SCSL-04-14-T
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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Mutanga Itoe

PUBLIC

Registrar: Robin Vincent

Date: 8th of June, 2005

REDACTED VERSION OF DECISION AND DISSENT FILED PURSUANT TO APPEAL CHAMBER ORDER DATED 26TH MAY 2006

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

CONFIDENTIAL

DECISION ON DEFENCE APPLICATION REGARDING WITNESS TF2-218

Office of the Prosecutor:

Luc Côté
James Johnson
Kevin Tavener

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
08 JUN 2005
NAME Neil Gibson
SIGN
TIME 14:52

Court Appointed Counsel for Sam Hinga Norman:
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Michiel Pestman
Arrow J. Bockarie

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
09 JUN 2006
NAME GEOFF WALKER
SIGN
TIME 11:30

TRIAL CHAMBER I ("The Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

NOTING the submissions of the Defence and the Prosecution made on the 7th of June, 2005, relating to the request by Court Appointed Counsel for the Third Accused [redacted] ("Witness TF2-218") to reveal to the Court the name of an informant, whom he testified [redacted] gave him information on, *inter alia*, the recruitment of child soldiers and their initiation in Kenema;

NOTING the Letter of Mr. Ralph Zacklin, Assistant Secretary-General for Legal Affairs, addressed to Mr. David Crane, Prosecutor of the Special Court for Sierra Leone ("United Nations Letter"), dated the 23rd of May, 2005;

CONSIDERING that the purposes of the United Nations, as set forth in the United Nations Charter, which entered into force on the 24th of October, 1945, are to maintain international peace and security; to develop friendly relations among nations; to cooperate in solving international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms; and to be a centre for harmonizing the actions of nations in attaining these ends;

CONSIDERING that the parties to the United Nations Charter accepted the fundamental principles on which the United Nations operates, that include impartiality and confidentiality, and have thus assumed a treaty obligation to ensure non-disclosure in judicial proceedings of information relating to the work of the United Nations and that the confidentiality interest of the United Nations is well established in international customary law;

CONSIDERING that the principle of confidentiality, on which the United Nations relies, refers to the practice of the United Nations not to disclose to third parties information that comes to the knowledge of its employees in the performance of their functions, and that such confidentiality is directly derived from the principle of impartiality;

NOTING that as a former employee of the United Nations, [redacted] ("Witness TF2-218") enjoys the privileges and immunities set out in Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on the 13th of February, 1946, pursuant to Article 105 of the Charter;

CONSIDERING that when determining an issue of disclosure of confidential or privileged information obtained by an employee of the United Nations, a distinction should be made between information gathered in the course an official capacity and information gathered in a private capacity;

NOTING the ruling of the Trial Chamber of the ICTY in the case of *Simic*, which held that: "[i]f the information was obtained in the course of performing official functions, it can be considered as belonging to the entity on whose behalf the individual was working. It follows from this that the relevant entity can be considered to have a legal interest in such information and accordingly may raise objections to the disclosure of the Information";

CONSIDERING that in the instant case, the information given by the informant to Witness TF2-218 was acquired in the course of official duties performed by Witness TF2-218 while an employee of

8th of June, 2005

the United Nations, and while visiting Kenema on an official visit to perform human rights monitoring;

CONSIDERING that the Secretary General, in the United Nations Letter, waived the immunity from legal process for Witness TF2-218 to permit him to appear as a witness for the Prosecution in this case and "to testify freely as to the existence or otherwise of any of the elements of any of the crimes set out in the Statute of the Special Court or other matters which, in the opinion of the Court, are relevant to the individual criminal responsibility of an accused or of any circumstance of an exculpatory or mitigatory nature, as well as to be asked and to answer questions which seek to establish the existence or inexistence of any such element or circumstance";

NOTING that The Chamber agreed to protect the sensitive and confidential information obtained by Witness TF2-218 in the course of his official capacity as a United Nations employee, by granting the request of the Secretary General of the United Nations for his testimony to be delivered in closed session;

NOTING that Rule 70 of the Rules provides that:

> Rule 70: Matters Not Subject to Disclosure *(amended 7 March 2003)*
>
> (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.

