SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Raja Fernando, Presiding
Justice Geoffrey Robertson
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter

Registrar: Mr. Lovemore Munlo

Date filed: 16 December 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Allieu Kondewa
(Case No. SCSL-04-16-AR73(B))

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

***AMICUS CURIAE* BRIEF**
OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Office of the Prosecutor:
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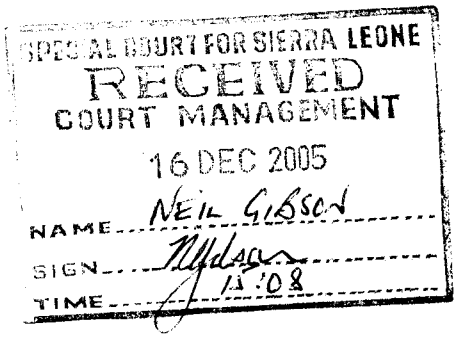

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1. Louise Arbour, the United Nations High Commissioner for Human Rights (the High Commissioner) respectfully submits this *Amicus Curiae* brief pursuant to the 28 November 2005 order of the Appeals Chamber.

ISSUES FOR COURT

2. The motion before the Court concerns the appeal filed by the Prosecution on 19 October 2005 against the Decision of Trial Chamber II on 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, filed on 16 September 2005.

3. The Appeals Chamber is being asked to determine whether the majority of the Trial Chamber II erred in dismissing the Prosecution's request that Witness TF1-150, a former human rights adviser to the U.N. Assistance Mission for Sierra Leone (UNAMSIL), be permitted to testify without being compelled to answer questions relating to the names of his informants or sources of information, on the grounds that he obtained the information from these sources on conditions of confidentiality.

4. The issues to be considered in this appeal include a consideration of the scope of application of Rule 70 of the Rules of Procedure and Evidence of the Court, and of the independent existence of an immunity which prevents the Court from compelling a U.N. human rights officer who has agreed to testify before the Court from disclosing the confidential sources for his or her testimony.

SUMMARY OF SUBMISSIONS OF *AMICUS CURIAE*

5. The High Commissioner submits that the appeal be allowed and that the Court find that Witness TF1-150 be permitted to testify as a witness for the Prosecution in *The Prosecutor v. Alex Tamba Brima; Ibrahim Bazzy Kamara and Santigue Kamu* without being required to reveal the identities of the sources of information on which his or her testimony is based.

6. The High Commissioner bases this submission on:

   (i) the provisions of Rule 70 of the Court's Rules of Procedure and Evidence; and
   (ii) the existence of a privilege protecting the identities of the confidential sources of a U.N. Human Rights officer.

7. The asserted privilege is based on the mandate of the High Commissioner and the international interest in the High Commissioner's ability to fulfil that mandate. More specifically, it is submitted that the High Commissioner's capacity to fulfil her mandate depends on the ability of U.N. human rights officers to form relationships of trust and confidence with the local communities with whom they work. A key element of this relationship is the confidential basis on which information is communicated to U.N. human rights officers. Confidentiality is a central working method of U.N. human rights officers and is essential to facilitating the flow of reliable information regarding violations of human rights. Failure to protect the confidential sources of a U.N. human rights officer would cause irreparable damage to the ability of U.N. human rights officers to perform their functions, and thus to the ability of the High Commissioner to discharge her mandate.

8. The High Commissioner submits that as a general rule, this privilege is not subject to a balancing of the interests favouring disclosure of the confidential sources. The existence of this privilege is itself the outcome of a balancing of the considerations favouring protection of confidentiality against those favouring disclosure (including the right to a fair trial of an accused person, and more particularly, his or her right to make a full answer and defence).

9. The focus of the privilege is on the removal of the apprehension of compelled disclosure. Any balancing of the interests supporting the privilege against interests favouring the disclosure of the information in a particular case would necessarily undermine the confidence placed in U.N. human rights officers by members of local communities, and thereby frustrate the purpose of the privilege. Making 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.

10. It is submitted that the only situation where the privilege may yield is the exceptional case where the undisclosed evidence goes to the guilt of an accused person and where there is a genuine risk of a wrongful conviction. However, before this exception may be considered by the Court, the accused must first demonstrate the basis on which to conclude that the disclosure of the identity of the source could raise a reasonable doubt as to the guilt of the accused.

11. It is submitted that the Court may alleviate the detriment to the rights of the accused occasioned by upholding the privilege and preventing the identification of confidential sources by taking account of the fact that the identity of the sources for the U.N. human rights officer's testimony were withheld (and correspondingly, that the accused was not afforded an opportunity to cross-examine the source in relation to the information) as part of the Court's assessment of the *weight* to be attributed to the testimony of the U.N. human rights officer.

12. The High Commissioner proposes that the Court assess the probative value to be accorded to the U.N. human rights officer's testimony in such cases according to a "spectrum" which varies according to how closely the testimony is related to the ultimate issues implicating the accused. Where the testimony is closely related to the ultimate issues and is not otherwise supported by other evidence, it may be accorded so little probative value that it is excluded altogether. It is submitted that this approach is far preferable to a balancing exercise which may result in the disclosure of the U.N. human rights officer's confidential sources.

