THE APPEALS CHAMBER

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

Registrar: Mr. Lovemore Munlo

Filed: 16 December 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Allieu Kondewa

Case No. SCSL-04-16-AR73(B)

***AMICUS CURIAE* BRIEF OF AMNESTY INTERNATIONAL CONCERNING THE PUBLIC INTEREST INFORMATION PRIVILEGE**

Office of the Prosecutor:
Luc Côté
Lesley Taylor
Nina Jorgensen
Melissa Pack

Defence Counsel for Alex Tamba Brima:
Glenna Thompson
Kojo Graham

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

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain

Counsel for *Amicus Curiae* Amnesty International:
Christopher Keith Hall and Ian Seiderman

Counsel for *Amicus Curiae* Human Rights Watch
Elise Keppler and Sara Darehshori

Counsel for *Amicus Curiae* United Nations High Commissioner for Human Rights
Louise Arbour and Mona Rishmawi

INTRODUCTION

This brief is submitted pursuant to the order of the Appeals Chamber of the Special Court for Sierra Leone on 2 December 2005 granting leave to Amnesty International to appear as *amicus curiae*, pursuant to Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and Article 1 (2) of the Practice Direction on *Amicus Curiae*.

The issue before the Appeals Chamber is whether a human rights researcher who has voluntarily agreed to testify in court can be compelled to reveal the identity of confidential sources who provided information concerning human rights violations and abuses on which the human rights researcher's testimony is based. Amnesty International considers that the Appeals Chamber should answer the question in the negative. It believes that courts should recognize a public interest information privilege to protect from compelled disclosure the identity of sources that have provided human rights researchers in the context of a confidential relationship with information concerning human rights violations and abuses, including genocide and crimes against humanity, as well as war crimes.

Amnesty International's interest in this case. Amnesty International Ltd is a company limited by guarantee. Amnesty International aims to secure the observance of the Universal Declaration of Human Rights and other international standards throughout the world. Amnesty International monitors law and practices in countries throughout the world in the light of international human rights and humanitarian law and standards. It is a worldwide human rights movement of some 1.8 million people (including members, supporters and subscribers). It enjoys Special Consultative Status to the Economic and Social Council of the United Nations and Participatory Status with the Council of Europe.

Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination, within the context of its work to promote all human rights. The organisation works independently and impartially to promote respect for human rights. It does not take a position on the views of persons whose rights it seeks to protect. It is concerned solely with the impartial protection of internationally recognized human rights.

Amnesty International has lobbied governments to elaborate and adopt a statute for a just, fair and effective International Criminal Court. Amnesty International co-founded the Coalition for the International Criminal Court, which is made up of over 2000 NGOs, and is a member of its Steering Committee. Following the adoption of the Rome Statute of the International Criminal Court, Amnesty International launched a worldwide campaign for universal ratification and implementation.

Amnesty International believes that any person who is responsible for crimes against humanity, war crimes and other crimes under international law should be brought to justice in the course of proceedings that meet international standards for a fair trial. Amnesty International strongly supports the aims of international criminal courts and seeks to assist their work, including the Special Court for Sierra Leone, as an essential tool in combating global impunity. Amnesty International believes that such courts can serve as a deterrent to people planning to commit grave crimes under international law and allow victims and their families the chance to obtain justice, truth and full reparations.

Amnesty International is concerned that an affirmation of the decision of the Trial Chamber could carry adverse consequences for the capacity of Amnesty International to carry out effectively its human rights research and action based on that research. In particular, compelling Amnesty International to disclose confidential information would have a deterrent

effect on potential sources of information, thus reducing available information of possible crimes under international law and consequently the furtherance of international justice.

The legal and policy analysis in this submission reflects Amnesty International's experience of nearly half a century of researching human rights violations in more than 192 countries around the world. Although the analysis is generally similar to that of the Prosecutor of the Special Court and those of the other *amici curiae*, the description of the scope of this privilege and the reasons it gives for the existence of the public interest information privilege may differ in some respects from their submissions.

The public interest information privilege and confidential relationships. The public, as well as prosecutors, have a strong interest in protecting from compelled disclosure communications concerning human rights violations or abuses, including genocide and crimes against humanity, as well as concerning war crimes, made in the course of a confidential relationship with a human rights researcher, whether that person works for a non-governmental organization, an intergovernmental organization, a government-established commission of inquiry, the press or any other body researching such conduct or is doing so as an independent human rights researcher. The test is a functional one. As with other evidentiary privileges against disclosure, unless the privilege is waived by the source, all such communications, apart from a few possible narrow exceptions, in rare or extreme circumstances, must be protected in the public interest.

The balancing test between the cost to society and the judicial system of the loss of information about the identity of the source and the benefits to society and the judicial system that the public interest information privilege brings by drawing the attention of the public, as well as police and prosecutors, to human rights violations and abuses must be made with reference to the time when the source makes the communication in the course of a confidential relationship to the human rights researcher. It cannot – and should not – be made case by case at the time when it is invoked in court. The public interest information privilege belongs at all times to the source, who can waive it at anytime, not to the human rights researcher.

Issues not before the Appeals Chamber. The Appeals Chamber is not asked to address the separate, but related question whether a human rights researcher can - or should – ever be compelled to testify about the general human rights situation in a particular region when investigators for prosecutors, defence or victims (when they are permitted to participate in a criminal proceeding) are unable to obtain access to that region. Although many of the same risks to the independence and impartiality of human rights researchers, as well as to their safety, if they are perceived by those violating or abuses of human rights or committing war crimes to be testifying on behalf of the prosecution or against a particular religious, ethnic or other group are present in this second question, it is not before the Appeals Chamber.

