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SCSL-04-16-AR73
(18290-18332)

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SPECIAL COURT FOR SIERRA LEONE

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THE APPEALS CHAMBER

SPECIAL COURT FOR SIERRA LEONE
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26 MAY 2006
NAM Geoff WALKER
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TIME 16:08

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

Interim Registrar: Mr. Lovemore Munlo, SC

Date: 26 May 2006

PROSECUTOR Against **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-2004-16-AR73)

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

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

Amici Curiae
Human Rights Watch,
UN High Commissioner for Human Rights,
Amnesty International

Defence Counsel for Alex Tamba Brima:
Glenna Thompson, Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Andrew K. Daniels, Mohammed Pa-Momo Fofanah

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

THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Raja Fernando, Presiding Judge, Justice Gelaga King, Justice Emmanuel Ayoola, Justice Renate Winter, and Justice Geoffrey Robertson, QC;

BEING SEISED OF the "Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality" (the "Prosecution Appeal"), filed by the Prosecution on 19 October 2005 pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules");

CONSIDERING the "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," rendered by Trial Chamber II on 16 September 2005 (the "Impugned Decision");[1]

NOTING (i) the Order of the President of 24 November 2005 assigning the matter to the full bench of the Appeals Chamber; (ii) the Order Appointing Human Rights Watch as *Amicus Curiae* filed by the Appeals Chamber on 24 November 2005; (iii) the Order Appointing the United Nations High Commissioner for Human Rights as *Amicus Curiae* filed by the Appeals Chamber on 28 November 2005; and (iv) the Order Appointing Amnesty International as *Amicus Curiae* filed by the Appeals Chamber on 2 December 2005, and its Corrigendum of 5 December 2005;

CONSIDERING ALSO:

(i) 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

[1] Pursuant to the Appeals Chamber's jurisprudence requiring separate and dissenting opinions to be filed together with the related majority decision, the Dissenting Opinion of Justice Doherty filed on 23 September 2006 ought to have been filed on 16 September 2005. *See Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris As Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, paras. 20-24.

of Confidentiality" filed by the three Defendants on 27 October 2005 (the "Joint Defence Response to Prosecution Appeal");

(ii) The "Reply to Joint Defence Response to Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality," filed by the Prosecution on 31 October 2005 (the "Prosecution Reply");

(iii) The "*Amicus Curiae* Submission Filed under Rule 74 of the Rules of Procedure and Evidence of the Special court for Sierra Leone on Behalf of Human Rights Watch," (the "Human Rights Watch Brief"); the "*Amicus Curiae* Brief of the United Nations High Commissioner for Human Rights," (the "UNHCHR Brief"); the "*Amicus Curiae* Brief of Amnesty International Concerning the Public Interest Information Privilege," (the "Amnesty International Brief") all, severally, filed on 16 December 2005;

(iv) The "Joint Defence Response to *Amicus Curiae* Briefs By Human Rights Watch, Amnesty International and the United Nations High Commissioner for Human rights," filed by the three Defendants on 17 January 2006 (the "Joint Defence Response to Amicus Briefs");

NOW DETERMINES THIS APPEAL ON THE BASIS OF THE WRITTEN SUBMISSIONS:

I. INTRODUCTION

1. The Prosecution has appealed the Impugned Decision in which a majority of Trial Chamber II declined to issue an order guaranteeing that Witness TF1-150, a human rights officer with the United Nations, would not be compelled to answer any questions in cross-examination identifying his confidential sources.

2. Witness TF1-150 is a foreign national who served as a United Nations human rights officer in Sierra Leone from 1998 to 2001. By virtue of his employment, Witness TF1-150 enjoyed immunity from legal process. By letter dated 23 May 2005, the United Nations waived this immunity in order

to enable TF1-150 to testify for the Prosecution in a number of cases before the Special Court. Given the sensitive and confidential nature of the witness's testimony, this waiver was conditioned upon the witness testifying in closed session, a condition that was granted by the Trial Chamber.[2] Prior to calling the witness to testify, the Prosecution requested the Trial Chamber to guarantee that Witness TF1-150 would not be compelled to answer any questions in cross-examination relating to the names of his confidential informants or sources.

3. In the Impugned Decision, the Trial Chamber found that Rule 70[3] did not apply to the witness or his testimony because the Prosecution failed to show, as a necessary precondition to the application of Rule 70, that it was in possession of the "initial information" and because the Witness was the recipient and not the originator of the information.[4] Although the Trial Chamber recognized the special 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 information in the field, the Trial Chamber found that these factors did not outweigh the rights of the accused persons to a fair trial as guaranteed by Article 17 of the Statute of the Special Court.[5] The Trial Chamber also

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[2] Transcript of 13 September 2005, Oral decision, p. 24.

[3] Rule 70: Matters not Subject to Disclosure

(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.

[4] Impugned Decision, para. 19.

[5] Impugned Decision, para. 20.

considered that the protective measure of hearing the witness in closed session pursuant to Rule 79 of the Rules was sufficient to maintain the confidentiality of the witness's testimony.[6]

4. The Prosecution appealed from the impugned decision on three grounds, namely, that:

1. The majority erred in law in the interpretation and construction of Rule 70(B) and Rule 70(D) of the Rules;[7]
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] and
3. The balancing exercise to be carried out by the Chamber was incorrectly formulated and that 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.[9]

5. The two main issues that arise from these three grounds of appeal are: whether Rule 70(B) and Rule 70(D) are applicable to the Prosecution's request; and, whether the majority decision was correct in balancing the public interest attaching to the work of human rights officers with the rights of the accused persons to a fair trial.

II. SUBMISSIONS OF THE PARTIES AND THE AMICI CURIAE

A. Are Rule 70(B) and Rule 70(D) applicable to the Prosecution's request?

6. The Prosecution submitted that the Trial Chamber erred in holding that Rule 70 was not applicable to Witness TF1-150 or his testimony on the ground that the witness's sources were not

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[6] Impugned Decision, para. 20.
[7] Prosecution Appeal, para. 8.
[8] Prosecution Appeal, para. 9, *citing Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 (the "Milošević Decision"). *See also*, Prosecution Reply, paras. 2-5.
[9] Prosecution Appeal, para. 10.

"information which has been provided" to the Prosecution within the meaning of Rule 70 (B).[10] The Prosecution relied on a decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), which held that "[t]he 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] to argue 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) triggering the application of Rule 70 in its entirety.[12]

7. The Prosecution also drew a distinction between Rule 70(D) and Rule 70(B), submitting that Rule 70(D) deals with a situation in which information is being presented in evidence. Rule 70(B) deals with the basis upon which information is provided to the Prosecution, as opposed to its form or content when it comes to be presented in court.[13] The Prosecution argued that "[t]he 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 provision 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)."[14] The Prosecution also noted a distinction between witness immunity and testimonial privilege.[15]

8. According to the Defence, the Prosecution's request that the witness be allowed to withhold information which is not even in the possession of the Prosecution is beyond the scope of Rule 70(B).[16] The Defence submitted that the Trial Chamber was correct in determining that the witness, who is only a recipient of hearsay information, cannot rely on Rule 70.[17] The Defence emphasised that the right of the accused to a fair trial enshrined in Article 17(4)(e) of the Statute includes the

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[10] Prosecution Appeal, para. 14.
[11] *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002.
[12] Prosecution Appeal, paras. 15-20.
[13] Prosecution Appeal, paras. 21-23. *See also*, Prosecution Reply, para. 6.
[14] Prosecution Appeal, para. 21.
[15] Prosecution Appeal, para. 22.
[16] Joint Defence Response to Prosecution Appeal, paras. 9-16. *See also*, Joint Defence Response to Amicus Briefs, paras. 1-26.
[17] Joint Defence Response to Prosecution Appeal, paras. 17-31.

right "[t]o examine or have examined, the witness against him or her."[18] The Defence opposed the proposed limitation on cross examination, explaining that without cross-examination on the sources of the information the evidentiary value of the evidence could not be assessed.[19]

9. The United Nations High Commissioner for Human Rights ("UN High Commissioner") urged the Appeals Chamber to adopt an interpretation consistent with the interpretation given to Rule 70 of the ICTY Rules of Procedure and Evidence by the Appeals Chambers of the ICTY.[20] The UN High Commissioner argued that the Trial Chamber was unduly restrictive in limiting the application of Rule 70(B) to cases where the "provider" of the initial information for purposes of Rule 70(B) is also the source of that information.[21] While the Trial Chamber has the authority to assess whether information was provided by the witness in accordance with Rule 70(B), its enquiry is limited to an examination of whether the information was, in fact, provided on confidential basis.[22]

10. Human Rights Watch submitted that Rule 70 should be permissively construed to ensure that a human rights officer acting as a witness would not be compelled to answer a question on grounds of confidentiality or privilege in circumstances such as those in the instant case.[23]

B. Was the majority decision correct in balancing the public interest attaching to the work of human rights officers with the rights of the accused persons to a fair trial?