13. The High Commissioner submits that, as an alternative to the analysis proposed above, the appropriate test for any balancing of the public interest in upholding the privilege against the public interest in the right of an accused person to a fair trial is that the privilege not be 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. Moreover, the Court should *first* seek to address any prejudice to the rights of the accused person by adjusting the probative value accorded to the testimony of the U.N. human rights officer in the absence of disclosure of the sources of information on which that testimony is based.

14. Finally, it is submitted that the privilege in the present appeal has not been validly waived. This submission is based on (i) the nature of the

privilege in question, as one that does not belong to the High Commissioner or to the U.N. human rights officer, and is therefore incapable of being validly waived by either of them; and (ii) the proper construction of the U.N. Waiver Letter, which waived the immunity from legal process of Witness TF1-150 as a former employee of the United Nations but did not purport to waive any privilege of the nature asserted in these submissions.

I. SUBMISSIONS BASED ON RULE 70 OF THE COURT'S RULES OF PROCEDURE AND EVIDENCE

15. The counterpart to Rule 70 of the Court's Rules of Procedure and Evidence is Rule 70 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Appeals Chamber of the ICTY has stated that the purpose of Rules 70(B) to (G) of the ICTY Rules of Procedure and Evidence (which are in the same terms as Rules 70(B) to (G) of the Court's Rules of Procedure and Evidence) is to encourage States, organizations and individuals to share sensitive information with the Court.[1] The provisions of Rule 70 are designed create an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer, and of the information's sources, will be protected.[2]

16. The High Commissioner urges the Court to interpret Rule 70 of the Court's Rules of Procedure and Evidence in a manner consistent with the interpretation given to Rule 70 of the ICTY Rules of Procedure and Evidence by the Appeals Chambers of the ICTY in *Prosecutor v. Milošević*[3] and in *Prosecutor v. Oric*.[4]

17. The interpretation of Rule 70(B) adopted by the majority of the Trial Chamber in the present appeal restricts the application of Rule 70(B) to cases where the "provider" of the initial information for purposes of Rule

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[1] *Prosecutor v. Milošević*, 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, at para. 19.
[2] Ibid.
[3] 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.
[4] Case No. IT-03-68-AR73, Public Redacted Version of "Decision on Interlocutory Appeal Concerning Rule 70" Issued on 24 March 2004, 26 March 2004.

70(B) is also the source of that information.[5] It was on this basis that the majority determined that Witness TF1-150 was neither the originator of the initial information nor the person or representative of the entity providing the initial information, and therefore fell outside the application of Rule 70(B), and the protection of Rule 70(D).[6]

18. It is submitted that the majority has adopted an unduly narrow interpretation of the scope of Rule 70(B). Such interpretation is also at odds with the scope of application of the Rule suggested by the Appeals Chamber of the ICTY. In *Prosecutor v. Milošević,* the discussion of Rule 70 by the Appeals Chamber of the ICTY 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.

19. An example of a situation that would attract the operation of Rule 70, if the Rule were interpreted consistently with the approach of the Appeals Chamber of the ICTY in *Prosecutor v. Milošević*, yet would fall outside the Rule if it were interpreted in accordance with the decision of the majority of the Trial Chamber in the present appeal, is where an NGO possesses information which it received from its own sources. In order to encourage the NGO to share that information with the Prosecution, the Prosecution may assure the NGO that neither the information nor the NGO's sources will be disclosed by the Prosecutor without the NGO's consent. Rule 70(D) is intended to complement Rule 70(B) by providing that, if a representative of the NGO is called as a witness by the Prosecution to introduce such evidence, he or she cannot be compelled to answer any question relating to that information or its source if he or she declines to do so on grounds of confidentiality.

20. In addition, while the Trial Chamber has the authority to assess whether information provided by Witness TF1-150 was provided in accordance with Rule 70(B), its inquiry is necessarily of a very limited nature; extending only to an examination of whether the information was in fact

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[5] See *Prosecutor v Brima et. al,* SCSL-04-16-T-389, 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, 16 September 2005, at para. 19.
[6] Ibid.

provided on a confidential basis.[7] As the Appeals Chamber of the ICTY noted in *Prosecutor v. Miloševic*, before ruling on the application of Rule 70 to the information in question, a Trial Chamber should invite the party which provided the information to the Prosecutor to supply evidence as to the basis on which the information was provided.[8]

II. SUBMISSIONS BASED ON THE EXISTENCE OF A PRIVILEGE PROTECTING THE CONFIDENTIAL SOURCES OF INFORMATION PROVIDED BY A U.N. HUMAN RIGHTS OFFICER

21. The High Commissioner submits that, quite apart from the application of Rule 70 in the present case, the confidential communications of U.N. human rights officers are protected against compelled disclosure by a privilege which is based on the public interest in the promotion and protection of international human rights.

22. Although the Rules of Procedure and Evidence of the Court only explicitly provide for the privilege against self-incrimination (Rule 90(E)) and the lawyer-client privilege (Rule 97), other privileges, such as those pertaining to war correspondents and their confidential sources, and to the ICRC, have been recognized in the practice of the ICTY.[9] The Court is free to recognize and develop testimonial privileges pursuant to Rule 89(B) of the Court's Rules, based on developments in its practice and in the practice of international criminal tribunals such as the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).

