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SCSS-04-16-T
(15501 - 15521)

15501

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: 31 October 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No. SCSL-04-16-AR73(B))

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

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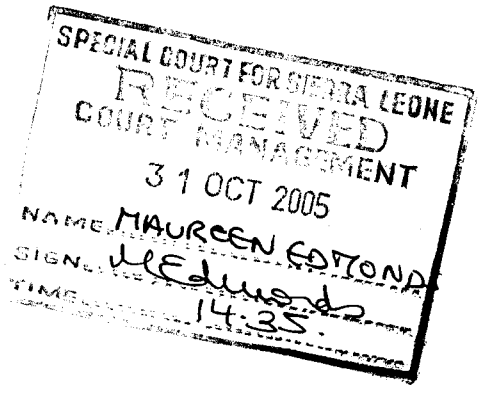

1. The Prosecution files this Reply to the Joint Defence Response to Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality, filed on 27 October 2005 ("Defence Response").[1]

I. RULE 70

Interpretation of Rule 70(B)

2. Paragraphs 9 to 37 of the Defence Response argue that in this case Rule 70(B) does not apply to the identity of Witness TF1-150's sources (i) because Rule 70(B) applies only to substantial information, and not to the mere identity of the source of that information, and (ii) because Witness TF1-150 never revealed to the Prosecution the identity of his sources, and their identities are therefore not "information" of which the Prosecution is "in possession" within the meaning of Rule 70(B).

3. It is not the Prosecution's argument that the identities of Witness TF1-150's sources is itself "information" to which Rule 70(B) applies. Rather, it is the Prosecution's argument that the "information" consists of the evidence of the witness which, in its totality, was provided confidentially to the Prosecution because it was received by the witness during his employment as a UN human rights officer. The Prosecution argument is that because this witness has provided the Prosecution with information to which Rule 70***(B)*** applies, the application of Rule 70***(D)*** is thereby triggered. Rule 70(D) prevents Witness TF1-150 from being required to disclose his sources.

4. Rule 70(D) applies when a witness who has provided information under Rule 70(B) is testifying in relation to that information. The express effect of Rule 70(D) in this situation is that the Trial Chamber cannot compel the witness "to answer any question the witness declines to answer on grounds of confidentiality". The Defence interpretation of Rule 70 would defeat the very object of that rule. In some cases, the provider of Rule 70(B) information may consider the identity of the sources to be so sensitive, that the provider is not willing to disclose the identity of the sources even to the Prosecution. On the Defence interpretation, Rule 70 would not protect the identity of the sources in this situation, because this information has not been provided to the Prosecution. On the

[1] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-AR73(B)-426, "Joint Defence Response to Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality," ("Defence Response"), 27 October 2005.

other hand, if the information provider was willing to disclose the identity of the sources to the Prosecution on a confidential basis, the identity would, anomalously, be protected by Rule 70.

5. Paragraph 33 of the Defence Response suggests that sub-paragraphs (B) and (D) of Rule 70 should be interpreted differently to the corresponding provisions in the Rules of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), given that Rule 70 of the ICTY Rules contains two additional sub-paragraphs ((F) and (G)) that are not found in the Rules of the Special Court. However, these additional paragraphs merely spell out what is implicit in the ICTY and Special Court Rules in any event.[2]

Interpretation of Rule 70(D)

6. Paragraphs 38 to 43 of the Defence Response state, without substantive argument, that Rule 70(D) is inapplicable as Rule 70 does not apply to witnesses who provide hearsay evidence. This submission should be rejected. Hearsay evidence is permitted in international criminal tribunals, so that witnesses may give evidence of information obtained from other sources. The Prosecution submits that the identity of a confidential source is in fact a classic example of the kind of information that Rule 70 is designed to protect.

II. WITNESS PRIVILEGE

7. The Prosecution acknowledges at the outset that the precise issue raised in this appeal has not previously been determined by the ICTY or the International Criminal Tribunal for Rwanda ("ICTR"). To the extent that the question of the non-disclosure of a witness's sources has arisen before the ICTY or ICTR, the precise question of privilege has been circumvented and the witnesses concerned have simply not been required to reveal their confidential sources.[3] The case law of the ICTY and ICTR relied upon by the Prosecution is referred to by way of analogy, rather than as directly applicable precedents.

8. Paragraphs 44 and 45 of the Defence Response incorrectly suggest that the Prosecution

[2] Rule 89(B) of the Special Court's Rules provides that "a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". Rule 95 on the exclusion of evidence provides that "[n]o evidence shall be admitted if its admission would bring the administration of justice into serious disrepute".

