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SCSL-04-16-T
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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde

Registrar: Robin Vincent

Date: 16 September 2005

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

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.

Office of the Prosecutor:
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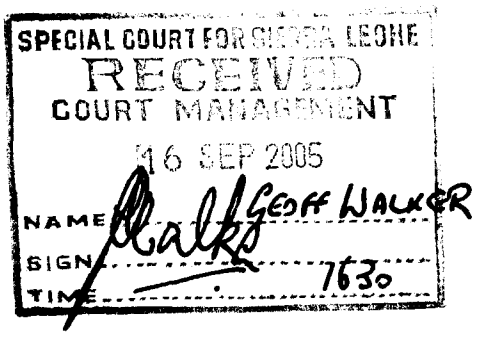
Lesley Taylor
Melissa Pack



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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Prosecution's Oral Request for Leave for Witness TF1-150 to testify without being compelled to answer any question in cross-examination that the witness may decline to answer on grounds of confidentiality, pursuant to the provisions of section 70 (B) and (D) of the Rules; (the "Motion");

NOTING the oral submissions in response by Counsel for the accused persons Brima, Kanu and Kamara (the " Joint Response");

NOTING the Prosecution's oral submissions in reply (the "Reply");

CONSIDERING also the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("the Statute") and Rules 70 and 79 of the Rules of Procedure and Evidence of the Special Court ("the Rules"):

HEREBY DECIDES AS FOLLOWS :

I. INTRODUCTION:

1. Prosecution Witness TF1-150 is a foreign national who served in Sierra Leone during the period May 1998 to 2001 as a Human Rights advisor to an international organisation ("the former employer"). By virtue of his employment, Witness TF1-150 obtained information relating to the conflict situation in Sierra Leone during the said period, some of which information he obtained on a confidential basis. In the interest of the former employer, Witness TF1-150 enjoyed and continues to enjoy by virtue of his employment, certain privileges and immunities in respect of all words spoken or written and all acts performed by him in the performance of his duties, including immunity from legal process. That means that he cannot testify before a court of law regarding his work except with the express permission of his former employer.

2. By a letter dated 23 May 2005 addressed to the Prosecutor, SCSL, the former employer waived part of that immunity and granted Witness TF1-150 permission to testify before the Special Court in a number of cases including the *Prosecutor v. Alex Tamba Brima et al.* However, due to the sensitive and confidential nature of some of the information that the witness might divulge, the waiver of immunity is conditional upon certain conditions, one of which is that the witness must testify in closed session. In compliance with the request of the former employer, the Trial Chamber on 13 September 2005 ordered pursuant to Rule 79 (A) (iii) of the Rules that in the interests of justice Witness TF1-15- do testify in closed session.

3. In addition to the closed session, the Prosecution now seeks an order from the Trial Chamber guaranteeing before Witness TF1-150 is called to testify, that he will not be compelled to answer any questions in cross-examination, relating to the names of his informants or sources of information, on the grounds that he obtained information from these sources on conditions of confidentiality.

II. SUBMISSIONS OF THE PARTIES:

The Motion:

4. The Prosecution requests the Trial Chamber pursuant to the provisions of Rule 70 (B) and (D) of the Rules to allow Witness TF1-150 to testify without being compelled to answer any questions in cross-examination which questions the witness may decline to answer on grounds of confidentiality.

5. In particular the Prosecution submitted that despite having been granted leave to testify in closed session, Witness TF1-150 is unwilling to disclose or divulge the names of the sources of information that he obtained in the course of his employment as a Human Rights officer while working in Sierra Leone, by virtue of the fact that he obtained that information under conditions of confidentiality. The Prosecution maintained that under Rule 70 (D) the Trial Chamber has no power to compel the witness to answer any question which the witness declines to answer on grounds of confidentiality.

6. The Prosecution further submitted that as a matter of principle, Witness TF1-150 being a Human Right official, is privileged from revealing the identity of his sources and that if he were compelled to reveal the names of those sources, this will result not only breach of confidentiality between the witness and his sources but may also lead to the compromise of their safety or security. The Prosecution relies in this regard on the provisions of section "J- Confidentiality" of the Training Manual on Human Rights Monitoring, 2001.

7. The Prosecution further submitted that if the Trial Chamber were to compel Witness TF1-150 to disclose the names of his sources it will set a bad precedent for other Human Rights workers trying to gather information in the field as victims and other would-be informers will find it difficult in future to confide in such officials again.

8. The Prosecution submitted that in any event, the Defence will suffer no unfair prejudice if the witness is allowed to confine his testimony to the type of source e.g. an NGO or an individual, but without being compelled to name the organisation or individual.