The Source of the Privilege is the Mandate of the High Commissioner.

23. The High Commissioner submits that the privilege the subject of the present appeal is based on the mandate of the High Commissioner which

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[7] *Prosecutor v. Miloševic*, 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, at para. 29.
[8] Ibid, at para. 31.
[9] See for example, *Prosecutor v. Brdjanin et al.*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 (war correspondents); *Prosecutor v. Simic et al*, Case No. IT-95-9-PT, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 (ICRC).

is contained in resolutions of the General Assembly and the Security Council. It is further submitted that these resolutions must be interpreted as giving to the High Commissioner the powers and means necessary to discharge her mandate effectively.

24. The High Commissioner's mandate requires her to monitor, assess, investigate and report on the compliance by states with their obligations under international human rights law. This mandate is entrusted to the High Commissioner by the United Nations inter-governmental bodies and requires the High Commissioner to perform those functions for and on behalf of the international community. The High Commissioner submits that, by accepting to be bound by the Charter of the United Nations, including resolutions of the Security Council, the members of the United Nations have agreed to the special role and mandate of the High Commissioner.

25. The High Commissioner's mandate is set forth in United Nations General Assembly resolution 8/141 of 7 January 1994. It includes promoting and protecting the effective enjoyment by all of all civil, cultural, economic, political and social rights, carrying out the tasks assigned to her by the competent bodies of the United Nations system and making recommendations to them with a view to improving the promotion and protection of all human rights, preventing human rights violations, enhancing international cooperation for human rights, coordinating relevant activities throughout the United Nations and strengthening and streamlining the United Nations human rights machinery.

26. In addition, the High Commissioner is required to perform certain functions pursuant to specific mandates, including mandates contained in resolutions of the U.N. Security Council in the context of maintaining international peace and security.

27. The mandate of the human rights component of the United Nations peace mission in Sierra Leone (United Nations Assistance Mission in Sierra Leone, UNAMSIL) is contained in various resolutions of the U.N. Security Council. The human rights mandate of UNAMSIL is wide-ranging and includes promoting respect for human rights, and

monitoring, investigating and reporting on violations of human rights.[10] A description of the history and activities of the human rights component of UNAMSIL is attached hereto as Annex A. One of the primary functions of the human rights component of UNAMSIL (and of its predecessor, UNOMSIL) has been to monitor and report on human rights violations and abuses of international humanitarian law throughout the country.

The privilege is also supported by the international interest in the activities of U.N. human rights officers.

28. The High Commissioner submits that, in addition to the mandate, there is an international interest in the functions of U.N. human rights officers that supports the existence of the privilege.

29. The activities of U.N. human rights officers relate directly to the promotion and protection of human rights.[11] The monitoring, assessing, investigating and reporting functions of U.N. human rights officers are not only essential to the discharge of the High Commissioner's mandate, but also enable the international community to receive adequate information on issues of public concern. In this sense, the public interest in the work of U.N. human rights officers is at least equal to that which the Appeals Chamber of the ICTY has found to attach to the newsgathering function of war correspondents.[12]

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[10] SC Res 1270 (1999), 22 October 1999; SC Res 1289 (2000), 7 February 2000; SC Res 1313 (2000), 4 August, 2000.

[11] Human rights monitoring includes gathering information regarding incidents, observing events (e.g. elections, trials and demonstrations), visiting sites such as places of detention and refugee camps, holding discussions with government authorities to obtain information and pursue remedies and other immediate follow-up. The process includes an evaluation of activities by the U.N. as well as fact-gathering first hand and other fieldwork. The major focus of U.N. monitoring is on carrying out investigations and subsequently denouncing human rights violations as a means of fighting impunity. Human rights monitoring must be seen as the most fool-proof means of assessing a country's situation and impeding its human rights violations: see U.N. Office of the High Commissioner for Human Rights, *Human Rights: A Basic Handbook for U.N. Staff*, U.N. Staff College Project, United Nations, Geneva, 2001 at 69-79.

[12] See *Prosecutor v. Brdjanin et al*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

30. The High Commissioner submits, however, that the public interest in the work of U.N. human rights officers goes beyond the provision of accurate and reliable information to the international community that is analogous to the public interest served by the work of war correspondents.

31. The High Commissioner's assessments of the human rights situations in various regions, the results of which are publicly disseminated in reports of the Secretary-General to the international community and to the Security Council, frequently form a basis for political action taken by governments and the international community as a whole (acting through the United Nations and in some cases, through Security Council under Chapter VII of the Charter of the United Nations).[13] The work of U.N. human rights officers is therefore of fundamental importance to the restoration and maintenance of international peace and security, and to upholding the rule of law and the administration of justice.[14]

Maintenance of confidentiality is an essential element of the working method of U.N. human rights officers in performing their mandated functions.

32. U.N. human rights officers carry out the various monitoring, assessing, investigating and reporting tasks by relying on a wide range of sources, including witnesses and victims, to establish trends and patterns and verify specific incidents.

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[13] See for example, SC Res 1289 (2000) 7 February 2000, which noted the continuing human rights violations against the civilian population of Sierra Leone, and the lack of progress on the release of abductees and child soldiers, among other things, as a basis for acting under Chapter VII to revise and extend the mandate of UNAMSIL. See also SC Res 1562 (2004) 17 September 2004, extending the mandate of UNAMSIL and determining the tasks of the residual UNAMSIL presence.