11. The Prosecution submitted that Trial Chamber II erred in balancing the public interest attaching to the work of Human Rights officers, including the privileged relationship between those officers and their informants, against the rights of the accused protected under Article 17 of the Statute.[24] According to the Prosecution, the correct balancing exercise should have been between the public interest attaching to the work of human hights officers and the public interest in having all

[18] Joint Defence Response to Prosecution Appeal, paras. 32-37.
[19] Joint Defence Response to Prosecution Appeal, paras. 38-43.
[20] UNHCHR Brief, paras. 15-20.
[21] UNHCHR Brief, paras. 17-19.
[22] UNHCHR Brief, para. 20.
[23] Human Rights Watch Brief, paras. 19-26.
[24] Prosecution Appeal, paras. 24-26, 28-54. *See also,* Prosecution Reply, paras, 7-24.

the relevant information before the Chamber.[25] Applying this test, the Prosecution argued that the balance falls in favour of permitting a human rights officer to refuse to disclose the identities of his sources.[26] The Prosecution submitted that the Rules recognize that non-revelation of some information to the Chamber does not breach the fair trial rights of the accused *per se*.[27] Moreover, non disclosure of the identities of sources would not prejudice the rights of the accused because the Defence could call other evidence to challenge any information provided by the witness and because the Trial Chamber could determine how much weight, if any, to place on the particular portion of the evidence which was given without a named source.[28]

12. The Defence submitted that the rights of the accused should be taken into account and that the issue in this case cannot be equated with other situations involving testimonial immunity or with the special protections accorded to employees of the International Committee of the Red Cross.[29] The Defence argued that the witness cannot seek to rely on the immunities and privileges which have already been waived by the United Nations and that the issue is not one involving freedom of speech.[30] According to the Defence, the protective measure of hearing the witness in closed session is sufficient to safeguard the witness's informants and the role of the human rights officer.[31]

13. The UN High Commissioner explained that confidentiality is an essential element of the working methods of UN human rights officers, and that their work is of fundamental importance to the restoration and maintenance of international peace and security, the rule of law, and the administration of justice.[32] Thus, she argued in favour of a privilege protecting the identities of the confidential sources of a UN human rights officer which is not subject to any balancing of

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[25] Prosecution Appeal, para. 26.
[26] Prosecution Appeal, paras. 26-27.
[27] Prosecution Appeal, para. 26.
[28] Prosecution Appeal, para. 55.
[29] Joint Defence Response to Prosecution Appeal, paras. 44-76, 85-93. *See also*, Joint Defence Response to Amicus Briefs, paras. 27-45.
[30] Joint Defence Response to Prosecution Appeal, paras. 72-76. *See also*, Joint Defence Response to Amicus Briefs, paras. 48, 52-54.
[31] Joint Defence Response to Prosecution Appeal,, paras. 78-84. *See also*, Joint Defence Response to Amicus Briefs, paras. 55-65,
[32] UNHCHR Brief, paras. 32-34.

compelling interests, but is subject to a specific exception where exculpatory evidence is involved.[33] In her view, any prejudice to the rights of an accused person could be addressed by reducing the weight to be accorded to the testimony for which the sources are being withheld.[34] The UN High Commissioner submitted that this privilege cannot be waived by the Secretary-General, the High Commissioner, or the human rights officer and that the UN waiver letter did not purport to waive the privilege protecting the confidential sources of a UN human rights officer.[35]

14. Amnesty International addressed the public interest in protecting confidential communications concerning human rights violations. According to Amnesty International the public interest information privilege is grounded in the human right to freedom of opinion and expression and, thus, can only be waived by the source and not the human rights officer.[36]

15. Human Rights Watch submitted that there is a generally consistent jurisprudence protecting a category of witnesses, including human rights officers, from revealing their sources.[37] Human Rights Watch explained that the accused person would not be prejudiced by expert evidence containing hearsay on factual matters because a court could give appropriate weight to such evidence.[38]

III. DELIBERATIONS

16. The Appeals Chamber gratefully acknowledges the extensive and helpful submissions in the briefs.[39] However, this appeal will focus on the two grounds which properly arise from the Impugned Decision, namely: first, the question of the applicability of Rules 70(B) and 70(D) to the

[33] UNHCHR Brief, paras. 21-46.
[34] UNHCHR Brief, paras. 47-63.
[35] UNHCHR Brief, paras. 64-70.
[36] Amnesty International Brief.
[37] Human Rights Watch Brief, paras. 27-57.
[38] Human Rights Watch Brief, paras. 58-63.
[39] As a preliminary matter, the Appeals Chamber notes the Defence objection to the Prosecution's failure to file copies of jurisprudential authorities referred to in the Prosecution Appeal. The exception created by Article 7(D)(i) of the Practice Direction on Filing Documents before the Special Court, which exempts a party from filing a document when it is "readily available on the internet", does not include paid or subscription websites. In order to ensure that the parties and the court have access to all necessary authorities, copies of authorities accessed on such websites must be filed pursuant to Article 7(B) of the Practice Direction on Filing Documents before the Special Court.

Prosecution's request; and, second, the balancing of the public interest in protecting confidentiality in the work of human rights officers and the public interest in the fair trial of an accused.

A. Are Rule 70(B) and Rule 70(D) applicable to the Prosecution's request?

17. Rule 70 is principally an exception to the disclosure scheme contained in Rules 66 to 69. Rule 70(A) exempts internal documents prepared by a party from these disclosure rules. Rule 70(B) exempts from disclosure "information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence" unless the Prosecutor first gains the provider's consent. Rules 70(C) and 70(D) recognise the competence of the person or entity providing information under Rule 70 to give evidence but continue to ensure that such person shall not be compelled or required to reveal more than he or she had consented to. Rule 70(E) preserves the right of the accused to challenge the evidence presented by the Prosecution but recognises the limitation to that right in Rules 70(C) and 70(D).

18. With regard to the applicability of Rule 70, the Prosecution's appeal raises two issues: first, did the Trial Chamber err in finding that Rule 70 does not apply because the Prosecution failed to prove that it was in possession of the initial information?; and, second, did the Trial Chamber err in finding that Rule 70(D) did not apply because Witness TF1-150 is not the "originator of the initial information" or "the person or representative of the entity providing the initial information"?

1. Did the Trial Chamber err in finding that Rule 70 does not apply because the Prosecution failed to prove that it was in possession of the initial information?

19. It is the possession of the "initial information" which has been provided to the Prosecutor on a confidential basis *and* which has been used solely for the purpose of generating new evidence that triggers the protection from disclosure of both the information and its origin in Rule 70(B). However, the ICTY Appeals Chamber has explained that, for the purposes of Rules 70(C) and 70(D), the term "initial information" is not limited to evidence used solely for generating new

evidence, since these parts of Rule 70 regulate the use of the previously confidential material in court with the consent of the provider:

> By definition, the information is by this stage no longer being 'used solely for the purpose of generating new evidence'. It becomes a matter of necessary textual interpretation, therefore, that the information referred to in paragraphs (C) and (D) must be that which was provided to the Prosecutor on confidential basis (the first option), and *not* that which was so provided and which has been used solely for the purpose of generating new evidence (the second option). In the opinion of the Appeals Chamber, the Trial Chamber erred in adopting the second option rather than the first.

20. The Appeals Chamber agrees with the opinion of the ICTY Appeals Chamber in the *Milošević Decision*[40] and finds that "information" referred to in Paragraphs (C) and (D) is information which was provided to the Prosecutor on a confidential basis, without the characteristic that it "has been used solely for the purpose of generating new evidence". The guiding characteristic of the information provided under Rule 70 is that it was provided on confidential basis. That makes the consent of the person who provided the information on confidential basis a pre-condition to disclosure in paragraph (B); makes additional evidence received from that person protected in paragraph (C); and, makes that person, if called as a witness, not compellable to answer any question that he may decline to answer on the basis of confidentiality in paragraph (D).