CONSIDERING that the Prosecution can in no manner rely on Rule 70 of the Rules as support for Witness TF2-218 abstaining from disclosing the said information, as this provision refers *inter alia* to information that is in the possession of the Prosecutor, which has been provided to him on a confidential basis, and which has been used solely for the purpose of generating new evidence, which is not applicable to the case in point, as none of the conditions required for such application has been satisfied;

8th of June, 2005

THE CHAMBER THEREFORE FINDS that the confidentiality interest in the said information was waived by the Secretary General through the United Nations Letter and that the claim of privilege by Witness TF2-218 not to disclose the name of his informant is legally impermissible and that Witness TF2-218 shall disclose the name of the informant in closed session.

Done in Freetown, Sierra Leone, this 8th day of June, 2005

Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

Hon. Justice Benjamin Mutanga Itoe appends a Dissenting Opinion to this Decision.

[Seal of the Special Court for Sierra Leone]

SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Benjamin Mutanga Itoe
Registrar:	Robin Vincent
Date:	19th of September, 2005

PROSECUTOR	Against	SAM HINGA NORMAN MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-T)

CONFIDENTIAL
DISSENTING OPINION OF HON. JUSTICE BENAJMIN MUTANGA ITOE ON THE CHAMBER MAJORITY DECISION ON DEFENCE APPLICATION REGARDING WITNESS TF2-218

Office of the Prosecutor:

Luc Côté
James Johnson
Kevin Tavener

Court Appointed Counsel for Sam Hinga Norman:
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Michiel Pestman
Arrow J. Bockarie

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana

TRIAL CHAMBER I ("The Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

NOTING the submissions of the Defence and the Prosecution made on the 7th of June, 2005, relating to the request by Court Appointed Counsel for the Third Accused, [redacted] Witness TF2-218") to reveal to the Court, the name of the informant, who in his testimony he said gave him information on, *inter alia*, the recruitment of child soldiers and their initiation[redacted]

MINDFUL OF the Letter of H.E. Ralph Zacklin, Assistant Secretary-General for Legal Affairs, addressed to Mr. David Crane, Prosecutor of the Special Court for Sierra Leone ("United Nations Letter"), dated the 23rd of May, 2005;

CONSIDERING that one of the principal objectives of the United Nations, as set forth in Article 1 of its Charter, is to maintain international peace and security;

CONSIDERING that the principle of confidentiality on which the United Nations relies, refers to the practice of the United Nations not to disclose to third parties, information that comes to the knowledge of its employees in the performance of their functions;

CONSIDERING that [redacted] ("Witness TF2-218") enjoys the privileges and immunities set out in Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on the 13th of February, 1946, pursuant to Article 105 of the Charter;

MINDFUL of the issue of disclosure of confidential or privileged information obtained by an employee of the United Nations,

CONSIDERING that in the instant case, the information given by the informant to Witness TF2-218 was acquired on a confidential basis in the course of the performance of official duties by Witness TF2-218 while an employee of the United Nations;

CONSIDERING that the Secretary General, in a letter, dated the 23rd of May 2005 signed by H.E. Ralph Zacklin, Assistant Secretary General for Legal Affairs, waived the immunity from legal process for Witness TF2-218 to permit him to appear as a witness for the Prosecution in this case and "to testify freely as to the existence or otherwise of any of the elements of any of the crimes set out in the Statute of the Special Court or other matters which, in the opinion of the Court, are relevant to the individual criminal responsibility of an accused or of any circumstance of an exculpatory or mitigatory nature, as well as to be asked and to answer questions which seek to establish the existence or inexistence of any such element or circumstance";

MINDFUL of the provisions of Rule 70, particularly those of Rule 70 (B) of the Rules of Procedure and Evidence of the Special Court;

NOW ISSUES THE FOLLOWING DISSENTING OPINION:

FACTS OF THE CASE

1. The 3 Accused Persons in this case, Chief Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, stand indicted before this Court and are being jointly tried on an 8-Count Indictment for crimes against Humanity and other serious violations of International Humanitarian Law, in violation of Articles 2, 3 and 4 of the Statute of the Court.

