SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-AR73

Before:	Justice Teresa Doherty, Presiding Justice Julia Sebutinde Justice Richard Lussick
Interim-Registrar:	Lovemore Munlo
Date filed:	17 January 2006

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

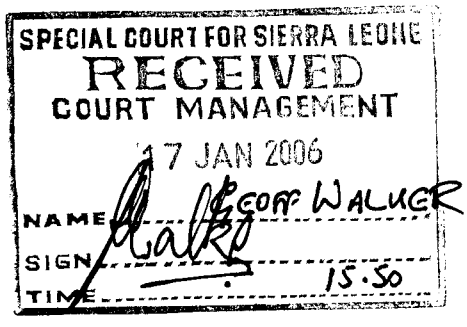
JOINT DEFENCE RESPONSE TO *AMICUS CURIAE* BRIEFS BY HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, AND THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Office of the Prosecutor:
Christopher Staker
Luc Côté
James Johnson

Defence Counsel for Kanu:
Geert-Jan A. Knoops
Carry J. Knoops
A.E. Manly-Spain

Defence Counsel for Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah



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I INTRODUCTION

1. On 15 December 2005, Human Rights Watch filed its "*Amicus Curiae* Submission Filed under Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone on behalf of Human Rights Watch" ("**HRW Brief**") after the Appeals Chamber's "Order on the Appointment of Amicus Curiae" ("**Order on HRW Brief**") of 28 November 2005.[1]

2. On 16 December 2005, the United Nations High Commissioner for Human Rights ("**UNHCHR**") filed its "*Amicus Curiae* Brief of the United Nations High Commissioner for Human Rights"[2] ("**UNHCHR Brief**") after the Appeals Chamber's "Order on the Appointment of Amicus Curiae" ("**Order on UNHCHR Brief**") [3] of 28 November 2005.

3. On 16 December 2005, Amnesty International filed its "*Amicus Curiae* Brief of Amnesty International Concerning the Public Interest Information Privilege" ("**Amnesty International Brief**") after the Appeals Chamber's "Order on the Appointment of Amicus Curiae"[4] ("**Order on Amnesty International Brief**") of 2 December 2005.[5]

4. The Defence herewith, in a joint response to three Briefs, and on the basis of Article 6 of the Practice Direction on *Amicus Curiae* Applications[6] and the three abovementioned Orders, files its "Joint Defence Response to *Amicus Curiae* Briefs by Human Rights Watch, Amnesty International, and the United Nations High Commissioner for Human Rights" ("**Response**") thereto.

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[1] Case No. SCSL-2004-16-T-435.
[2] Case No. SCSL-2004-16-T-451.
[3] Case No. SCSL-2004-16-T-438.
[4] Case No. SCSL-2004-16-T-439; see also Corrigendum to the Order on the Appointment of Amicus Curiae, Case No. SCSL-2004-16-T-440, of 5 December 2005.
[5] All three Briefs are together referred to as "***Amicus Curiae* Briefs**."
[6] Practice Direction on filing *Amicus Curiae* applications pursuant to Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, adopted on 20 October 2004.

II THE INTERPRETATION OF RULE 70

2.1 Non-Disclosure to Prosecution in Contravention to Rule 70

1. Rule 70(B) of the Special Court Rules requires that the Prosecutor is "in possession of information which has been provided to him on a confidential basis." In fact, the Prosecution, and the *Amicus Curiae* Briefs in support thereof, argue to overlook this essential part of Rule 70(B). In the current case, the Prosecution is not in possession of the sources of the Witness TF1-150's proposed testimony.

2. Para. 15 of the UNHCHR Brief indicates that "the counterpart to Rule 70 of the [Special] Court's Rules of Procedure and Evidence is Rule 70" of the ICTY Rules. It argues that the Chamber should interpret Rule 70 in a manner consistent with the decisions in *Prosecutor v. Milosevic*[7] and *Prosecutor v. Oric*.[8]

3. The UNHCHR Brief submits the argument "that the majority has adopted an unduly narrow interpretation of the scope of Rule 70(B)."[9] Furthermore, the HRW Brief mentions that the Defence and Trial Chamber interpretation of Rule 70 is "overly semantic" and that "[t]here is no imperative in the language of Rule 70(B) or the language of Rule 70 generally to require Rule 70(D) to be read as being subject to Rule 70(B)."[10] However, the Defence submits that Rule 70(D) does refer to its previous limbs, where it specifically says that "a witness providing

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[7] *Prosecutor v. Milosevic*, Case No. IT-2002-54-AR108*bis*&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("**Milosevic Decision**"). The contents of this decision were dealt with in the 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 ("**Defence Response to Prosecution Appeal**") of 27 October 2005, Case No. SCSL-2004-16-T-426.

[8] *Prosecutor v. Oric*, Public Redacted Version of 'Decision on Interlocutory Appeal Concerning Rule 70' Issued on 24 March 2004, Case No. IT-03-68-AR73 ("**Oric Decision**").

[9] UNHCHR Brief, para. 18.

[10] HRW Brief, para. 24.

(...) information under this Rule,"[11] which indicates that sub-Rule (D) should indeed be read in conjunction with sub-Rule (B).

4. In support of its opinion, the UNHCHR Brief mentions that the aforementioned Milosevic Decision "implicitly acknowledged the possibility that the provider of the information to the Prosecutor under Rule 70(B) may be (and in many cases, will be) a person other than the original source of that information."[12] However, it does not refer to any specific paragraph or section in that decision. In any case, the Defence cannot deduct such interpretation from the Milosevic Decision and such an interpretation would violate the rationale of the Milosevic Decision, i.e. the verifiability of the particular information.

5. The Oric Decision, although not dealt with in the Defence Response to Prosecution Appeal, supports the Defence argument as made in section 3.1.2 thereof. In the Oric Decision, the ICTY Appeals Chamber held that "Rule 70(F) falls to be interpreted as enabling the Defence to request a Trial Chamber that it be permitted to give the same undertaking as the Prosecution to a prospective provider of confidential material that that material will be protected if disclosed to the Defence."[13] This decision therefore underlines the Defence contention that the material which Witness TF1-150 does not wish to disclose, needs to be disclosed to the Prosecution at minimum. The ICTY Appeals Chamber merely stresses in this decision that it is irrelevant whether, at the time of the request, this information has already been obtained or whether it still needs to be obtained. Fact is that at some point, the information in question needs to be obtained by the party invoking Rule 70.