21. It is not profitable to ask whether the term "information" includes the source of the information for the purposes of Rule 70. It is manifest that Rule 70(B) only requires that the Prosecution be in possession of the "initial information". Both the initial information and its source are protected by Rule 70(B) from disclosure without the prescribed written consent. Even if the Prosecutor was in possession of the source information, he could not be required to disclose it without the provider's consent.

22. The Appeals Chamber, therefore, finds that the Trial Chamber majority erred in holding that Rule 70 applies only where the Prosecutor is in possession of information which has been provided

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[40] *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002.

to him on a confidential basis and which has been used solely for the purpose of generating new evidence, without noting that the condition that the information "has been used solely for the purpose of generating new evidence" does not apply to sub-Rules 70(C) and 70(D). This deficiency affected the Trial Chamber's conclusion that the Prosecution had failed to show that it was "in possession of that initial information."

23. The Appeals Chamber, moreover, observes that a Trial Chamber should be conscious of the difficulties in assessing the scope of information provided to the Prosecution on a confidential basis. An assertion by the Prosecution that information has been provided on a confidential basis would normally satisfy the Trial Chamber. Notwithstanding these practical limitations, the Appeals Chamber shares the view of the ICTY Appeals Chamber that the jurisdiction of the Trial Chamber to probe the assertion is undoubted:

> Chambers of the Tribunal do indeed have the authority to assess whether information has been provided in accordance with Rule 70(B) and so benefits from the protection afforded by that Rule. However, such enquiry must be of a very limited nature: it only extends to an examination of whether the information was in fact provided on a confidential basis, bearing in mind that the providing of information may not be confined to a single act, but may consist of a process involving several acts. This is an objective test. The Chambers may be satisfied of this simply by a consideration of the information itself, or by the mere assertion of the Prosecutor, or they may require confirmation from the information provider or, where the information is in the form of a document, for example, there may be something on the face of the document which indicates that it was indeed provided on a confidential basis.[41]

24. In the instant case, the Defence was concerned with witness's confidential sources, since the evidence of the witness himself was already disclosed to the Defence. The Defence did not argue and the Trial Chamber did not find that the information concerning the witnesses sources could not have been provided on a confidential basis. In the view of the Appeals Chamber, the Prosecution's statement that the information had been confidentially provided and the UN letter referring to the "the sensitive and confidential" nature of the witness's information were sufficient to demonstrate

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[41] *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 29.

that the Prosecutor was in possession of initial information provided on confidential basis rather than to the contrary.

25. The Appeals Chamber, therefore, concludes that the Trial Chamber erred in finding that Rule 70 did not apply because the Prosecution failed to show that it was in possession of the initial information.

26. The Appeals Chamber notes that although the *Milošević Decision* was cited to the Trial Chamber, the majority considered that it was "distinguishable and therefore not pertinent to the case."[42] The Appeals Chamber considers that this authoritative and historical exposition of the purpose of Rule 70 of the ICTY Rules, on which the Rules of the Special Court are based, should not have been dismissed as "not pertinent" to a case in which the main issue was Rule 70's applicability.

2. Did the Trial Chamber err in finding that Rule 70(D) did not apply because Witness TF1-150 is not the "originator of the initial information" or "the person or representative of the entity providing the initial information"?

27. The Trial Chamber found that the Prosecution could not rely on the protection offered by Rule 70(D) because the witness was neither the "originator of the initial information nor the person or representative of the entity providing the initial information but merely a recipient thereof." The Trial Chamber reasoned that "Rule 70(D) applied where 'the person or representative of the entity providing the initial information' (i.e. the informant himself) has been called upon to testify." The Trial Chamber categorized the "originator" of the information as "the informant himself" and the witness as "a recipient".

28. The Appeals Chamber finds that this reasoning is flawed in several respects. First, the term "initial information" in Rules 70(B) and 70(C) does not necessarily include all information from

[42] Impugned Decision, para. 19.

which the information provided to the Prosecutor was derived. As explained above, the reference to "initial information" in Rules 70(C) and 70(D) means information provided on confidential basis.

29. Second, in Rules 70(B) and 70(C), the Prosecutor is the recipient of the information and the person or representative of the entity who provided the information to him is the "provider". The actual origin, in the sense of an ultimate originating source, of the information provided to the Prosecutor may not be known or may not be discernable because the information may not have been given to the provider by any single person. More often than not the origin of information gleaned by a provider may be a collection of persons, such as a community piecing knowledge together—a little here a little there—to build up information or an entity collecting facts from different sources to build up information provided to the Prosecutor on confidential basis.

30. The category of "originator of the initial information", coined by the Trial Chamber, is alien to Rule 70 (D). Rule 70(D) grants the person providing or the representative of the entity providing the initial information ("the provider") protection from compellability in regard to answering questions. Rule 70(D) does not require that the witness is the "originator of the initial information". Indeed, one of the purposes of Rule 70(D) is to leave to the provider of the initial information the discretion to reveal or not to reveal the source or sources of information provided to the Prosecutor on a confidential basis. The Rules thus enable the witness to remain faithful to the pact of confidentiality, thus preserving the conditions under which the information provided to the Prosecutor may have been obtained.

31. The Trial Chamber erred in concluding that Rule 70(D) could not apply because Witness TF1-150 is not the "originator of the initial information" or "the person or representative of the entity providing the initial information". The Appeal Chamber, thus, finds that the Trial Chamber erred in finding that the provisions of Rule 70 upon which the Prosecution sought to rely were not applicable to the witness or his testimony.

B. Was the majority decision correct in balancing the public interest attaching to the work of human rights officers with the rights of the accused persons to a fair trial?

32. Having found that Rule 70 did not apply to Witness TF1-150, the Trial Chamber proceeded to reject the Prosecution's request on a second basis. While recognizing the privileged relationship between a human rights officer and his informants, as well as the public interest that attached to the work of human rights officers gathering confidential information in the field, the Trial Chamber found that that these considerations should not outweigh the rights of the accused to a fair trial as guaranteed by Article 17 of the Statute of the Special Court. The Prosecution has appealed this finding.

33. Since the Trial Chamber has acknowledged the privileged relationship and the public interest arising out of the work of human rights officers, the Appeals Chamber will not delve into these issues in any further detail. However, the Appeals Chamber considers that the special interests of human rights officers who have provided confidential information to the Prosecutor are adequately covered by Rule 70, which can be interpreted as protecting confidential information from disclosure and protecting the provider from certain aspects of compellability. To this extent, a limited testimonial privilege has already been recognized in the Rules. Moreover, insofar as Rule 70 is not focused on the status, office, or profession of the informant, it offers a more general protection. Read purposively, the provisions of Rule 70 can achieve the same purpose as is served by erecting a shield of privilege to protect some categories of persons from compulsion to divulge details and sources of confidential communication or information where appropriate. The purposes served by Rules 70(C) and 70(D) will not be served merely by resort to a closed session. The Rule 70 information provider must be empowered to guarantee anonymity to a confidential source. This guarantee of non-disclosure of identity cannot depend on the chance that a future Trial Chamber might order a closed session hearing or other protective measures.

34. However, the probative value of the witness's remaining evidence may be affected by the invocation of Rule 70 protection. Thus, the fairness of the trial can be ensured by the Trial Chamber's overriding obligation to assess the evidence in its totality and the following safeguards set out in the ICTY Appeals Chamber's decision:

> The Appeals Chamber observes that two safeguards exist to ensure that any misuse does not deprive accused of their rights to challenge the evidence against them and to receive a fair trial. First [...] the Trial Chambers do possess a limited authority to police the application of Rule 70 in order to prevent its misapplication. Second, paragraph (G) of Rule 70 expressly empowers the Trial Chambers to 'exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.' Designed to ensure that the restrictions in paragraphs (C) and (D) do not undermine the bedrock requirement of fair trial when the Rule is properly invoked, paragraph (G) also gives Trial Chambers a tool to protect that requirement if the Rule has been misused.[43]

35. The Appeal Chamber notes that there is no Rule 70 (G) in the Rules of the Special Court. However, there is Rule 95 which is specifically referred to in Rule 70(F) and which provides that "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute." This provision is wide enough to cover such cases as would be covered by Rule 70 (G) of the ICTY Rules.

36. For these reasons, the Appeals Chamber is satisfied that Rule 70 applies to Witness TF1-150 or his testimony and that the request of the Prosecution should have been granted.

