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SCSL-04-16-AR73(B)
(15354 - 15393)

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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

Interim Registrar: Mr. Lovemore Munlo

Date filed: 19 October 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(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

NOTICE OF APPEAL AND SUBMISSIONS

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NOTICE OF APPEAL

I. TITLE AND DATE OF APPEALED DECISION

1. The Prosecution files this appeal pursuant to Rule 73(B) and Rule 108(C) of the Rules of Procedure and Evidence ("Rules") of the Special Court, and the Practice Direction for Certain Appeals before the Special Court of 30 September 2004, 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 ("Majority Decision").[1]

II. SUMMARY OF PROCEEDINGS

2. By a letter dated 23 May 2005, the United Nations ("UN") waived the immunity from legal process attaching to witness TF1-150, a former employee of the UN ("UN Letter").[2]

3. Witness TF1-150 had previously been called by the Prosecution in the *Norman* and others proceedings before Trial Chamber I (as witness TF2-218) and testified in closed session on 7 and 8 June 2005. In the course of the witness's cross-examination in the *Norman* and others case, he declined to disclose the name of an informant without the express consent of the informant, on the basis of confidentiality. By an oral decision delivered in closed session on 7 June 2005, the majority in Trial Chamber I held that it had the power to compel the witness to name his source. The confidential written majority decision was filed on 8 June 2005. The confidential written dissenting opinion was filed on 19 September 2005.

4. As a consequence of the decision of Trial Chamber I, in oral submissions on 13 and 14 September 2005, the Prosecution sought an order from Trial Chamber II guaranteeing, before witness TF1-150 was called to testify, that he would not be compelled to answer any questions in cross-examination relating to the names of informants or sources of

[1] *Prosecutor v Brima, Kamara, Kanu,* 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 ("Majority Decision").
[2] Letter from the United Nations ("UN Letter"), Attachment 1.

information whom he regarded as confidential on the grounds that he obtained information from those sources on conditions of confidentiality.

5. An oral decision (absent reasons) was delivered on 15 September 2005 (Justice Doherty dissenting) dismissing the Prosecution application and ruling that witness TF1-150 could be compelled to answer questions relating to the sources of his information. The written decision of the majority was handed down on 16 September 2005 and the written Dissenting Opinion of Justice Doherty was filed on 22 September 2005 ("Dissenting Opinion").[3]

6. As a consequence of the Trial Chamber's Decision, the Prosecution did not call witness TF1-150.

7. An application pursuant to Rule 73(B) of the Rules for leave to appeal the Majority Decision was filed by the Prosecution on 19 September 2005.[4] The Defence filed a Joint Response on 23 September 2005[5] and the Prosecution filed its Reply on 27 September 2005.[6] Trial Chamber II filed its Decision granting the Application for Leave to Appeal on 12 October 2005.[7]

III. GROUNDS OF APPEAL

8. Ground 1: The majority erred in law in the interpretation and construction of Rule 70(B) and Rule 70(D) of the Rules.

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[3] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-394, Dissenting Opinion of Justice Doherty on the Prosecution's Oral Application for Leave to be Granted to Witness TF1-150 to Testify without being Compelled to Answer any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality pursuant to Rule 70(B) and (D) of the Rules, 22 September 2005 ("Dissenting Opinion").

[4] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-390, Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 19 September 2005.

[5] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-396, Joint Defence Response to Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 23 September 2005.

[6] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-399, Prosecution Reply to Joint Defence Response to Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 27 September 2005.

[7] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-414, Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 12 October 2005.

9. Ground 2: The majority erred in law in distinguishing and finding inapplicable the Public Version of the Confidential Decision on the Interpretation and Application of Rule 70 in the *Milošević* case[8] from and to the instant case.

10. Ground 3: The balancing exercise to be carried out by the Chamber was incorrectly formulated. Having found that there exists a privileged relationship between a human rights officer and his informants, and having found that a public interest attaches to the work of human rights officers gathering information in the field, the majority erred in law in balancing the public interest attaching to the work of human rights officers with the rights of the accused to a fair trial.

IV. RELIEF SOUGHT

11. The Prosecution requests that the Appeals Chamber reverse the Majority Decision and grant the Prosecution's request for leave for witness TF1-150 to testify without being compelled to answer any question in cross-examination that the witness may decline to answer on grounds of confidentiality pursuant to Rule 70, or without being compelled to reveal the identity of any source in accordance with a privilege not to disclose the names of confidential informants.

[8] *Prosecutor v. Milošević*, IT-02-54-AR108bis & AR 73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, ("Milošević Rule 70 Decision").

PROSECUTION'S SUBMISSIONS ON THE GROUNDS OF APPEAL

I. GROUNDS 1 AND 2: APPLICABILITY OF RULE 70

12. Rule 70 of the Rules on "Matters not Subject to Disclosure" provides:

> (A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.
>
> (B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
>
> (C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. The consent shall be in writing.
>
> (D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.
>
> (E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).
>
> (F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power to exclude evidence under Rule 95.

13. Rules 70(B) and (D) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") are identical to the Special Court's Rules 70(B) and (D). The established purpose of Rule 70 is to create an incentive for the sharing of information on a confidential basis, which can only be achieved where information providers are guaranteed that the confidentiality of the information they offer and of the information's sources will be protected.[9] In the view of the ICTY Appeals Chamber, it would be impossible for the tribunal to fulfill its functions without such guarantees of confidentiality in that certain information would either not be provided to the Prosecutor or would be rendered unusable on account of its confidential nature or its origin.[10]

14. The Prosecution submits that the Trial Chamber erred in holding that Rule 70 was not applicable to witness TF1-150 or his testimony on the grounds that the witness's sources were not "information which has been provided" to the Prosecution within the meaning of Rule 70 (B). In so finding, the Trial Chamber erred in its interpretation of the provisions of Rule 70 (B). It wrongly failed to find that the provision of this witness' testimony fell within the terms of Rule 70 (B) and similarly that the form or content of his testimony fell within the terms of Rule 70 (D).

15. The Trial Chamber erred in finding that the Milošević Rule 70 Decision was distinguishable and did not explain its reasoning in this respect. That decision provides persuasive guidance as to the application of Rule 70 in these circumstances, having particular regard to the fact that the Special Court's Rules 70(B) and (D) are identical to the ICTY Rules 70(B) and (D).