[3] See *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, "Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison des Forges," ("Alison Des Forges Decision"), 2 September 2005, para. 31; *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, p. 4.

position involves a balancing exercise in which the rights of the accused are not one of the factors to be taken into account.[4] Paragraph 26 of the Appeal Submissions[5] expressly deals with the role of Article 17 rights of the accused in the balancing exercise. The Prosecution's point is that the rights of the accused are not a *competing* interest to be weighed in the balance; rather, they remain protected through the use of effective cross-examination and the appropriate application of the rules of evidence.

9. Paragraphs 46 to 50 of the Defence Response correctly state that the ICTY decisions in the *Brdjanin*[6] and *Simic*[7] cases concerned the question whether a witness would testify at all, rather than the question whether a witness who does testify can refuse to answer certain questions in cross-examination. However, the Prosecution submits that the *rationale* underlying the immunity of the ICRC in the *Simic* case, and the privilege of war correspondents in the *Brdjanin* case, is analogous to that underlying the witness privilege of human rights workers. In some cases, witness privilege may be invoked to prevent a witness from testifying at all. However, there is no reason why a witness might not testify, and be subject to a privilege in relation to certain categories of information only. The Prosecution in no way suggests that human rights workers should be equated with the ICRC.[8] It is merely argued that for the reasons given, an analogy can be drawn between the immunity of the ICRC, and the privilege of human rights workers.

10. Paragraphs 59 to 69 of the Defence Response argue that no valid analogy can be drawn with the privilege of police informants in certain common law national legal systems. Paragraphs 61-65 of the Defence Response argue that in these national legal systems, the information provided by police informants is only used by the prosecution to generate new evidence. The Defence Response argues that this is a different situation to one in which a person testifies as a witness, but refuses to reveal the identity of sources. The Prosecution acknowledges that these national cases are concerned with slightly different factual circumstances, but maintains that the rationale underlying the privilege of police

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[4] Defence Response, paras. 44-45.
[5] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-AR73(B)-419, "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," ("Appeal Submissions"), 19 October 2005.
[6] *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9, "Decision on Interlocutory Appeal," 11 December 2002, ("Brdjanin Appeals Decision").
[7] *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 ("Simic Decision").
[8] See paras. 52 to 58 of the Defence Response.

informants in national legal systems provides a valid analogy to the issue in this appeal. In national common law systems, hearsay evidence is inadmissible. Therefore, courts in those systems will never be confronted with the question of whether a witness who gives hearsay evidence can refuse to reveal the source of that hearsay information. In contrast, in international criminal tribunals hearsay evidence is admissible, and this issue therefore does arise. In finding an answer to this issue, the case law on witness privileges in national legal systems is of obvious relevance, even if it does not deal with precisely the same circumstances.

11. Paragraphs 66-69 of the Defence Response argue that the Prosecution treats as interchangeable the concepts of anonymity of informants and anonymity of witnesses. The Prosecution denies this. Witness TF1-150 was not an anonymous witness. His identity is known to the Trial Chamber and the parties. It is only the witness's sources that are anonymous. The European Court of Human Rights case referred to in the Defence Response[9] concerned the question of the right to a fair trial where a conviction was based solely on statements made to the police by witnesses whom neither the accused nor his counsel had been able to examine. However, the existence of the privilege contended for by the Prosecution does not prevent the Defence from cross-examining the human rights worker to test the reliability or credibility of the human rights worker's testimony, or of the human rights worker's confidential source. The privilege merely prevents disclosure of the *actual identity* of the confidential source. If a case were to arise in which the defence simply could not test the reliability and credibility of that evidence without knowing the identity of the confidential source, the remedy would be for the Trial Chamber to disregard altogether the information provided by the confidential source. The rights of the accused are thereby preserved. Indeed, there may be instances where the defence itself wishes to call a human rights worker as a witness, and where the witness would be unwilling testify but for the existence of the privilege.

12. The situation of a human rights worker who refuses to give the identity of a source is no different from the situation of a witness who gives hearsay evidence in circumstances where he does not know the identity of the source. In either case, the giving of the hearsay evidence does not make the witness who gives it an anonymous witness. The

[9] *Delta v. France*, European Court of Human Rights, 191-A Eur Ct. H. R. (A Series) 15, 19 December 1990, ("*Delta v France*").

evidence is admissible, but it is a matter for the Trial Chamber to determine how much weight to give to such evidence, in view of the fact that the source of the information is not known.