IV. DISPOSITION

FOR ALL THE ABOVE REASONS THE APPEALS CHAMBER,

ALLOWS the Prosecutor's appeal,

QUASHES the Impugned Decision,

AND GRANTS the Prosecution's oral application for leave to be granted to witness TF1-150 to testify without being compelled to answer questions in cross-examination that the witness declines to answer on grounds of confidentiality pursuant to Rule 70 (B) and (D) of the Rules.

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[43] *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 26.

Hon. Justice Robertson is appending his Separate and Concurring Opinion to the present Decision.

Done at Freetown this day 26th of May 2006

Justice Raja Fernando
Presiding Judge,

Justice Emmanuel Ayoola

Justice George Gelaga King

Justice Renate Winter

Justice Geoffrey Robertson, QC

[Seal of the Special Court for Sierra Leone]

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THE APPEALS CHAMBER

Before:	Justice Raja Fernando, Presiding Justice George Gelaga King Justice Emmanuel Ayoola Justice Renate Winter Justice Geoffrey Robertson, QC
Registrar:	Mr. Lovemore Munlo, SC
Date:	26 May 2006
PROSECUTOR	Against: **Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-2004-16-AR73)

SEPARATE AND CONCURRING OPINION OF HON. JUSTICE GEOFFREY ROBERTSON, QC

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

Amici Curiae
Human Rights Watch,
UN High Commissioner for Human Rights,
Amnesty International

Defence Counsel for Alex Tamba Brima:
Glenna Thompson, Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Andrew K. Daniels, Mohammed Pa-Momo Fofanah

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

Introduction

1. This appeal raises important issues regarding the testamentary privileges of witnesses who have worked in and reported from conflict zones on behalf of international organisations. Although judicial consideration has been given to the general compellability as witnesses of Red Cross employees[1] and war correspondents,[2] there has been no international court decision relating to a class of witness described compendiously as "human rights monitors", willing to step into the witness box but reluctant when called upon to identify those persons who, at some risk to themselves, have vouchsafed to them some of the information they relate in their evidence to the court.

2. There is a presumptive privilege recognised in international law for journalists to protect their sources: see the European Court of Human Rights judgement in *Goodwin v UK*.[3] That privilege is implicit in the freedom of expression guarantee (Article 10 European Convention Human Rights; Article 19 International Covenant on Civil and Political Rights) because if newsworthy information cannot be divulged to journalists in confidence, then much will not be divulged at all: the media's role as watchdog for the public interest would be circumscribed. Although treated as a "privilege" available to the journalist witness, it is really a reflection of the public interest in protecting the sources' right of free speech in circumstances when identification would result in reprisals for exercising it. To what extent can this reasoning be applied to a "human rights monitor", in this case an official employed by the UN to report on human rights abuses in Sierra Leone to the Secretary General to inform his reports to the Security Council? To what extent may it apply to "human rights monitors" in the garb of researchers and investigators employed by NGOs, such as Amnesty International and Human Rights Watch, to provide material for their published reports? And if such "monitors"–I would prefer to call them, generically, "human rights reporters" –come to testify for the prosecution in a criminal trial, can the court protect them from a cross-examination exposing

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[1] *Prosecutor v. Simić et al.*, Case no. IT-95-9, [Public Version] *Ex Parte Confidential* Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.
[2] *Prosecutor v Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.
[3] *Goodwin v. United Kingdom*, [1996] ECHR 16.

their human sources whilst at the same time upholding the rights of the defence, notably the basic right to test the reliability of prosecution evidence?

3. On these difficult questions, the answers to which are still evolving in international courts, we have had the benefit of extensive and well-argued submissions by the Prosecution and Defence teams and we are additionally grateful to the UNHCHR, Amnesty International and Human Rights Watch for their detailed *amici* submissions. The issue in this case has been decided by the full court, whose judgement I join, by a purposive interpretation of Rule 70 which permits this particular witness to testify without fear of being compelled to disclose the names of individuals who have placed their trust in him. But this case requires, in my view, an eventual appreciation and analysis of the wider issue of testamentary privilege, which provides an alternative and in some ways more satisfactory means of resolving not only this case but others that may follow, where the witness has not supplied information to the Prosecutor under Rule 70(B) by the Defence.

The Open Justice Principle

4. This appeal arises from an application made by the Prosecution in the AFRC trial on 13 September 2005 in relation to protected Witness TF1-150, described in open court as "a staff member of the United Nations who was a human rights monitor in Sierra Leone". It tendered a letter from the UN which waived his and that organisation's immunity rights so that he might "testify freely", on condition that he be permitted to do so in closed court. The Prosecution's first application was to close the court, and then to obtain an advance ruling from the Trial Chamber that when giving his evidence, the witness should not be compelled under cross-examination to name any human source from which he had received information and upon which he had drawn for his evidence. There was good reason for the Prosecutor's caution. A few months previously there had been a testimony from a human rights reporter in closed session in the CDF trial before another Trial Chamber, which had, by a majority, ruled that he could be compelled to identify his sources.

5. That CDF order should have been appealed, but the delay had been caused by the failure of the dissenting judge to append his judgment to that of the court – a practice to which the appeals

chamber has now put a stop.[4] What does concern me is that this important decision in the CDF case had been rendered in closed court and had not been made public, so Defence Counsel in this case were not allowed to see a copy and even in this appeal the "confidential" judgement in the CDF case was not supplied to our *amici*. If it is really necessary (and I stress necessary – not just convenient or desirable) to sit in closed session, any decision made in that session must nonetheless be speedily made public – if it is necessary (in the sense I have already emphasized) to remove names or identifying details, then that can be done by a simple process of redaction. If justice requires that paragraphs or parts of the judgement remain confidential to the parties, then they can be edited out of the version placed on public file. It is the duty of every Chamber to ensure that its decisions become public as soon as practicable: it is incumbent upon judges under Rule 4(B) of the Practice Directions on Document Filing to ensure that a version of the judgement, however redacted or heavily edited to remove confidential material, is placed on the public file.

6. Any application to go into closed session must be closely scrutinised by the court. I am far from convinced that the condition imposed by the UN on the waiver of its immunity in this case was justified and I do not necessarily accept (we have heard no argument on this point) that its immunities under Articles V and VII of the 1946 Convention on the Privileges and Immunities of the UN apply to testimony by officials in international courts set up by the UN itself. The UN and other organisations volunteering employees as witnesses should appreciate the importance of the open justice principle. It is enshrined in all human rights instruments. Its contribution to forensic fairness is explained by Wigmore:

> Its operation in tending to improve the quality of testimony is twofold. Objectively, it produces in the witness's mind a disinclination to falsify: first, by stimulating the instinctive responsibility to public opinion, symbolised in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through the disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers

[4] Doc. No. SCSL-04-16-AR73-441:*Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris As Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, paras. 19–26.

> and yet may not have been known beforehand to the parties to possess any information.[5]

7. Justice Bertha Wilson in the Supreme Court of Canada has accurately summarised the modern reasons for the open justice principle:

> ...the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.[6]

8. These reasons carry force in international criminal courts. It must be recognised, however, that the principle is limited by what is necessary in the interests of justice itself: closed sessions are acceptable where justice cannot be done at all if the hearing proceeds in public. This may be more common in war crimes courts sitting in former war zones, where the need to protect witnesses from reprisals is for obvious reasons much greater than in the domestic courts of countries at peace. But before approving applications from one or even both parties to anonymise witnesses and close courtrooms, judges must first consider the sufficiency of their powers to protect witnesses and security information by taking lesser measures. For example, they have power to close their court for short periods so that a particularly sensitive question can be discussed in private, instead of shutting the doors on the entire testimony of a particular witness. They have power to direct, even retrospectively, that certain sensitive evidence, if inadvertently given in open court, should not be reported. They have, as will be seen, power to protect witnesses from being required to divulge sensitive information, including their sources. They have many other powers to protect witnesses and victims. It may be that the UN would not have insisted upon a closed hearing as a condition of waiving immunity had it been aware of these safeguards, or had they been specifically raised with the court beforehand.

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[5] Wigmore on Evidence, para 1834

[6] *Edmonton Journal v AG for Alberta*, [1989] 2 S.C.R. 1326, 1361 (Supreme Court of Canada). *See also, Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (United States Supreme Court)..

9. The evidence of the UN witness had long before been disclosed to the Defence. It consisted both of his direct observations of the war and of what others had told him of the "widespread and systematic" commission of certain war crimes in some areas. This was relevant but secondary evidence: it was directed to establish an element of the crime charged (namely the widespread and systematic nature of the attacks) but did not directly connect any defendant with an offence. Much of it was already a matter of public record and could have been given in open court without any danger to the UN or to the witness and his sources, so long as the court protected him from having to name them.