16. In the *Milošević* case, the Appeals Chamber found as follows:

> The fact that information is provided in the form of testimony does not exclude it from being "information" or "initial information" provided under the Rule.[11]

[9] Milošević Rule 70 Decision, para. 19.
[10] Ibid.
[11] Milošević Rule 70 Decision, para. 23.

17. What this finding means is that the provision of information in the form of witness testimony on a confidential basis constitutes "information ... provided ... on a confidential basis" within the meaning of Rule 70 (B), and so triggers the application of the Rule in its entirety.

18. This Trial Chamber wrongly considered that only the *source* of the information provided confidentially to witness TF1-150 would be protected by the provisions of Rule 70 (had the source provided that information to the Prosecution on a confidential basis) and thereby failed to consider as two distinct issues: (i) the question whether the witness had been provided to the Prosecution on a confidential basis (the Rule 70 (B) issue) and (ii) the form or content of his testimony (the Rule 70 (D) issue).

19. It is the entity or person providing the information who determines its confidentiality.[12] In the *Milošević* case, the Appeals Chamber found that the court's authority to determine whether information has been provided under the terms of Rule 70(B) is limited.[13] The court may examine whether information was provided on a confidential basis but must keep in mind that providing information may consist of a process involving several acts.[14]

20. There can be no doubt that this witness' testimony was provided as confidential information to the Prosecution in the first instance whether by or on behalf of himself (the "person" within the meaning of Rule 70 (B)) or his employer, the UN (the "entity" within the meaning of Rule 70 (B)). This conclusion is endorsed by the UN in their letter to the Prosecutor dated 23 May 2005, by which they required the Prosecution to obtain a waiver from them before allowing the witness to testify as to the "sensitive and confidential information" that he might provide.[15]

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[12] *Prosecutor v. Blaskic*, Case No. IT-95-14, Decision of Trial Chamber 1 on the Prosecutor's Motion for Video Deposition and Protective Measures, 11 November 1997, ("Blaskic Decision"), para. 15. The Trial Chamber held that "it is neither for the Chamber nor the parties to determine whether the information in the possession of the Prosecution is confidential or not; the person or entity having the information is the sole judge of what was deemed to be confidential and what must be kept so in whole or in part."

[13] Milošević Rule 70 Decision, para. 29.

[14] Ibid. It was held that the Tribunal may be satisfied by a consideration of the information itself, an assertion by the Prosecutor or confirmation from the information provider.

[15] UN Letter, p. 2.

21. Rule 70 (D) deals separately with the situation where information – in this case, witness testimony - is being presented in evidence.[16] That testimony might include both direct and hearsay evidence. Whether or not it does is not a question that falls to be considered under Rule 70 (B). That Rule deals with the *basis* upon which information (testimony) is *provided to the Prosecution*, as opposed to its form or content *when it comes to be presented in court*. The fact that a witness may give evidence as to information provided to him by third parties on a confidential basis does not mean that the witness may not remain protected by the provisions of Rule 70 insofar as his testimony was provided to the Prosecution, in the first instance, on a confidential basis within the meaning of Rule 70 (B).

22. While the question of immunity falls under Rule 70(B) and was in this case waived by the UN Letter, the question of testimonial privilege is covered by Rule 70(D). The fact that the UN Letter waived the witness's immunity does not detract from the testimonial privilege he continued to enjoy under Rule 70(D). It is apparent from Rule 70(D) that the consent of the information provider (in this case either the witness himself or the UN as his employer) to present the information as evidence does not deprive him of the right to claim confidentiality at trial.[17] If that were not the case, there would have been no need for the Rule which evidently seeks to preserve the right of information providers to claim confidentiality in respect of material they deem sensitive at trial.

23. This application of Rule 70(D) is in keeping with the rationale for its enactment. Given the intended purpose of the Rule, namely, to allow information providers the right to limit access to confidential information, the Court does not have a discretion under Rule 70 to compel a witness to disclose information where he refuses to do so by reason of confidentiality. The ordinary meaning of the words "may not" in their context and in the light of the object and purpose of the Rule is to disallow a discretion.

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[16] See Milošević Rule 70 Decision, para. 25.
[17] Blaskic Decision, paras 23 and 25. See also *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 28.

II. GROUND 3: BALANCE OF INTERESTS

Formulation of the balancing exercise

24. The Majority Decision held that the privileged relationship between a human rights officer and his informants as well as the public interest that attaches to the work of human rights officers gathering confidential information in the field, does not outweigh the rights of accused persons to a fair trial.[18]

25. The Prosecution submits that the majority erred in law in the manner in which it identified the balancing exercise to be carried out by the Chamber. The public interest that attaches to the work of human rights officers, including the privileged relationship between those officers and their informants, should be weighed against the public interest in having all relevant information before the Chamber. It is incorrect to formulate the test as a balancing act between the public interest attaching to the work of human rights officers and the rights of the accused protected under Article 17 of the Special Court's Statute.[19]

26. The Article 17 rights of the accused necessarily envision situations where some available information will not be given to the Chamber. Indeed, this is the effect of Rule 70(D). But even if Rule 70 does not apply to witness TF1-150, the Rules of Procedure and Evidence contain a recognition of the fact that the non revelation of some information to the Chamber does not breach the fair trial rights of the accused *per se*. It follows that the correct formulation of the balancing exercise to be undertaken by the Chamber is as between competing public interests *under the rubric of the Article 17 rights of the accused*, including the right of the accused to know his accusers and the accusations against him, rather than weighing the public interest attaching to the work of human rights officers *against* the Article 17 rights.

27. Applying the correct test for the balancing of the relevant public interests, the Prosecution submits that the balance tilts in favour of permitting a human rights officer, as a matter of principle, to refuse to disclose the identities of his sources.

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[18] Majority Decision, para. 20.
[19] Ibid.

Protecting the functions of human rights officers

28. International law could be said to recognize the need to protect confidential sources in the case of war correspondents.[20] This follows from the protection of journalistic sources as a basic condition for press freedom in the laws and professional codes of conduct in a number of countries.[21] The categories of confidentiality meriting protection under international law are not closed.[22] The situation of human rights monitors and their confidential sources is analogous to that of journalists in that they obtain information and work under comparable conditions. Like war correspondents, human rights monitors often rely on confidential information provided by third parties upon assurances of confidentiality. Confidentiality is essential to the full and satisfactory preservation of such relationships and thus deserves protection.