I. THE NATURE OF EVIDENTIARY PRIVILEGES CONCERNING COMMUNICATIONS MADE IN THE CONTEXT OF A CONFIDENTIAL RELATIONSHIP

There are certain common elements in international as well as national courts with respect to evidentiary privileges concerning communications made in the course of a confidential relationship. These common elements are variously formulated, but they include:

- the making of a communication during the course of a confidential relationship,
- the necessity of preserving that confidentiality to ensure that such communications continue to be made, the importance of the relationship to society and
- costs to the legal system of losing access to such information in a particular case being far outweighed by the benefits to society in the long run of such communications being made in similar situations in the future.

It is important to note that an evidentiary privilege belongs to the person whose communication society wishes to encourage, not to the person or organization receiving the communication. The person making that communication can, at any time, waive the privilege.

Evidentiary privileges recognized by the international community in the Rules of Procedure and Evidence of the International Criminal Court. Most recent formulation of evidentiary privileges protecting from disclosure communications made in the course of confidential relationships with respect to international criminal courts with jurisdiction over crimes under international law, and one that has received wide support from states, is found in Rule 73 of the Rules of Procedure and Evidence of the International Criminal Court, adopted pursuant to Article 69 (5) of the Rome Statute.[1] That provision reflects an international consensus of well over 100 states concerning evidentiary privileges based on confidential relationships.[2] It was adopted after intense debate in which all aspects of evidentiary privileges concerning communications made in the context of a confidential relationship and a wide range of positions were advocated by intergovernmental organizations, governments and non-governmental organizations.[3] In the light of this history and the broad international support for this rule, it should guide all international and national courts in determining which confidential relationships are covered and which communications are protected from compelled disclosure. Amnesty International believes that viewed in its entirety, the rule would protect all communications made in the context of a confidential relationship between a human rights researcher and a source.

Rule 73 establishes a comprehensive regulation of privileges for confidential relationships which should be seen as an integral whole. It consists of three components:

(1) a general rule protecting from disclosure in all cases communications made in the context of one specific relationship – the lawyer-client relationship – which is applicable to communications made in the context of other confidential relationships meeting certain criteria,

(2) criteria for determining the existence of such other confidential relationships, with an illustrative list, and

(3) additional special rules defining the scope of the broader privilege under international humanitarian law with respect to the confidential relationship that the International Committee of the Red Cross has with victims, detainees and governments.

The general rule of evidentiary privileges concerning communications made in the context of a confidential relationship is the rule concerning communications between a lawyer and client. Paragraph 1 of Rule 73 provides that communications made in the context of that professional relationship are privileged from disclosure absent written consent of the client or the client's voluntary disclosure of the communication to a third party who gives evidence of the disclosure.[4] All

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[1] Rome Statute of the International Criminal Court, Art. 69 (5) ("The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.").

[2] The broad international consensus includes states that had not ratified the Rome Statute of the International Criminal Court (Rome Statute), but which participated in the Preparatory Commission for the International Criminal Court; the states parties to the Rome Statute participating in the Preparatory Commission and those that attended the first session of the Assembly of States Parties that adopted it; and the states that have subsequently ratified the Rome Statute, which provides in Article 21 (1) (a) that the International Criminal Court shall apply the Rules of Procedure and Evidence.

[3] See Donald Piragoff, *Privileged Communications and Information, in* Roy S. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* 359 (Ardsley, N.Y.: Transnational Publishers, Inc. 2001); Christopher Keith Hall, *The first five sessions of the Preparatory Commission for the International Criminal Court*, 94 Am. J. Int'l L. 773, 785 (2000).

[4] Rule 73 (1) states:

> "Without prejudice to article 67, paragraph 1 (b) [guaranteeing the right of an accused "to communicate freely with counsel of the accused's choosing in confidence"], communications

communications made within that professional relationship are privileged, not just confidential communications.

Paragraph 2 of Rule 73 provides that the same privilege from disclosure in paragraph 1 applies to communications made in the context of other confidential relationships if the Court determines that there was a reasonable expectation that they would not be disclosed, confidentiality is essential to the relationship and recognition of the privilege would further the objectives of the Rome Statute and the Rules of Procedure and evidence:

> "Having regard to rule 63, sub-rule 5 [excluding the application of national law, except in accordance with Article 21 of the Rome Statute], communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) [governing the lawyer-client relationship] if a Chamber decides in respect of that class that:
> (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
> (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
> (c) Recognition of the privilege would further the objectives of the Statute and the Rules."

Rule 73 as a whole provides further useful guidance in determining the types of confidential relationships meeting these criteria where communications are privileged from disclosure. First, paragraph 3 lists a number of examples of such relationships where the Court shall give particular regard to recognizing as privileged communications made in the context of such relationships. These examples are: professional relationships between a person and his or her doctor, psychiatrist, psychologist or counsellor and the relationship between a person and a member of a religious clergy.[5] Second, paragraph 1 governs the relationship between a lawyer and a client. Third, paragraphs 4 to 6 govern the relationship between the International Committee of the Red Cross and victims, detainees and governments.[6] The privilege

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made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:
(a) The person consents in writing to such disclosure; or
(b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure."

[5] Rule 73 (3) states:

> "In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion."

[6] Rule 73 (4) to (6) provides:

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

accorded to the International Committee of the Red Cross relationship is broader than those recognized with respect to other relationships because of the special role it performs under international humanitarian law, but, as explained below, communications with that organization are also privileged for the reason that it performs the same types of information gathering functions as each of the examples cited and human rights researchers.[7].