The Trial Chamber Decision

10. Trial Chamber II initially granted the Prosecution's application to close the court but soon realised that it was inappropriate to hear the legal argument in closed session. Its decision was delivered in open court, without identifying the UN employee by name. The majority (Judges Lussick and Sebutinde) decided, as had the majority in Trial Chamber I in the CDF case, that Rule 70 was inapplicable. They then went on to state as their ratio:

> ...whereas the Trial Chamber recognises 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, we do not think that the privilege and/ or public interest should outweigh the rights of the accused persons to a fair trial as guaranteed by Article 17 of the Statute. In any event, we are of the view that the protective measures pertaining to a closed session under Rule 79 are more than sufficient to maintain the confidentiality of any information that witness TFI-150 may divulge in the course of his testimony, without the need for additional measures whose effect is to curtail the statutory rights of the accused.[7]

In other words, the majority recognised a public interest in protecting the identity of sources of information given to human rights monitors, but felt they would be sufficiently protected if they were named in closed session, after full-blooded cross-examination.

[7] Impugned Decision, para. 20.

11. Hon. Justice Doherty dissented, principally on the ground that human rights monitors had a qualified privilege to protect the identity of sources to whom they had promised anonymity, just like the war correspondents whose position in this respect had been considered by the ICTY Appeals Chamber in the *Brđanin* case,[8] upon which she drew extensively for her conclusion that the balance of public interest favoured source protection, even in closed courtrooms. She described the public interest thus:

> This witness has served under the mandate of UNOMSIL and UNAMSIL. The mandate of UNOMSIL established by the Security Council Resolution 1181(1998) of 13 July 1998 was, *inter alia* to "[...] report on violations of international humanitarian law and human rights in Sierra Leone [...]" This mandate was carried over to UNAMSIL which was established by the Security Council in 1999 under Chapter VII of the United Nations Charter. ...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 such information that international organisations and governments take political actions. ...[they] 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. ...the witness has assured his sources that he will protect their identity and on that basis they gave the information. It is the trust in the Human Rights Officer and his/her integrity that the Prosecutor seeks to enforce and protect, ...ensuring that Human Rights Officer (sic) can collect information [...] given free from fear of reprisal.[9]

Rule 70

12. I can well understand the confusion in both Trial Chambers as to the interpretation of Rule 70. Its sub-rules are badly drafted and elliptically expressed and it is to be hoped that the expansive interpretation now provided by the Appeals Chamber will clear up some of the problems.

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[8] *Prosecutor v Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002

[9] 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, para. 16.

[9] 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, paras. 4-6, 16.

The Rule itself seems to have originated by considering the possible need for ICTY Prosecutors to obtain secret surveillance evidence - especially telephone intercepts - from Western States, which would naturally be concerned lest supply of such evidence would release information about the capacities of their intelligence organisations and so prove contrary to their national interest. So a distinction familiar in UK interception law made its appearance in Rule 70(B)[10]: the state or organisation could offer the fruits of sensitive operations, on a confidential basis, so long as it was only used by the prosecutor for the purpose of investigating, i.e. to "generate new evidence" rather than being put in evidence itself or used e.g. to coach prosecution witnesses or cross-examine defendants. As long as its use was confined in this way, its very existence need not be disclosed to the defence. A particular state or supplying entity might, of course, change its mind over time and permit the information to be used in evidence - in which case disclosure would immediately be made to the defence. To what extent can Rule 70, designed to protect national security information, be used to protect "information" supplied by the UN or NGOs coming to the prosecution in the form of a witness employed by those entities? The section was construed authoritatively by the ICTY Appeals Chamber in the *Milošević* case. It said that the Rule was "designed to encourage states and others (such as "humanitarian organisations operating in the relevant territory" to assist the prosecution or (under paragraph F of the Rule) the defence. Its purpose:

> ...is to encourage states, organisations, and individuals to share sensitive information with the tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected.[11]

13. This court will follow the ICTY approach in *Milošević*. Rule 70 encourages states, organisations and individuals to share sensitive information with the tribunal. It creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information sources will be protected. When requesting a third party to provide it with

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[10] *See R. v. Preston* (1994) 2 AC 130.

[11] *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis&AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 18

confidential information the Prosecution can, at that time, guarantee to the provider that the information will not be disclosed without their consent. "Information" under Rule 70(B):

> a. must be in the prosecutor's possession,
> b. must have been provided on a confidential basis; and
> c. can only be used for the purpose of generating new evidence.

14. The Court has the duty to ensure that Rule 70 is properly applied and particularly that witnesses claiming protection under Rule 70(D) have in fact provided the information under Rule 70(B). Rule 70(B) relevantly reads

> Matters not subject to disclosure
>
> 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.

15. The information is protected from disclosure not because it is necessarily confidential in the civil law sense, but because it is information "provided to (the prosecutor) on a confidential basis". As the ICTY Appeals Chamber in *Milošević* case points out, it is not for the court to enquire, under 70(B), into whether the information itself is confidential: it needs only to be satisfied that the relationship established between the information supplier and the prosecutor is a confidential one. This could hardly be the case if the information was obtained by subpoena or from a police search: normally it will be the result of a negotiated approach by the prosecution to a state agency or to an organisation believed to have information, and that entity will agree to supply it under a stipulation (agreed by the prosecutor) that the relationship will be treated as confidential. If any issue subsequently arises as to whether information has been "provided on a confidential basis" the Court will be entitled to look at all the circumstances to decide whether the basis on which the information was supplied by the entity was that it should be treated as confidential by the prosecution – whether in fact it was confidential information is nothing to the point. So long as the Prosecutor uses the information solely for investigative purposes (i.e. "for the purposes of generating new evidence") it

remains immune from disclosure to the Defence without the consent of the supplier. This immunity covers both "the initial information and its origin", i.e. the information itself and the identity of the supplying entity and (by implication) the identity of any person or agency which has provided the information to the entity that in turn supplies it to the prosecutor. This follows from the ordinary and natural meaning of the word "origin", i.e. "that from which anything originates or is derived: source of being or existence; starting point".[12]

16. It is plain that protection from disclosure is necessarily given by Rule 70(B) to the identity of the original source as well as to the identity of the supplying agency and to the information itself. If, however, the supplying entity subsequently consents, then the information itself may be given in evidence once proper disclosure has been made to the accused. This disclosure duty, however, is limited to that part of the information that the Prosecution intends to present in evidence. If the Prosecutor does not intend to call evidence as to the original source of the information, then the issue of whether the identity of that source can be elicited in cross-examination falls for decision under Rule 70(D).

17. Rule 70(D) reads:

> 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.

In determining whether to uphold a witness's refusal to answer under this sub-Rule, the court must first be satisfied that he represents the entity which has provided information to the Prosecutor on the confidential basis described by Rule 70(B). Then, however, it must test the claim of confidentiality according to legal principles and satisfy itself that the information the witness seeks to withhold is truly of a confidential nature. To take an obvious example, information provided by cooperative NGO under Rule 70(B) may include a file of press clippings and the witness may have given evidence based on information in those clippings. A refusal to answer questions directed to

[12] Oxford English Dictionary, "origin".

identifying that source could not possibly be upheld: although initially provided "on a confidential basis" to the prosecutor at the pre-trial stage covered by Rule 70(B), the information itself is entirely lacking in the quality of confidence (because it has been published to all the world) and cannot be protected under Rule 70(D).

18. It follows that a claim made under Rule 70(D) cannot be upheld without some enquiry into the nature of the information. In the CDF trial, the UN's "human rights monitor" testified about what he had been told of the incidence of child recruitment in a particular area of Sierra Leone. He declined to name his source, because he explained that he had given an undertaking not to do so from which he had not been released. He gave sufficient information about the source for the court to recognise his claim to confidentiality as genuine: the source was truly "confidential" because the undertaking had been given to a person who had provided information on the strength of it and might still suffer brutal reprisals if it was ever revealed that he was at the time divulging what he knew to the UN. Since the information had been provided originally to the prosecution by the UN under Rule 70(B), the court should not have compelled the witness to answer any question directed to identifying his confidential source.