29. Indeed, the basic principles of human rights monitoring, which include the principles of credibility and confidentiality, are set out in a training manual of the Office of the High Commissioner for Human Rights of 2001[23] which, although published after the period to which witness TF1-150 would have testified, is evidence of what was considered to be good and expected practice of human rights officers in the field. On the principle of confidentiality, the manual states the following:

> 11. Respect for the confidentiality of information is essential because any breach of this principle could have very serious consequences: (a) for the person interviewed and for the victim; (b) for the HROs' [Human Rights Officer]

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[20] *Prosecutor v Brdjanin and Talic*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 41 ("Brdjanin Appeals Decision").

[21] See *Goodwin v The United Kingdom*, Judgment of 22 February 1996, para. 39. See also Written Comments submitted by Article 19, The International Centre Against Censorship, and Interights, The International Centre for the Legal Protection of Human Rights, pursuant to Rule 37 of the Rules of the Court, 10 March 1995, http://www.interights.org/doc/Goodwin%20amicus.pdf, where it is stated at para. 48: "In sum, this survey of comparative law suggests that there is a decided trend within Europe, matched by developments in other parts of the world, towards strengthening the right of journalists to protect the confidentiality of their sources."

[22] In *Prosecutor v Blaskic*, Case No. IT-95-14, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, 12 May 1999, the ICTY Trial Chamber determined in a case where Rule 70 did not apply, that protective measures could include an authorization for the witness to state that information requested during his testimony was confidential. The need for confidentiality related to security concerns in the sense that the information could endanger the safety of civilian or military personnel on duty on the territory of the Former Yugoslavia and might create difficulties for the military and humanitarian action of the United Nations and France in that region, but this was not raised as a point of principle.

[23] Office of the High Commissioner for Human Rights, Training Manual on Human Rights Monitoring, Professional Training Series No. 7, United Nations, 2001, Attachment 2.

> credibility and safety; (c) for the level of confidence enjoyed by the operation in the minds of the local population; and thus (d) for the effectiveness of the operation. The HRO should assure the witness that the information s/he is communicating will be treated as strictly confidential. The HRO should ask persons they interview whether they would consent to the use of information they provide for human rights reporting or other purposes. If the individual would not want the information attributed to him or her, s/he might agree that the information may be used in some other, more generalized fashion which does not reveal the source. The HRO should take care not to communicate his/her judgements or conclusions on the specific case to those s/he interviews.[24]

30. On the principle of credibility, the manual provides:

> 10. The HRO's credibility is crucial to successful monitoring. HROs should be sure not to make any promises they are unlikely or unable to keep and to follow through on any promise that they make. Individuals must trust the HROs or they will not be as willing to cooperate and to produce reliable information. When interviewing victims and witnesses of violations, the HRO should introduce him/herself, briefly explain the mandate, describe what can and cannot be done by the HRO, emphasize the confidentiality of the information received, and stress the importance of obtaining as many details as possible to establish the facts (for example, whether there has been a human rights violation).[25]

31. The undertakings as to confidentiality and credibility are ones that the witness entered into with third parties to perform his duties as a human rights officer and are undertakings that are integral to the effectiveness of human rights officers in their information-gathering function.

32. While to the Prosecution's knowledge there is no case law directly on the point raised in this appeal, save for the confidential decision of Trial Chamber I in relation to which leave to appeal (by way of a confidential application) has been sought, a decision of the Appeals Chamber of the ICTY in the case of *Prosecutor v Brdjanin and Talic* on the privilege from testifying of war correspondents, is informative. The Prosecution stresses, however, that the issue in the current case is not immunity from testifying, indeed, the

[24] Ibid, p. 90.
[25] Ibid.

Prosecution's argument is that human rights officers should be encouraged to testify.[26] In the *Brdjanin* case the ICTY Appeals Chamber considered (i) whether there was a public interest in the work of war correspondents; (ii) whether compelling war correspondents to testify would adversely affect their ability to carry out their work; and (iii) the appropriate test for balancing the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence before the court.[27] The Chamber concluded in strong terms that there was indeed a public interest in the work of war correspondents.[28] On the second question, the Chamber found that compelling war correspondents to testify may have a significant impact upon their ability to obtain information and disseminate it to the public, and that the Chamber "will not unnecessarily hamper the work of professions that perform a public interest".[29] On the appropriate test for the balancing of interests, the Chamber held that in order for a Trial Chamber to issue a subpoena to a war correspondent, it must be demonstrated that the evidence sought is of direct and important value in determining a core issue in the case and that the evidence sought cannot reasonably be obtained elsewhere.[30]

33. In the *Brdjanin* case it was not necessary to consider the question of a testimonial privilege for journalists when it came to protecting confidential sources in the event that a war correspondent was subpoenaed. However, the Chamber drew an analogy with such a privilege, and stated that "the amount of protection that should be given to war correspondents from testifying [before] the International Tribunal is directly proportional to the harm that it may cause to the newsgathering function".[31] The ICTY Trial Chamber had drawn a distinction between evidence relating to published information and confidential sources which the Appeals Chamber rejected, finding that the same problems existed "even if the testimony of war correspondents does not relate to confidential

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[26] Cf. *Prosecutor v Simic et al.*, Case No. IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (released as public document by Order dated 1 October 1999), 27 July 1999, para. 76, in which the ICTY Trial Chamber held that the International Committee of the Red Cross had a confidentiality interest and claim to non-disclosure of information received by its employees and that no question of balancing of interests arose.
[27] Brdjanin Appeals Decision, para. 34.
[28] Ibid, paras 35-38.
[29] Ibid, para. 44.
[30] Ibid, para. 50.
[31] Ibid, para. 41.

sources".[32] It may be inferred from this that the need to protect confidential sources in the context of newsgathering in war zones was easier to justify.

34. Justice Doherty's Dissenting Opinion sums up the importance of a human rights officer's duties and suggests that human rights reports may have a greater significance before international tribunals than media reports:

> The Human Rights Officer's duty is to report in unstable and occasionally dangerous environments and such reports are part of the information that the Security Council depends upon to assess and decide on action in maintaining peace and security and upholding the rule of law. It is on these informations [sic] that international organizations and governments take political actions. In fact such information may be more vital to these bodies than media reports, as professional monitors gather information for mandated organizations...Government and International Organizations therefore rely heavily on such reports and there is a public interest in the work and the information of Human Rights Officers as there is in media reports.[33]

35. Human rights reporting has provided the impetus for the establishment of international criminal tribunals.[34] The work of human rights officers in the field during and immediately post conflict has often provided a starting point for the original investigations by these tribunals. It is therefore imperative that these officers be afforded conditions in which to testify that both encourage them to come forward and allow future missions to proceed unhindered.

