



**SPECIAL COURT FOR SIERRA LEONE**

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**TRIAL CHAMBER II**

Before: Justice Teresa Doherty, Presiding Judge  
 Justice Richard Lussick  
 Justice Julia Sebutinde

Registrar: Robin Vincent

Date: 16 September 2005

PROSECUTOR Against Alex Tamba Brima  
Brima Bazy Kamara  
Santigie Borbor Kanu  
(Case No.SCSL-04-16-T)

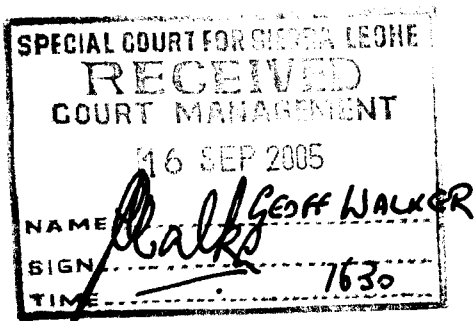
**DECISION ON THE PROSECUTION'S ORAL APPLICATION FOR LEAVE TO BE GRANTED TO WITNESS TF1-150 TO TESTIFY WITHOUT BEING COMPELLED TO ANSWER ANY QUESTIONS IN CROSS-EXAMINATION THAT THE WITNESS DECLINES TO ANSWER ON GROUNDS OF CONFIDENTIALITY PURSUANT TO RULE 70 (B) AND (D) OF THE RULES.**

Office of the Prosecutor:  
 Jim Hodes  
 Lesley Taylor  
 Melissa Pack

Defence Counsel for Alex Tamba Brima:  
 Glenna Thompson  
 Kojo Graham

Defence Counsel for Brima Bazy Kamara:  
 Andrew Daniels  
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Defence Counsel for Santigie Borbor Kanu:  
 Geert-Jan Alexander Knoops  
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 Abibola E. Manly-Spain  
 Amadu Koroma



**TRIAL CHAMBER II** ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

**SEISED** of the Prosecution's Oral Request for Leave for Witness TF1-150 to testify without being compelled to answer any question in cross-examination that the witness may decline to answer on grounds of confidentiality, pursuant to the provisions of section 70 (B) and (D) of the Rules; (the "Motion");

**NOTING** the oral submissions in response by Counsel for the accused persons Brima, Kanu and Kamara (the "Joint Response");

**NOTING** the Prosecution's oral submissions in reply (the "Reply");

**CONSIDERING** also the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("the Statute") and Rules 70 and 79 of the Rules of Procedure and Evidence of the Special Court ("the Rules");

**HEREBY DECIDES AS FOLLOWS :**

### I. INTRODUCTION:

1. Prosecution Witness TF1-150 is a foreign national who served in Sierra Leone during the period May 1998 to 2001 as a Human Rights advisor to an international organisation ("the former employer"). By virtue of his employment, Witness TF1-150 obtained information relating to the conflict situation in Sierra Leone during the said period, some of which information he obtained on a confidential basis. In the interest of the former employer, Witness TF1-150 enjoyed and continues to enjoy by virtue of his employment, certain privileges and immunities in respect of all words spoken or written and all acts performed by him in the performance of his duties, including immunity from legal process. That means that he cannot testify before a court of law regarding his work except with the express permission of his former employer.
2. By a letter dated 23 May 2005 addressed to the Prosecutor, SCSL, the former employer waived part of that immunity and granted Witness TF1-150 permission to testify before the Special Court in a number of cases including the *Prosecutor v. Alex Tamba Brima et al.* However, due to the sensitive and confidential nature of some of the information that the witness might divulge, the waiver of immunity is conditional upon certain conditions, one of which is that the witness must testify in closed session. In compliance with the request of the former employer, the Trial Chamber on 13 September 2005 ordered pursuant to Rule 79 (A) (iii) of the Rules that in the interests of justice Witness TF1-15- do testify in closed session.
3. In addition to the closed session, the Prosecution now seeks an order from the Trial Chamber guaranteeing before Witness TF1-150 is called to testify, that he will not be compelled to answer any questions in cross-examination, relating to the names of his informants or sources of information, on the grounds that he obtained information from these sources on conditions of confidentiality.



