."

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 3 (d) (art. 6-1, art. 6-3-d)

32. Mr Delta complained that he had not had a fair trial. He relied on paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d) of the Convention:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ... ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

The Paris Criminal Court and Court of Appeal had allegedly

convicted him on the strength solely of statements made to the police by persons - the victim of a robbery, Miss Poggi, and a friend of hers, Miss Blin - whom neither his lawyer nor he himself had been able to examine or have examined before either of those two courts or, because of recourse to the direct committal procedure, before an investigating judge. They had thus, he claimed, deprived him of the opportunity to impugn the statements of the two persons concerned. The only witness heard at the trial was the police constable who had arrested Mr Delta and taken the initial statements of Miss Poggi and Miss Blin; but he had not witnessed the attack in the underground and was not an officier de police judiciaire (see paragraph 11 above). The Court of Appeal refused to call two defence witnesses and likewise considered it unnecessary to hear evidence from the complainant and her friend. In sum, the applicant claimed that he had been tried exclusively on the basis of written evidence, in accordance with a practice of taking hearsay evidence from policemen.

The Commission accepted these arguments in substance.

33. The Government pointed out that in the Paris Criminal Court the applicant did not call any witnesses or request any further inquiries into the facts. They added that the prosecution did not fail to summon the victim of the attack and her friend, but the girls did not appear in court; there had accordingly not been any inequality of treatment between the prosecution and the defence.

In the Court of Appeal Mr Delta had indeed asked that Miss Poggi and Miss Blin should be called, together with two defence witnesses, but the Government alleged that he had only done so in order to challenge the judgment at first instance by every possible means and not in order to complain of any inequality of treatment.

Generally speaking, Article 6 para. 3 (d) (art. 6-3-d) did not, they submitted, give an accused an unlimited right to call witnesses; it allowed the judicial authorities a discretion to decide whether hearing a witness could contribute to the discovery of the truth. The applicant had in no way shown how the appearance in court of the victim and her friend or of defence witnesses who had not seen what had happened could provide any evidence of his innocence.

34. As the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1), the Court will consider the applicant's complaint under paragraphs 3 (d) and 1 taken together (art. 6-3-d, art. 6-1), (see, among other authorities, the

Windisch judgment of 27 September 1990, Series A no. 186, p. 9, para. 23).

Although the victim of the offence and her friend did not testify in court in person, they are to be regarded for the purposes of Article 6 para. 3 (d) (art. 6-3-d) as witnesses - a term to be given an autonomous interpretation (ibid., p. 9, para. 23) - since their statements, as reported orally by Police Constable Bonci at the Criminal Court hearing and as recorded in writing by Inspector Duban, were in fact before the court, which took them into account.

35. The admissibility of evidence is primarily a matter for regulation by national law, and, as a general rule, it is for the national courts to assess the evidence before them. Accordingly, the Court's task under the Convention is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (ibid., p. 10, para. 25).

36. In principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1), provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings (see the Kostovski judgment of 20 November 1989, Series A no. 166, p. 20, para. 41).

37. In the instant case Miss Poggi and Miss Blin had been interviewed, at the police-investigation stage, only by PC Bonci and the inspector who drew up the record of their statements. They were questioned neither by an investigating judge, because of recourse to the direct committal procedure (see paragraph 15 above), nor by the courts.

Before the Criminal Court the defence did not ask in their written submissions for any witnesses to be called. Nevertheless, the prosecution had duly summoned the two girls and, since they did not appear and gave no reasons for their failure to do so, the court could have made use of Articles 438 and 439 of the Code of Criminal Procedure to compel them to attend.

In the Court of Appeal, on the other hand, the defendant

- relying, inter alia, on Article 6 para. 3 (d) (art. 6-3-d) of the Convention - expressly asked for the complainant and her friend and two defence witnesses to be summoned. This application was, however, refused (see paragraph 20 above).

Accordingly, neither the applicant nor his counsel ever had an adequate opportunity to examine witnesses whose evidence, which had been taken in their absence and later reported by a policeman who had not witnessed the attack in the underground, was taken into account by the courts responsible for trying the facts - decisively at first instance and on appeal, as the file contained no other evidence. They were therefore unable to test the witnesses' reliability or cast doubt on their credibility.

In sum, the rights of the defence were subject to such restrictions that Mr Delta did not receive a fair trial. There has accordingly been a breach of paragraph 3 (d) of Article 6 taken together with paragraph 1 (art. 6-3-d, art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 2 AND 3 (b) AND ARTICLES 17 AND 18 (art. 6-2, art. 6-3-b, art. 17, art. 18)

38. Before the Court, counsel for the applicant also relied on Article 6 paras. 2 and 3 (b) (art. 6-2, art. 6-3-b) and Articles 17 and 18 (art. 17, art. 18) of the Convention.