[14] In this regard, the interest which is the basis for the privilege is analogous to the public interest protected by the privilege protecting the identity of police informers that operates in English common law: see *Marks v. Beyfus* [1890] 25 Q.B.D. 494; *D v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171; *R. v. Governor of Brixton Prison, ex parte Osman* [1992] 1 All E.R. 108 and *R. v. Keane* (1994) 99 Crim. App. R. 1. The principle is recognized in United States law (*Roviaro v. United States*, 353 U.S. 53 (1957)); Canadian law (*Bisaillon v. Keable* [1983] 2 S.C.R. 60) and Australian law (*Cain v. Glass (No. 2)* (1985) 3 N.S.W.L.R. 230). The protection of the identity of informers recognized in common law jurisdictions is said to encourage members of the public to report information relating to the commission of crimes to law enforcement officials, and thus promote the public interest in the prevention and detection of crime.

33. The U.N. Training Manual on Monitoring identifies 18 basic principles of monitoring which human rights officers are required to respect at all times. These principles are described as being essential for the effective fulfilment of the monitoring mandate.[15] Among these are the principles of credibility, impartiality, objectivity and respect for the confidentiality of information.[16]

34. Although information may be provided to U.N. human rights officers with the intention that it be publicly disclosed, this only ever occurs on the explicit understanding that the identities of those providing the information will be strictly protected. This requirement of confidentiality is acknowledged in U.N. human rights training materials which specifically provide that human rights officers must assure the person providing them with information that such information will be treated as strictly confidential.[17] The confidential treatment of information provided to U.N. human rights officers is essential to performance of these functions and is a fundamental feature of communications between U.N. human rights officers and the local populations with whom they work.

Requiring U.N. human rights officers to disclose their confidential sources would adversely affect their ability to carry out their functions; and would irreparably damage the ability of the High Commissioner to discharge her mandate.

35. The ability of U.N. human rights officers to effectively perform their activities and carry out the mandated functions of the High Commissioner depends on the capacity of those officers to establish and maintain relationships of trust and confidence with the members of the communities with whom they work. The obligation and guarantee of confidentiality is the cornerstone of such a relationship.

36. Any breach of the principle of respect for the confidentiality of information would strike at the heart of the relationship between U.N. human rights officers and local populations and would have very serious

[15] Office of the High Commissioner for Human Rights, Training Manual on Human Rights Monitoring, Professional Training Series No. 7, United Nations, 2001 (hereafter, Human Rights Training Manual), in Chapter V (Basic Principles of Monitoring) at 87.
[16] These principles are listed in Chapter V of the Human Rights Training Manual as Items I, O, P and J, respectively.
[17] See Human Rights Training Manual, at 90 (Item J.11).

consequences: first, for the safety of persons providing the information to the human rights officer, as well as for the victim; secondly, for the credibility and safety of the human rights officer; thirdly, for the level of confidence enjoyed by U.N. operations in the minds of the local population; and therefore ultimately, for the overall effectiveness of the U.N.'s human rights operations.[18]

37. Failure to recognize a rule protecting the confidentiality of the identities of those who provide information to U.N. human rights officers would undermine the credibility of guarantees of confidentiality which such officers are required to provide, leading local actors to lose confidence in the trustworthiness and independence of U.N. human rights officers. This would inevitably result in local populations (including NGOs and other local groups and institutions) 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.

38. In sum, if the Court were to require U.N. human rights officers to disclose the identities of their confidential sources, it would fundamentally affect the work of U.N. human rights officers in Sierra Leone and in other parts of the world in a way that would produce substantial adverse consequences for the local populations. Moreover, it would involve a significant limitation on the ability of the High Commissioner to fulfil her mandate, and thereby adversely affect the work of the UN as a whole.

III. THE PRIVILEGE IS NOT SUBJECT TO ANY BALANCING OF COMPETING INTERESTS IN DISCLOSURE

39. The High Commissioner submits that the nature of, and basis for, the privilege protecting the identity of a U.N. human rights officer's confidential sources does not, as a general rule, allow for a balancing of the interests in upholding the privilege against competing interests in disclosure in a specific case.

[18] Such consequences have been acknowledged elsewhere by the High Commissioner; for example, they are specifically listed in the Human Rights Training Manual, Chapter V, at 90 (J.11).

40. The considerations which led the Trial Chamber of the ICTY in *Prosecutor v. Simic* to conclude that the privilege of the ICRC to withhold its confidential information was absolute in nature; namely, that a privilege of this nature was necessary for the effective discharge by the ICRC of its mandate,[19] apply equally to the privilege protecting the disclosure of the confidential sources of U.N. human rights officers.

41. The privilege itself represents the outcome of a balancing process and the conclusion that the considerations favouring the perfect security of the identity of a U.N. human rights officer's confidential sources should prevail. The focus of the privilege is on removing the *apprehension* of compelled disclosure; or put another way, the need to provide subjective assurance to members of local populations with whom U.N. human rights officers work that they need not fear that their identities may one day be disclosed.