2. One of the components of the conflict which has given rise to this Indictment as shown in its Count 8 and whose evidence has given rise to this Opinion, charges the 3 Indictees with enlisting Children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an offence punishable under Article 4(C) of the Statute.

3. The facts that have led to this Dissenting Opinion are as follows:

[redacted] a Human Rights Officer, was sent to serve here in Sierra Leone as Human Rights Adviser under the auspices of the United Nations. [redacted]

4. It is against this background that [redacted] was called by the Prosecution to testify to facts on the conflict that came to his knowledge in the course of and by virtue of this position he held within the United Nations Organs in the course of resolving the conflict.

5. In his examination- in- chief on the 7th of June, 2005, [redacted] testified that he visited [redacted]. He added that whilst he was in [redacted] he met with a [redacted] who revealed to him that in July and August, 1998, children were being recruited in [redacted] into the CDF and that initiation ceremonies of 'washing the face' were taking place there.

6. During cross-examination, Mr. Charles Margai, Learned Counsel for the 3rd Accused, asked [redacted] to reveal the name of this informant. [redacted] refused to do so

even though he admitted that he knew the name. He backed his refusal by explaining that the information was given to him on a confidential basis and that he could not reveal the identity of the source and origin without having obtained the informant's authority for him to do so.

7. Learned Counsel, Mr. Margai, argued that [redacted] was legally bound to reveal the name of his informant particularly so because his testimony was being heard in a closed session. Following the persistent and sustained refusal by [redacted] and of the Prosecution to reveal and name the source of this information, Mr. Margai applied to the Chamber to issue an Order compelling him to reveal the name of his informant. The Prosecution objected to this application and relied on the provisions of Rule 70 of the Rules of Procedure and Evidence.

8. Before delivering a ruling on this Defence Application on the 8th of June, 2005, the Chamber, at my request, inquired to know from [redacted] the nationality of his informant. He told the Chamber that the informant is a [redacted]

9. The Chamber soon thereafter retired for a deliberation and returned with a Majority Decision which took the view that because [redacted] testimony was in a closed session, he could, and should be compelled to release the name of his informant. The Chamber accordingly upheld this application and made an order compelling [redacted] to release the name of this informant immediately. [redacted] still refused to submit to and to respect the Majority Order of the Court.

10. It is in respect of this Majority Decision of the Chamber that I am, with due respect to my Honourable Colleagues, entering this Dissenting Opinion even though [redacted] without having been cited for contempt, was allowed to continue testifying in cross-examination after defying the Court Order by refusing to name his informant even after he was ordered to do so.

11. I recall here that for [redacted] to testify in these proceedings, the privileges and immunities he enjoyed under the provisions of Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on the 13th

of February, 1946, pursuant to Article 105 of the Charter, had to be waived by the Secretary General.

12. In a letter dated the 23rd May, 2005 signed by H.E. Ralph Zacklin, Assistant Secretary-General for Legal Affairs and addressed to Mr. David Crane, Prosecutor of the Special Court, [redacted] was authorised "to testify freely as to the existence or otherwise of any of the elements of any of the crimes set out in the Statute of the Special Court or other matters which, in the opinion the Court, are relevant to the individual criminal responsibility of an accused or of any circumstances of an exculpatory or mitigatory nature as well as to be asked and to answer questions which seek to establish the existence or inexistence of any such element or circumstance."

13. For [redacted] to accomplish this mission and in view of the sensitive and confidential information which he may provide in the course of his testimony, the Prosecution's application for him to testify in closed session was granted by the Chamber.

14. The question to be addressed and answered in order to grant or to dismiss the application in question by Mr. Margai, Counsel for the 3rd Accused, is whether the granting by the Chamber of a closed session hearing on the application of a Party, the Prosecution in this case as Mr. Margai argues, necessarily lifts the protection from disclosure of the identity which informants enjoy under the law and as a matter of public policy.