6. The UNHCHR Brief suggests one exception to this assertion, namely "where the undisclosed evidence goes to the guilt of an accused person and where there is a

[11] Underlining added.
[12] UNHCHR Brief, para. 18.
[13] Oric Decision, para. 6 (underlining added, GJK); the Defence was the party requesting the Rule 70 protection.

genuine risk of a wrongful conviction."[14] The Defence, however, holds the opinion that:

(i) First, this reasoning finds no basis in the Rules, more specifically in Rule 70, and should thus be set aside.

(ii) Secondly, the proposed system renders it impossible for the Accused, the Prosecution and even the judiciary, to determine whether undisclosed evidence would go to the guilt of the Accused, precisely because it is undisclosed. The same counts for the test "whether there is a genuine risk of wrongful conviction." At this stage of the proceedings it is hardly possible to analyze such risk.

7. Whilst the HRW Brief states that "it cannot be accepted that Rule 70 was drafted so as to limit the category of witnesses," it only bases this conclusion on the assertion that the Trial Chamber's interpretation was "overly semantic."[15] According to the humble submission of the Defence, this unsubstantiated argument bears no merit, and the interpretation formulated by the majority of the Trial Chamber,[16] should be followed.

8. The Defence submits that the Special Court Trial Chamber rightly held that Rule 70 "applies only where the Prosecutor 'is in possession of information which has been provided to him on a confidential basis (...).'"[17]

9. The principle that organizations like Human Rights Watch, the UN High Commissioner for Human Rights and Amnesty International do not wish their human rights officers in the field to disclose any of the information relating to

[14] UNHCHR Brief, paras. 10 and 44-46.
[15] See HRW Brief, paras. 19 and 24.
[16] Trial Chamber Decision.
[17] 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 ("**Trial Chamber Decision**"), para. 19.

their sources, not even to the Prosecution, is in clear contravention to the provision of Rule 70(B), and should thus be dismissed. The Defence does agree that the purpose of Rule 70(B) is to encourage States, organizations and individuals to share sensitive information with the Tribunal without the procedural safeguards of the Special Court Statute and judicial scrutiny,[18] but not if such encouragement leads to a breach of the Accused's rights under Article 17 of the Statute.

2.2 Prevalence of Judicial Scrutiny over Admission of Confidential Sources

10. The Amnesty International Brief sets out that "the mere fact that Amnesty International handling such material to a third party would obviously undermine trust and cause anxiety to its sources of information."[19] However, it is the Defence contention that by allowing such evidence without its sources, the verification of the evidence factually lies with the individual human rights officer or the supporting organization, and *not* with the Court, which violates the principle that the judiciary rather than the executive branch should determine the admissibility of evidence. For in the suggested situation where Witness TF1-150 does not reveal his confidential sources to anyone, no one can verify the correctness and authenticity of this witness's information, only the witness himself and the UN High Commissioner for Human Rights. It is the Defence submission that not an NGO but the Court should have primacy over judicial issues such as the admission of evidence within a criminal trial, the confidentiality of which likewise is a matter of judicial scrutiny.

11. Similarly, on p. 16 of the Amnesty International Brief, it is suggested that "Amnesty International or other genuine human rights researchers"[20] should not be required to disclose the identity of confidential sources. The Brief does not say how to determine which organizations or researchers meet the threshold of

[18] Milosevic Decision, para. 19.
[19] Amnesty International Brief, p. 10.
[20] Underlining added, GJK.

"genuine." The HRW Brief asserts that "[t]he position of HROs [human rights observers, researchers and investigators] working for HRW and similar 'non-mandated' human rights organisations is analogous to that of UN mandated HROs," and "[t]here is no rational basis or other requirement to distinguish between the rights and privileges of 'mandated' or 'non-mandated' HROs."[21]

12. The Defence contends that, as a matter of principle, it should be the Special Court which assesses the evidence, and not an organization outside of the Special Court system.

13. Para. 8 of the UNHCHR Brief mentions that "as a general rule, this privilege is not subject to a balancing of the interests favouring disclosure of the confidential sources." Moreover, the subsequent paragraph mentions that "[m]aking the privilege contingent on an *ad hoc* balancing of competing interests would have a devastating effect on the High Commissioner's human rights monitoring, assessing, investigating and reporting activities throughout the world." Also in paras. 39 – 43 of the UNHCHR Brief, this argument is advanced.

14. It should not be left to that organization itself to make such assessment. Also in this approach, it is ultimately to a judicial body to decide which organizations can or cannot rely on such privilege.

2.3 Conclusion

15. For these reasons, the Defence submits that a proper interpretation of Rule 70, in keeping with ICTY case law and principles, should lead to dismissal of the arguments mentioned in the *Amicus Curiae* Briefs in support of the Prosecution Appeal.

[21] HRW Brief, para. 14.

III INTERNATIONAL AND COMMON LAW CONCEPTS OF HEARSAY DIFFER

16. In para. 59 of the UNHCHR Brief, the UNHCHR suggests the Court to recognize the privilege in analogy to privilege accorded to confidential relationships protected on a case-by-case basis pursuant to common law.[22] The Defence refers to section 4.2.2 of its Defence Response to Prosecution Appeal, where it is submitted that there can be no reasonable equation between national case law relating to hearsay evidence on the one hand and international (criminal) law principles on the other hand.

17. The Defence submits that common law practice as such cannot justify the NGOs' arguments in this instance, in the absence of further substantiation of why this domestic case law would be supportive to the underlying theory. Within the common law system, the 'hearsay rule' is an exclusionary rule. If no particular exception is applicable, the hearsay evidence needs to be excluded upon appropriate objection to its admission.[23] This is, of course, different from the international tribunals, where hearsay evidence is in principle admissible.[24] For this same reason, the common law case law mentioned in, *inter alia*, footnote 20 of the UNHCHR Brief,[25] cannot be taken into account in dealing with this issue before an international tribunal,[26] and any analogy to the US 'confrontation clause' should thus be dismissed.[27]

18. For the above reason, the Defence respectfully submits that case law from common law areas cannot, without further substantiation as to its applicability in this specific case, be applied to the underlying situation given that the

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[22] UNHCHR Brief, para 59.
[23] See Richard May & Marieke Wierda, International Criminal Evidence, New York: Transnational Publishers 2002, p. 114, para. 4.49 (attached as **Exhibit 1**).
[24] This was first decided in *Prosecutor v. Tadic*, Case No. IT-94-1, Opinion and Judgment, 7 May 1997, para. 555.
[25] See also case law mentioned in footnote 21 of the UNHCHR Brief, and the case law relating to the privilege to police informants.
[26] See also Sections 5-(2) and 5-(3) of the HRW Brief.
[27] HRW Brief, para. 41.

admissibility of hearsay evidence before the Special Court greatly varies from admissibility of such evidence in most common law areas.