42. A rule which permitted the possibility that the identity of those providing information to U.N. human rights officers could be overridden by the Court by reason of the outcome of some subsequent balancing process, or whenever particular circumstances arise in subsequent cases, would fail to remove the apprehension of compelled disclosure that is the purpose of the rule, would have a chilling effect on the flow of information to U.N. human rights officers and would therefore be out of harmony with the purpose of the privilege.[20]

43. For similar reasons, it is submitted that it is not to the point that the Trial Chamber had ordered protective measures under Rule 79 of the Court's Rules of Procedure and Evidence. The efficacy of the work of U.N. human rights officers, and the ability of the High Commissioner to

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[19] *Prosecutor v. Simic et. al.* IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, at paras. 65-76.

[20] Similar considerations have influenced the common law rule that legal professional privilege cannot be displaced by a balancing of competing public interests in disclosure (including the right to a fair trial of an accused person in a criminal proceeding). Rather, legal professional privilege is a rule which permits of certain well-defined, *a priori* exceptions which do not operate to undermine the purpose of the privilege in the way that a subsequent case-by-case balancing would. See for example, the statements (in the context of the absolute nature of legal professional privilege) of the High Court of Australia in *Carter v. The Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121; the Supreme Court of Canada in *R. v. McClure* [2001] 1 S.C.R 445 and the House of Lords in *R. v. Derby Magistrates' Court ex parte B* [1995] 4 All ER 478, at 540-542. See also *Three Rivers District Council v. Bank of England* (2005) 1 AC 610 (per Lord Scott at para. 25).

discharge her mandate, depends on the confidential sources being protected in a manner that is as close to absolute as possible.

IV. THE PRIVILEGE IS SUBJECT TO A SPECIFIC EXCEPTION WHERE EXCULPATORY EVIDENCE IS INVOLVED

44. The High Commissioner submits that the only circumstance where the privilege protecting the confidential sources of a U.N. human rights officer should yield is the exceptional case where the information sought is directly relevant to establishing the innocence of the accused.

45. The High Commissioner submits that, just as the common law rule protecting the identity of police informers is subject to a carefully delineated exception; namely, where the disclosure of an informant's identity would permit the innocence of the accused to be demonstrated,[21] the Court should uphold the privilege protecting the confidential sources of U.N. human rights officers in all cases except where the identity of the confidential source itself gives rise to exculpatory evidence. In other words, the privilege should yield only in the exceptional case where the undisclosed evidence goes to the guilt of an accused person and where there is a genuine risk of a wrongful conviction. Moreover, before this exception may be considered by the Court, the accused must demonstrate that the disclosure of the identity of the source could raise a reasonable doubt as to the guilt of the accused.

46. This high threshold for the application of the exception acknowledges the fundamental importance of the privilege protecting the identities of a U.N. human rights officer's confidential sources to the promotion and protection of human rights and where applicable to the maintenance and restoration of international peace and security.

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[21] *Marks v. Beyfus* (1890) 25 Q.B.D. 494 at 498; *D v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171 at 218E-F (per Lord Diplock). The position in Australia is stated by McHugh JA (as he then was) in *Cain v. Glass (No. 2)* (1985) 3 NSWLR 230, at 248. In Canada, this exception is referred to as the "innocence at stake" exception to informer privilege; see *R. V. Leipert* [1997] 1 S.C.R. 281. Note however that in the United States, the Supreme Court has held that the balancing test applies even in the case of the police informer: *Roviaro v. United States* 353 US 53 at 62 (1957).

V. THE COURT MAY REDRESS ANY PREJUDICE TO THE RIGHTS OF AN ACCUSED PERSON OCCASIONED BY UPHOLDING THE PRIVILEGE

47. The High Commissioner submits that the Court may take other measures to mitigate the adverse effect on the rights of the accused occasioned by upholding the privilege. It is submitted that this approach is far preferable to an *ad hoc* balancing of competing interests that would have an adverse effect on the High Commissioner's human rights monitoring, assessing, investigating and reporting activities throughout the world.

48. This approach is also consistent with the approach of the Trial Chambers of both the ICTY and ICTR concerning the treatment of hearsay evidence generally.[22]

49. The principal method by which the Court may alleviate the impact of withholding from the accused the identity of sources testimony against him or her is to take account of the fact that the identity of the sources was withheld (and correspondingly, that the accused was not afforded an opportunity to cross-examine the source in relation to the information) as part of the Court's assessment of the weight to be attributed to the testimony of the U.N. human rights officer.

[22] *Prosecutor v Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feburary 1999; *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison des Forges, 2 September 2005.

50. Rule 89(C) of the Court's Rules of Procedure and Evidence permits a Chamber of the Court to admit any relevant evidence. Trial Chambers of the ICTY have been held to have a broad discretion to admit hearsay evidence under Rule 89(C) of the Rules of Procedure and Evidence of the ICTY.[23] There is no reason to suppose that the differences in Rule 89 of the Court's Rules of Procedure and Evidence and Rule 89 of the Rules of Procedure and Evidence of the ICTY and of the ICTR, respectively, require the Court to adopt a more restrictive approach to the admission of hearsay evidence than has been adopted by the Trial Chambers of the ICTY and the ICTR.