Jurisprudence of other international criminal courts. Essentially the same elements of the privilege in a variety of formulations are reflected in the jurisprudence of other international criminal courts and national courts. The International Criminal Tribunal for the former Yugoslavia has not directly addressed the question whether a human rights researcher could be compelled to identify confidential sources. In *Simić* a Trial Chamber addressed the question whether a former employee of the International Committee of the Red Cross could ever be compelled to testify at all. It concluded that the former employee could not be compelled to testify without the consent of the employer.[8] In *Brdjanin* (the *Randal* case) another Trial Chamber addressed the question whether a former reporter could be compelled to testify about the accuracy of his account of a public interview he conducted through an interpreter. Although it concluded that the privilege of a journalist in those circumstances not to testify was qualified, the Trial Chamber did consider some of the same factors in making these determinations as other courts consider when determining the different question whether a person can be compelled to disclose the identity of a confidential source. Moreover, Judge Agius of Trial Chamber II emphasized that while he was declining to recognize a privilege against testifying about the accuracy of the public interview, when no issue of protecting confidential sources was involved, he would respect the confidentiality that a journalist "has a right to, even if it may not be a legal right, not to disclose his source of information and other information."[9] The Trial Chamber subsequently explained that when it made this ruling it had "expressed its disposition to protect journalists and the confidentiality of their sources".[10] It

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(b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

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

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

[7] Rule 73 (4) to (6) relating to the International Committee of the Red Cross defines a procedure for the waiver of the absolute privilege with respect to information shared with that organization in exceptional circumstances. This procedure contemplates in the first instance consultation between the Court and the organization. However, the rule makes clear that the decision whether to disclose such information rests with the International Committee of the Red Cross. Similarly, as a matter of policy, in exceptional circumstances, Amnesty International might consider disclosing confidential information. Examples could include situations in which Amnesty International was in exclusive possession of evidence that may be crucial to avoid a miscarriage of justice in human rights cases. However, even in such cases Amnesty International would apply the same balance as set out in paragraph 6 of Rule 73. Amnesty International would take into account the relevance of the evidence sought, whether the evidence could be obtained from another source, the risks to the source, the interests of justice and of victims, the performance of the court's role and the impact on Amnesty International's ability to carry on its research and campaigning work.

[8] *Prosecutor v. Simić*, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, Case No. IT-95-9, 27 July 1999, Trial Chamber.

[9] *Prosecutor v. Brdjanin* (the *Randal* case), Unofficial Transcript, T2535, 1 March 2002.

[10] *Prosecutor v. Brdjanin,* Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, Case No. IT-99-36-T, 7 June 2002, Trial Chamber II, para. 5.

carefully distinguished the question of whether there was a testimonial privilege for journalists in a war zone from the question whether a journalist could be compelled to reveal the identity of a confidential source:

> "Almost the entirety of the case law quoted and/or referred to by Randal, including Goodwin v. United Kingdom, deals with the protection of journalistic sources as being one of the basic conditions for freedom of the media and the need to restrict compulsory source disclosure to those case where it is justified by an overriding requirement in the public interest. On the basis of the submissions made to this Trial Chamber it is more than obvious that this fundamental question does not arise in Randal's case. . . . This is therefore not a case in which Randal, if forced to testify, can claim that he has an interest in not disclosing and a right not to be forced to disclose his confidential source as part of his fundamental right to freedom of expression. . . ."[11]

National practice. One of the leading common law treatises on evidence lists the elements of the general principle of privileged communications in the following manner:

> "Looking back on the principle of privilege as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exceptions, four fundamental conditions are recognised as necessary to the establishment of a privilege against the disclosure of communications:
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> (1) The communications must originate in a *confidence* that they will not be disclosed.
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> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
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> (3) The *relation* must be one which in the opinion of the community ought to be sedulously fostered.
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> (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation."[12]

Similarly, civil law countries also recognize that information obtained in confidence during a professional relationship, such as lawyer-client or doctor-patient, may not be disclosed and those having obtained in during such a relationship may not be compelled to testify about such information.[13]

Types of relationships where privileged communications have been recognized. Courts and legislation have recognized evidentiary privileges against disclosure of communications made in the context of a wide variety of confidential relationships. These relationships have included lawyer and client, doctor and patient, psychiatrist or psychologist and patient, counsellor and victim of crimes, particularly crimes of sexual violence, social worker and informant, police and informant, journalist and source and monitors of compliance with international humanitarian law obligations, specifically the International Committee of the Red Cross, and victims, detainees and governments.

II. THE SOURCES OF THE PUBLIC INTEREST INFORMATION PRIVILEGE

The public interest information privilege is rooted both in human rights guarantees and public policy grounds.

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[11] *Ibid.*, at para, 28A.

[12] *Wigmore's Evidence in Criminal Trials at Common Law* (John T. McNaughton revision 1961, updated 1990).

[13] *See, for example,* French Penal Code, Art. 226-13; Swiss Penal Code, Art. 321.