APPLICABLE LAW

15. Rule 66 of the Rules of Procedure and Evidence provides as follows:

> Disclosure of Materials By the Prosecutor
>
> (A) Subject to the provisions of Rules 50, 53, 69 and 85, the *Prosecutor shall*
>
> > (i) Within 30 days of the initial appearance of an accused, ***disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testimony and all evidence to be presented pursuant to Rule 92 bis at the trial.***

16. This Rule is intended to give effect to the provisions or Article 17 of the Statute which guarantees to the Accused, the right to be informed promptly of the nature of the charge for

which he is held in addition to giving him adequate time and facilities to prepare his or her defence

17. Rule 69(A) of the Rules of Procedure and Evidence provides as follows:

> "In exceptional circumstances either of the parties may apply to a Judge of the Trial Chamber to order the non disclosure of the identity of a victim or witnesses who may be in danger or at risk, until the Judge or Chamber decides otherwise."

18. Rule 70(B) of the Rules of Procedure and Evidence which is relevant to these proceedings provides as follows:

> **Matters Not Subject to Disclosure** (amended 7 March 2003)
>
> "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."

19. Under Rule 75 of the Rules:

> (A) A Judge or a Chamber may, on its own motion or at the request of either party or of the victims or witnesses concerned, or of the Witnesses and Victims Section, order appropriate measures to safeguard the privacy and security of victims and witnesses provided that the measures are consistent with the rights of the Accused.

This includes the possibility, under Rule 75(B) for a Judge or a Chamber to hold an in camera proceeding to determine whether to order:

(ii) Closed sessions in accordance with Rule 79

20. Article 79 of the Rules on closed sessions as amended during the 6th Plenary on the 14th of May, 2005, provides as follows:

> (A) The Trial Chamber may order that the press and public be excluded from all or part of the proceedings for reasons of

(i) National Security

(ii) Protecting the privacy , security or non disclosure of the identity of a victim or witness as provided for in Rule 75 or

(iii) Protecting the interests of Justice

(B) The Trial Chamber shall make public the reasons for this order

(C) In the event that it is necessary to exclude the public, the Trial Chamber should if appropriate permit representatives of monitoring agencies to remain. Such representatives should, if appropriate, have access to the transcripts of closed sessions.

21. It is observed in this regard that these provisions apply only to veil a testifying witness from disclosure to the public excepting of course to the Accused persons and to those who constitute the limited audience that is starutorily supposed to participate in the proceedings. This procedure even allows for having his name and his location mentioned if this becomes relevant to issues at stake in the course of his testimony.

THE LEGAL BASIS OF THIS OPINION

22. The issue at stake here is to decide whether a closed session testimony creates a legal environment that renders a witness compellable to reveal the identity of his informant, particularly so, where the said informant is not being called by the Prosecution as a witness to testify on the information so volunteered. The other issue is whether the United Nations, in waiving the privileges and immunities which [redacted] enjoys under the United Nations Convention, also intended in so doing, to authorize him to reveal the sources of information which came to his possession certainly, in the execution of a United Nations mission, but on a purely confidential basis.

23. It should be emphasized here and the distinction should indeed be made between the waiver accorded to [redacted] by the United Nations to testify in a closed session on information he acquired by virtue of and in the course of his employment as United Nations Official on the one hand, and the obligation of revealing the identity of the informant from where he acquired the information in question on a purely confidential basis, on the other.

24. In this regard, I would like to highlight the following issues.

i. Rule 66 deals with the obligation imposed on the Prosecution to disclose witness statements, not even of all witnesses it has interviewed in the course of the investigation, but only of those it intends to call to testify at the trial. It places no obligation on the Prosecution or on any one to disclose the name or the identity of the informant who supplied the information that turns out to have triggered the prosecution or that is vital in establishing the offence or offences for which the Accused is charged.

ii. Rule 69(A) of the Rules is intended to protect from disclosure, the identity of a victim or a witness who may be in danger or at risk if this measure were not granted at a certain stage, either during the preparatory stages or in the course of the proceedings. It is important to observe here that this provision envisages only the protection of a witness who the Prosecution intends to call to testify as envisaged in the provisions of Rule 66.

iii. Rule 75 which is a follow up of the provisions of Rule 69(A) provides for the Court to order appropriate measures to safeguard the privacy and security of witnesses including the possibility of a further and additional reinforced measure of holding in-camera proceedings or of hearing testimony in a closed session in accordance with the provisions of Rule79 of the Rules, which I again observe, is intended to protect the privacy, security and non-disclosure of the identity of a victim or witness as provided for in Rule 75.