51. As the Appeals Chamber of the ICTR has stated, evidence will be admissible where it has some relevance to the issues for determination in the case and where sufficient indicia of reliability have been established (i.e. where the evidence has some probative value).[24]

52. Hearsay evidence provided by testimony of a U.N. human rights officer should be assessed by the Court in the same manner as other hearsay evidence; that is, it will be admissible under Rule 89(C), provided it has sufficient probative value and its admission is consistent with the right to a fair trial.[25]

53. It is submitted that the non-disclosure of the sources of information of a U.N. human rights officer is a matter which should go to the weight to be attributed to that officer's testimony. The effect of non-disclosure of the officer's sources on the probative value of the testimony must be assessed in the light of the content of the testimony, its relationship to the ultimate issues in the case and other evidence admitted in the case.

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[23] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996; *Prosecutor v. Blaškic*, Case No. IT-95-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 26 January 1998.

[24] An example of a case where hearsay evidence did not exhibit sufficient indicia of reliability was in *Prosecutor v Kordic and Cerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of A Deceased Witness, 21 July 2000. In this case, the Appeals Chamber of the ICTY declared inadmissible the unsworn, uncross-examined, uncorroborated out-of-court statement of a deceased witness which was sought to be admitted into evidence as the only proof of the presence of the accused in a particular place at a particular time.

[25] This approach was recently adopted by the Trial Chamber II of the ICTR in *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison des Forges, 2 September 2005.

54. U.N. human rights officers collect different types of information in the course of their monitoring, assessing, investigating and reporting activities. They may also appear as witnesses before international criminal tribunals in order to provide a wide range of information for a variety of evidentiary purposes.

55. It is submitted that the appropriate way for the Court to accommodate an accused person's right to a fair trial, particularly the right to make a full answer and defence, is to assess the probative value accorded to the testimony of the U.N. human rights officer according to a "spectrum" whereby probative value is reduced depending on how closely that testimony is related to the ultimate issues implicating the accused. At the far end of the spectrum (i.e. where the testimony bears directly on the ultimate issues), the testimony may be accorded so little probative value that it is discarded altogether.

56. The outcome of such an assessment should be undertaken on a case-by-case basis, taking due account of other information tendered in evidence as well as the way in which the human rights officer's testimony is sought to be used.

57. For example, it may be that a U.N. human rights officer's testimony (based on information provided by confidential sources) is provided in order to establish that the accused person committed a specific act, or did so with a specific intent. In such a case, the testimony in question bears directly on the ultimate issues implicating the accused. Where there is a direct and proximate relationship between the evidence to be provided by the U.N. human rights officer and the ultimate issues in the case, the fact that the evidence is substantially based on out-of-court statements of undisclosed persons, the veracity of which cannot be tested, coupled with other factors (e.g. a lack of corroboration of the testimony by other evidence tendered during the trial) may lead the Court to attribute very little, and perhaps even no, weight to that testimony.

58. In other cases, the testimony of a U.N. human rights officer may provide background or general information, rather than evidence of specific incidents relating to the crimes with which the accused has been charged. Information of this nature is often based on communications with a variety of unidentifiable sources (such as a general population fleeing an area). It may be tendered in evidence to assist in establishing the

existence of a pattern, or of the systematic nature of the crimes committed. Where information of this nature is provided for this purpose, the fact that it is based on information provided by confidential sources may affect the weight ultimately to be given to the testimony, but does not mean that its inclusion in evidence inevitably results in a denial of the right to a fair trial of the accused.[26]

VI. IN THE ALTERNATIVE, IT IS SUBMITTED THAT IN CONDUCTING A BALANCING OF INTERESTS, THE COURT SHOULD FIRST SEEK TO REDRESS ANY PREJUDICE TO THE ACCUSED BY REDUCING THE WEIGHT TO BE ACCORDED TO THE TESTIMONY FOR WHICH THE SOURCES ARE BEING WITHHELD

59. In the event that the Court were to reject the High Commissioner's submissions in Sections I through V above, the High Commissioner submits, in the alternative, that the Court should recognize the existence of a privilege protecting the relationship between a U.N. human rights officer and his or her sources, analogous to (i) the privilege accorded to confidential relationships protected on a case-by-case at common law[27] or (ii) the public interest in the work of U.N. human rights officers, which is at least as significant as the public interest in the work of war correspondents that the Appeals Chamber of the ICTY found to support the existence of a privilege precluding the issue of a subpoena to a war correspondent.[28]

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[26] In a recent decision relating to the testimony of an expert witness, a Trial Chamber of the ICTR adopted this approach where the witness had declined to reveal her sources. The Trial Chamber stated that the non-disclosure of sources was a matter that went to the weight, rather than to the admissibility of the evidence, and rejected the defence counsel's submission that the admission of hearsay testimony, in relation to which the witness has declined to reveal her sources, infringed the right of the accused to a fair trial: *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison des Forges, 2 September 2005; paras. 20-31.

[27] The circumstances under which the privilege is extended to communications that are not traditionally-recognized class privileges are set forth in Wigmore's four criteria, which are reproduced at paragraph 14 of the Reply to 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, filed by the Prosecution on 31 October 2005.

[28] *Prosecutor v Brdjanin, et. al,* Case No. IT-99-36-AR73.79, Decision on Interlocutory Appeal, 11 December 2002.