36. The Prosecution submits that the *Brdjanin* decision assists in identifying the scope of the privilege that attaches to the disclosure of confidential sources by a human rights officer. Human rights officers should be protected from having to reveal the identity of confidential sources to the extent that such protection is necessary to safeguard their function as gatherers of information on alleged human rights abuses. Compelling a human rights officer to name a confidential source may jeopardize the effectiveness of

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[32] Ibid, para. 42.
[33] Dissenting Opinion, para. 4.
[34] The Commissions of Experts established by the UN Secretary-General to examine and analyse evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia and Rwanda respectively, were comprised of human rights experts.

future human rights missions. In her Dissenting Opinion, Justice Doherty paraphrased the words of the Appeals Chamber in the *Brdjanin* case as follows:

> That compelling [a Human Rights Officer] to [reveal sources] before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern.[35]

37. It is the Prosecution's position that compelling a human rights officer to name a confidential source *under any circumstances* will jeopardize the effectiveness of their information gathering function and therefore the effectiveness of future missions for two reasons: (i) The effect of a decision that a human rights officer may be compelled to reveal his confidential sources is that in the future, human rights officers will be obliged to inform sources that any information given at the information-gathering stage may lead to the identity of the source being revealed in court, possibly in a court trying a perpetrator named by that source. This will necessarily hamper human rights officers in their work. (ii) The credibility of human rights officers working in the field presently will be undermined to the extent that assurances they have given as to the confidentiality of existing and past sources may not now be considered absolute or enforceable in court. The impact of this upon the willingness of potential sources to trust and provide information to human rights officers in the future is obvious.

38. Authorities from domestic jurisdictions may provide additional guidance. For instance, parallels could be drawn with the confidentiality accorded to police informants in domestic jurisdictions in respect of their confidential sources, particularly since the absence of a police force in the international system means that in international tribunals the Prosecution plays the role of both investigator and prosecutor.

39. In the United States, the government has a limited privilege to withhold from disclosure the identity of its informants. In the case of *U.S. v Lewis*, a District Court stated that disclosure of an informant's identity required the demonstration of a testimonial advantage not available to the defendant through other witnesses. Otherwise, disclosure is often denied in order to preserve active and productive sources of information for law

[35] Dissenting Opinion, para. 24.

enforcement and to protect cooperating persons from revenge attacks.[36] It has been established that a party "must establish the relevance, materiality, and necessity of the identity of a confidential informant as a predicate for disclosure."[37]

40. The Canadian Supreme Court considered the issue of the confidentiality of the identities of informants in *R v Leipert*[38] and confirmed that "informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement,"[39] referring to the purpose of the rule as being to protect informants and encourage others to divulge to the authorities any information pertaining to crimes. The Court cited a previous case in which it was held that:

> The rule gives a peace officer the power to promise his informers secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed.[40]

41. In *R v Scott*[41] the Canadian Supreme Court found that informer privilege was of such importance that it could not be balanced against other interests and the majority held that the general public interest to be served by preserving informer privilege outweighed the interest of the accused to make full answer and defence in that case.[42] In *Bisaillon v Keable*, Beetz J observed that "the secrecy rule regarding police informers' identity has chiefly taken the form of rules of evidence based on the public interest"[43] and that the rule was applicable in both criminal and civil matters. "Its application does not depend on the judge's discretion, as it is a legal rule of public order by the which the judge is bound".[44]

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[36] *U.S. v Lewis*, 156 F.Supp.2d 1280 (M.D.Fla.2001).
[37] *Browner v State*, 595 S.E.2d 610 (Ga.App. 2004), 611.
[38] *R v. Leipert*, [1997] 1 S.C.R.
[39] Ibid, at p. 9.
[40] *Bisaillon v Keable*, [1983] 2 S.C.R. 60, at p. 105.
[41] *R v Scott*, [1990] 3 S.C.R. 979.
[42] Ibid, para. 14. Cory J, at p. 994, stressed the heightened importance of the rule in the context of drug investigations and noted that such an investigation would often be based on a relationship of trust between the police officer and the informer, something that may take a long time to establish.
[43] *Bisaillon v Keable*, [1983] 2 S.C.R. 60, at p. 93.
[44] Ibid.

42. The English House of Lords has held that a similar immunity from disclosure of the identity of a source in civil proceedings should be extended to those who give information about neglect or ill-treatment of children to a local authority or the National Society for the Prevention of Cruelty to Children, to that which the law allows to police informers. Thus, the identity of the informer may not be disclosed, whether by discovery, interrogatories, or questions at trial, as the public interests served by preserving the anonymity of both classes of informants is analogous.[45] It was also stated that where a confidential relationship existed and disclosure would be in breach of some ethical or social value involving the public interest, the court had a discretion to uphold a refusal to disclose relevant evidence provided it considered that on balance the public interest would be better served by excluding such evidence.[46]

43. There is Australian case law confirming that the public interest in preserving confidentiality in relation to police informers outweighs any countervailing public interest.[47] In *R v Smith*, the Court of Criminal Appeal of New South Wales retraced the principles relating to public interest immunity that had been established by authority. As a starting point, the fact that one person provided information to another in confidence did not of itself mean that disclosure of the information could not be compelled in legal proceedings. "However, in certain circumstances the law recognizes that a more important public interest is served by protecting information, or the identity of an informant, from disclosure in court."[48] One such circumstance, "which has long since hardened into a rule of law" is that the identity of police informers will be protected from disclosure.[49] The rationale for the rule was that, without it, sources of information would dry up and the prevention and detection of crime would be hindered. The court went on to say that:

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[45] *Respondent v National Society for the Prevention of Cruelty to Children Appellants*, [1978] AC 171.
[46] Per Lord Edmund-Davies, p. 245.
[47] *R v Smith*, 86 A Crim R 308. See also *R v Mason*, No. SCCRM-99-235 [2000] SASC 161 (14 June 2000). An analogy may also be drawn with case law dealing with disclosure of documents related to an informant where a similar balancing of public interests occurs, in such cases between the harm that could be done by the production of documents and the risk of frustrating or impairing the administration of justice if the documents are withheld. See *Alister and Others v The Queen* (1984) 154 CLR 404 and *Sankey v Whitlam*, (1978) 142 CLR 1.
[48] *R v Smith*, 86 A Crim R 308, at p. 311.
[49] Ibid, citing *Respondent v National Society for the Prevention of Cruelty to Children Appellants*, [1978] AC 171, at p. 218.