13. Paragraphs 70 to 71 of the Defence Response argue that no valid analogy can be drawn with the privilege of a war correspondent because such a privilege relates to the protection of freedom of speech. The Prosecution submits that the reasoning in the *Brdjanin* case makes it clear that the categories of public interest that may support the existence of witness privileges are not closed. The Prosecution points to the three questions asked by the ICTY Appeals Chamber in that case, as set out in paragraph 32 of the Appeal Submissions. The same questions arise in relation to human rights workers, even if the nature of the public interest may be slightly different.[10]

14. The Prosecution submits that in determining whether there is a public interest that requires recognition of a witness privilege, a similar test should be applied to that used in certain common law systems. In these systems, the existence of a privilege against disclosure is determined on case-by-case basis, in accordance with the following criteria as set out in *Wigmore on Evidence*:

    (i) The communications must originate in a confidence that they will not be disclosed;

    (ii) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

    (iii) The relation must be one which in the opinion of the community ought to be sedulously fostered.

    (iv) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[11]

15. The Prosecution submits that all of these criteria are satisfied in the case of a human rights worker who has obtained information relating to human rights violations from a source under circumstances in which he or she has undertaken to preserve the confidentiality of the identity of the source.

16. Paragraphs 72 to 76 of the Defence Response incorrectly argue that Witness TF1-150 cannot claim any privilege, as his employer has waived its "privileges and immunities".

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[10] The public interest identified in the Brdjanin Appeals Decision was the interest of the "international community to receive vital information from war zones".

[11] Wigmore, *Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, at §2285; Cited in *L.L.A., The Sexual Assault Care Centre of the Plummer Memorial Public Hospital and Women in Crisis (Algoma) Inc. v A. B.*, [1995] 4 S.C.R. 536, para. 40.

Witness TF1-150's employer has waived its immunity, but the immunity enjoyed by the employer is something distinct from the individual professional privilege of the witness himself. The Prosecution draws a clear distinction between ***immunity*** on the one hand, and ***witness privilege*** on the other. This witness privilege is personal to the witness as an individual and exists in addition to any immunity that may be enjoyed by the organization for whom the witness works or has worked. For instance, if a human rights officer works for the United Nations or the ICRC, it may be that the witness cannot be compelled to testify without the consent of the organization concerned, because of an immunity that attaches to that organization. However, even if the organization concerned waives its *immunity*, the human rights officer still has a personal *privilege* that applies by virtue of his or her individual, professional ethical obligations of confidentiality as a human rights worker. In this case, the waiver of immunity in the UN Letter waived the confidentiality between the witness and the organization, but could not force him to breach a confidential relationship with a third party, which is the subject of a privilege that attaches to the witness personally. The witness did not come forward as agent of an organization (in this case the UN), but in his own individual capacity. An analogy may be drawn with a UN physician who may come forward to testify if his immunity is waived, but who may nevertheless assert privilege with respect to the confidentiality owed to his patients.

17. Paragraph 77 of the Defence Response states without any supporting argument that compelling witness TF1-150 to disclose his sources would not jeopardize the effectiveness of future human rights missions. This submission should be rejected. The Prosecution refers by analogy to the decisions of the ICTY in the *Brdjanin* and *Simic* cases. In the *Brdjanin* case, the Appeals Chamber was willing to accept that "If war correspondents were to be perceived as potential witnesses for the Prosecution...they may have difficulties in gathering significant information because the interviewed persons...may talk less freely with them and may deny access to conflict zones [and because]...war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk".[12] In the *Simic* case, the Trial Chamber accepted the ICRC's contention that "that the disclosure of information gathered by its employees while performing official duties

[12] Brdjanin Appeals Decision, para. 43; see also para. 41.

would destroy the relationship of trust on which it relies to carry out its mandate".[13] A breach of confidentiality by human rights workers would entail similar consequences.

18. Paragraphs 78 to 79 of the Defence Response argue that any potential prejudice to the work of human rights workers could be avoided if the identities of Witness TF1-150's sources were revealed in closed session. If that were correct, the same would hold true for war correspondents and the ICRC. However, the ICTY case law has accepted that the interests which are protected by the immunity of the ICRC and by the privilege of war correspondents could not be adequately protected by requiring ICRC officials and war correspondents to testify in closed session. Contrary to what is suggested in paragraph 80 of the Defence Response, this does not mean that there must be a privilege for all witnesses who fear that their information "may leak out". However, it does mean that the categories of witnesses who may have some form of privilege are not closed, and reference may be made to the criteria referred to in paragraph 14 above.

19. Paragraph 81 of the Defence Response suggests that human rights workers have no privilege because they have no authority to assure their sources that they will keep their identities confidential from international criminal tribunals. This argument is circular, and merely begs the question whether human rights workers have a privilege or not.