The primary source of the public interest information privilege is to be found in the right to seek, receive and impart information recognized more than half a century ago as an essential component of the right to freedom of opinion and expression in Article 19 of the 1948 Universal Declaration of Human Rights.[14] It has subsequently been confirmed in Article 19 of the 1966 International Covenant on Civil and Political Rights,[15] as well as in Article 10 of the 1950 European Convention for the Protection of Human Rights[16] and Fundamental Freedoms,Article 13 of the 1969 American Convention on Human Rights[17] and rticle 9 of the African Charter on Human and Peoples' Rights.[18]

Most recently, the international community reaffirmed the right to see, receive and impart information in the 1998 Human Rights Defenders Declaration.[19] In particular, the

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[14] Article 19 of the Universal Declaration of Human Rights states:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[15] Article 19 (1) of the International Covenant on Civil and Political Rights provides:
"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[16]Article 10 (1) of the European Convention states:

> "Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

The European Court of Human Rights has stated this right includes the privilege, albeit qualified, protecting confidential journalist sources:

> "Protection of journalistic sources is one of the basic conditions for press freedom. . . . , Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate andreliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an orderof source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."

Goodwin v. United Kingdom, Case No. 17488/90 [1996] ECHR 16 (27 March 1996).

[17] Article 13 (1) of the American Convention states:

> "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

[18] Article 9 of the African Charter on Human and Peoples' Rights, 1981, OAU Doc. CAB/LEG/67/3rev.5, reprinted in 21 Int'l Leg. Mat. 58 (1982), entered into force, October 1986, states:

> "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."

[19] Article 6 of the Human Right Defender Declaration provides:

> "Everyone has the right, individually and in association with others:
> (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
> (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
> (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters."

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defender Declaration), U.N. G.A. Res. 53/144, 9 December 1998.

Declaration states that everyone has the right to communicate with intergovernmental organizations and non-governmental organizations concerning human rights matters.[20] It also recognizes that non-governmental organizations have an important role to play in contributing to making the public more aware of questions relating to human rights through activities such as research.[21]

The individual right to seek, receive and impart information is one that can also be seen as the right of the general public to seek, receive and impart information through a variety of methods, including reporting by journalists, non-governmental organizations, intergovernmental organizations and commissions of inquiry.

In addition, in many cases where the person making the communication to the human rights researcher is providing confidential information in breach of contracts of employment or government secrecy laws, such as information concerning enforced disappearances or concealment of war crimes, the privilege can be seen as rooted in the right to freedom of conscience, protected by Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights.[22]

Moreover, as explained below, public policy supports recognition of a public interest information privilege to ensure that information about human rights violations and abuses and war crimes are brought to the attention of the public and police by persons that would otherwise be reluctant to do so.[23]

III. THE REASONS FOR THE PUBLIC INTEREST INFORMATION PRIVILEGE

In the light of the general criteria for determining the existence of an evidentiary privilege for communications made in the context of a confidential relationship, in particular, the most recent criteria that have been generally accepted by the international community, the public interest information privilege for communications made in the context of a confidential relationship between a human rights researcher and a source requires judicial recognition. As explained below, such communications are made to human rights researchers in the course of a relationship producing a reasonable expectation of privacy and non-disclosure.

A. The reasons that a public interest information privilege must be recognized

Confidentiality is essential to the nature and type of relationship between the source and the human rights researcher. Recognition of the privilege would further the objectives of the Statute of the Special Court for Sierra Leone, as well as the statutes of other international criminal courts and international justice. Protecting confidentiality of sources would facilitate

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[20] Article 5 of the Human Rights Defender Declaration states:

> "For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:
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> . . . .
>
> (c) To communicate with non-governmental or intergovernmental organizations."

[21] Article 16 of the Human Rights Defender Declaration states:

> "Individuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research in these areas to strengthen further, inter alia , understanding, tolerance, peace and friendly relations among nations and among all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities."

[22] Article 18 of the Universal Declaration of Human Rights states:
Article 18 of the International Covenant on Civil and Political Rights states:

[23] An important justification for the journalist source privilege is that "[p]ublic policy certainly supports the idea that individuals who possess information of significant value to the public should ordinarily be encouraged to convey that information to the public." Geoffrey R. Stone, *Testimony on a Proposed Journalist Source Privilege to the Senate Committee on the Judiciary* 4 (Occasional Papers from the University of Chicago Law School October 2005, No.46).

bringing to the attention of the public, as well as police and prosecutors, information concerning human rights violations and abuses and war crimes that would otherwise remain undiscovered. Denying such a privilege would have a chilling effect on such communications.

The expectation that communications will be confidential. Of course, in contrast to the International Committee of the Red Cross, which works almost exclusively on the basis of a confidential relationship with victims, detainees and governments, some of the communications made to human rights researchers, such as those who work for Amnesty International, are not made in the course of a confidential relationship. For example, such communications would include communications from governments providing copies of reports of investigations, legislation, instructions and court decisions or academics providing copies of published research. In addition, most of the information obtained by the International Committee of the Red Cross remains confidential, although in a limited number of instances, it will use that information publicly when all confidential methods have failed.

A significant number of communications made to Amnesty International researchers are made in the context of a confidential relationship. The organization receives a wide variety of communications in the context of confidential relationships with sources, including accounts of human rights violations or abuses and war crimes by victims, their families or independent eye-witnesses; information from government officials on a confidential basis about government steps to conceal human rights violations and war crimes, such as torture in secret wings of prisons or secret transfers of "disappeared" persons detained with no legal basis to other states where they are tortured or extrajudicially executed; and leaked secret government memoranda justifying torture and other ill-treatment and reports of attempts to suppress investigations into human rights violations and abuses and war crimes. Moreover, sometimes Amnesty International sources require confidentiality not only for themselves and their families but also for *their* sources, such as eye-witnesses of torture or killings, who would be placed at great risk were they or Amnesty International to do things that could lead to their being identified by the perpetrators. So, when an Amnesty International researcher enters into an agreement of trust, so to speak, with his or her source, he or she is sometimes also entering into a similar sort of agreement, albeit at second hand, with other sources.