> There is powerful authority for the proposition that, at common law, when a claim for immunity is made in respect of the identity of a police informer, the court before whom the claim is made does not undertake for itself, afresh, a balancing exercise, weighing one interest against another. The balance has already been struck; it falls on the side of non-disclosure except where, at a criminal trial, disclosure could help show that the accused is not guilty.[50]

44. The main points that may be distilled from this brief overview of the common law position are that the public interest immunity in relation to police informers is close to absolute and that a similar immunity may extend to other types of informant by analogy.

45. The Prosecution notes that in her Dissenting Opinion, Justice Doherty remarks that she is not satisfied that the naming of informants is important to a core issue in the case and that "[i]t is only when the evidence sought is direct and important to the core issues in that case that a Trial Chamber may compel a witness to answer".[51]

46. This statement would appear to reflect the common law position that a witness to whom an immunity from disclosure of the identity of informants attaches might nevertheless be compelled to reveal those sources if the evidence sought goes to a core issue in the case. In the current case, however, the proposed witness has not testified and the question being raised is one of principle, which, the Prosecution argues, applies to the obligation to reveal sources as such. The aim of protecting the functions of human rights officers could not be achieved if the question of their compellability to reveal the names of sources were left to be decided on a case by case basis. The Prosecution reiterates its submission that human rights officers require protection from naming their confidential sources.

47. Further, it must be emphasised that witnesses such as TF1-150 are not generally called to give evidence as to a core issue in the case, namely the acts and conduct of the accused. The Prosecution had intended to call witness TF1-150 to give evidence as to the widespread and systematic nature of the attacks against the civilian population of Sierra Leone during the relevant time. The witness would not have given (hearsay) evidence of

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[50] Ibid. The court cited *Respondent v National Society for the Prevention of Cruelty to Children Appellants*, [1978] AC 171, at p. 218 in support of this view, but noted that contrary views, in support of a conclusion that a balancing exercise was still required, had been expressed.
[51] Dissenting Opinion, para. 27.

accusations or observations directly implicating the accused. In this respect, as will generally be the case for this type of witness, the relevance, materiality and necessity of the identity of the sources of the evidence to be revealed are low. In the event that such a witness were to possess information relating to a core issue, the question would become one of weight or admissibility of the evidence relating to the confidential source as discussed in paragraph 55 below.

Willingness of human rights organizations to cooperate

48. The protection of confidentiality is imperative if international tribunals are to foster information sharing with international bodies, particularly those engaged in the reporting of human rights violations. Given the nature of their work, human rights officers often possess information that is not obtainable from other sources but which could assist the tribunals in the fair disposition of the cases before them. By compelling them to disclose their confidential sources in breach of their confidential undertakings, there is a real risk that these international entities might become less willing to present relevant or vital information, both at the investigative stage and during trial.

49. It must be stressed that not all sources of the information possessed by human rights officers will be deemed by them to be confidential. Indeed, a confidential source is more likely to be the exception rather than the norm. However, the impact of the Majority Decision is likely to be that human rights officers will be unwilling to testify *at all* because of the risk of being compelled to answer questions where a duty of confidentiality has been entered into. This could result in highly relevant evidence being withheld from the Court.

50. The Prosecution notes that the issue is not how best to interpret the scope of the UN waiver of immunity, but rather the question of principle whether a human rights worker may be compelled to breach a duty of trust imposed upon him in his interaction with a third party and how this may affect the willingness of such human rights workers to testify. The Prosecution submits that humanitarian organizations may be less willing to cooperate based on the negative experience of human rights workers before international criminal tribunals who can be forced to risk contempt of court action if they refuse to reveal the names of sources that provided information under conditions of confidentiality.

At the very least, waivers of immunity, in such instances where an organization is entitled to immunity, in the future might contain specific conditions to protect employees against breaches of confidentiality owed to third parties which would be unacceptable to a court that has found that a witness may be compelled to reveal the identities of confidential sources. This in itself could prevent important testimony from coming before international criminal tribunals.

Risk to security of informants

51. In addition, the potential risk posed to the security of informants living in post conflict areas cannot be underestimated and it may be essential to protect their identity. The security risk is especially pertinent as regards international tribunals as opposed to domestic courts. This argument has even more force with respect to the Special Court, which sits in the country of the alleged crimes. Moreover, it is not in the interest of justice for confidential sources, who give information to human rights officers under conditions of confidentiality at a time when a trial is not anticipated, to be made to assume the risk of exposure if the information is made the subject of testimony before international tribunals. Nor is it sufficient to say that human rights officers who agree to testify must undertake the risk of exposing their confidential sources. The harm to the functioning of an international tribunal is obvious: human rights officers will be less willing to come forward with both incriminating and exculpatory evidence.

52. While the purpose of a closed session hearing is designed to allay such security concerns, the Prosecution submits that the question of principle that is being raised here, namely whether a human rights officer can be compelled to reveal the identities of his sources, should not be circumvented by recourse to the supposed safety net of a closed session. The duty of the human rights officer to preserve his undertaking of confidentiality to a third party would be breached if he were compelled to reveal the identity of the third party irrespective of the protective measures imposed during a court hearing.

53. As a peripheral argument, the Prosecution submits further that despite the safeguards offered by the possibility of testifying in closed session, as required in this case by the UN Letter, this does not completely eliminate the danger that the identities of confidential sources may be made public. In spite of the strict rules governing the disclosure of

information given in closed sessions, the testimony of witnesses is unfortunately sometimes leaked to the public, either inadvertently or deliberately.