20. Paragraphs 82 to 84 of the Defence Response argue that the risk to the security of informants living in post-conflict areas is irrelevant as Witness TF1-150 does not reside in Sierra Leone. The Defence Response misses the point. Witness TF1-150 is not the informant. The risk is to those sources who provided the confidential information to Witness TF1-150.

21. Paragraphs 85 to 86 of the Defence Response argue that many ordinary witnesses may have received information in confidence from other people, and there is no reason why human rights workers should be treated as a special category. The Prosecution submits that there is a good reason. Many people will provide confidential information to a human rights worker that they would not otherwise confide in others, for the very reason that a human rights worker can be trusted to maintain the confidentiality of the source and to use the information for a positive purpose. The criteria for determining whether a privilege exists will not apply to every ordinary witness, but will apply to limited

[13] Simic Decision, para. 76; see also paras. 65-75.

categories of witnesses, such as human rights workers.

22. Paragraphs 87 to 93 of the Defence Response argue that the Prosecution position takes insufficient account of the rights of the accused. The Defence "vehemently objects" to the statement that the right to cross-examine is fully and effectively preserved,[14] and argues that it needs to be able to question the witness on his sources because the witness will rely on hearsay evidence.

23. In its Decision relating to the testimony of expert witness Dr. Alison Des Forges, the ICTR Trial Chamber considered the "critical issue...whether evidence in respect of which Dr. Des Forges (Senior Adviser to Human Rights Watch) has declined to disclose her source has probative value, and if so, whether the admission of such evidence is consistent with the right to a fair trial".[15] The ICTR case concerned an expert witness as opposed to a factual witness (and drew a distinction between the two), however, the Trial Chamber made the general point that the admission of hearsay evidence in relation to which the witness has declined to reveal her sources, did not infringe the right of the Accused to a fair trial. The Trial Chamber referred to the ability of the Defence to investigate and seek to refute the factual assertions made by the unnamed sources and to "challenge pieces of information which it contends are unreliable using investigative sources of its own".[16]

24. The Defence argues that it will have no way of determining the reliability of the witness's sources, but the Prosecution submits that the tools of cross-examination and investigations to produce rebuttal evidence guarantee sufficiently the rights of the accused, as the ICTR found in the Alison Des Forges Decision. The *Tadic* decision that the Defence relies upon[17] found that unreliable evidence may be excluded on the ground that it is of no probative value. However, reliability of evidence is a matter to be determined by the Trial Chamber on a case-by-case basis in relation to each item of evidence.[18] If a Trial Chamber found evidence from an undisclosed confidential source to be totally unreliable, it would be open to the Trial Chamber to give it no weight, or even to exclude it. However, this does not lead to the conclusion that all evidence from

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[14] Defence Response, para. 89.
[15] Alison Des Forges Decision, para. 13.
[16] Ibid, para. 26.
[17] *Prosecutor v. Tadic*, Case No. IT-94-1-T, "Decision on Defence Motion on Hearsay," 5 August 1996.
[18] See ibid, para. 12, citing *Delta v. France*, para. 36.

undisclosed confidential sources is unreliable, or should be excluded.

IV. AVAILABILITY OF PROSECUTION AUTHORITIES

25. Paragraphs 3 to 7 of the Defence Response request that the Appeals Chamber disregard certain authorities relied upon in the Prosecution Appeal, on the basis that that the Prosecution did not provide copies of them, which the Prosecution is required to do by the applicable Practice Direction[19] if the authorities are not "readily available on the internet". The Defence Response acknowledges that these documents are available on the internet at the Westlaw site, which requires the user to have a subscription. The Special Court's library has a subscription to Westlaw, and these documents are therefore readily available on the internet at the Special Court's library. On that basis, the Prosecution understands that documents on Westlaw are to be regarded as "readily available on the internet". Even if a particular Defence counsel is away from Freetown at the time of preparing a brief, copies of the relevant authorities from the Westlaw site could be obtained from the Special Court library, either by contacting the library directly, or via a co-counsel in Freetown, or via the Defence Office. The Defence does not appear to have made any attempt to obtain the authorities in question and there is no justification for its argument that they should be disregarded.[20]

IV. CONCLUSION

26. The Prosecution submits that the majority erred in law and requests that the appeal be granted on the grounds articulated.

Filed in Freetown,

31 October 2005

For the Prosecution,

Luc Côté

James C. Johnson

[19] Practice Direction on Filing Documents before the Special Court for Sierra Leone, as amended 10 June 2005.
[20] Court Management Memorandum, 27 October 2005, Attachment 1.