25. A close examination and analysis of the issues and Rules that have been raised reveals and confirms that what is intended and envisaged by the Rules referred to is to disclose the identity only of those witnesses, namely persons who are to be called upon to testify and to ensure their protection against possible risks to which they may be exposed to after their testimony and particularly in relation to the nature and sensitivity of the said testimony.

26. I observe here that the provisions of these cited Rules in their entirety do not, indeed, not even the particular provisions of Rule 79 of the Rules on closed sessions, impose either on the Prosecution or on the protected witness, the obligation to reveal the name or identity of an

informant who provided information to him on a confidential basis. This contention necessitates the examination of provisions of Rule 70 of the Rules which have a bearing with matters that are not subject to disclosure.

THE PROVISIONS OF RULE 70 OF THE RULES

MATTERS NOT SUBJECT TO DISCLOSURE

27. Rule 70(B) of the Rules provides as follows:

> "If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been 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."

28. The Prosecution, as I indicated earlier, objected to the disclosure of the identity o[redacted] informant. In so doing, they relied on the provisions of Rule 70(B) of our Rules which is a replica of Rule 70 of the Rules of the ICTY on which the decision of the Appeals Chamber of the ICTY in the case of THE PROSECUTION VS SLOBADON MILOSEVIC- CASE NO. IT-02-54-AR 1108 bis - AND AR73.3 of the 23rd of October, 2002, in which the application of Rule 70 was reviewed by their Lordships of the Appeals Chamber, was based.

29. In this case, the Trial Chamber held that Rule 70 of the Rules of Procedure and Evidence of the Tribunal which protects the sources of information given on a confidential basis, did not apply to the evidence of a witness sought to be presented under the terms of that Rule by the Prosecution.

30. It is not in dispute that [redacted] is a witness for the Prosecution and that statements on what was to be the testimony he gave in Court consisted of facts and information he furnished to the Prosecution which recorded them in the form of witness statements or interview notes. Some of these facts concern ordinary issues that are relevant to proving the crimes alleged in the Indictment. Others relate to facts that have been provided, as in this case, first of all, to the witness, [redacted] on a confidential basis, and also in turn, by [redacted] to the Prosecutor on an equally confidential basis and this, within the meaning and context of the provisions of Rule 70(B) of the Rules.

31. In fact, the [redacted] Child Soldier recruitment information and testimony by [redacted] is contained in his statement to the Prosecution dated the 18th of April, 2005, which records indicate was disclosed to the Defence by the Prosecution on the 22nd of April , 2005. There appears to be no doubt that in so disclosing this information, the Prosecutor did so solely for the purpose of generating new evidence whilst still, within the context of Rule 70 of the Rules, withholding, as is customary in a long time and subsisting tradition in contemporary criminal law and practice, the identity of the origin of that piece of evidence which was provided to [redacted] on a purely confidential basis by a source which coincidentally, for purposes of this Dissenting Opinion, [redacted]

32. I would like to add however that my opinion would not have been different even if the informant were [redacted] Let me however say that the fact that the informant [redacted] more solidly reinforces my conviction in this regard in view [redacted] and [redacted] were ever to be revealed in whatever circumstances, albeit in a Closed Session.

REASONS FOR PROTECTING THE IDENTITY OF WITNESSES, VICTIMS AND INFORMANTS

(A) Location of the Court

33. In granting protection to the identity of witnesses and victims and in this particular case, [redacted] serving within the Country as a Human Rights Official, we must, of necessity, address our attention to the peculiarity of this Court which is sitting in the same Country where the alleged atrocities are said to have been committed.