54. In sum, the Prosecution submits that given the established public interest in the work of human rights officers, the following factors should be weighed in the balance when determining the scope of any privilege attaching to their confidential sources: first, the impact on the ability of human rights officers to perform their functions effectively; secondly, the impact on the willingness of human rights organizations to cooperate with international tribunals in the future; and thirdly, the risk that the names of sources could be revealed to the public entailing security risks for the informants. The Prosecution submits that weighing all these factors, the qualified privilege that some jurisdictions afford to journalists and police informants would not provide the protections that human rights officers need in the conduct of their work and would be insufficient to guarantee their future cooperation or the security of their informants. As Justice Doherty noted, human rights officers may play a more crucial role than the media in gathering information that leads directly to action in maintaining peace and security and upholding the rule of law. The qualification that is sometimes applied to the privilege applicable to police informants, namely that disclosure may be required if it is necessary to establish innocence, does not generally arise in the context of evidence provided by human rights officers and can in any case be dealt with through the rules on admissibility and weight as discussed below.

Competing public interest

55. As regards the competing interest, namely the public interest that the Chamber has before it all relevant evidence and the right of the accused to cross-examine fully and effectively, the Prosecution is not suggesting that it should be taken lightly. However, the Prosecution submits that the non disclosure of the identities of sources would not prejudice the rights of the accused. First, the Defence has more than one avenue for presenting a defence to the charges and would be in a position to call their own evidence to challenge any information provided by the witness. Moreover, the right to cross-examine fully and effectively is preserved and there is no real limitation to the exercise of this right beyond requiring the Defence to stop short of asking the witness to reveal the

actual identity of his source. The effective use of cross-examination would ensure that all avenues for testing the probative value of the witness's evidence are explored. For instance, questions may be posed as to the context in which the information was received and the Defence may probe the witness as to all matters related to his source, including the type of source, whether it is an individual or an organization. As mentioned in paragraph 47, it would only be on rare occasions that the identity of a human rights officer's source would be essential to a core issue in the case. The second main point is that the Court has the authority to determine how much weight to place on the particular portion of the evidence linked to the confidential source, or even to the discard the evidence or deem it inadmissible. However, it is the view of the Prosecution that the non-disclosure of the identity of the source alone, where this does not go to a core issue, would not be a basis for excluding the evidence. In these circumstances it would be for the Defence to argue unfairness in that no avenue of cross-examination or defence to the charges would be as effective as knowing the identity of the witness's source.

III. CONCLUSION

56. In the circumstances, the Prosecution submits that the majority erred in law and requests that the appeal be granted on the grounds articulated.

Filed in Freetown,

19 October 2005

For the Prosecution,

Luc Côté

Chief of Prosecutions

Lesley Taylor

Senior Trial Attorney

RECORD ON APPEAL

1. *Prosecutor v Brima, Kamara, Kanu,* 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.

2. *Prosecutor v Brima, Kamara, Kanu,* SCSL-04-16-T-394, Dissenting Opinion of Justice Doherty on the Prosecution's Oral Application for Leave to be Granted to Witness TF1-150 to Testify without being Compelled to Answer any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality pursuant to Rule 70(B) and (D) of the Rules, 22 September 2005.

3. *Prosecutor v Brima, Kamara, Kanu,* SCSL-04-16-T-390, Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 19 September 2005.

4. *Prosecutor v Brima, Kamara, Kanu,* SCSL-04-16-T-396, Joint Defence Response to Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 23 September 2005.

5. *Prosecutor v Brima, Kamara, Kanu,* SCSL-04-16-T-399, Prosecution Reply to Joint Defence Response to Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 27 September 2005.

6. *Prosecutor v Brima, Kamara, Kanu,* SCSL-04-16-T-414, Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 12 October 2005.

7. *Brima et al.*, Trial Transcript, 13 September 2005, pp. 2-9 (open session) and pp. 23-54 (open session).

8. *Brima et al.*, Trial Transcript, 14 September 2005, pp. 1-37 (open session).

9. *Brima et al.*, Trial Transcript, 15 September 2005, pp. 2-3 (open session).

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2. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-394, Dissenting Opinion of Justice Doherty on the Prosecution's Oral Application for Leave to be Granted to Witness TF1-150 to Testify without being Compelled to Answer any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality pursuant to Rule 70(B) and (D) of the Rules, 22 September 2005.

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5. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-399, Prosecution Reply to Joint Defence Response to Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer Questions on Grounds of Confidentiality, 27 September 2005.

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2. Practice Direction for Certain Appeals before the Special Court of 30 September 2004.

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2. Letter from the United Nations ("UN Letter"), Attachment 1.
3. Office of the High Commissioner for Human Rights, Training Manual on Human Rights Monitoring, Professional Training Series No. 7, United Nations, 2001, Part III, Chapter 5, pp. 87-93, Attachment 2.

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ATTACHMENT 1

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UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE:

23 May 2005

Dear Mr. Crane

Special Court for Sierra Leone: The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Alieu Kondewa; The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao; and The Prosecutor v. Alex Tamba Brima; Ibrahim Bazzy Kamara and Santigue Kanu.

I wish to refer to your letters dated 29 April 2005 (received on 5 May 2005) and 12 May 2005 respectively requesting that the Secretary-General waive the immunity from legal process which is enjoyed by Mr. Michael O'Flaherty so that he can appear before the Special Court as a witness in the cases of *The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Alieu Kondewa*; *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao;* and *The Prosecutor v. Alex Tamba Brima; Ibrahim Bazzy Kamara and Santigue Kanu.*

Mr. Michael O'Flaherty was a staff member serving with the United Nations Assistance Mission for Sierra Leone (UNAMSIL), at the time of the events in respect of which you wish that he should testify and was therefore an official of the United Nations.

As such, Mr. O'Flaherty enjoyed, and continues to enjoy, the privileges and immunities set out in Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946 pursuant to Article 105 of the Charter. These privileges and immunities include immunity from legal process in respect of all words spoken or written and all acts performed by him in the course of the performance of his official functions.

Mr. David Crane
Prosecutor
Special Court for Sierra Leone
Freetown

At the same time, the privileges and immunities which Mr. O'Flaherty enjoys as a former United Nations official are granted to him in the interests of the United Nations. The Secretary-General has the right and the duty to waive those immunities in any case where, in his opinion, they can be waived without prejudice to those interests.