INDEX OF AUTHORITIES

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A. Orders, Decisions and Judgments

Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, "Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison des Forges," ("Alison Des Forges Decision"), 2 September 2005.

http://196.45.185.38/ENGLISH/cases/Bizimungu/decisions/020905.htm

B. Rules of Procedure and Evidence and Practice Directions

Practice Direction on Filing Documents before the Special Court for Sierra Leone, as amended 10 June 2005, ("Practice Direction").

C. Other Documents

Wigmore, *Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, at §2285; Cited in *L.L.A., The Sexual Assault Care Centre of the Plummer Memorial Public Hospital and Women in Crisis (Algoma) Inc. v A. B.*, [1995] 4 S.C.R. 536

Court Management Memorandum, 27 October 2005, Attachment 1.

L.L.A., The Sexual Assault Care Centre of the Plummer Memorial Public Hospital and Women in Crisis (Algoma) Inc. *Appellants*

v.

A.B. *Respondent*

and

Her Majesty The Queen, the Attorney General of Canada, the Attorney General of Manitoba, the Canadian Foundation for Children, Youth and the Law, the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, DAWN Ontario: DisAbled Women's Network Ontario, the Women's Legal Education and Action Fund ("LEAF") and the Criminal Lawyers Association *Interveners*

Indexed as: A. (L.L.) *v.* B. (A.)

File No.: 24568.

1995: June 16; 1995: December 14.

V. Privilege

31 At the outset, it is useful to determine what is to be understood by private records. The context in which the question of production of private records not in the possession of the Crown generally arises is not limited to medical and therapeutic records of complainants in sexual assault cases. It extends generally to any record, in the hands of a third party, in which a reasonable expectation of privacy lies. These records may include medical or therapeutic records, school

records, private diaries, social worker activity logs and so on. For the sake of convenience, I refer to such documents as "private records held by third parties".

32 The appellants and the interveners who favour recognizing a class privilege at common law for communications between counsellors and sexual assault complainants invoke several arguments in support of their view. Before addressing each of them, however, a brief reference to the principles and rationales for privilege as well as a review of the law of privilege in Canada and in other common law countries are in order.

A. *Principles and Rationales*

33 The doctrine of privilege acts as an exception to the truth-finding process of our adversarial trial procedure. Although all relevant information is presumptively admissible at trial, some probative and trustworthy evidence will be excluded to serve other overriding social interests. The same principles apply to exempt, completely or partially, particular communications arising out of certain defined relationships from disclosure in judicial proceedings. Since the existence of privilege impedes the realization of the central objective of our legal system in order to advance other goals, the question of privilege is essentially one of public policy.

34 Traditionally, the justification for the law of privilege has been based on utilitarian (or "instrumental") considerations. Essentially, this rationale asserts that communications made within a given relationship should be privileged only if the benefit derived from protecting the relationship outweighs the detrimental effects of privilege on the search for the truth. The utilitarian theory of privilege focuses on the societal importance of certain relationships. Maxine H. Neuhauser, in "The Privilege of Confidentiality and Rape Crisis Counselors" (1985), 8 *Women's Rts. L. Rep.* 185, remarks at p. 188:

> It [the utilitarian rationale] is based on the notion that if people fear that their confidences may be revealed in court they will choose not to form particular, valued relationships or will fail to communicate information necessary to the fostering of these relationships, and that, consequently, society will suffer.

See also, Robert Weisberg, "*Defendant v. Witness*: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges" (1978), 30 *Stan. L. Rev.* 935, at pp. 940-42.

35 More recently, an additional rationale based on privacy has emerged to justify the recognition of privileged communications (see Charles T. McCormick, *McCormick on Evidence* (4th ed. 1992), vol. 1, at §§ 72 and 77; also *R. v. Gruenke*, [1991] 3 S.C.R. 263, at pp. 302-3, *per* L'Heureux-Dubé J., concurring). This non-utilitarian view is founded on more abstract premises, for example, that privilege is vital to the protection of fundamental individual values. In

"Developments in the Law -- Privileged Communications" (1985), 98 *Harv. L. Rev.* 1450, the authors observe at pp. 1480-81:

Rather than focusing on the systemic impact that compelled disclosures might have on behavior, the privacy rationale focuses on the protection that privileges afford to individual privacy. The confidentiality of communications is regarded as a privacy interest that itself justifies whatever impairment of truth-seeking that privileges may cause.

In the context of counsellor and sexual assault complainant communications, Anna Y. Joo, in "Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor" (1995), 32 *Harv. J. on Legis.* 255, makes these observations, at p. 260:

Whereas the utilitarian rationale views the goal of the counselor-patient privilege as promoting beneficial future relations, the privacy justification perceives the main purpose of the privilege as shielding the patient from the harm that disclosure may cause. According to the privacy justification, some human relationships are fundamental to human dignity and should be free from state interference. [Emphasis added.]