IV ULTIMATE ISSUE

4.1 Evidence Goes to Ultimate Issue

19. One should distinguish between the admission of hearsay evidence *per se* (whereby the witness can be examined in court as to its source) and the admission of hearsay evidence of which the sources are not verifiable in absolute sense. The latter type should not have *any* weight, and should thus not be admissible at all.

20. Even though evidence of this particular human rights officer may not go directly towards the actual participation of the Accused, and may not be seen as 'core evidence,' his testimony is expected to be supportive of, *inter alia*, the widespread and systematic aspects of the alleged crimes,[28] which forms an element of the charges of the Indictment against the Accused, and as such does go to the ultimate issue of the charges against the Accused. This invasion of the ultimate issue should also lead to dismissal of the appeal.

4.2 Impossible to Obtain Evidence Elsewhere

21. Additionally, the Defence in this respect refers to the Brdjanin Decision,[29] where the ICTY Appeals Chamber held that, in order to subpoena a war correspondent, the Prosecution "must demonstrate that the evidence sought cannot reasonably be obtained elsewhere."[30] This part of the test for subpoenaing a war correspondent can be illustrative in the current case too.

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[28] See Prosecution Appeal, para. 47.
[29] *Prosecutor v. Brdjanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("**Brdjanin Decision**"), para. 50.
[30] The first part of the test is further explained under section "War Correspondents" below.

22. The Prosecution Appeal indicated that witnesses like TF1-150 "are not generally called to give evidence as to a core issue in the case, namely the acts and conduct of the accused. The Prosecution had intended to call witness TF1-150 to give evidence as to the widespread and systematic nature of the attacks against the civilian population of Sierra Leone during the relevant time."[31]

23. At no time did the Prosecution show or indicate, nor did the *Amicus Curiae* Briefs, that the evidence to be provided by Witness TF1-150, concerning the alleged widespread and systematic nature of the attacks against the civilian population, could not have been obtained elsewhere, i.e. without the testimony of TF1-150.

24. The conclusion is thus justified that the nature of Witness TF1-150's evidence is not such, that he could give evidence on an issue that no other witness or source could give.

4.3 Conclusion

25. For these reasons, the Defence is of the humble opinion that the proposed evidence of Witness TF1-150, even when it would not relate to direct participation of the Accused in any of the crimes charged, does go to the ultimate issue of the charges against the Accused where it is intended to support the alleged widespread and systematic character of the attacks, which is a constitutive element of the crimes against humanity charged. This conclusion is actually also supported by the own submissions of the UNHCHR Brief. This Brief states namely that "the privilege be not set aside unless evidence of the identity of the confidential sources is shown to be of direct and important value in determining a core issue in the case."[32]

[31] See Prosecution Appeal, para. 47.
[32] UNHCHR Brief, para. 13 (emphasis added, GJK).

26. In addition to this, the fact that it has not been demonstrated that the evidence Witness TF1-150 is purported to give, cannot be obtained elsewhere, with less prejudicial effect to the Accused's right to a fair trial, makes that the Prosecution Appeal grounds, as further explained and substantiated in the *Amicus Curiae* Briefs, cannot be accepted.

V ICRC EXCEPTION IS UNIQUE

27. The argument made in para. 40 of the UNHCHR Brief, namely that the exception accepted by the ICTY for the International Committee of the Red Cross ("**ICRC**") "apply equally to the privilege protecting the disclosure of the confidential sources of U.N. human rights officers," should be dismissed. In the **first place**, the Defence in rebuttal of this argument refers to para. 55 ff. of its Defence Response to Prosecution Appeal, where it is extensively set out that the privileges attributed by the ICTY decision in *Prosecutor v. Simic*[33] and established in ICC Rule 73 are strictly limited to the organization of the ICRC, and cannot be read to also include other organizations than the ICRC.

5.1 ICRC's Special Position Recognized as Part of and Based upon Customary International Law

28. In the **second place**, the ICRC was allowed this privilege, because of the ICRC's special position and the protection of its workers, which are embedded in customary international law. The ICRC under its mandate is an "impartial, neutral and independent organization,"[34] and the ICTY Trial Chamber held that "confidentiality is necessary for the effective performance by the ICRC of its functions."[35] The ICTY Trial Chamber moreover held that "[t]he ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio*

[33] *Prosecutor v. Simic et al.*, Case No. IT-95-9, (Public Version of the) Ex Parte and Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 ("**Simic Decision**").
[34] Mandate of the ICRC (attached as **Exhibit 2**).
[35] Simic Decision, para. 73.

juris of these State Parties, which, in addition to the general practice of States in relation to the ICRC (...), leads the Trial Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of the Information."[36] As opposed to the other organizations, "[i]n order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature."[37] This is the specific reason why the ICTY ruled that ICRC workers cannot be compelled to testify. This rationale is clearly not met by Human Rights Watch, Amnesty International and the UN High Commissioner for Human Rights, or any other NGO.

5.2 ICRC Workers Are Exempted from Testifying At All

29. In the **third place**, ICRC workers are exempt from testifying at all. This results therefore only in information which could be helpful in merely the preparation of the Prosecution case, and does not result in the evidence-in-chief. The Simic Decision therefore in no way impacts upon the fair trial rights of the Accused.

30. However, the proposed testimony of Witness TF1-150 does affect the Accused's fair trial rights, because this witness is proposed to testify in chief, unlike the ICRC situation. At the same time this witness wishes to withhold material information relating to the sources of his evidence. Contrary to ICRC workers, witness TF1-150 testifying in chief will be prejudicial to the fair trial rights of the Accused.

31. Also in this respect, any equation between the ICRC and Witness TF1-150 of the UN High Commissioner for Human Rights is moot.

[36] Simic Decision, para. 74.
[37] See Jean Pictet, The Fundamental Principles of the Red Cross: commentary (attached as **Exhibit 3**).

5.3 Conclusion

32. In conclusion, the Defence submits that, in addition to its arguments formulated in the Defence Response to Prosecution Appeal in this respect, the position of the ICRC is in no way be comparable to the situation of organizations like the UN High Commissioner for Human Rights, Human Rights Watch, Amnesty International, or other (inter)national non-governmental organizations working in the human rights field. They are simply not "neutral, impartial and independent" organization like the ICRC. Thus, also for this reason, the Prosecution Appeal should be dismissed.