That being so, I am pleased to advise you that, subject to what is said below, the Secretary-General hereby waives the immunity from legal process which is enjoyed by Mr. Michael O'Flaherty to the extent that is necessary to permit him to appear as a witness for the prosecution in the cases of *The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Alieu Kondewa*; *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao;* and *The Prosecutor v. Alex Tamba Brima; Ibrahim Bazzy Kamara and Santigue Kanu* and, for that purpose, to testify freely as to the existence or otherwise of any of the elements of any of the crimes set out in the Statute of the Special Court or other matters which, in the opinion of the Court, are relevant to the individual criminal responsibility of an accused or of any circumstance of an exculpatory or mitigatory nature, as well as to be asked and to answer questions which seek to establish the existence or inexistence of any such element or circumstance.

In view of the sensitive and confidential information which Mr. O'Flaherty may provide, it is a condition of this waiver that he testify in closed session, that transcripts and recordings of his testimony be restricted to the Trial Chambers and their staff, to the Prosecutor and her staff and to the Accused and their counsel and expert advisers, and that the Prosecutor and her staff and the Accused and their counsel and expert advisers be prohibited from divulging the contents of such testimony to the media or to any other third party.

It is also a condition of this waiver that you seek and obtain from the Trial Chambers before which the cases of *The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Alieu Kondewa*; *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao;* and *The Prosecutor v. Alex Tamba Brima; Ibrahim Bazzy Kamara and Santigue Kanu* are to be heard orders of protective measures giving effect to the condition set out in the preceding paragraph.

I should emphasize that the waiver hereby granted is limited to the appearance of Mr. O'Flaherty as a witness for the purposes which are set out above and that it does not relate to the release of confidential documents of the United Nations, which is subject to separate authorization by the Secretary-General.

Finally, I would appreciate it if you would provide Mr. O'Flaherty – with whom you are in contact with a copy of this letter.

Yours sincerely,

Ralph Zacklin
Assistant Secretary-General for Legal Affairs

cc: Judge Ayoola, President of the Special Court for Sierra Leone ✓
Mr. Jean-Marie Guéhenno
Mr. Michael O'Flaherty

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ATTACHMENT 2

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OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

PROFESSIONAL TRAINING SERIES No. 7

Training Manual on Human Rights Monitoring

UNITED NATIONS
New York and Geneva, 2001

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Part Three

THE MONITORING FUNCTION

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.....Chapter V
BASIC PRINCIPLES OF MONITORING.....

Key concepts

Monitoring should aim to reinforce State responsibility to protect human rights — not to replace this responsibility.

There are a number of basic principles of monitoring, which human rights officers performing monitoring functions should keep in mind and respect at all times. They are essential for the effective fulfilment of the monitoring mandate.

Human rights officers should not only observe developments, collect information, and perceive patterns of conduct, but should identify problems, diagnose their causes, consider potential solutions, and assist in problem solving.

A. Introduction

1. This chapter identifies **eighteen basic principles of monitoring** which HROs should keep in mind as they pursue their monitoring functions as described in the following chapters, including information gathering, interviewing, visits to persons in detention, visits to internally displaced persons and/or refugees in camps, monitoring the return of refugees and/or internally displaced persons, trial observation, election observation, monitoring demonstrations, monitoring economic, social and cultural rights, monitoring during periods of armed conflict, verification and assessment of the information collected, and use of the information to address human rights problems.

B. Monitoring as a method of improving the protection of human rights

2. Monitoring is a method of improving the protection of human rights. The principal **objective** of human rights monitoring is to **reinforce State responsibility to**

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protect human rights. HROs can also perform a **preventative role** through their presence. When a Government official or other responsible actor is monitored, s/he becomes more careful about her/his conduct.

3. HROs must relate their work to the overall objective of human rights protection. They can record observations and collect information for immediate action and later use. They can communicate the information to the appropriate authorities or other bodies. HROs should not only observe developments, collect information, and perceive patterns of conduct, but should, as far as their mandate allows and their competence permits, identify problems, diagnose their causes, consider potential solutions, and assist in problem solving. While exercising good judgement at all times, HROs should take initiative in solving problems and, provided they are acting within their authority and competence, should not wait for a specific instruction or express permission before acting.

C. Do no harm

4. HROs and the operation they are assigned to should make every effort to address effectively each situation arising under their mandate. Yet, in reality, HROs will **not** be in a position to **guarantee the human rights and safety of all persons.** Despite their best intentions and efforts, HROs may not have the means to ensure the safety of victims and witnesses of violations. It is critical to remember that the **foremost duty of the officer is to the victims and potential victims** of human rights violations. For example, a possible conflict of interest is created by the HRO's need for information and the potential risk to an informant (victim or witness of the violation). The HRO should **keep in mind the safety of the people who provide information.** At a minimum, the action or inaction of HROs should not jeopardize the safety of victims, witnesses or other individuals with whom they come into contact, or the sound functioning of the human rights operation.

D. Respect the mandate

5. A detailed mandate facilitates dealing with UN headquarters, other UN bodies (especially those less sensitive to human rights imperatives), and all other involved parties. Every **HRO should** make an effort to **understand the mandate**, bear it in mind at all times, and learn how to apply and interpret it in the particular situations s/he will encounter. In evaluating the situation, HROs should consider such questions as: What are the relevant terms of the mandate? What are the relevant international standards underlying and explicating the mandate? How will the mandate be served by making a particular inquiry, by pursuing discussions with the authorities, or by taking any other course of action? What action am I authorized to undertake under the mandate? What are the ethical implications, if any, of that course of action? How will the action being considered by the HRO be received by the host Government? What potential harm could be caused by the action under consideration?

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E. Know the standards

6. HROs should be fully familiar with the international human rights standards which are relevant to their mandate and applicable to the country of operation. International human rights standards not only define the HROs' mandate, but also provide sound legal basis and legitimacy to the work of the HRO and the UN operation in a specific country, in that they reflect the will (or the agreement) of the international community and define the legal obligations of the Government.

F. Exercise good judgement

7. Whatever their number, their relevance and their precision, **rules cannot substitute for** the **good personal judgement** and common sense of the human rights officer. HROs should exercise their good judgement at all times and in all circumstances.

G. Seek consultation

8. Wisdom springs from discussion and consultation. When an HRO is **dealing with a difficult case**, a case on the borderline of the mandate or a case which could be doubtful, it is always **wise to consult other officers** and, whenever possible, superiors. Similarly, HROs will ordinarily work in the field with several UN and other humanitarian organizations; they should consult or make sure that there has been appropriate consultation with those organizations to avoid duplication or potentially contradictory activity.