19. It is at this point, in deciding whether a claim of confidentiality under Rule 70(D) is properly made by a witness in relation to information provided under Rule 70(B), that the broader issue of privilege may be relevant in confirming that the relationship between the witness and his source truly imports a duty of confidence. Privilege will, of course, be of vital importance where the witness cannot avail himself or herself of the shield afforded by Rule 70(D), because the information has not initially been provided to the prosecution under Rule 70(B). For these reasons, I will proceed to consider the broader issue of the extent to which the confidential sources developed by human rights reporters can be protected from disclosure when those reporters subsequently testify in an international criminal court.

The Defence Right to Challenge Prosecution Evidence

20. Let me first, however, deal with the objection forcibly made on behalf of the defendants that the interpretation of Rule 70 adopted by the ICTY in *Milošević* and now applied by this court is a breach of their rights fully to test the Prosecution evidence granted by Section 17 of the SCSL Statute. This objection does not arise in relation to material supplied under 70(B) to the Prosecution for use solely for the purposes of investigation, although there may be a potential difficulty if that information includes exculpatory material. (Further investigation may stand it up to the extent that the prosecutor drops the charges: if by the time of trial it still points credibly to innocence, I would have thought that the prosecution has an obligation either to disclose it to the defence or to decline to proceed the change or changes in respect to which it points to innocence.[13]) Once information provided under Rule 70(B) has been introduced into evidence, and a claim of confidentiality has been upheld under Rule 70(D) which limits defence opportunities to test its reliability, the court has nonetheless ample powers to ameliorate any prejudice. This amplitude is emphasised by Rule 70(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)*) and Rule 70(F) (*nothing in sub-Rule (C) or (D) above shall affect a Trial Chamber's power to exclude evidence under Rule 95.*) These provisions may also be used in a non-70(D) situation where a journalist or human rights reporter is permitted to protect confidential sources. These powers include:

(1) Cross-Examination

21. The Defence may not elicit the name of the source, or obtain answers to any questions the witness reasonably believes will tend to identify that source. But his reliance on the source may be shaken in other ways: by confronting him with evidence that what the source told him could not be true; by establishing that the source was paid for the information; by eliciting the fact that the source came from a community or organisation that had an axe to grind or a motive for malice, and so on.

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[13] *See* Rule 68: **Disclosure of Exculpatory Evidence** *(amended 14 March 2004)*

(A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.

(B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

The witness can be questioned about the nature of his undertaking to the source, the genuineness of the source's fear of reprisal; the circumstances of their meeting; whether the witness has contacted the source to seek a release from the undertaking, and so on. Obviously the court must respect the witness's refusal to answer any question which might lead to the discovery of the source's identity, but that still leaves some scope for a challenge to the reliability of the source and of the witness's understanding of what the source actually told him.

(2) Exclusion of the Evidence

22. Rule 95 provides that no evidence shall be admitted if its admission could bring the administration of justice into serious disrepute. This might well be the case if the prosecution were allowed to call a witness who averred that a confidential source told him that the defendant had committed the alleged crime. The spectacle of defendants being confronted with hearsay statements from anonymous sources alleging their guilt of the crime charged would be a plain breach of the right to confront adverse witnesses guaranteed by Article 17(4)(e) of the Special Court Statute. The court might, alternatively, admit this sort of evidence and then give it no weight, but the preferable course is to exclude it *ab initio*, so that anonymous accusations of crime do not sully the court process.

(3) Weighting Hearsay Evidence

23. That hearsay evidence is "admitted" or heard without objection does not mean that it is necessarily accepted as reliable or probative. A witness who objects to naming his source may diminish the probative value of any evidence he gives based on or inferred from what that source has told him. Hearsay evidence will be evaluated by the court at the end of the day and unless corroborated may count for very little. Its value will depend on the context and on all the circumstances: I cannot imagine a situation where conviction would actually turn upon uncorroborated hearsay. It may, nonetheless, be significant, usually by enabling the Prosecution readily to establish the existence of some factual situation which must be proved to exist before the defendant can be held on other, direct evidence, to have been responsible for it. Hearsay is

routinely used by experts as part of the factual matrix upon which their opinions are based, and in this respect the approach of the ICTR Trial Chamber in *Prosecutor v Bizimungu* is instructive.[14] Dr. Alison des Forges was called as an expert: she based an opinion upon two accounts of a meeting with the ex-President given by confidential sources, confirmed (to the extent that the meeting did take place) by documentary evidence. Her right to withhold the names of her sources was upheld, although the court pointed out that this would be a factor to be considered in evaluating her evidence. *Bizimungu* must be handled with care, however: it applies only to expert evidence and does not suggest that direct hearsay accusations cannot infringe fair trial rights. Defendants must never be convicted solely on evidence from anonymous accusers: the court effectuates that principle by excluding or else devaluing hearsay accusations, rather than by compelling a witness who reports them to divulge the identity of the confidential source who made them.

Do Human Rights Reporters have a testamentary privilege?

24. The novel issue canvassed by the parties to this appeal is whether human rights reporters are entitled, in the course of their testimony, to decline to answer questions directed to identifying the source of their information. The Prosecution, forcefully supported by the *amici*, urges that the public interest requires them to possess such a privilege, either in absolute terms or at least on a qualified basis. The defence urges that any entitlement to resist source disclosure would improperly undermine a defendant's right to challenge the evidence given against him.

25. It is important at the outset to clarify one matter that has confused the submissions before us. The cases of *Simić* and *Brđanin* were concerned with the compellability of certain classes of persons to testify at all - whether the Red Cross was entitled to stop its employees from giving any evidence about their work (*Simić*) and whether a war correspondent was entitled to resist a subpoena issued by the court at the behest of the prosecutor (*Brđanin*). Although the approach taken by the court - in *Brđanin* at least - is instructive, the compellability of human rights reporters is not here in issue. The UN official was perfectly willing to testify and the UN was agreeable so long as he did so in

[14] *Prosecutor v. Bizimungu*, case No. ICTR-99-50-T, Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison des Forges, 2 September 2005.

closed court. I should have thought that Amnesty International and Human Rights Watch – organisations that have done so much to alert the world to the need to try alleged perpetrators of crimes against humanity and have been so supportive of international criminal courts - should not be concerned if their monitors and researchers are called upon to provide evidence, whether at the instance of prosecution or defence or the court itself. These organisations issue reports which describe in detail facts which can be highly relevant to war crimes trials, compiled by their on-the-spot experts sometimes for the very purpose of galvanising international actions including prosecutions. For that reason, their reporters may be compelled (normally they will volunteer) to assist the court as experts (like Dr. de s Forges) or as witnesses of fact. What they and their organisations are rightly concerned about is the danger that when under cross-examination they could be asked questions the honest answers to which would identify a source to whom they have promised anonymity and who may well be in danger of harsh or even lethal reprisals if publicly exposed or even if named in closed session.

26. A similar problem has taxed the courts for centuries in cases concerning police informers, where the answer is usually given that the public interest requires non-disclosure unless there is a real danger of justice miscarrying – e.g. through the informant's malice or invention. There is a great deal of domestic case law on how this balance should be struck, identifying situations (e.g. the involvement of a "participating informant" or an *agent provocateur*) when disclosure will be ordered. In common law systems, courts were initially inclined to protect information divulged in the course of established confidential relationships – husband and wife; priest and penitent; psychiatrist and patient etc, although the modern trend is to subordinate confidentiality to the interests of justice, especially in the prosecution of serious crime. The only exception, where judges have decided that confidentiality must be absolute, is within the lawyer/ client relationship, although even in that sacrosanct area, inroads have been made by requiring, for example, notification of certain financial transactions or of plans by clients to commit crime. The closest analogy with the present case is the claim of journalists to protect their sources and in this respect we have the benefit of the landmark ECHR decision in *Goodwin v. UK* which in turn influenced the ICTY decision granting war correspondents qualified compellability in the *Brđanin* case.