VI COMPARISON TO WAR CORRESPONDENTS

33. In line with the previous argument, the Defence submits that the situation of Witness TF1-150 cannot be compared to the exemption to testify, as developed by the ICTY, in regard to war correspondents.

34. In para. 59 of the UNHCHR Brief, it suggests that an equation can be made between the current situation and the privilege granted to war correspondents. In the **first place**, the Defence in this respect refers to section 4.2.3 of its Defence Response to Prosecution Appeal, where it argues that the alleged privilege of human rights officers cannot be based on the privilege of war correspondents since their positions are not similar.

6.1 No Justification Based upon Fundamental Human Right to Information

35. In the **second place**, the HRW Brief sets out that the work of human rights officers "has a greater content and significance than that of foreign correspondents reporting from the same kinds of locations,"[38] and "there can be no dispute that a HRO must be ranked above a journalist in terms of service to the

[38] HRW Brief, para. 32.

public interest."[39] The Defence vehemently denies such statement, and wishes to indicate that the public interest in the work of war correspondents is embedded in many national jurisdictions, unlike the position of human rights officers. The fact that "HRW reports are more detailed than normal journalistic reportage of human rights violations,"[40] cannot justify the purported prevalence of the position of HRO. To the contrary, unlike the work of human rights officers,[41] the position and activities of war correspondents directly relates to the public's right to receive information, as laid down in, *inter alia*, Article 19 of the Universal Declaration of Human Rights, Article 9(1) of the African Charter on Human and Peoples Rights, Article 10 of the European Convention on Human Rights, Article 19 of the International Covenant on Civil and Political Rights, and Article 13 of the American Convention on Human Rights.[42] Therefore, the work of war correspondents, and thus the protection of their sources from disclosure, can be deemed to have an impact on the rights of the public, especially the basic right of the people to receive information, that, unlike the work of human rights officers, has been laid down in all the important human rights conventions.

36. The Amnesty International Brief seems to categorize the suggested privilege of human rights officers under the category "public interest information privilege." However, the privilege sought cannot be seen as a public interest in information, similar to war correspondents. The aim of human rights workers is not, like war correspondents, dissemination of information. On the other hand, "[h]uman rights officers (...) should identify problems, diagnose their causes, consider potential solutions, and assist in problem solving."[43] This therefore cannot be equated to the fundamental function of war correspondents: the dissemination of information. Therefore, protection of the latter category is justified by human rights provisions

[39] HRW Brief, para. 45.
[40] HRW Brief, para. 32.
[41] The distinction between the two is recognized in the HRW Brief, para. 31.
[42] See Brdjanin Decision, para. 37.
[43] See Training Manual, UN High Commissioner for Human Rights, p. 87, attached to the Prosecution Appeal as Attachment 2.

on freedom of information. Clearly, human rights officers do not serve the same human rights purpose.

6.2 War Correspondent Did Not Testify At All in Brdjanin Case

37. In the **third place,** the Brdjanin Trial Chamber considered the question whether a war correspondent could be subpoenaed to testify. Other war correspondents had testified before, and they had done so voluntarily. However, the result of the Brdjanin Decision was that this war correspondent did not testify at all. The scenario of the instant case, namely the withholding of the source of hearsay evidence, was thus not at stake. Any prejudicial effects on the rights of the accused were therefore non-existent in the case of Brdjanin, as opposed to the underlying case.

38. One should realize that all the examples set forth on p. 13 of the Amnesty International Brief only relate to the privilege of being exempted from giving evidence at trial, instead of non-disclosure of the sources of the evidence which is sought to be admitted at trial. The reference mentioned on p. 13 of the Amnesty International Brief, namely that "the privilege is costless to the legal system, and at the same time provides significant benefits both to law enforcement and the public," does not apply to this case now that the privilege sought for Witness TF1-150 would be seriously detrimental to the rights of the Accused. Moreover, the HRW Brief mentions that the Brdjanin criteria should be used in the underlying case and that "[i]f the submissions made by Defence Counsel in the present case were to be accepted, that is, that the rights of the accused may be prejudiced by non-disclosure of confidential sources, the court must still proceed and weigh this potential prejudice against the importance of preserving the public interest addressed above."[44] Without any valid argument, prejudice as acknowledged by the Human Rights Watch Brief, results in a violation of Article

[44] HRW Brief, para. 35.

17 of the Statute and it is hard to see how this could be outweighed by an alleged public interest.

39. Whilst Human Rights Watch presents a definition of 'journalists' as formulated by the Council of Europe, it overlooks that the Brdjanin Decision only aims at war correspondents and not at journalists in general. It is thus not appropriate to apply a general definition of journalists based on the Brdjanin Decision. Moreover, this same Recommendation by the Council of Europe indicates that "[s]anctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings (...)." [45] However, the HRW Brief fails to mention that the result of the Brdjanin Decision was that the particular war correspondent was ultimately not subpoenaed, and thus *did not testify at all.*

6.3 Conclusion

40. In conclusion, the Defence respectfully holds that any equation with the war correspondents privilege as set out by the ICTY, is not justified and even moot. In addition to the arguments set out in the Defence Response to Prosecution Appeal, one should observe that the rationale for the war correspondents privilege lies in the public's right to information; this rationale is not – at least not to the same extent – applicable to persons such as Witness TF1-150. In the last place, the war correspondent in the Brdjanin case did not testify at all, which situation as such does not amount to a breach of the Accused's right to a fair trial, while the requested testimony of TF1-150, whereby the sources of his hearsay evidence may not be revealed, does breach the Accused's right to a fair trial.

[45] Recommendation No. R(2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted on 8 March 2000, Principle 5(c) (attached as **Exhibit 4**).

VII OTHER PRIVILEGED RELATIONSHIPS

41. The Amnesty International Brief mentions several other evidentiary privileges which have been recognized by "[c]ourts and legislation,"[46] in which regard it mentions some eight categories of privileged relationships. However, it does not formulate any authority for any of these categories, nor does it set forth in which legal system these are allegedly recognized. The Defence again stresses that common law jurisprudence in regard to hearsay evidence as such cannot justify the testimony at trial of Witness TF1-150, which evidence is only admissible in common law systems under strict conditions, whilst the Special Court ruled that in principle hearsay evidence is admissible.

VIII ICC DEVELOPMENTS

42. As stated in the Defence Response to the Prosecution Appeal section 4.2.1, the ICC Rules of Procedure and Evidence (RPE) are unequivocal in this regard: only the International Committee for the Red Cross (ICRC) is granted this far-reaching privilege.