## II. SUBMISSIONS OF THE PARTIES:

### *The Motion:*

4. The Prosecution requests the Trial Chamber pursuant to the provisions of Rule 70 (B) and (D) of the Rules to allow Witness TF1-150 to testify without being compelled to answer any questions in cross-examination which questions the witness may decline to answer on grounds of confidentiality.

5. In particular the Prosecution submitted that despite having been granted leave to testify in closed session, Witness TF1-150 is unwilling to disclose or divulge the names of the sources of information that he obtained in the course of his employment as a Human Rights officer while working in Sierra Leone, by virtue of the fact that he obtained that information under conditions of confidentiality. The Prosecution maintained that under Rule 70 (D) the Trial Chamber has no power to compel the witness to answer any question which the witness declines to answer on grounds of confidentiality.

6. The Prosecution further submitted that as a matter of principle, Witness TF1-150 being a Human Right official, is privileged from revealing the identity of his sources and that if he were compelled to reveal the names of those sources, this will result not only breach of confidentiality between the witness and his sources but may also lead to the compromise of their safety or security. The Prosecution relies in this regard on the provisions of section "J- Confidentiality" of the Training Manual on Human Rights Monitoring, 2001.

7. The Prosecution further submitted that if the Trial Chamber were to compel Witness TF1-150 to disclose the names of his sources it will set a bad precedent for other Human Rights workers trying to gather information in the field as victims and other would-be informers will find it difficult in future to confide in such officials again.

8. The Prosecution submitted that in any event, the Defence will suffer no unfair prejudice if the witness is allowed to confine his testimony to the type of source e.g. an NGO or an individual, but without being compelled to name the organisation or individual.

### *Joint Response:*

9. The Defence jointly opposed the application and submitted that Rule 70 upon which the Prosecution seeks to rely does not apply to Witness TF1-150 or his testimony and therefore does not accord him the immunity from being compelled to answer certain questions, in particular naming the sources of his information.

10. The Defence submitted further that the protective measures already accorded to Witness TF1-150 including leave to testify in closed session pursuant to Rule 79 of the Rules sufficiently guarantee the confidentiality of any information that the witness may divulge in the course of his testimony and that it is unnecessary for the Trial Chamber in addition to shield him from having to answer certain question in cross-examination.

11. The Defence further submitted that the right of an accused person to examine witnesses against him as part of a fair trial process, is guaranteed by Article 17 (4) (e) of the Statute and outweighs any other considerations such as the witness's confidentiality obligations towards his informants. The Defence further submitted that Rule 75 (A) which empowers the Trial Chamber to grant witnesses and victims "protective measures" also enjoins the Trial Chamber to ensure that such measures are not inconsistent with the rights of the accused persons, and that in fact the Prosecution request if granted would be prejudicial to those rights.

*Prosecution Reply*

12. The Prosecution submitted in reply that Rule 70 (D) absolutely prohibits the Trial Chamber from compelling a witness summoned under that Rule to answer a question after the witness declines to do so on grounds of confidentiality.

13. Furthermore, the Prosecution maintained that the duty of a Human Rights Official to maintain the confidentiality of his sources outweighs the rights of accused persons to insist on disclosure of the names of those sources.

### III. DELIBERATIONS

14. Witness TF1-150 worked as a Human Rights monitor for an international organisation in Sierra Leone during a period relevant to the indictment in the case of *The Prosecutor v. Alex Tamba Brima et al.*<sup>1</sup> By virtue of his employment in the organisation he enjoyed and continues to enjoy certain privileges and immunities including immunity from legal process. In other words he cannot be compelled to appear and testify in a court of law relating to his employment without the express permission of his former employer.