Such sources may be located in zones of armed conflict or areas where persecution is taking place. Often sources are refugees who are located in refugee camps outside such zones and areas, but where those responsible for persecuting them are present. A significant amount of information is provided in countries outside war zones by refugees who fear reprisals against their families who remain in their country of origin if they speak to human rights researchers.[24]

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[24] In addition, much of the work that Amnesty International has done in pressing states to adopt effective human rights and international humanitarian law treaties and standards has been facilitated by receiving information from government officials whose careers would be destroyed or who would face prosecution for their role. Such invaluable information has included copies of draft resolutions or proposals by governments made in the course of confidential treaty-drafting sessions from which non-governmental organizations have been excluded. Indeed, the member organizations in the Coalition for an International Criminal Court received throughout the drafting of the Rome Statute and supplementary instruments, such as the Rules of Procedure and Evidence, daily, up-to-the-minute information from government delegates on a confidential basis on the course of discussions (For a description of how the members of the Coalition for an International Criminal Court operated at the preparatory meetings and at the Rome Diplomatic Conference and their impact, see William R. Pace & Jennifer Schense, *The Role of Non-Governmental Organizations*, in Antonio Cassese, Paola Gaeta & John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* 105 (Oxford: Oxford University Press 2002).). The organization also receives a considerable number of confidential draft bills implementing international law obligations, such as those under the Rome Statute of the International Criminal Court, that have been leaked to the organization with a view to permitting civil society to make comments indirectly at a critical stage.

Similarly, journalists, who often perform similar functions as human rights researchers, both in war zones and in a wide range of other situations where human rights violations and abuses and war crimes occur, but whose reports usually are less comprehensive, depend to a large extent on information made in the context of a confidential relationship and their experience in this regard is illustrative.

The need for confidentiality. It goes without saying that it is essential that absolute and credible guarantees must be given by the recipient of such information to sources that their identity will never be disclosed without their consent. Otherwise, most sources will not provide such information, which could endanger their lives, subject them to criminal prosecution, destroy their government careers or have other devastating consequences for them. Indeed, in one recent high-profile case in the United Kingdom, a government employee who revealed confidential information to a journalist concerning government assessments about the weapons capability of a foreign state committed suicide when his identity was disclosed.

The experience of Amnesty International since it was founded in 1961 has been that many sources will not provide the types of information outlined above without absolute and credible guarantees that the human rights researcher will not reveal their identity under any circumstances whatsoever without their consent. Amnesty International has also developed practices to be followed by all those acting on its behalf, particularly during field missions, dealing with matters such as being aware of surveillance and keeping notes secure. Paramount in this context is the concern for the safety of contacts and therefore the need to keep confidential names and other details identifying sources of information who may be at risk. This is so usually at the request of those providing Amnesty International with such information, with whom the organization normally discusses the possible use of the information and its implications. Whenever possible, the organization will seek the informed consent of the source and where that is not possible, it will err on the side of caution. The organization believes that it has a duty to do everything that is reasonable to ensure the security of our sources, as many survivors and witnesses face and continue to face serious risks for speaking to human rights organizations like Amnesty International.

Amnesty International's sources have in fact encountered difficulties from governments and armed political groups, some of whom have deliberately created obstacles for human rights activists providing information and advice to the organization, sometimes reaching the level of physical harassment or outright attack. In some situations, Amnesty International itself has refrained from maintaining visible contact with people at particular at risk of reprisal.

For Amnesty International to reveal any information that could threaten the security of the source of the information would be a betrayal of trust. In addition, even when the name of the source is not included in the published report based on the information, Amnesty International takes care not to include additional information which could lead to the identification of the person who is at risk. Even when names, places and dates are edited out, unless great care is taken, there may be something remaining that could lead to the identification of a source to a competent investigator. The mere fact of Amnesty International handing such material to a third party would obviously undermine trust and cause anxiety to its sources of information.

The analogous experience of the International Committee of the Red Cross over nearly a century and a half has also demonstrated that there is a wide range of information concerning violations of international humanitarian law that would not be provided to its representatives carrying out their official functions without absolute and credible guarantees that the identity of the source would never be revealed under any circumstances. Of course, there are considerable differences between the role of the International Committee of the Red Cross and others researching human rights violations and abuses and war crimes. In

particular, the International Committee of the Red Cross, which works on the basis of absolute confidentiality, will not disclose either the sources of its information or any information gathered by its employees, apart from rare occasions when it concludes that all confidential methods of altering the behaviour of the government concerned have failed. Amnesty International, by contrast, publicizes a considerable amount of its information, particularly in respect of the general human rights situation or, individual cases, where agreed by the victim or relevant source. Exposure and campaigning constitute key instruments of Amnesty International's objectives of protecting victims and combating impunity. However, these methodologies and the objectives towards which they directed would be rendered ineffective if not accompanied by the promise and expectation of confidentiality by the source.