60. It is submitted that the appropriate test for balancing the public interest in upholding the privilege (i.e., in accommodating the work of U.N. human rights officers) against the public interest in the right of an accused person to a fair trial (including the right to cross-examine) is akin to that which was adopted by the Appeals Chamber of the ICTY in *Prosecutor v. Brdjanin.*[29] This test requires the person seeking to set aside the privilege to demonstrate that the evidence sought is of direct and important value in determining a core issue in the case.

61. Moreover, in conducting the weighing of competing interests, the Court must consider the extent to which any prejudice to the accused person arising from the denial of a right to cross-examine the source information on which adverse testimony against him or her is based cannot otherwise be addressed by the Court's adjusting the weight to be accorded to such testimony and its assessment of the indicia of reliability of such testimony.[30]

62. It is submitted that the Court should avoid, wherever possible, reconciling the competing interests in disclosure and non-disclosure of the confidential sources of U.N. human rights officers in a way that would result in the disclosure of those sources. This submission is based on the severe adverse consequences that such a loss of protection would entail for the confidential sources, the communities in which the human rights officer works and the monitoring, assessing, investigating and reporting functions of U.N. human rights officers in missions throughout the world.

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[29] Ibid, at para. 50.

[30] In this respect, it is submitted that before the privilege protecting the identities of the confidential sources of a U.N. human rights officer yields to concerns about convicting an innocent person, it is appropriate to first relax any other evidentiary rules that may be applicable so as to avoid having to infringe on the privilege: this approach, based on logic, principle and policy, was said to operate in respect of legal professional privilege; see *R. v. Brown* [2002] 2 S.C.R. 185 at para. 117 (per Arbour J.).

63. As submitted above, the preferable approach is for the Court to address any prejudice to the rights of the accused person by reference to the probative value accorded to the testimony of the U.N. human rights officer in the absence of disclosure of the sources of information on which that testimony is based. Depending on the relationship of the testimony to the ultimate issues in the case, this may result in the testimony in question being given so little weight that it is discarded altogether.

VII. THE PRIVILEGE IN QUESTION WAS NOT WAIVED

The privilege cannot be waived by the Secretary-General, the High Commissioner or the Human Rights Officer.

64. It is submitted that, because the privilege asserted in these submissions is based on the international interest in the promotion and protection of international human rights and, where applicable, on the maintenance or restoration of international peace and security, it is of a "public" character rather than a private right belonging to a litigant. As such, it cannot be validly waived by the parties to the proceedings.[31]

65. For these reasons, the privilege protecting the identity of confidential sources of Witness TF1-150 cannot be waived by the Secretary-General, the High Commissioner or by Witness TF1-150 himself. The privilege is not a privilege or immunity vested in the High Commissioner or the U.N. human rights officer as such, but a rule that the public interest in the promotion and protection of international human rights and humanitarian law cannot be jeopardised by the disclosure of the identities of the confidential sources of U.N. human rights officers, quite apart from the claims of the particular parties to the litigation.

66. The High Commissioner's arguments relating to the proper interpretation of the U.N. Waiver Letter are addressed below. However, even if the Court were to reject the construction of the U.N. Waiver Letter advanced on behalf of the Secretary-General, it is submitted that neither the

[31] The same analysis operates with respect to common law privileges (such as the police informer's privilege) which are based on public interest immunity: see, *Rogers v. Secretary of State for the Home Department* [1972] 2 All ER 1057, at 1066 (per Lord Simon) and *Makanjuola v. Commissioner of Police of the Metropolis* [1992] 3 All ER 617, at 623 (per Bingham LJ).

Secretary-General, nor the High Commissioner, nor Witness TF1-150, could validly waive the protection afforded to the confidential sources of Witness TF1-150.

The U.N. Waiver Letter did not purport to waive the privilege protecting the confidential sources of a U.N. human rights officer.

67. Pursuant to the U.N. Waiver Letter[32], the U.N. waived the immunity from legal process enjoyed by Witness TF1-150 to the extent necessary to permit him to appear as a witness for the prosecution in the cases set forth in the letter, including the present case.

68. The waiver of immunity from legal process is expressed as being granted for the purpose of permitting Witness TF1-150 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 and other circumstances relevant to the individual criminal responsibility of an accused, and to permit Witness TF1-150 to answer questions seeking to establish the existence or inexistence of any such element or circumstance. The waiver is also expressed as being conditional on the making of orders of protective measures and is limited to the appearance of Witness TF1-150 as a witness for specific purposes.

69. As is clear from the third and fifth paragraphs of the U.N. Waiver Letter, the waiver is of the *immunity from legal process* of Witness TF1-150 as a former employee of the United Nations. In other words, the U.N. Waiver Letter pertains to the *compellability* of Witness TF1-150.