43. Remarkably, the Amnesty International Brief purports to extend the formulation of this Rule to other confidential relationships.[47] However, as can be derived from para. 55 of the Defence Response to Prosecution Appeal, the exclusive formulation of Rule 73 of the ICC was done so deliberately. As evidenced by the article written by Stephane Jeannet quoted in the Defence Response to Prosecution Appeal, it was the general view of the drafters of the ICC Rules of Procedure and Evidence, that "[w]hile 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

[46] Amnesty International Brief, p. 6, under subtitle "Types of relationships where privileged communications have been recognized."
[47] Amnesty International Brief, p. 3.

or individual."[48] Therefore, the contention that the privilege accorded to the ICRC, as laid down in Rule 73 of the ICC Rules, should be extended to other organizations such as the UN High Commissioner for Human Rights, Amnesty International and Human Rights Watch finds no support in the ICC system.

44. Human Rights Watch refers to its cooperation with the Prosecutor of the ICC,[49] and that "HRW and similar organisations would likely feel compelled to cease or diminish co-operation with relevant tribunals, investigators and prosecutors"[50] if the privilege in the current case would not be upheld. Yet, the wording of the ICC Rules of Procedure and Evidence only accord such privilege to the ICRC, and *not* to Human Rights Watch and other human rights organizations. This cooperation argument thus bears no merit and may not serve as a legally improper argument to endorse the testimony of TF1-150.

45. In conclusion, the arguments of the NGOs in this case and those of the Prosecution are not valid in view of the ICC Rules of Procedure.

IX *AMICUS CURIAE* BRIEFS RESTRICTED TO PROSECUTION APPEAL

46. It is the Defence submission that arguments raised by the *Amicus Curiae* Briefs should have been restricted to the arguments mentioned in the Prosecution Appeal, and arguments outside the scope of this appeal should not be taken into account, as they are not deemed part of the Prosecution Appeal.

47. The Order on UNHCHR Brief asserts that it will assist the Appeals Chamber in "reaching its decision on the issues raised by the present Appeal."[51] In the humble opinion of the Defence, this reference indicates that the *amicus curiae* brief

[48] S. Jeannet, Testimony of ICRC Delegates before the International Criminal Court, International Review of the Red Cross No. 840, p. 993-1000 (attached to Defence Response to Prosecution Appeal as Exhibit 1).
[49] HRW Brief, para. 18.
[50] HRW Brief, para. 17.
[51] Order on UNHCHR Brief, p. 2, last paragraph (emphasis added, GJK).

should indeed have been restricted to matters raised within the boundaries of the Prosecution Appeal.

9.1 Privilege Waiver Cannot Be Assessed in this Instance

48. In the **first place**, para. 14 of the UNHCHR Brief argues that "the privilege in the present appeal has not been validly waived." However, the Defence submits that this is not part of the appeal grounds as set out in the "Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality" ("**Prosecution Appeal**").[52] The relief sought by the Prosecution is as follows: "the Prosecution's 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 Rule 70, or without being compelled to reveal the identity of any source in accordance with a privilege not to disclose the names of confidential informants."[53]

49. The Defence therefore holds that this argument should not be taken into account in the current appeal.

9.2 Possible Consequences for Amnesty International Workers Cannot Be Assessed

50. In the **second place**, the Amnesty International Brief refers to possible consequences for Amnesty International sources if they have to be disclosed. However, this is not part of the Prosecution Appeal in this case.[54] Moreover it is not possible for the Appeals Chamber and not within its adjudicatory scope and task to foresee and anticipate all factual consequences of a decision on the present issue.

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[52] Case no. SCSL-2004-16-T-419 of 19 October 2005.
[53] See Prosecution Appeal, para. 11.
[54] Amnesty International Brief, p. 9.

9.3 No Expert Witness

51. In the **third place**, the HRW Brief suggests that the "evidence which is given by organisations such as HRW will often be expert evidence and contain hearsay on factual matters."[55] The HRW Brief mentions the case of *Prosecutor v. Bizimungu*, and states that the ICTR "held that there was a fundamental difference between factual evidence called about the particular crimes in issue and expert evidence which is intended to enlighten the judges on specific issues."[56] The conclusion, according to the HRW Brief, is that "the admission of hearsay or expert testimony (necessarily founded on hearsay in many instances) does not infringe the right of the accused to a fair trial."[57] However, this admission is not the issue at stake here (see above). Moreover, the *Bizimungu* decision relates to expert witnesses, and not witnesses of fact such as Witness TF1-150. In that same decision, the fundamental difference between these two was indicated.[58] The situation may have been different in case Witness TF1-150 would have been called as an expert witness. However, this transgresses the Prosecution Appeal, and should thus not be taken into account in the assessment of the Prosecution Appeal.

9.4 Response to Issues Outside of Prosecution Appeal

52. In case the honorable Appeals Chamber, in spite of the above arguments that issues outside of the scope of the Prosecution Appeal should not be taken into account, would nonetheless take notion of those issues, the Defence herewith provides its response thereto.[59]

53. In para. 70 of the UNHCHR Brief, it is stated that the UN could not waive Witness TF1-150's privilege, and that "interpreted in context" the reference in the

[55] HRW Brief, para. 61.
[56] HRW Brief, para. 61.
[57] HRW Brief, para. 62.
[58] HRW Brief, para. 61.
[59] See also Amnesty International Brief, p. 2, section "Issues not before the Appeals Chamber."

UN letter[60] to sensitive and confidential information to be provided by Witness TF1-150, should be understood as a reason for seeking to impose conditions on the waiver of immunity from legal process.

54. The Defence is of the humble opinion that the text of the UN letter is self-explanatory, and the meaning given to it by the UNHCHR is not self-evident. Moreover, if the UN Legal Affairs section would share the UNHCHR Brief's interpretation of its own letter, they would have formulated it differently. In this sense, it is unnecessary to interpret the wording of the letter "in context" as suggested by the UNHCHR Brief. If the wording is unclear, it should be the Legal Affairs section of the UN itself who clarifies this, and not a sub-organ of the UN, in its own interest. A similar argument is set out in the Amnesty International Brief, p. 15, where it states that only the source of the information can waive confidentiality. It is the Defence submission that this is an internal matter for an organization and its employees, and as such is not a matter to resolve by the judiciary.