See also, Stephen A. Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists" (1980), 66 *Va. L. Rev.* 597, at pp. 621-22.

36 It is useful at this stage to review briefly how the law of privilege has developed so far in Canada, as well as in other common law countries, particularly as regards the issue now before the Court.

B.*A Comparative View*

37 In Canada, very few communications are recognized as privileged either at common law or under statutory law. At common law, the solicitor-client privilege as well as the informer privilege are fully recognized. These privileges are not absolute however; they must yield, in some circumstances, to the accused's right to make full answer and defence. For example, in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 607, McLachlin J., speaking for the majority of the Court, held that informer privilege and solicitor-client privilege may yield in the context of a criminal trial if the accused's innocence is at stake. Similarly, in *Stinchcombe*, *supra*, at p. 340, Sopinka J. noted that existing privileges may, in certain circumstances, constitute unreasonable limits on the constitutional right to make full answer and defence. See also Loretta N. Colton, "*R.* v. *Stinchcombe*: Defining Disclosure" (1995), 40 *McGill L.J.* 525, at p. 556.

38 By statute, as regards criminal law, communications between spouses are the only ones regarded as privileged (s. 4(3) of the *Canada Evidence Act*, R.S.C., 1985, c. C-5; see *R. v. Salituro*, [1991] 3 S.C.R. 654, regarding separated spouses without any reasonable possibility of reconciliation). Similarly, provincial

legislation generally provides for spousal communications privilege in civil proceedings. Two Canadian provinces, Quebec and Newfoundland, have enacted statutes recognizing religious communications privilege: see Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 9; and Newfoundland's *Evidence Act*, R.S.N. 1970, c. 115, s. 6. With regard to doctor-patient relationships, Quebec is the only province which has recognized a statutory privilege in civil matters: see s. 42 of the *Medical Act*, R.S.Q. 1977, c. M-9. Neither at common law nor by statute have communications between counsellors and sexual assault complainants been recognized as privileged in Canada.

39 The question of privilege has recently been visited by our Court in *Gruenke*, *supra*. In that case, the Court had to decide whether communications from an accused to her pastor and to a lay counsellor were privileged in criminal proceedings at common law and under the freedom of religion guarantee in s. 2 of the *Charter*. The majority discussed the two categories of privilege at common law: first, a "class" privilege, and second, a "case-by-case" privilege. A class privilege entails a *prima facie* presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure. In order for the privilege to attach, compelling policy reasons must exist, similar to those underlying the privilege for solicitor-client communications, and the relationship must be inextricably linked with the justice system.

40 In a case-by-case privilege, the communications are not privileged unless the party opposing disclosure can show they should be privileged according to the fourfold utilitarian test elaborated by **←Wigmore→** (*Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, at § 2285). These criteria are:

(1)The communications must originate in a *confidence* that they will not be disclosed.

(2)This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3)The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4)The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. [Emphasis in original.]

See *Gruenke*, at p. 286, *per* Lamer C.J. for the majority; also *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2

S.C.R. 494, at p. 512, *per* Laskin C.J., dissenting; and *Slavutych v. Baker*, [1976] 1 S.C.R. 254, at p. 260.

41 The issue of whether private records held by third parties are privileged at common law has never been decided by this Court. The Nova Scotia Court of Appeal did, however, consider it in *R. v. Ryan* (1991), 69 C.C.C. (3d) 226. The question was whether social agency records of two sexual assault complainants were privileged in a criminal trial for sexual assault and narcotic trafficking. The trial judge had recognized that the records were privileged and had ordered a stay of proceedings for denial of the accused's right to make full answer and defence. The Court of Appeal held that the competing interests at stake weighed in favour of disclosure and overruled the stay. Similarly, in *R. v. R.S.* (1985), 19 C.C.C. (3d) 115, the Ontario Court of Appeal had to decide whether records relating to family group therapy sessions were privileged in the criminal trial of a man accused of having sexually assaulted his two step-daughters. The Court of Appeal opined that, in the context of child abuse, the search for the truth overcomes the interests in family therapy and, therefore, the records could be produced at trial. See also the decisions of the British Columbia Supreme Court in *R. v. Kliman*, [1994] B.C.W.L.D. No. 587, and of the Ontario Court, General Division, in *R. v. Coon* (1991), 74 C.C.C. (3d) 146.