15. The Prosecution tendered to the court a letter dated 23 May 2005 in which the former employer of Witness TF1-150 did in fact waive part of that immunity and granted him permission to appear before the Special Court in the AFRC Case and to “*testify freely as to the existence or otherwise of any of the elements of any of the crimes set out in the Statute of the Special Court or other matters which, in the opinion of the Court, are relevant to the individual criminal responsibility of an accused person or of any circumstance of an exculpatory or mitigatory nature, as well as to be asked and to answer questions which seek to establish the existence of any such element or circumstance.*”

16. However, the former employer observes in the said letter that in view of the “*sensitive and confidential information*” that the witness is likely to divulge, his testimony should only be given on that following conditions, namely that he “*testifies in closed session; that transcripts and recordings of his testimony be restricted to the trial Chambers and their staff, to the Prosecution and their staff and to the accused and their counsel and expert advisers; and that the Prosecution and their staff as well as accused and their counsel and expert advisers be prohibited from divulging the contents of such testimony to the media or to any other third part.*” The waiver does not extend to the release confidential documents of the former employer unless prior permission in this regard is sought and obtained.

17. Based upon the contents of this letter the Trial Chamber on 13 September 2005 granted leave to Witness TF1-150 to testify in closed session pursuant to Rule 79 (A) (iii) of the Rules. In addition to the closed session measures, the Prosecution now seeks additional protection for the witness by requesting the Trial Chamber not to compel him to answer certain questions in cross-examination if the witness refuses to answer the questions on grounds of confidentiality.

18. We note that in the said letter the former employer does not impose any restrictions on the witness’s testimony or on his ability to disclose the sources of information and instead authorises him

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<sup>1</sup> Case No. SCSL-04-16-T

to “testify freely” once the above pre-conditions have been met. It is the witness himself who as a matter of principle feels that he is under obligation to maintain the confidentiality of his sources.

19. First of all, 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. Similarly, 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. Furthermore the ICTY authorities cited by the Prosecution in support of their arguments, including *The Prosecutor v. Slobodan Milosevic*<sup>2</sup> and *The Prosecutor v. Radoslav Brdjanin and Momir Talic*<sup>3</sup>, are persuasive but distinguishable and therefore not pertinent to this case.

20. Secondly, whereas the Trial Chamber recognises the privileged relationship between a Human Rights officer and his informants as well as the public interest that attaches to the work of Human Rights officers gathering confidential information in the field, we do not think that the privilege and/or public interest should outweigh the rights of the accused persons to a fair trial as guaranteed by Article 17 of the Statute. In any event, we are of the view that the protective measures pertaining to a closed session under Rule 79 are more than sufficient to maintain the confidentiality of any information that Witness TF1-150 may divulge in the course of his testimony, without the need for additional measures whose effect is to curtail the statutory rights of the accused. In this regard we agree with the view expressed by the witness’s former employer in their letter referred to above. In our opinion it would be prejudicial to the rights of the accused persons if Witness TF1-150 were permitted to disclose certain information and withhold the names of the sources, as the Defence would be handicapped in their attempts to challenge the information disclosed without knowing the name of the source.

**FOR ALL THE ABOVE REASONS** the Trial Chamber dismisses the Prosecution request and rules that Witness TF1-150 can be compelled to answer questions relating to the sources of his information.

Honourable Justice Teresa Doherty will deliver a separate dissenting opinion.

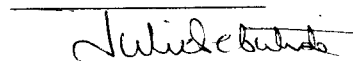
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<sup>2</sup> *The Prosecutor v. Slobodan Milosevic*, Confidential Decision on Prosecution’s Application for a Witness Pursuant to Rule 70 (B), 30 October 2003; *The Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AR108bis & AR 73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002.

<sup>3</sup> *The Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

Done at Freetown this 16<sup>th</sup> day of September 2005.

  
Justice Richard Lussick

  
Justice Julia Sebutinde