A similar experience has been encountered in recent decades by journalists, who also depend to a large extent on information provided in the course of a confidential relationship on a wide range of issues, from government corruption to violations and abuses of human rights and war crimes. Some journalist sources will not only fear for their safety, but also other forms of retaliation, condemnation by their peers and loss of privacy, making them unwilling to provide information without effective guarantees that their identity will never be disclosed under any circumstances without their consent.[25]

Indeed, although the issue is not before the Appeals Chamber in this case, even the compulsion of a recipient of a communication made in the context of a confidential relationship, such as a journalist, to testify about non-confidential matters could make sources unwilling to provide such information for fear that the communications might be disclosed. In addition, the recipients of such information themselves could be put at risk if they were to be compelled to testify in favour of the prosecution, defence or victims. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia explained in the *Randal* case with regard to journalists in a war zone ordered to testify against an accused,

> "If war correspondents were to be perceived as potential witnesses for the Prosecution, two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk."[26]

Similar problems have been encountered by humanitarian organizations. For example, in May 2005, Paul Foreman, the director of operations in Sudan of the humanitarian organization Médicins sans Frontières (MSF), and Vince Hoedt, the Darfur coordinator for the Dutch section of MSF, were arrested in Sudan and charged based on allegations that the organization had made concerning rape by government armed forces and ordered to disclose the identity of those who had complained to MSF. The organization refused. Paul Foreman stated that "medical privilege" and patient confidentiality prevented him from disclosing this information and a spokesperson for MSF Netherlands stated that another reason was that women "made pregnant as a result of rape outside wedlock can be arrested by the authorities" under the Sudanese Shari'a law. After an international outcry, the employees were released and the government appears to have abandoned efforts to compel them to disclose their confidential sources.

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[25] One scholar has noted that individuals who possess confidential information of significant value to the public "may fear retaliation, gaining a reputation as a 'snitch,' losing their privacy, . . . simply getting 'involved'" or disapproval by co-workers and that, "without a journalist source privilege, sources may decide silence is the better part of wisdom". Stone, *supra*, n. 23, at 4-5.

[26] *Prosecutor v. Brdjanin (Randal case)*, Decision on Interlocutory Appeal, Case No. IT-99-36-AR73.9, Appeals Chamber, 11 December 2002, para. 43.

In addition to confidentiality, a related objective is the need for human rights researchers to be seen as impartial when gathering work. As the Appeals Chamber in the *Randal* case observed with respect to war correspondents, they "must be perceived as independent observers rather than as potential witnesses for the prosecution."[27] It added that it was necessary to be perceived as

> "independent observers rather than as potential witnesses for the Prosecution[], . . . [o]therwise they may face more frequent and grievous threats to their safety and to the safety of their sources. These problems remain, contrary to what was held by the Trial Chamber, even if the testimony of war correspondents does not relate to confidential sources."[28]

According to a legal adviser to MSF Netherlands,

> "applying this logic to the case of a humanitarian organisation, a privilege may be claimed on the basis of the importance to the organisation of being seen to be neutral, rather than because the organisation would not normally speak out about events its employees have witnessed."[29]

The distinction between testifying on general matters and testifying about sources will often be unclear to victims, witnesses and other sources who may be unfamiliar with court procedures, particularly international criminal court procedures. As the Appeals Chamber in the *Randal* case explained,

> "What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information."[30]

B. Costs of not recognizing a public interest information privilege

The recognition of a public interest information privilege with regard to communications relating to human rights violations and abuses and war crimes that are made in the context of a confidential relationship would further the objectives of the Statute of the Special Court for Sierra Leone, as well as international justice generally, by encouraging the discovery of information that would assist the Office of the Prosecutor to focus its investigations of crimes against humanity and war crimes.

The cost of not recognizing such a privilege would be that most of such communications will not be made.[31] The public, and prosecutors working on behalf of the public, will be less likely to learn of such conduct. The ability of non-governmental organizations to research such conduct, take effective action based on that research in a timely and effective way and to play an effective role in the drafting of treaties and other international standards and legislation will be damaged. These costs will far outweigh the possible benefit in a particular case if a court were to order that the identity of a source be revealed. Not only would such information not be forthcoming in the future, it is likely, as with many journalists who have been ordered to identify their sources, that human rights researchers would decide, as a matter of conscience and fundamental moral principle, that

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[27] *Ibid.*, at para. 42.
[28] *Ibid.* A similar concern has been expressed by the International Committee of the Red Cross. See an account of that organization's views on this point in *Simić*, *supra*, n. XXX, at paras. 59-61.
[29] Kate Mackintosh, *Note for humanitarian organizations on cooperation with international tribunals*, Int'l Rev. Red Cross, No. 853, March 2004, at137.
[30] *Prosecutor v. Brdjanin*, *supra*, n. XXX, at para. 43.
[31] Of course, some people will continue to speak out publicly about human rights violations at great risk to their personal safetly. Some of them will pay for their boldness with their lives, deterring others from doing the same.

they would rather go to jail than to reveal their sources, both to ensure the safety of their sources and their ability to continue to work independently and impartially in the future.

In measuring the cost of the privilege with regard to depriving a court of relevant information, the time to measure this cost is at time the source speaks to the human rights researcher, not at the time it is invoked in court in a particular case. Indeed, this is the moment that courts and society have normally considered when determining whether to recognize an evidentiary privilege for communications made in the context of a confidential relationship, whether the relationship is that of a lawyer-client, priest-penitent, doctor-patient or journalist-source. A helpful explanation of the importance of the timing in making this assessment has been made in the context of the journalist – source relationship;