42 In the context of civil litigation, some courts and masters have examined claims of privilege. In *M.(A.) v. Ryan*, [1993] 7 W.W.R. 480, the British Columbia Supreme Court considered whether psychiatric records had to be produced in a civil suit for sexual abuse. The court held that, while confidentiality was essential to the psychiatrist-patient relationship, the interest in the proper administration of justice prevailed over the need to maintain confidentiality. In *M.(E.) v. Martinson* (1993), 81 B.C.L.R. (2d) 184 (Master), the defendant sought production of the plaintiff's counselling records of treatment for sexual abuse, alcoholism and drug addiction, in an attempt to show that the alleged pain and suffering did not result from the automobile accident which was the object of the suit. It was held that, in the circumstances, the interest in maintaining the confidentiality of the records outweighed the benefit there may have been to the administration of justice by their disclosure.

43 The Law Reform Commission of Canada has recommended the recognition of a general privilege for professionals in criminal proceedings in its *Report on Evidence* (1975), although not without a *caveat*. Section 41 of the proposed Evidence Code provides:

> **41.**A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice. [Emphasis added.]

44 The American position with regard to privilege at common law is somewhat similar to the Canadian approach. The rationales underlying the recognition of privileged communications are also analogous (see *McCormick on Evidence*, *supra*, at § 72). However, in the United States, a number of communications, including those between counsellors and sexual assault complainants, are considered privileged as a result of the enactment of statutory privilege, both by the Federal Government and by the states, for communications that are not privileged at common law. See Scott N. Stone and Robert K. Taylor, in *Testimonial Privileges* (2nd ed. 1993), for a more detailed compilation of the statutes granting such privilege in the United States as well as the degree and the extent of confidentiality it affords to such communications.

45 Without going into a detailed analysis, it is fair to say that many states in the United States have enacted some statute limiting disclosure and testimony by doctors, psychiatrists, psychologists, social workers, and other psychotherapists. An increasing number of states are according privileged status to communications between counsellors and sexual assault complainants; they include Alaska, California, Connecticut, Florida, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Pennsylvania, Utah, and Wyoming. Most of these privileges provide an absolute protection of private records relating to sexual assault complainants in criminal trials.

46 There is, however, a constitutional element to the law of privilege in the United States. The right to a fair trial (or "due process"), as guaranteed by the Fourteenth Amendment, as well as the rights guaranteed by the confrontation clause and the compulsory process clause of the Sixth Amendment, impose limits on statutory privilege (see *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *United States v. Nixon*, 418 U.S. 683 (1974); *Davis v. Alaska*, 415 U.S. 308 (1974); and *Washington v. Texas*, 388 U.S. 14 (1967)). The Supreme Court of the United States has determined the constitutionality of privilege in general as regards the disclosure and the admissibility of evidence through a balancing process, weighing the rights of the accused, as guaranteed by the American Constitution, against the public interests served by privilege. That court has yet to decide the question of constitutionality of absolute privilege attaching to private records of sexual assault complainants, but there are a number of commentators who have dealt with this issue: see Maureen B. Hogan, "The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling" (1989), 30 *Boston College L. Rev.* 411, at pp. 470-74; Welsh S. White, "Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence" (1989), 80 *J. Crim. L. & Criminology* 377, at pp. 423-25; and Robert Weisberg, *supra*, at pp. 968-73.

47 On the other hand, several state courts have addressed the conflict between sexual assault defendants' constitutional rights and absolute confidentiality privilege for sexual assault counselling communications. Most

have ruled that such absolute privilege is unconstitutional because it infringes upon defendants' constitutional rights: see *In re Robert H.*, 509 A.2d 475 (Conn. 1986); *Commonwealth v. Two Juveniles*, 491 N.E.2d 234 (Mass. 1986); *Commonwealth v. Samuels*, 511 A.2d 221 (Penn. 1986); *Advisory Opinion to the House of Representatives*, 469 A.2d 1161 (R.I. 1983). Both the Supreme Court of Pennsylvania, in *Commonwealth v. Wilson*, 602 A.2d 1290 (1992), and the Supreme Court of Illinois, in *People v. Foggy*, 521 N.E.2d 86 (1988), have found the same kind of absolute privilege constitutional.

48 Most Commonwealth countries, including England, Scotland, Ireland, New Zealand and Australia, use a different qualification of privilege. These countries distinguish between private privilege and public interest immunity. See Sir Rupert Cross, *Cross on Evidence* (7th ed. 1990), at pp. 416 *et seq.* and 456 *et seq.*; David Field, *The Law of Evidence in Scotland* (1988), at pp. 248 *et seq.*; Caroline Fennell, *The Law of Evidence in Ireland* (1992), at pp. 165 *et seq.* and 193 *et seq.*; Sir Rupert Cross, *Evidence*, (3rd ed. 1979), at pp. 254 *et seq.* and 284 *et seq.*; and Andrew Ligertwood, *Australian Evidence* (2nd ed. 1993), at pp. 207 *et seq.* and 280 *et seq.*