X REQUESTED PRIVILEGE IS NOT PROPORTIONAL TO ACCUSED'S RIGHTS

10.1 Effect Is Not Objectively Established or Verifiable

55. The Defence in no way underestimates the potential importance of human rights officers working for organizations like the Human Rights Watch, the UN High Commissioner for Human Rights, and Amnesty International, and *many* other actors in this field. However, besides the fact that the Defence is of the opinion that the Rules do not provide for such interpretation, it is neither convinced by the argument[61] that the only way to protect such work in the future would be to grant absolute privilege against revealing their sources from international tribunals such as the Special Court. The conclusion that "[t]his would inevitably result in local

[60] Letter by Mr. Ralph Zacklin, Assistant Secretary-General for Legal Affairs of 23 May 2005 ("UN Letter"), attached to the Defence Response to Prosecution Appeal as attachment 1.
[61] UNHCHR Brief, para. 35-38.

populations (...) being unwilling to cooperate with, and provide reliable information to, U.N. human rights officers, thereby making it impossible for the human rights officers to carry out their functions effectively,"[62] is not objectively established nor verifiable for the Court.

56. The HRW Brief moreover suggests that the Trial Chamber interpretation of Rule 70 is inconsistent with "the approach taken by international tribunals to Rule 70 and similar provisions in other rules of evidence and procedure."[63] However, there is no inconsistency in the current interpretation of this Rule with the case law of the ICTY and the Special Court, and the Rules of Procedure and Evidence of the ICC. On the contrary, deviation from the Trial Chamber Decision would create such inconsistency.

10.2 Closed Session Sufficient and Balancing of Interests

57. The Defence submits that disclosure of such information to the Prosecution, and consequently to the Trial Chamber and both parties, does not breach the promise of confidentiality, as long as dissemination of such information is done in closed session. Rule 79(A)(ii) of the Rules is designed especially for such purpose, "protecting the privacy, security or non-disclosure of the identity of a victim or witness (...)." If the Prosecution, or any organization, would find such closed session protection inadequate, it needs to present specific arguments in support of such inadequacy. The UNHCHR Brief's contention that the protection of confidential sources should be "as close to absolute as possible,"[64] and that the protection of Rule 79 is insufficient, is inadequately argued and not motivated. Moreover, it is insufficiently balanced against the Accused's right to a fair trial, and the right to have access to the evidence against him. The argument that a closed session is a proper mechanism finds support in the Recommendation of the Council of Europe, mentioned in the HRW Brief para. 34, which

[62] UNHCHR Brief, para. 37 (underlining added, GJK).
[63] HRW Brief, para. 26.
[64] UNHCHR Brief, para. 43.

Recommendation reads that "[w]here journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure."[65]

58. The contention that "the privilege itself represents an outcome of a balancing process" is insufficient in the view of the Defence, insofar that within this balancing process, the basic human rights of the Accused, as laid down in the same instruments these organizations are expected to protect, are not taken into account. The mere submission that the "perfect security of the identity of a U.N. human rights officer's confidential sources should prevail" over the Accused's right to a fair trial, without further substantiation, is an artificial argument and cannot support the Prosecution Appeal. Hearsay evidence of which the actual source cannot be verified is a serious breach of the accused's right to a fair trial. This is not taken into account in the "balancing process" suggested by the UN High Commissioner for Human Rights.

59. In addition to the foregoing, potential interest served by providing this witness with a privilege granting him the right to conceal the sources of his information, cannot reasonably be deemed proportionate to the serious prejudice done to the fair trial rights of the Accused. Also for this reason the arguments set out in the *Amicus Curiae* Briefs, as well as the Prosecution Appeal, should be dismissed.

60. Besides the point mentioned in section 2.2 above, that it is not up to an international organization or other non-adjudicatory institution to decide upon the reliability of evidence, one could perhaps imagine that under certain specific circumstances, a privilege could be upheld for certain human rights workers.

[65] Recommendation No. R(2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted on 8 March 2000, Principle 5(e).

However, such privilege could perhaps amount to an exemption to testify at all, rather than a privilege to withhold sources. It would, however, be up to the Trial Chamber, and ultimately the Appeals Chamber, to determine whether the requirements for such privilege are fulfilled.

10.3 Lack of Witness Protection

61. The Amnesty International Brief suggests that the life of the sources might be at risk if they are revealed and that "[e]ven when witness protection programs in temporary courts have been successful so far, such as that of the Special Court for Sierra Leone, satisfactory arrangements for continuing them after these courts complete their work have not yet been completely worked out."[66] The Defence submits that, if the witness protection program cannot guarantee long-term protection of its witnesses, this should not be applied to the Accused's detriment, in the sense that it would lead to the withholding of essential information from the Accused. In any event, such contention does not justify the mentioned prejudice to the Accused.

62. Similarly, the HRW Brief goes into this, where it states that "if sources are disclosed, the safety of those sources and their families may be immediately jeopardized."[67] If there is a real threat of information being disclosed despite closed session, and this would pose a serious threat to witnesses appearing before the Special Court, separate measures taken by the Victims and Witness Unit could be considered rather than solving this to the detriment of the Accused's position.

63. In any sense, in the opinion of the Defence, it would not be appropriate to justify a serious breach of the Accused's right in order to compensate the alleged fact that the existing system of victim and witnesses protection would be insufficient.

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[66] Amnesty International Brief, p. 13.
[67] HRW Brief, para. 17.

10.4 Probative Value

64. The HRW Brief mentions that "there appears to be no issue about the probative value of the testimony of Witness TF1-150," and consequently concludes that "the existence of a privilege (...) does not prejudice the accused or prevent a fair trial from taking place."[68] However, as expressed by Defence Counsel for the second Accused Brima, the Defence does question the probative value of the proposed testimony of Witness TF1-150.[69] In addition, the sources of Witness TF1-150 are of considerable influence on the probative value of the evidence given by this same witness. Furthermore, prejudicial effects on fair trial rights and probative value should not be mixed as these as such are two separate issues. The probative value issue can only be dealt with after having assessed whether the fair trial notions admit the testimony of Witness TF1-150.

10.5 Conclusion

65. Therefore, the Defence is of the opinion that the recommendations set out in the *Amicus Curiae* Briefs, supporting the Prosecution Appeal, should be dismissed because of disproportionality between the aim it pursues – creating a privilege – and the resulting serious prejudice to the fair trial rights of the Accused. The Defence submits that the closed session provisions in the Rules provides for a far more proportionate solution from an exclusion of any control of the sources of TF1-150.

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[68] HRW Brief, para. 58.
[69] See Transcript 14 September 2005, p. 3 (lines 9-10).

XI CONCLUSION

66. For the above reasons, the Defence respectfully prays the honorable Appeals Chamber to dismiss the arguments set out by the three *Amicus Curiae* Briefs when assessing the Prosecution Appeal.