> "If, in any given situation, we focus on the moment the privilege is invoked (for example, when the reporter refuses to disclose a source to a grand jury), the cost of the privilege will seem high, because we appear to be 'losing' something quite tangible because of the privilege. But if we focus on the moment the source speaks with the reporter, we will see the matter quite differently.
>
> Assume a particular source will not disclose confidential information to a reporter in the absence of a privilege. If there is no privilege, the source will not reveal the information, the reporter will not be able to publish the information, the reporter will not be called before the grand jury, and the grand jury will not learn the source's identi[t]y. Thus, in this situation, the absence of the privilege will deprive the grand jury of the exact same evidence as the privilege. But at least with the privilege, the public and law enforcement will gain access to the underlying information through the newspaper report. In this situation, the privilege is costless to the legal system, and at the same time provides significant benefits both to law enforcement and the public."[32]

In addition to these considerations, assuming, in the unlikely event that the recipient of the information is willing to disclose the identity of the source, in many situations the safety - or even life - of the source will be at risk. This risk is present in most international criminal courts which do not yet have the same effective witness protection programs as in certain states. Even 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. The victim and witness programs of other international criminal courts have been less successful. For example, there have been a number of disturbing reports over the years that, despite measures to protect the identity of witnesses who testified for the prosecution in the International Criminal Tribunal for Rwanda, a number have been killed after they returned home, apparently in retaliation for their testimony. Victim and witness programs of the new permanent International Criminal Court for the situations under investigation in the Democratic Republic of the Congo, the Sudan and Uganda are still at a preliminary stage.[33]

IV. THE SCOPE OF THE PUBLIC INTEREST INFORMATION PRIVILEGE

The privilege belongs to the source, not the human rights researcher, and only the source, not the recipient of the information, can waive the privilege. To whom can the source provide

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[32] Stone, *supra*, n. 23, at 10.

[33] For example, the Prosecutor has recently stated with respect to the investigation of the situation in Darfur in Sudan:

> "The establishment of an effective system for the protection of victims and witnesses is a precondition to the effective conduct of investigative activities in Darfur. Given the prevailing climate of insecurity and the current absence of an effective system of protection, investigative activities have taken place outside Darfur".

Address by Luis Moreno-Ocampo Prosecutor of the International Criminal Court, to the United Nations Security Council, New York, 13 December 2005, at 4.

confidential information under the privilege? The answer must be a functional one. There should be a reasonable expectation by the source that the person is a human rights researcher who will give the general public or a special audience the provided information without disclosing the source. Thus, a reasonable expectation would exist when the recipient of the information was working for an intergovernmental organization, a government-established commission of inquiry, the press or any other body researching such human rights violations or abuses, as well as war crimes, or is conducting such research independently. It would necessarily include persons assisting persons conducting such research.

A. The need for an absolute, rather than a qualified, privilege

The public interest information privilege must be absolute with respect to the protected information, not qualified on a case-by-case basis. This is essential if the source is to have any confidence that the source's identity will not be disclosed. The uncertainty of the case-by-case determinations of the journalist source privilege in US states that have qualified, rather than absolute, privileges has chilled disclosures to the press in those states. As Professor Stone, a noted expert on the journalist source privilege has explained, a qualified journalist source privilege simply does not work:

> "[T]he qualified privilege undermines the very purpose of the journalist-source privilege. Imagine yourself in the position of a source. You are a congressional staffer who has reason to believe that a Senator has taken a bribe. You want to reveal this to a journalist, but you do not want to be known as 'loose-lipped" or "disloyal." You face the prospect of a qualified privilege. At the moment you speak with the reporter, it is impossible for you to know whether, four months hence, some prosecutor will or will not be able to make the requisite showing to pierce the privilege. This puts you in a craps-shoot.
>
> But the very purpose of the privilege is to encourage sources to disclose useful information to the public. The uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce. In short, the qualified privilege is bad business all around. And that is precisely why the other privileges are not framed in this manner."[34]

A further problem with a qualified privilege is that the most important information to the prosecutor or defence will often be the most dangerous for the source to provide and, therefore, the most in need of protection. The least important information to the prosecutor or the defence will often be available from other sources and, therefore, the least in need of protection. Moreover, given that most of the crimes before international criminal courts have been committed on a large scale and that most of the accused are likely to be military commanders or civilian superiors, where there is no need to prove direct orders, there are likely to be a wide range of other types of evidence available without the need to identify and question confidential sources.

B. Measures to ensure a fair trial

All evidentiary rules deny the court relevant evidence. This is true not only with respect to the various absolute privileges regarding communications in the context of a confidential relationship, but also to rules excluding evidence of the accused's bad character, such as prior convictions, hearsay evidence and discussions of possible plea bargains. Courts and society, however, have determined that the interests served by these rules outweigh the impediments to the determination of guilt or innocence at trial. They do not necessarily by their nature *per se* prevent a fair trial.

Nevertheless, there are a number of ways in which such impediments and any possible infringements of the right to a fair trial can be avoided or minimized with regard to

[34] Stone, *supra*, n. 23, at 12-13.

the public interest information exception concerning communications about human rights violations and abuses and war crimes made in the context of a confidential relationship. First of all, in those instances where the employer or former employer of a human rights researcher has agreed that he or she may testify (a few organizations do, as in the current case), it will usually be in accordance with an agreement that the human rights researcher's testimony will be limited to describing the general background to help inform the court about the general situation, not with respect to matters directly relevant to the guilt or innocence of the accused. Rarely will a human rights researcher be in a position to provide eye-witness testimony concerning human rights violations and abuses, a situation which involves very different considerations.

When the testimony is general background, the exact identity of the dozens or hundreds of sources will be of little or no interest to an accused seeking to discredit that testimony, although the ethnic or religious affiliations of the sources might be relevant to balance. Assuming, however that the exact identity of the source were directly relevant to avoid a miscarriage of justice, the human rights researcher would attempt to contact the source and request the source to waive confidentiality (provided that an effective victim and witness protection system was in place). Such sources are often impossible for the human rights researcher to locate, particularly years after the communication was made, as many sources will have been in war zones, areas of intense persecution or temporary camps for displaced persons.