The alleged disregard of the presumption of innocence concerned the same facts and consequences that the Court has held to be contrary to paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1); in the circumstances of the case, no separate examination of it is necessary.

As regards the complaints relating to paragraph 3 (b) of Article 6 and to Articles 17 and 18 (art. 6-3-b, art. 17, art. 18), which were likewise not raised before the Commission, they fall outside the limits resulting from the Commission's decision on admissibility (see, among other authorities, the Bezicheri judgment of 25 October 1989, Series A no. 164, p. 12, para. 27). The Court accordingly has no jurisdiction to entertain them.

III. APPLICATION OF ARTICLE 50 (art. 50)

39. Article 50 (art. 50) of the Convention provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the

consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Under this provision the applicant sought compensation for damage and reimbursement of expenses.

A. Damage

40. Mr Delta claimed to have suffered damage on account of the failure to comply with the requirements of the Convention and sought 156,698.49 French francs (FRF) in respect of pecuniary damage and FRF 600,000 in respect of non-pecuniary damage. The first of these sums represented loss of earnings caused by his detention, quantified on the basis of the national guaranteed minimum wage, while the second related to the feelings of distress induced by the violation of Article 6 (art. 6) and to the deprivation of liberty. In respect of both sums, the applicant claimed interest calculated at the French statutory rate, to run from the date of the Court's judgment.

41. The Government pointed out that at the time the applicant was arrested he had no occupation and was not receiving any unemployment benefit. They considered that if the Court were to find a breach, its judgment would provide sufficient just satisfaction in respect of the non-pecuniary damage.

42. The Delegate of the Commission expressed doubts as to the existence of a causal link between the alleged violation and the damage sustained by Mr Delta on account of his loss of liberty; he left it to the Court to award a nominal sum if it wished to go beyond a finding of a violation.

43. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of all the guarantees of Article 6 (art. 6). Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard Mr Delta as having suffered a loss of real opportunities (see, among other authorities and mutatis mutandis, the Goddi judgment of 9 April 1984, Series A no. 76, pp. 13-14, paras. 35-36, and the Colozza judgment of 12 February 1985, Series A no. 89, p. 17, para. 38).

Taking its decision on an equitable basis, as required by Article 50 (art. 50), it awards Mr Delta compensation in the amount of FRF 100,000 in respect of the whole of the damage he suffered.

B. Costs and expenses

44. Counsel for the applicant claimed compensation for the loss of earnings he had sustained by defending Mr Delta free of charge. He sought FRF 24,000 plus interest in respect of the national proceedings, as Mr Delta had preferred to choose his own counsel and thus forgo legal aid for the proceedings in the Paris Court of Appeal and in the Court of Cassation. As regards the European proceedings, he requested the Court to decide whether compensation should be awarded and, if so, how much; however, he assessed his fees for the work done up to 1 May 1990 at FRF 44,000 and stated that his client had been legally aided in the proceedings before the Convention institutions.

45. In the Government's submission, only the expenses actually incurred by Mr Delta himself could be reimbursed. It was for the Court to assess the amount of the expenses entailed by the national proceedings, having regard to the supporting documents produced. Furthermore, the applicant had not proved that in respect of the proceedings in Strasbourg he had incurred any financial liabilities exceeding the amount of legal aid.

46. The Delegate of the Commission left the matter to the Court's discretion.

47. According to the Court's case-law, an applicant's lawyer cannot rely on Article 50 (art. 50) to claim just satisfaction on his own account (see, among other authorities, the Luedicke, Belkacem and Koç judgment of 10 March 1980, Series A no. 36, p. 8, para. 15, and the Artico judgment of 13 May 1980, Series A no. 37, p. 19, para. 40).

The claim for reimbursement of costs and expenses must therefore be dismissed.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of paragraph 3 (d) of Article 6 of the Convention taken together with paragraph 1 (art. 6-3-d, art. 6-1);

2. Holds that it is not necessary also to examine the case under Article 6 para. 2 (art. 6-2);

3. Holds that it is not called upon to consider the complaints under Article 6 para. 3 (b) and Articles 17 and 18 (art. 6-3-b, art. 17, art. 18);

4. Holds that the respondent State is to pay the applicant compensation for damage in the sum of 100,000 (one hundred thousand) French francs;

5. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 December 1990.

Signed: Rolv RYSSDAL
President

Signed: For the Registrar
Herbert PETZOLD
Deputy Registrar