27. *Goodwin* decided that a qualified privilege to protect journalistic sources followed from the right to freedom of expression. The public right to newsworthy information entails that those who supply it to journalists, frequently in breach of the confidence of their employers or colleagues, should nonetheless be protected because otherwise these sources would "dry up", i.e. stay silent, and much newsworthy information would not be imparted and would not in consequence be published. The European Court of Human Rights held:

> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press and informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[15]

28. The reasoning behind the protection of journalistic sources can, it seems to me, be applied in principle to human rights reporters, or at least to those "monitors" who are in effect tasked with collecting information for public purposes – to inform the reports of the UN Secretary General (which may well lead to Security Council action) or to research for reports issued to the public by NGOs like Amnesty and Human Rights Watch. There is in my judgement little meaningful difference in this respect between an investigative journalist tracking a story in a war-torn country, a war correspondent reporting on the ebb and flow of the conflict, and a researcher for a human rights organisation filing information for an "in depth" report or for filtered use in an annual report, or for a UN monitor gathering information for a Secretary General's report to the Security Council. All are exercising a right to freedom of expression, (and, more importantly, assisting their source's right of free speech) by extracting information for publication from people who would not give it without an assurance that their names will remain anonymous. The reprisal they often face in such circumstances, unlike the risk run by Mr. Goodwin's source of being sacked or sued for breach of

[15] *Goodwin v. United Kingdom*, [1996] ECHR 16, para. 39.

confidence, is of being killed as an "informer" – a traitor to the organisation or the community on whom they are silently squealing. To identify them in court would betray a promise and open them to such reprisals: more importantly, if courts routinely ordered witnesses to name their sources, then information about human rights abuses would diminish because reporters could not in good conscience elicit it by promises to protect their sources. For these reasons, I consider that "human rights monitors", like journalists, have a privilege to refuse to name those sources to whom they have promised anonymity and who are in danger of reprisal if that promise is broken. In practical terms, that means they must not be compelled to do so by threats to invoke the court's power to hold them in contempt and to fine or imprison them. It does not mean, of course, that the evidence that they give, based on information from sources they decline to name, will be accorded normal weight. Their entitlement to protect their source has this downside for the party that calls them: it may lose some and perhaps all of the weight that might otherwise be placed on the evidence that is given based on the anonymous source material.

29. This right to protect sources must be qualified rather than (as some *amici* argue) absolute. It cannot extend beyond the public interest which sustains it in the first place. Just as a journalist who writes of his discovery of an "impeccable source" for the innocence of a man being tried for murder will be compelled to disclose that source on pain of a finding of contempt of court, so a human rights monitor who offers, say, a hearsay account of a defendant's confession of guilt, may well be required to identify the source. There can be no confidence in iniquity, and any reporter who has been tricked into giving an undertaking of confidentiality to someone who has exploited them to put false evidence before the court in an attempt to pervert justice will not be allowed to protect that source. Instances might be multiplied, although in practice interesting hypotheticals are usually resolved by the parties themselves declining to call a witness if there is a danger that a genuinely confidential source will be exposed. That danger can be forestalled by an application for a preliminary ruling as was sensibly made in this case. No court wishes to punish for contempt a witness of probity who refuses to answer a question on grounds of honest conscience.

30. The majority in both Trial Chambers were wrong to regard the privilege to protect a confidential source merely as an interest to be balanced against the interest of the Defence in

securing a fair trial. This approach fails to recognise that the privilege itself has emerged as a result of balancing the public interest in protecting confidential news sources against countervailing public interests, and one reason why the balance has come down in favour of the qualified privilege is that the court can avoid unfairness to the defence by excluding anonymous hearsay or by giving it less weight. Members of local communities in war zones must be able to trust UN monitors when they promise that cooperation will remain confidential. If courts were to make the privilege contingent upon an unpredictable balancing exercise, this would preclude the honest giving of promises to protect and hence reduce the information available to the UN. As its High Commissioner for Human Rights has submitted:

> Failure to recognize a rule protecting the confidentiality of the identities of those who provide information to U.N. human rights officers would undermine the credibility of guarantees of confidentiality which such officers are required to provide, leading local actors to lose confidence in the trustworthiness and independence of U.N. human rights officers. This would inevitably result in local populations (including NGOs and other local groups and institutions) being unwilling to cooperate with, and provide reliable information to, U.N. human rights officers, thereby making it impossible for the human rights officers to carry out their functions effectively.[16]

31. This is a claim of a kind that is not susceptible to proof, but which experience suggests is likely to have some substance and should not lightly be put aside. There is an overriding international public interest in UN human rights reporters being able to give an assurance of confidentiality to those who put their necks on the line to inform on the murderous activities of powerful forces or figures within their community: the punishment of "necklacing" in apartheid South Africa is a vivid reminder of just how ferocious revenge can be against those who inform. The High Commissioner accepts that the privilege is qualified, but only where the disclosure of an informant's identity could raise a reasonable doubt as to the guilt of the accused. There may be other hard cases – where for example the prosecution tenders uncorroborated hearsay evidence that the defendant committed a truly atrocious crime – but their exceptionality and rarity should not preclude an honest guarantee of confidentiality. In practice, where information of this significance is volunteered, it will be the

[16] *Amicus Curiae* Brief of the United Nations High Commissioner for Human Rights, 16 December 2005, para. 37.

duty of the monitor's organisation to convince the source to come forward and testify, under conditions (including relocation of the source and his family) that will provide sufficient protection.

32. The public interest in protecting UN sources so as to keep a free flow of information to the Security Council can readily be appreciated. Does that interest apply with the same force to organisations like Amnesty and Human Rights Watch? In this respect their work is indistinguishable in principle (if not in expertise) from that of other media outlets: they collect and expertly analyse information about human rights abuses in various countries and publish it in annual and in special reports which are widely disseminated and which serve to inform governments and international institutions, as well as the interested public, about such abuses and serve as a basis for campaigns to end them. The public interest in the free flow of information to such publications is at least as great as to other investigative media. Moreover, the consequences of exposure for sources of this kind of information can be calamitous. It is apt to recall that the protective rule in *Goodwin* was fashioned in the context of the genteel environment of the City of London, where a business journalist was fined £1,500 for refusing to name an "insider" source of information about a company's finances: the source would face only disciplinary action or a writ for breach of confidence. In repressive countries, sources for Amnesty and Human Rights Watch reporters who tell of torture, death squads and arbitrary imprisonment may, if exposed, face these very consequences. Not only may they be brutally treated as punishment for embarrassing the government or other power brokers, but their families and friends may also face reprisals. This fact underlines the need for the protective rule that I have identified as a privilege in the witness, although that "privilege" is a reflection of the rather more weighty "right" of the source.

33. It permits the journalist or monitor – in effect, the reporter – to withhold the source's name or identifying details when questioned in court. This means that such a refusal should not amount to contempt and so cannot be punished by fine or imprisonment. It also carries the consequence that the court must adjust its reception of evidence based on the unidentified source to ensure a fairness to the defence, e.g. by excluding it from consideration altogether or reducing its weight or requiring corroboration before it is taken into account. The privilege is not absolute, but must yield in cases where the identification of the source is necessary either 1) to prove guilt, or 2) to prove a reasonable

doubt about guilt. In the first case, e.g. where the reporter tells of a source who claims to be an eye-witness to the crime or the recipient of a confession from the defendant, the problem may in practice be avoided if the Prosecution declines to lead the evidence, which would be inadmissible hearsay in common law jurisdictions. In the second case, as the UNHCHR accepts, there is no way out: the overriding importance of avoiding a miscarriage of justice does require the naming of an exculpatory witness, or (if the prosecution wishes to avoid this) dropping the charge upon which the hearsay evidence is based.

34. One problem to which the *amici* have not adverted is the proliferation of "human rights NGOs" - several thousand, at last count - most with "monitors" of varying calibre and experience. Some of these NGOs have been accused of sensationalising reports in order to gain support for campaigns or membership subscriptions, whilst others might have a bias derived from political connections. Certain NGOs with "human rights" in their title may even undermine human rights causes.[17] Are all these "human rights monitors" to be accorded a qualified privilege to withhold the names of sources - a privilege we may be content to award to those who work for the three *amici*? For myself, I do not see how a meaningful distinction can be made any more than the *Goodwin* privilege can be denied to the many "journalists" who have a propaganda agenda or report on wars where they support one side or the other. The reporter's privilege is, after all, the obverse of the right possessed by the source, who may speak low, in fear and trembling, to the first journalist or monitor who appears in his burnt out village, completely unaware of any bias and concerned only that their identity be protected if they tell what they know. The prospect that what they say will be "spun" or exaggerated by partisan journalists or monitors does not lose the source his or her right to be protected from exposure: what it does mean is that the court must give the party which cross-examines the reporting witness full reign to explore any bias or hidden agenda or other motive for distortion or exaggeration.

35. Courts must guard against allowing prosecutions to present evidence which amounts to no more than hearsay demonisation of defendants by human rights groups and the media. The right of

[17] According to the Economist, 4 December 2004, "Yanukovich's Friends - a human rights group that defends dictators".

sources to protection is not a charter for lazy prosecutors to make a case based on second-hand media reports and human rights publications. Unchecked hearsay has an inevitable place in the factual matrix upon which expert opinion is based (e.g. the evidence of Dr. des Forges in *Bizimungu*) and it may be introduced uncontroversially for secondary purposes and to fill gaps: it may be the best evidence available or it may be corroborated by first-hand evidence. The court's scrutiny of it will be the more intense the closer it comes to implicating a defendant and there may come a point at which it may be rejected entirely unless the source can be identified.