34. As I mentioned in my Decision on this issue in the case of THE PROSECUTOR VS SANTIGIE BORBOR KANU, this class of actors on the scene, a majority of whom are Sierra Leoneans, residing in Sierra Leone, 'deserve a cloud of anonymity around them' given 'the circumstances surrounding these offences and the personality of the perpetrators, coupled with the fear of recriminations on them or on members of their families."

35. On a related issue, and in the case of the PROSECUTION VS ALLIEU KONDEWA, I had this to say in my Decision of the 10th of October, 2003:

"... The Republic of Sierra Leone is a relatively small community where people are bound to and in fact know and identify themselves very easily thereby increasing the danger of risk of a recruitment of hostilities against potential witnesses and victims and their families if they are identified by the indictees or their sympathizers as those whose testimony would incriminate them ..."

B) The Need to Meet Up With The Adversarial System of International Criminal Justice

36. It is apparent that in the adversarial system in which this Court, like other International Criminal Tribunals function, witnesses are a key element and an important component in administering Justice in the process of getting at the truth of the case for the Prosecution and for the Defence. In fact, in that same Kondewa Decision, and still within the context of protecting witnesses, I highlighted the necessity to put in place, a "protective wall between the victim or witness and the accused so that neither the latter nor his sympathizers would identify the former for possible recriminations and eventual elimination" and further had this to say:

"It is only to this strategy that International Criminal Justice owes its exceptional survival for, in the absence of these protected witnesses and victims, there will be no trials and consequently no end to the criminal impunity that the International Community is endeavoring to contain and to combat ..."

37. In our recent Decision of the 25th of July, 2005, on the PROSECUTION VS SAMUEL HINGA NORMAN AND 2 OTHERS On Immediate Cessation Of Violations Of Orders On Protective Measures For Witnesses And For Contempt, we asserted and affirmed these principles which are cardinal in ensuring success at various stages of investigations and of the proceedings in the International Criminal Justice System.

(C) Customary Protection Given to Informants on The Grounds of Public Policy

38. It is a very well known fact that the entire foundation of Criminal Justice resides on the successful detection of crimes, achieved mostly under very difficult circumstances and a times, on tip-offs to the detecting agents by informants who, because of fear of recriminations, do this on a confidential basis and on the understanding that their identity will not be disclosed. In view of the valuable contribution of informant sources in the detection of crimes, the criminal

justice system and public policy have a vital interest in very closely and adequately protecting that source of information from any possible disclosure unless the overall interests of justice would be compromised if the identity were not disclosed. This is not the case here because no credible circumstance that justifies such disclosure has been shown or demonstrated by the Defence excepting their reliance on the unconvincing closed session argument.

39. The protection of this policy becomes even more imperative when viewed in terms of the disproportion of the ratio of the entire civilian population as against that of the detecting agents who, because of their meager numbers, cannot be present everywhere and at all times with these populations that host the criminals. In fact, States and their Police and other detecting Agents have to count and rely very much on informants of all categories. The only way of doing this and encouraging them is by concealing their identity and to ensure, through laid down public policy mechanisms and rules, that neither the Defence, the Prosecution, nor the Law Courts are given the discretion or the possibility of compelling a witness to reveal the source or the identity of his informant except of course, where the supreme and overall interests of justice so dictate.

40. I note that in the instant case the Defence, besides the usual but unjustified inquisitiveness of the application premised on speculations and a quest to unmask a veiled informant, has failed to demonstrate why there should be a derogation from this rule and practice and how the disclosure of the identity of this informant [redacted] would serve either its case or the supreme and overall interests of justice. Indeed, the Defence, if it seeks to contest the factual content of the information so provided, should either have cross-examined [redacted] extensively on the said information (which the Defence failed to do at the appropriate time) or to exercise the right to adduce evidence in rebuttal which is still available to it, should it come to that stage.

41. In Phipson's Manual of the Law of Evidence, 10th Edition: 1972 it is stated that "the ground upon which public policy forbids evidence of certain matters is that disclosure of those matters would affect the security of the good administration of public affairs or justice" and in this particular case "information for the detection of crime".