H. Respect the authorities

9. HROs should keep in mind that one of their objectives and the **principal role of the UN operation is to encourage the authorities to improve their behaviour**. In general, the role envisaged for HROs does **not** call for officers to **take over governmental responsibilities** or services. Instead, HROs should respect the proper functioning of the authorities, should welcome improvements, should seek ways to encourage governmental policies and practices which will continue to implement human rights after the operation has completed its work.

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I. Credibility

10. The HRO's credibility is crucial to successful monitoring. HROs should be sure not to make any promises they are unlikely or unable to keep and to follow through on any promise that they make. Individuals must trust the HROs or they will not be as willing to cooperate and to produce reliable information. When interviewing victims and witnesses of violations, the HRO should introduce him/herself, briefly explain the mandate, describe what can and cannot be done by the HRO, emphasize the confidentiality of the information received, and stress the importance of obtaining as many details as possible to establish the facts (for example, whether there has been a human rights violation).

J. Confidentiality

11. **Respect for the confidentiality of information** is essential because any breach of this principle could have very serious consequences: (a) for the person interviewed and for the victim; (b) for the HROs' credibility and safety; (c) for the level of confidence enjoyed by the operation in the minds of the local population; and thus (d) for the effectiveness of the operation. The HRO should assure the witness that the information s/he is communicating will be treated as strictly confidential. The HRO should ask persons they interview whether they would consent to the use of information they provide for human rights reporting or other purposes. If the individual would not want the information attributed to him or her, s/he might agree that the information may be used in some other, more generalized fashion which does not reveal the source. The HRO should take care not to communicate his/her judgements or conclusions on the specific case to those s/he interviews.

12. Special measures should also be taken to **safeguard the confidentiality of recorded information**, including identities of victims, witnesses, etc. The use of coded language and passwords, as well as keeping documents which identify persons in separate records from facts about those persons, may be useful means to protect the confidentiality of information collected.

K. Security

13. This basic principle refers both to the security of the HRO and of the persons who come in contact with him/her. As discussed in **Chapter V-K: "Security"** of this Manual, HROs should protect themselves by taking **common-sense security measures**, such as avoiding travelling alone, reducing risks of getting lost, and getting caught in cross-fire during an armed conflict.

14. HROs should always **bear in mind the security of the people who provide information**. They should obtain the consent of witnesses to interview and assure them about confidentiality. Security measures should also be put in place to protect the

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identity of informants, interviewees, witnesses, etc. The human rights officer should *not offer unrealistic guarantees concerning the safety of a witness or other individual*, should avoid raising false hopes, and should be sure that any undertakings (such as keeping in touch) to protect the victim or witness can be kept.

L. Understand the country

15. HROs should endeavour to understand the country in which they work, including its **people, history, governmental structure, culture, customs, language**, etc. (See **Chapter II: "The Local Context"**.) HROs will be more effective, and more likely to receive the cooperation of the local population, the deeper their understanding of the country.

M. Need for consistency, persistence and patience

16. The collection of sound and precise information to document human rights situations can be a long and difficult process. Generally, a variety of sources will have to be approached and the **information** received from them will have to be **examined carefully, compared and verified**. Immediate results cannot always be expected. The HRO should continue his/her efforts until a comprehensive and thorough inquiry has been completed, all possible sources of information have been explored, and a clear understanding of the situation has been obtained. Persistence may be particularly necessary in raising concerns with the Government. Of course, cases will arise in which urgent action is required (e.g., if there is evidence of an imminent threat to a particular individual or group). The HRO should **promptly respond** to such **urgent cases**.

N. Accuracy and precision

17. A central goal of the HRO is to **provide sound and precise information**. The information produced by the HRO will serve as the basis for the officer's immediate or future action with the local authorities, or the action of his/her superiors, or action by the Headquarters of the operation, or by other UN bodies. The provision of sound and precise information requires thorough and **well-documented reports**. The HRO should always be sure to ask precise questions (e.g., not just whether a person was beaten, but how many times, with what weapon, to what parts of the body, with what consequences, by whom, etc.)

18. **Written communication** is always **essential** to avoid lack of precision, rumours and misunderstandings. Reports prepared by HROs should reflect thorough inquiries, should be promptly submitted, and should contain specific facts, careful

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analysis and useful recommendations. Reports should avoid vague allusions and general descriptions. All conclusions should be based on detailed information included in the report.

O. Impartiality

19. The HRO should keep in mind that the UN operation is an impartial body. Each task or interview should be approached with an attitude of impartiality **with regard to the application of the mandate and the underlying international standards**. Violations and/or abuses by all parties should be investigated with equal thoroughness. The HRO should not be seen as siding with one party over another.

P. Objectivity

20. The HRO should maintain an objective **attitude and appearance at all times**. When collecting and weighing information, the HRO should **objectively consider all the facts**. The HRO should apply the standard adopted by the UN operation to the information received in an unbiased and impartial way.

Q. Sensitivity

21. When interviewing victims and witnesses, the HRO should be sensitive **to the suffering which an individual may have experienced**, as well as to the need to take the necessary steps to protect the security of the individual — at least by keeping in contact. The HRO must be particularly sensitive to the **problems of retraumatization** and vicarious victimization discussed in **Chapter VIII: "Interviewing"** and **Chapter XXIII: "Stress, Vicarious Trauma and Burn-out"**. HROs should also be very careful about any conduct or words/phrases which might indicate that their concern for human rights is not impartial or that they are prejudiced.

R. Integrity

22. The HRO should treat all informants, interviewees and co-workers with **decency and respect**. In addition, the officer should carry out the tasks assigned to him/her in an **honest and honourable manner**. (See **Chapter XXII: "Norms Applicable to UN Human Rights Officers and Other Staff"**.)

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S. Professionalism

24. The HRO should approach each task with a professional manner. The officer should be **knowledgeable, diligent, competent and** fastidious about details.

T. Visibility

25. HROs should **be sure that both the authorities and the local population are aware of the work** pursued by the UN operation. The presence of visible HROs can deter human rights violations. As a general rule, a visibly active monitoring presence on the ground can provide some degree of protection to the local population since potential violators do not want to be observed. Also, a highly visible monitoring presence can reassure individuals or groups who are potential victims. Moreover, a visible monitoring presence can help to inspire confidence in crucial post-conflict processes, such as elections, reconstruction and development. Hence, **effective monitoring means both seeing and being seen.**