Respectfully submitted,
On 17 January 2006

Geert-Jan Alexander Knoops Kojo Graham Andrew Daniels

TABLE OF AUTHORITIES

A **Special Court Documents:**

- 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, Case No. SCSL-2004-16-T-426, 27 October 2005 ("**Defence Response to Prosecution Appeal**"), relevant section: para. 55 ff.

- 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, Case No. SCSL-2004-16-T-389, 16 September 2005 ("**Trial Chamber Decision**"), relevant section: para. 19.

- Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, Case no. SCSL-2004-16-AR73(B)-419, 19 October 2005 ("**Prosecution Appeal**"), relevant sections: paras. 11, 47.

- *Amicus Curiae* Submission Filed under Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone on behalf of Human Rights Watch," Case No. SCSL-2004-16-AR73-453, filed on 15 December 2005 ("**HRW Brief**")

- Order on the Appointment of Amicus Curiae, Appeals Chamber, Case No. SCSL-2004-16- AR73-435, 28 November 2005 ("**Order on HRW Brief**").

- *Amicus Curiae* Brief of the United Nations High Commissioner for Human Rights, Case No. SCSL-2004-16- AR73-451, filed on 16 December 2005 ("**UNHCHR Brief**").

- Order on the Appointment of Amicus Curiae, Appeals Chamber, Case No. SCSL-2004-16- AR73-438, 28 November 2005 ("**Order on UNHCHR Brief**").

- *Amicus Curiae* Brief of Amnesty International Concerning the Public Interest Information Privilege, Case No. SCSL-16- AR73-452, 16 December 2005 ("**Amnesty International Brief**").

- Order on the Appointment of Amicus Curiae, Appeals Chamber, Case No. SCSL-2004-16-AR73-439, 2 December 2005 ("**Order on Amnesty International Brief**").

- Corrigendum to the Order on the Appointment of Amicus Curiae, Appeals Chamber, Case No. SCSL-2004-16-T-440, 5 December 2005.

- Transcript, 14 September 2005, p. 3 (lines 9 – 10).

- Practice Direction on filing *Amicus Curiae* applications pursuant to Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, adopted on 20 October 2004.

B ICTY Case Law:

- *Prosecutor v. Oric*, Case No. IT-03-68-AR73, Public Redacted Version of 'Decision on Interlocutory Appeal Concerning Rule 70', 24 March 2004 ("**Oric Decision**") (URL: http://www.un.org/icty/oric/appeal/decision-e/040326.htm), relevant section: para. 6.

- *Prosecutor v. Brdjanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("**Brdjanin Decision**") (URL: www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm), relevant sections: paras. 37, 50.

- *Prosecutor v. Tadic*, Case No. IT-94-1, Opinion and Judgment, 7 May 1997 (URL: http://www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf), relevant section: para. 555.

- *Prosecutor v. Milosevic*, Case No. IT-02-54-AR108*bis*&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("**Milosevic Decision**") (URL address: http://www.un.org/icty/milosevic/appeal/decision-e/23102002.htm), relevant section: para. 19.

- *Prosecutor v. Simic et al.*, Case No. IT-95-9, (Public Verision of the) Ex Parte and Confidential Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 ("**Simic Decision**") (URL address: http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm), relevant sections: paras. 73, 74.

C Book:

- Richard May & Marieke Wierda, International Criminal Evidence, New York: Transnational Publishers 2002, p. 114, para. 4.49 **(Exhibit 1)**.

D Miscellaneous:

- Mandate of the International Committee for the Red Cross (URL: http://www.icrc.ch/HOME.NSF/060a34982cae624ec12566fe00326312/125ffe2d4c7f68acc1256ae300394f6e?OpenDocument) (**Exhibit 2**).

- See Jean Pictet, The Fundamental Principles of the Red Cross: commentary (URL: http://www.icrc.ch/Web/Eng/siteeng0.nsf/htmlall/5MJE9N?OpenDocument&View=defaultBody&style=custo_print) (**Exhibit 3**).

- Recommendation No. R(2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted on 8 March 2000 (**Exhibit 4**), relevant sections: Principles 5(c) and (e).

17328

EXHIBIT 1

INTERNATIONAL CRIMINAL EVIDENCE

JUDGE RICHARD MAY
MARIEKE WIERDA

Transnational Publishers, Inc.
Ardsley, New York

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Ardsley Park Science and Technology Center
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prevent the acts or to punish the perpetrators." One Trial Chamber of the ICTY held that the knowledge of a commander can be inferred from general circumstances, however, it "cannot be presumed, but must be established by way of circumstantial evidence."[84]

4.47 *Inferences.* Circumstantial evidence may give rise to inferences, the drawing of which is mostly an application of common sense. In everyday life inferences are made from different events or occurrences. So it is with the law of evidence. The trier of fact is obliged to consider the evidence on a particular point and to draw appropriate conclusions from it. Of course, there must be pieces of evidence from which the conclusions are drawn and they must be able, taken together, to bear the weight of the inference which is sought to be drawn. From time to time the international criminal judge will be presented with difficult questions on the fairness of drawing inferences from circumstance, especially in dealing with mass or system crimes.

3.2 Hearsay

4.48 The treatment of hearsay evidence forms an instructive part of the tribunals' developing laws of evidence. An area of law beset by complications in the common law system, the hearsay rule itself is not part of civil law systems (which tend to have different means of guarding against reliance on derivative evidence).[85] At the same time, evidence that can be classified as hearsay is a significant portion of the material presented in international criminal trials, particularly in the form of documents.

4.49 *Definition of hearsay.* The U.S. Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[86] In the common law system the "hearsay rule" is an exclusionary rule of evidence: if a statement is hearsay and no exception is applicable, the evidence must be excluded upon appropriate objection to its admission.[87] Moreover, this is a rule of law and not a matter of discretion. Hearsay can take the form of an oral or written assertion

84. *Delalić et al.*, Judgment, Nov. 16, 1998 at ¶ 386. *Kordić and Čerkez*, Judgment, Feb. 26, 2001, at ¶ 427.