42. This information that was given to [redacted] falls within this category and relates to the detection of the crime of

recruitment of child soldiers for which the accused persons stand indicted today in Count 8 of the Consolidated Indictment.

43. In the case of the ATTORNEY GENERAL VS BRIANT (1846) 15 M&W 25 169, it was decided that in public prosecutions and in civil proceedings arising there from, witnesses will not be allowed to disclose the channels through which came the information which led to the prosecution.

44. In MARKS V BEYFUS (1890) 25 QBD 494 the plaintiff who had brought an action alleging conspiracy to prosecute maliciously, sought to elicit from the Director of Public Prosecutions, the name of his informant. The refusal of the Director of Public Prosecutions to answer was upheld.

45. MARTIN CJS, delivering the Judgment of the Saskatchewan Court of Appeal in the Canadian Case of R VS BLAIN, 31 WWR 69B, had this to say:

> "A genuine privilege for communication on the fundamental principle of privilege must be recognized for the communications made by the informers to the Government; because such communications ought to receive encouragement and because that confidence which will lead to such communications can be created only by holding out exemption from a compulsory disclosure of the informant's identity."

46. MURPHY ON EVIDENCE 7TH Edition, 2000 states that "no question may be asked and no evidence may be given which would tend to reveal the identity of any person who has given information leading to the institution of the prosecution ... There is said to be an overriding public interest in preserving the anonymity of informants because of the likelihood of sources of information drying up ... the rule prevents any question, direct or indirect, which would tend to reveal the identity of an informant or the channel of the information ..."

47. In the MILOSEVIC DECISION under reference, the APPEALS CHAMBER of the ICTY pertinently noted that Rule 70 is indeed the basis of co-operation with the Prosecution for Governments and other Bodies who possess confidential and sensitive information which could assist its investigations.

48. Indeed, I would say that if we rule in favour of the policy of departing from the norm of non-disclosure of the identity of informants, we would seriously have jeopardised and

compromised the efficiency of detection by and contribution of informants in sustaining criminal investigations and in so doing, would have occasioned the collapse of the very foundation on which the administration of criminal justice, be it municipal or international, to a large measure, owes its success. In fact, this pre-occupation is clearly summarized in the testimony of [redacted] during cross-examination and in response to a Court question when he had this to say on the 7th of June, 2005, and I quote:

> "Your Honour, it is because I have not received the consent of that person to use his or her name in this Courtroom. If he or she were to give me that consent, I would freely provide the name to you. But since the entire basis of human rights monitoring is that of a trust between the informant and the monitoring body, I would violate that profoundly if I were to share that name with you without the consent of the informant."

EVIDENCE WHICH BEST FAVOURS A FAIR DETERMINATION OF THE CASE

49. While it is a conceded that the principle of protection of the identity of informants is an emanation of municipal legal systems, it is also pertinent to observe, that given the emergence of the principle of the protection of witnesses in International Criminal Law which neither expressly recognizes nor rejects the principle of the protection of the identity of informants, this principle which is so deeply embedded in municipal legal systems could, and should well constitute a source of evidential legal principles which should indeed be incorporated and adopted in the International Criminal Justice System.

50. In this regard, even though Rule 89(A) of the Rules of Procedure and Evidence stipulates that the Chambers shall not be bound by national Rules of Evidence, it is clear that the application of such rules is not excluded in the light of the provisions of Rule 89(B) which authorizes the Chamber to apply, where otherwise not provided for in this Section, rules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

51. As was stated by the Trial Chamber of the ICTY in the TADIC CASE:

> "rules derived from other adversarial systems will necessarily be strong persuasive authority when it becomes necessary to determine what should be done in instances not legislated for by the International Tribunal's own Rules, as long as they are otherwise consistent with the International Tribunals Statute and Rules ... where a

substantial number of well recognized legal systems adopt a particular solution to a problem, it is appropriate to regard that solution as involving some quite general principle of law."