36. This approach upholds a reporter's privilege to protect sources who tell of their crimes, derived from the source's right both to speak freely about abuses and to assist the well-established international law duty of states and international agencies to investigate crimes against humanity. To effectuate that doubly-justified right, certainly in repressive or post-conflict societies, the source is entitled to expect that the reporter deliver on the undertaking never to disclose identity without consent. If that is the condition upon which the information is vouchsafed, the reporter who comes to testify in a war-crimes court is under a duty of conscience to refuse to answer questions which may expose the source. The court must respect that refusal, either by applying Section 70(D) where the evidence has originated in circumstances covered by Rule 70(B) or in other cases by relieving the witness of the duty to answer. There should be no finding of contempt made against a reporter who refuses to disclose a confidential source, unless the court is satisfied that the source's right to protection is overridden by the interests of justice, either in establishing the defendant's guilt or in demonstrating a real prospect that he is innocent.

37. This approach should be applied pragmatically, by courts which recognise the danger (observed at the ICTY and ICTR) that witnesses (and sources) who have been embroiled in armed conflict may be partisan and in some cases malicious, even to the extent of inventing or fabricating evidence. Fabrication, moreover, may without cross-examination of the source fool even the most experience human rights monitor (it was, after all, an experienced researcher for a respectable organisation who published the notoriously false story about the Kuwaiti babies being thrown out of hospital incubators by Iraqi troops during the first Gulf war). On the other hand, there must be an equal recognition that score-settling will continue for long after the conflict and that sources may be

assaulted, killed or driven out of their communities as the result of exposure. On that hand, too, there must be a recognition that closed court hearings do not provide any firm guarantee that information about the source will not leak: the name must be provided to the defendant as well as to a variety of lawyers, prosecution and defence investigators and court staff. This court has had one case where its protective measures were insufficient to protect a witness. The right of the source extends to having the confidential undertaking by the reporter respected by the Court, although since the source may at any time release the reporter from that undertaking it will be reasonable to enquire of the reporter whether such a release has been sought.

38. The reporter's privilege for human rights monitors must follow, in my view, from the decision in *Goodwin* extrapolated to a conflict situation where reports are being made to inform and influence the public. It is powerfully supported by dicta in *Brđanin*, a case in which the ICTY Appeals Chamber ruled that war correspondents could not be compelled to testify in war crimes courts unless the party which subpoenaed them could establish that their evidence would be "really significant" - i.e. of direct and important value in determining a core issue in the case, and that in any event this evidence could not reasonably be obtained elsewhere. That conclusion was reached in respect of war correspondents - many (but not all) of whom insist that their profession depends upon strict neutrality and that in an ongoing conflict their neutrality would be undermined were they to appear for any "side" in a war crimes trial. In fashioning a rule that accommodated this interest, the Appeals Chamber took *Goodwin* as its starting point, namely that the freedom of expression guarantee protects sources in order to maintain the free flow of public interest information. The court in *Brđanin* went on to assess war zone information as serving the highest public interest:

> In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death... There is the public interest in the work of war correspondents, which requires that the newsgathering function be

> performed without unnecessary constraints so that the international community can receive adequate information on issues of public concern.[18]

The court concluded that compelling war correspondents to testify 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."[19]

39. I see no meaningful distinction between the war correspondent and the human rights reporter in terms of the importance of the information they gather or the public interest that its publication will serve or the danger that it will dry up if the court routinely orders them to identify their sources. *Brđanin* was a case on compellability rather than privilege but it assumes that on the limited occasions when war correspondents are compelled to testify on core issues, they will be accorded a *Goodwin*-style privilege to withhold the names of their sources. It is that assumption which this case must put in a definitive form.

40. The prosecution and *amici* have placed reliance additionally upon *Simić* but I agree with the Defence that this case does not assist them. It is an ICTY Trial Chamber majority decision to the effect that the ICRC, because of its unique position under the Geneva Conventions, was entitled in customary international law to an absolute privilege which could be exerted to prevent employees from giving evidence of observations made whilst on Red Cross work. It was a ruling that Red Cross employees and ex-employees lacked capacity to testify. Like Justice Hunt, who dissented, I do not find in customary international law any warrant for such a sweeping and absolute exemption from those dictates of conscience and humanity which will often impel witnesses of crimes against humanity to offer to testify, irrespective of confidentiality arrangements. The ICRC has a duty to remain neutral but that does not mean that customary international law treats its employees and ex-employees as incompetent to testify, certainly if their evidence is indispensable to determining guilt or innocence. The ICRC has been criticised for choosing to say nothing about the holocaust in

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[18] *Prosecutor v Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002. paras. 36, 46.
[19] *Ibid*, para. 44.

order that its work in prisoner of war camps in Germany might not suffer,[20] and there is no basis for finding a warrant for that position in customary international law. Should an ex-employee offer eye-witness evidence that a defendant ordered torture or (even more pointedly) offer conclusive evidence that a defendant was not involved in the acts of torture with which he was charged, I doubt that the majority Trial Chamber decision in *Simić* should be followed so as to debar the court from hearing such crucial evidence. The preferable rule is that ICRC employee evidence should be excluded unless it is indispensable to prove a crime of utmost gravity.[21] Justice Hunt preferred to balance the competing interests: his test was "whether the harm which would be done by the allowance of the evidence outweighs the harm done by the frustration or the impairment to justice if the evidence is not available."[22] While it would only be in a rare case that the Red Cross employee would be ordered to testify, he identified two such situations: "Where the evidence of an official or employee of the ICRC is vital to establish the innocence of the accused person" and "Where the evidence of an official or employee of the ICRC is vital to establish the guilt of the particular accused in a trial of transcendental importance."[23] He thus concluded that:

> The correct test is whether the evidence to be given by the witness in breach of the obligations of confidentiality owed by the ICRC is so essential to the case of the relevant party (here the prosecution) as to outweigh the risk of serious consequences of the breach of confidence in the particular case. Both the gravity of the charges and the availability of means to avoid disclosure of the fact that the evidence has been given would be relevant to that determination.[24]

Simić is far removed from the present case: it concerns not testamentary privilege but the incapacity of a witness to testify, as the result of a unique international obligation undertaken by the potential witness's employer and enshrined in the Geneva Conventions.

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[20] David Rieff, A Bed for the Night - Humanitarianism in Crisis (Vintage, 2002) pp. 76-77, 148.
[21] This was the ICRC fall-back position in argument in *Simić*. *See*, *Prosecutor v. Simić et al.*, Case no. IT-95-9, [Public Version] *Ex Parte Confidential* Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para 19.
[22] Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para 27.
[23] *Ibid*, paras 29-31.
[24] *Ibid*, para. 35.

41. The court has been helpfully supplied by Professor Knoops and his defence team with an analysis of European Court jurisprudence on defence rights. That shows that where witnesses do not attend for cross-examination but the court places reliance on their statement or deposition, or in the case of an anonymous witness Article 6 is not necessarily violated unless either there is no reason for anonymity, or the evidence has been determinative of guilt. The leading case is *Delta v France*, which concerned a conviction for assault where the defendant had not been allowed to cross-examine the victim or an eye-witness who provided the written statements on which he was convicted. The court held:

> In principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings.[25]

42. I agree, but this case too is far removed from the present, where the defence will have full opportunity to challenge the reliability and credibility of the reporter-witness and to argue for the minimalisation of such part of his evidence as may be based on an unidentified source. That evidence is entirely secondary: it does not name or implicate any defendant, but simply offers one description of a situation on the ground, so that the court may assess (with the help of other evidence) whether there was a pattern of criminal conduct. It should be heard, for what it is worth, as a background fact, and the reporters privilege to decline to name the source for it should be upheld.

Conclusion

[25] *Delta v. France*, [1990] ECHR 30, para. 36.

43. This appeal should be upheld. The majority decision below should be reversed. The prosecution request for leave for witness TF1-150 to testify without being compelled to reveal the identity of his source in accordance with a privilege not to disclose the name of confidential informants, or alternatively pursuant to Rule 70(D), should be upheld.

Justice Geoffrey Robertson, QC

[Seal of the Special Court for Sierra Leone]