70. Nowhere does the U.N. Waiver Letter purport to waive any privilege that might otherwise exist in respect of information in the possession of Witness TF1-150. Paragraph six of the letter makes reference to the sensitive and confidential information which Witness TF1-150 is expected to provide, but interpreted in context, the reference should be understood as a reason for seeking to impose conditions on the waiver of immunity from legal process (i.e. the requirement that testimony be given in closed session) rather than an implicit waiver of any privilege which

[32] Letter, dated 23 May 2005, of the Assistant Secretary-General for Legal Affairs of the United Nations to the Prosecutor for the Special Court for Sierra Leone regarding the U.N.'s waiver of the immunity from legal process enjoyed by [Witness TF1-150] as a former United Nations official (hereafter U.N. Waiver Letter).

might attach to the information to be given by Witness TF1-150, and otherwise prevent its disclosure. In any event, even a full and complete waiver issued by the Secretary-General can only refer to matters within his competence to waive, i.e., matters related to the interest of the United Nations. Whether the privilege is properly viewed as a "public interest" privilege, or as the privilege of the source (informant), it cannot be validly waived by the Secretary-General, the High Commissioner, or the Human Rights Officer testifying.

VIII. CONCLUSION

71. The High Commissioner submits that the Court allow the appeal on the grounds set forth herein.

Respectfully submitted,
On 16 December 2005

Louise Arbour
United Nations High Commissioner for Human Rights

Index of Authorities

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Three Rivers District Council v. Bank of England (2005) 1 AC 610.

B. United Nations Documents

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SC Res 1270 (1999), 22 October 1999.
SC Res 1289 (2000), 7 February 2000.
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C. Miscellaneous Documents

Rules of Procedure and Evidence of the Special Court for Sierra Leone.

Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.

Office of the High Commissioner for Human Rights, Training Manual on Human Rights Monitoring, Professional Training Series No. 7, United Nations, 2001.

ANNEX A

U.N. Human Rights Activities in Sierra Leone:

The U.N. Assistance Mission in Sierra Leone (UNAMSIL) was established by Security Council resolution 1270 (1999) in October 1999 as a successor to the previous U.N. Observer Mission in Sierra Leone (UNOMSIL). Its main objectives are to assist the efforts of the Government of Sierra Leone to extend State authority, restore law and order and further stabilize the situation progressively throughout the entire country and to assist in the promotion of the political process.[1]

The human rights mandate of UNAMSIL is wide-ranging and includes promoting respect for human rights, and monitoring, investigating and reporting on violations of human rights.[2] The mandate of UNAMSIL's residual presence in 2005 specifically includes monitoring, investigating, reporting and promoting the observance of human rights, and specifically, monitoring the repatriation, reception, resettlement and reintegration of Sierra Leonean ex-combatants from abroad.[3] The UNAMSIL mandate has been extended several times by various resolutions of the Security Council (based on recommendations of the Secretary General).[4] Most recently, it was extended to 31 December 2005, after which time, UNAMSIL will withdraw from Sierra Leone and the U.N. Integrated Office in Sierra Leone (UNIOSIL) will be established for an initial period of 12 months commencing on 1 January 2006.[5]

The Secretary-General makes periodic reports to the Security Council on UNAMSIL's activities. These reports include sections on human rights, international humanitarian law, women's rights, gender issues and rights of the child. UNAMSIL's monthly human rights reports are also shared with the U.N. system, the Government and the diplomatic and donor communities.

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[1] SC Res 1334 (2000), 22 December 2000.
[2] SC Res 1270 (1999), 22 October 1999; SC Res 1289 (2000), 7 February 2000; SC Res 1313 (2000), August 2000.
[3] SC Res 1562 (2004), 17 September 2004.
[4] SC Res 1289 (2000), 7 February 2000; SC Res 1317 (2000), 5 September 2000; SC Res 1321 (2000), 20 September 2000; SC Res 1334 (2000), 22 December 2000; SC Res 1436 (2001), 30 March 2001; SC Res 1370 (2001), 18 September 2001; SC Res 1400 (2002), 28 March 2002; SC Res 1436 (2002), 24 September 2002; SC Res 1470 (2003), 28 March 2003; SC Res 1508 (2003), 19 September 2003; SC Res 1537 (2004), 30 March 2004; SC Res 1562 (2004), 17 September 2004; and SC Res 1610 (2005), 30 June 2005.
[5] SC Res 1620 (2005), 31 August 2005.

UNAMSIL implements its human rights mandate within a collaborative framework, working as a partner with the Government, national institutions, U.N. agencies, human rights and humanitarian NGOs, both national and international, inter-religious communities and other members of civil society. The OHCHR has been assisting UNAMSIL's human rights component in implementing the mandated activities, including by supporting the Truth and Reconciliation Commission and the Court.

One of the primary functions of the human rights component in both UNOMSIL and UNAMSIL was to monitor and report on human rights violations and abuses of international humanitarian law throughout the country. The performance of these functions by the human rights components in UNOMSIL and UNAMSIL has played a crucial role in the peace process in Sierra Leone. Monitoring and reporting on the human rights situation in Sierra Leone helped define the consequences of the conflict in human terms. The civil conflict has resulted in brutal rights violations and terror campaigns directed at unarmed civilians. The work of the human rights component has been a valuable confidence builder for the peace process. Victims of human rights abuses have felt that the international community does care about them and about what had happened to them. Concern over the egregious human rights violations committed by the RUF prompted the United Nations to introduce a reservation to the blanket amnesty for the rebels that was provided under the Lomé Peace Agreement. Human rights monitoring has assisted and added credibility to the peace process in Sierra Leone.