49 Private privilege at common law is limited to legal professional relationships. As regards other relationships, such as doctor-patient, pastor-penitent, journalist-informants and spousal relationships, no privilege is recognized in the absence of statutory provisions. England, for example, has no statutory provision providing for a general privilege for doctor-patient communications, with only limited exceptions in civil proceedings; there is nothing specifically relating to counsellor-sexual assault complainant communications either. The situation is the same in both Scotland and Ireland. New Zealand and the states of Victoria and Tasmania and the Northern Territory in Australia have enacted civil proceeding privilege regarding communications between physicians and their patients. The legislation, however, is silent on sexual assault counselling communications and the case law has not extended the existing privileges to cover such communications.

50 In these Commonwealth countries, public interest immunity (formally referred to as Crown privilege) constitutes the residual basis to prevent relevant evidence from being disclosed or being found admissible when considerations of public policy are found to be more important than the full disclosure of facts. See *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171 (H.L.); *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)*, [1974] A.C. 405 (H.L.), and *Rogers v. Home Secretary*, [1973] A.C. 388 (H.L.). The immunity is founded in the common law; it is not a creature of statute. It gives protection to state interests, reports of proceedings in Parliament, police matters and other confidential subjects, including educational records, social worker logs and medical documents: see *Campbell v. Tameside Metropolitan Borough Council*, [1982] 1 Q.B. 1065 (C.A.); and *Gaskin v. Liverpool City Council*, [1980] 1 W.L.R. 1549 (C.A.).

51 In the criminal law context, public interest immunity cannot prevent the disclosure or bar the admissibility of documents that can enable the accused to resist an allegation of crime or to establish innocence: see *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.). In that respect, English courts have held that the public interest in ensuring a fair trial for a defendant outweighs the interest in protecting such confidential records if their disclosure is necessary for the defendant's full answer and defence. See, in the context of governmental documents, *R. v. Governor of Brixton Prison, Ex parte Osman*, [1991] 1 W.L.R. 281 (Q.B.); concerning the identity of police informants, *R. v. Agar*, [1990] 2 All E.R. 442 (C.A.); and in the context of social worker logs, *Re M (A Minor) (Disclosure of Material)*, [1990] 2 F.L.R. 36 (C.A.). See also Rachel Langdale and Simeon Maskrey, "Public Interest Immunity: Disclosure of Social Work Records" (1994), 24 *Fam. L.* 513.

52 Courts of Commonwealth countries have not addressed the issue of whether private records of sexual assault complainants must be disclosed in criminal proceedings. However, given how this issue has been decided in other contexts, it is doubtful that public interest immunity would bar disclosure of such records when the accused's guilt or innocence is at stake. In the general context of medical records, the Lord Chancellor in England made the following statement (reported at (1956) 197 H.L. Official Report (5th series), col. 745):

> We also propose that if medical documents, or indeed other documents, are relevant to the defence in criminal proceedings, Crown privilege [public interest immunity] should not be claimed.

This statement was quoted with approval by Lord Reid in *Conway v. Rimmer*, [1968] A.C. 910 (H.L.), at p. 942. Therefore, in England at least, in criminal proceedings, it appears that the balance between the right to full answer and defence and the public policies supporting the recognition of a privilege for sexual assault counselling communications is likely to be struck in favour of the former.

53 With this background in mind, I now turn to the question raised by the appellants and the interveners: Whether, as a matter of law, private records of complainants in sexual assault criminal proceedings should, as a class, be considered privileged communications. In my view, they should not for the reasons that follow.

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ATTACHMENT 1

SPECIAL COURT FOR SIERRA LEONE
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COURT MANAGEMENT MEMORANDUM

Date:	27th October 2005	**Ref:**	
To:	Luc Coté - Chief of Prosecution	**Through:**	
		From:	Neil Gibson - Deputy Chief, Court Management
Cc:	Plummer Hamilton - Chief, CITS		
Cases:			
Subject:	**Access to Westlaw Database**		

Dear Mr. Coté,

Concerning your recent enquiry regarding access to our Westlaw Database, having contacted our Communication & Information Technology Section (CITS) I can confirm the following;

Subject to being an authorised user of Westlaw within the SCSL, which both Prosecution and Defence are, our CITS department could provide access to users who are currently based outside of Sierra Leone.

Please note however this would only be considered following a request in writing by the individual and would be subject to certain conditions.

I trust this clarifies the position and should you have any further questions regarding this matter please do not hesitate to contact either me or our CITS department directly.

Regards,

Mr. Neil Gibson
Deputy Chief, Court Management
Ext 7251