52. It is in this context that the Trial Chamber of the ICTY in a Majority Opinion in the SIMIC CASE (Case No. IT-95-9) on a Ruling Concerning the Testimony of a Witness, held that the International Committee of the Red Cross (ICRC) benefited from an absolute privilege against disclosure in the International Tribunal of information which an employee or an official gained through his employment. This duty of confidentiality owed by the ICRC was justified as necessary for the Organisation to continue to have access to warring areas and to be able to continue to accomplish its mandate.

53. On this issue, I subscribe to the view that the question whether or not to prevent disclosure of information in a criminal trial must be resolved through a balancing exercise and that the right test is to determine whether the evidence to be given by the witness in breach of the obligations of confidentiality is so essential to the case of the relevant party as to outweigh the risk of serious consequences of the breach of confidence in the particular case.

(D) Disclosure of Informant's Identity in Relation to Its Effects on U.N. Missions

54. One of the principal purposes and principles governing the United Nations according to Article 1 of its Charter is:

"To maintain international peace and security"

In fulfilling this mandate and in a world that is virtually permanently conflict ridden at one time or the other, the maintenance of peace and the putting in place of conflict resolution strategies constitute a principal preoccupation of the main and ancillary Organs of the United Nations and of its Officials.

55. In this regard, the important role of the Organisation and of the International Community as a whole in restoring peace and stability in Sierra Leone would have been impossible but for the engagement, commitment, and sacrifice of the Staff of the Organisation and of other Non-Governmental Organisations and Bodies without and or within Sierra Leone. Most of them carried out discrete and hazardous missions around the Country and dialogued with the partners in conflict as well as with members of the civil society and in so

doing, created a conducive atmosphere and acquired some information that finally contributed to restoring the peace and stability that now reigns in this Country. In fact, the evidence shows that some of the information these Officials exploited was obtained in secrecy and in confidence particularly given the volatility and insecurity of environment. It was in these circumstances that this informan[redacted]provided the information in question to the witness,[redacted]

56. I would like to observe here that this is a case where the credibility and reliability of the United Nations and of its Officials and the successful pursuit of their peace keeping missions and operations are at stake. If the public policy of shielding informants is not applied by or to these Officials who are specially and exceptionally authorized to testify before International Tribunals, it would have the effect of weakening the capacity of the United Nations to fulfill its peace restoring and peace keeping missions in addition to losing its credibility that enables it to accede to and to access from various sources, confidential information that is vital in the fulfillment of its missions. If these sources were to be revealed, it would seriously compromise the efficiency and success, not only of the United Nations Peace Keeping Missions on the ground, but also of ensuring anonymity of sources of detection and the mechanisms used in that process.

CONCLUSION

57. In the light of the above, I respectfully do not share the views of my Learned Brothers and Colleagues that it is appropriate to compel[redacted]o disclose the name of his informant merely because the Court is in a Closed Session because Rule 79 provides only for the protection of the testifying witness. It creates no obligation for him or her to disclose the identity of an informant who provided him with vital information on a purely confidential basis.

58. Moreover, the waiver of the privileges and immunity of[redacted]by the United Nations Secretary General, besides authorizing him to testify in closed session because of his status and the sensitive confidential information which he may provide, did not and would not have mandated him to testify in violation of the sacred legal principle of preserving the anonymity of informants by revealing the identity of his informant in addition to testifying on information that was provided to him on a confidential basis.

59. In the light of the foregoing analysis, I am of the opinion and I do so find, that Witness TF2-218, [redacted] is justified in resisting any constraints for him to reveal the identity of his informant and do, in these circumstances, hold that he cannot be compelled to, and should not, disclose the name and identity of his informant as this would amount to a flagrant violation of the law and of a long-standing public policy if the Defence application to this effect were ever granted, given the overall circumstances of this case.

60. **ACCORDINGLY, DEFENCE COUNSEL'S APPLICATION IS DENIED AND DISMISSED.**

Done in Freetown, Sierra Leone, this 19th day of September, 2005.

Hon. Justice Benjamin Mutanga Itoe
Trial Chamber I

[Seal of the Special Court for Sierra Leone]