85. Mirjan Damaška, *Of Hearsay and its Analogues*, 76 MINN. L. REV. 425 (1992).

86. U.S. FED. R. EVID. 801(c).

87. U.S. FED. R. EVID. 802.

or non-verbal conduct,[88] and can assume several levels amounting to double or triple hearsay. The reasons for excluding hearsay are:

(1) Evidence that is given second-hand is likely to be unreliable or subject to distortion.
(2) Evidence not given under oath and not the subject of cross-examination is more likely to be unreliable as the court cannot test its reliability, or observe the sincerity or demeanor of the witness.
(3) There is a danger that if the rule were relaxed there would be a proliferation of evidence directed to proving or negating hearsay.[89]

It is the second reason which (it is submitted) provides the real rationale for the rule, leading a member of the House of Lords (the U.K.'s highest court) to say:

> The rule against the admission of hearsay is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanour would throw on the testimony is lost.[90]

4.50 *Relaxation of hearsay rules in domestic war crimes trials.* While exceptions have been developed to the hearsay rule in areas such as confessions and documents,[91] the hearsay rule is still in general existence in common law systems. However, common law courts have been known to relax their technical rules of evidence when confronted by the special circumstances of war crimes trials.[92] The Supreme Court of Canada in *Finta* recognized that a flexible approach to the hearsay rule is appropriate, provided that the evidence is necessary and reliable.[93] Special rules of evidence have also been legislated in Israel, thus allowing courts to depart from rules of evidence ordinarily applicable to criminal trials, such as the hearsay rule, in cases of war crimes or crimes against humanity.[94]

88. U.S. FED. R. EVID. 801(a).
89. MAY, *supra* note 36, at ¶ 9–03.
90. *Teper* [1952] A.C. 480 at 486 *per* Lord Normand.
91. *See, for example,* in relation to documents in England, Criminal Justice Act 1988, Part II.
92. This has particularly been the case in dealing with war crimes stemming from World War II where the passage of time has been significant.
93. *R. v. Finta* [1994] 1 S. C.R. 701 at 854–55.
94. Section 15 (b) of the Nazis and Nazi Collaborators (Punishment) Law,

International Committee of the Red Cross

The mission

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organiza whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal and to provide them with assistance. It directs and coordinates the international relief activities conduct Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengtheni humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movem

ENGLISH

EXHIBIT 3

ICRC International Committee of the Red Cross

1-01-1979 ICRC Publication *by Jean Pictet*

The Fundamental Principles of the Red Cross : commentary

Proclamation of the Fundamental Principles of the Red Cross

The Fundamental Principles are the result of a century of experience. Proclaimed in Vienna in 1965, they bond together the National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, and guarantee the continuity of the Movement and its humanitarian work.
In this succinct commentary intended for the general public, Jean Pictet explains the meaning of each of the seven Fundamental Principles; he analyses them on the basis of different criteria and presents all their various aspects, thus making this essential part of Red Cross doctrine accessible to all.

The XXth International Conference of the Red Cross proclaims the following fundamental principles on which Red Cross action is based:

HUMANITY

The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours - in its international and national capacity - to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.

IMPARTIALITY

It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.

NEUTRALITY

In order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

INDEPENDENCE

The Red Cross is independent. The National Societies, while auxiliaries in the humanitarian services of their Governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with Red Cross principles.

VOLUNTARY SERVICE

The Red Cross is a voluntary relief organization not prompted in any manner by desire for gain.

UNITY

There can be only one Red Cross Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

17329
17330

UNIVERSALITY

The Red Cross is a world-wide institution in which all Societies have equal status and share equal responsibilities and duties in helping each other.

1-01-1979

Section: Focus > RC Movement

~~17330~~
17331

EXHIBIT 4

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation No. R (2000) 7
of the Committee of Ministers to member states
on the right of journalists not to disclose
their sources of information

(Adopted by the Committee of Ministers
on 8 March 2000
at the 701st meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Recalling the commitment of the member states to the fundamental right to freedom of expression as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Reaffirming that the right to freedom of expression and information constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and the development of every individual, as expressed in the Declaration on the Freedom of Expression and Information of 1982;

Reaffirming the need for democratic societies to secure adequate means of promoting the development of free, independent and pluralist media;

Recognising that the free and unhindered exercise of journalism is enshrined in the right to freedom of expression and is a fundamental prerequisite to the right of the public to be informed on matters of public concern;

Convinced that the protection of journalists' sources of information constitutes a basic condition for journalistic work and freedom as well as for the freedom of the media;

Recalling that many journalists have expressed in professional codes of conduct their obligation not to disclose their sources of information in case they received the information confidentially;

Recalling that the protection of journalists and their sources has been established in the legal systems of some member states;

Recalling also that the exercise by journalists of their right not to disclose their sources of information carries with it duties and responsibilities as expressed in

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Aware of the Resolution of the European Parliament of 1994 on confidentiality for journalists' sources and the right of civil servants to disclose information;

Aware of Resolution No. 2 on journalistic freedoms and human rights of the 4th European Ministerial Conference on Mass Media Policy held in Prague in December 1994, and recalling Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension,

Recommends to the governments of member states:

1. to implement in their domestic law and practice the principles appended to this recommendation,

2. to disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and

3. to bring them in particular to the attention of public authorities, police authorities and the judiciary as well as to make them available to journalists, the media and their professional organisations.

-

Appendix to Recommendation No. R (2000) 7

Principles concerning the right of journalists

not to disclose their sources of information

Definitions

For the purposes of this Recommendation:

a. the term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;

b. the term "information" means any statement of fact, opinion or idea in the form of text, sound and/or picture;

c. the term "source" means any person who provides information to a journalist;

d. the term "information identifying a source" means, as far as this is likely to lead to the identification of a source:

i. the name and personal data as well as voice and image of a source,

ii. the factual circumstances of acquiring information from a source by a journalist,

iii. the unpublished content of the information provided by a source to a journalist, and

iv. personal data of journalists and their employers related to their professional work.

Principle 1 (Right of non-disclosure of journalists)

Domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

Principle 2 (Right of non-disclosure of other persons)

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

Principle 3 (Limits to the right of non-disclosure)

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member states shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph *b*, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,

- the circumstances are of a sufficiently vital and serious nature,

- the necessity of the disclosure is identified as responding to a pressing social need, and

- member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

Principle 4 (Alternative evidence to journalists' sources)

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

Principle 5 (Conditions concerning disclosures)

a. The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

b. Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.

c. Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.

d. Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.

e. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

Principle 6 (Interception of communication, surveillance and judicial search and seizure)

a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:

> *i.* interception orders or actions concerning communication or correspondence of journalists or their employers,
>
> *ii.* surveillance orders or actions concerning journalists, their contacts or their employers, or
>
> *iii.* search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of

this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Principle 7 (Protection against self-incrimination)

The principles established herein shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and journalists should, as far as such laws apply, enjoy such protection with regard to the disclosure of information identifying a source.