If the human rights researcher declines to provide the court with the identity of the source, the source declines to testify or cannot be located, and the identity of the source is essential to prevent a miscarriage of justice that would lead to a person being wrongly convicted, the court has a number of options to protect the right to fair trial. The court could follows the model set out in Rule 73 (6) of the Rules of Procedure and Evidence of the International Criminal Court. It could hold a consultation with the human rights researcher or his or her organization to seek to resolve the matter by cooperative means, taking into account the relevance of the evidence sought, whether the evidence could be obtained from another source, the risks to the source, the interests of justice and of victims, the performance of the court's role and the impact on the ability of the human rights researcher or the organization for which he or she works to carry on research and campaigning work.[35]

In the exceptional circumstance where the evidence is not disclosed, but the human rights researcher has testified, the court may either exclude the portions of the human rights researcher's testimony based on that source or give it little or no weight.[36] Courts often take such steps in national security cases when they determine that the identity of an informant is crucial to determining such core issues, and prosecutors, after discussion with government intelligence experts will sometimes decline to prosecute where disclosure of the identity of an informant would be required.

In any event, the experience of states in the USA with absolute journalist source privileges demonstrates that it has little or no impact on effective law enforcement. As one authority on such privileges has explained:

> "If one compares criminal prosecutions in states with an absolute privilege with those in states with only a qualified privilege, there is almost certainly no measurable

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[35] As a matter of policy, rather than law, in the extremely rare case where an Amnesty International researcher had exclusive access to such exculpatory information in an individual case which was based on a confidential source and efforts to persuade the source to provide testimony failed despite the absence of an effective victim and witness program, it would bring it to the attention of the international criminal court and it would consult with the court on how that information could be presented without endangering the life or physical safety of the source and the source's family.

[36] *See, for example, Prosecutor v. Casimir Bizimungu*, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe, Case No. ICTR-99-50-T, 2 September 2005, para. 16.

difference in the effectiveness of law enforcement. Even though there may be a difference in the outcomes of a few idiosyncratic cases, the existence of even an absolute privilege probably has no discernable effect on the legal system as a whole. If we focus, as we should, on these large-scale effects, rather than on a few highly unusual cases when the issue captures the public's attention, it seems clear that the benefits we derive from the privilege significantly outweigh its negative effects on law enforcement. This is so because the percentage of cases in which the issue actually arises is vanishingly small and because, in serious cases, prosecutors are almost always able to use alternative ways to investigate the crime."[37]

CONCLUSION

Requiring Amnesty International or other genuine human rights researchers to disclose the identity of confidential sources would go a long way towards making it impossible for Amnesty International to continue to conduct the sort of carefully documented, thorough and timely human rights research that it has conducted over the past 44 years. Such an outcome would be completely against the wider public interest, given the value and importance of that work to society as a whole, as recognized by its receipt of the 1977 Nobel Peace Prize. For all the reasons set forth above, the Appeals Chamber should recognize a public interest information privilege that protects communications made to human rights researchers in the context of a confidential relationship and the identity of the sources of that information from compelled disclosure.

Christopher Keith Hall
Senior Legal Adviser

Ian Seiderman
Senior Legal Adviser

Amnesty International
International Secretariat
1 Easton Street
London WC1X 0DW
United Kingdom
Tel.: +44-(0) 207-413-5500
Fax: +44-(0) 207-956-1157

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[37] Stone, *supra*, n. 23, at 11. He also noted that, without a privilege, a source may not report a crime, such as a bribe, to a journalist and the crime will remain unknown, but

> "[w]ith the privilege, the source will speak with the journalist, who may publish the story, leading to an investigation that may uncover the bribe. In this situation, law enforcement is actually better with the privilege than without it. . . " [I would put this in the main text, either here or wherever we have first made this point]

Ibid., at 5.

chall@amnesty.org

16/12/2005 16:25

To: chall@amnesty.org
cc: edmondsm@un.org, "Neil Gibson" <gibsonn@un.org>, ISeiderman@amnesty.org, MMacpherson@amnesty.org, massaquoij@un.org, walker3@un.org, ccordone@amnesty.org, jzuniga@amnesty.org, aladugui@amnesty.org, slee@amnesty.org, MSmart@amnesty.org, jheine@amnesty.org, YGinbar@amnesty.org, jodonohu@amnesty.org, HRelva@amnesty.org, KGrewal@amnesty.org, LGormley@amnesty.org, SVanDerP@amnesty.org, fcamara@amnesty.org
Subject: Prosecutor v. Brima, Case No. SCSL-04-16-439, Amnesty International amicus curiae brief

Dear Mr Gibson,

I have enclosed a copy of the Amnesty International *amicus curiae* brief and cover in the *Prosecutor v. Brima* appeal. We will send a signed copy dated today by courier and endeavour to fax a copy to you as well.

Yours sincerely,

Christopher Keith Hall

Senior Legal Adviser, International Justice Project
Amnesty International
International Secretariat
1 Easton Street
London WC1X 0DW
United Kingdom
Tel.: +44-(0) 207-413-5733 (office) - Tuesday, Wednesday and Friday
Tel.: +44-(0) 207-241-1728 (home) - Monday and Thursday
Fax: +44-(0) 207-956-1157
E-mail: chall@amnesty.org

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