Joint Response:

9. The Defence jointly opposed the application and submitted that Rule 70 upon which the Prosecution seeks to rely does not apply to Witness TF1-150 or his testimony and therefore does not accord him the immunity from being compelled to answer certain questions, in particular naming the sources of his information.

10. The Defence submitted further that the protective measures already accorded to Witness TF1-150 including leave to testify in closed session pursuant to Rule 79 of the Rules sufficiently guarantee the confidentiality of any information that the witness may divulge in the course of his testimony and that it is unnecessary for the Trial Chamber in addition to shield him from having to answer certain question in cross-examination.

11. The Defence further submitted that the right of an accused person to examine witnesses against him as part of a fair trial process, is guaranteed by Article 17 (4) (e) of the Statute and outweighs any other considerations such as the witness's confidentiality obligations towards his informants. The Defence further submitted that Rule 75 (A) which empowers the Trial Chamber to grant witnesses and victims "protective measures" also enjoins the Trial Chamber to ensure that such measures are not inconsistent with the rights of the accused persons, and that in fact the Prosecution request if granted would be prejudicial to those rights.

Prosecution Reply

12. The Prosecution submitted in reply that Rule 70 (D) absolutely prohibits the Trial Chamber from compelling a witness summoned under that Rule to answer a question after the witness declines to do so on grounds of confidentiality.

13. Furthermore, the Prosecution maintained that the duty of a Human Rights Official to maintain the confidentiality of his sources outweighs the rights of accused persons to insist on disclosure of the names of those sources.

III. DELIBERATIONS

14. Witness TF1-150 worked as a Human Rights monitor for an international organisation in Sierra Leone during a period relevant to the indictment in the case of *The Prosecutor v. Alex Tamba Brima et al.*[1] By virtue of his employment in the organisation he enjoyed and continues to enjoy certain privileges and immunities including immunity from legal process. In other words he cannot be compelled to appear and testify in a court of law relating to his employment without the express permission of his former employer.

15. The Prosecution tendered to the court a letter dated 23 May 2005 in which the former employer of Witness TF1-150 did in fact waive part of that immunity and granted him permission to appear before the Special Court in the AFRC 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 person 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 of any such element or circumstance.*"

16. However, the former employer observes in the said letter that in view of the "*sensitive and confidential information*" that the witness is likely to divulge, his testimony should only be given on that following conditions, namely that he "*testifies in closed session; that transcripts and recordings of his testimony be restricted to the trial Chambers and their staff, to the Prosecution and their staff and to the accused and their counsel and expert advisers; and that the Prosecution and their staff as well as accused and their counsel and expert advisers be prohibited from divulging the contents of such testimony to the media or to any other third part.*" The waiver does not extend to the release confidential documents of the former employer unless prior permission in this regard is sought and obtained.

17. Based upon the contents of this letter the Trial Chamber on 13 September 2005 granted leave to Witness TF1-150 to testify in closed session pursuant to Rule 79 (A) (iii) of the Rules. In addition to the closed session measures, the Prosecution now seeks additional protection for the witness by requesting the Trial Chamber not to compel him to answer certain questions in cross-examination if the witness refuses to answer the questions on grounds of confidentiality.

18. We note that in the said letter the former employer does not impose any restrictions on the witness's testimony or on his ability to disclose the sources of information and instead authorises him

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[1] Case No. SCSL-04-16-T

to "*testify freely*" once the above pre-conditions have been met. It is the witness himself who as a matter of principle feels that he is under obligation to maintain the confidentiality of his sources.

19. First of all, we are of the view that the provisions of Rule 70 upon which the Prosecution seeks to rely are not applicable to Witness TF1-150 or his testimony. The Rule applies only where 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 has not been shown to be the case here. We might add that it is that initial information together with its source that may not be disclosed by the Prosecutor without the prior consent of the source. In this case the Prosecution has not shown that they are in possession of that initial information. Similarly, the Prosecution has not satisfied the criteria envisaged under Rule 70 (D) of the Rules. In our view Rule 70 (D) applies where "*the person or representative of the entity providing the initial information*" (i.e. the informant himself) has been called upon to testify. In this case Witness TF1-150 is not the originator of the initial information nor "*the person or representative of the entity providing the initial information*" but is merely a recipient thereof. As such he cannot rely on the protection offered by Rule 70 (D) of the Rules. Furthermore the ICTY authorities cited by the Prosecution in support of their arguments, including *The Prosecutor v. Slobodan Milosevic*[2] and *The Prosecutor v. Radoslav Brdjanin and Momir Talic*[3], are persuasive but distinguishable and therefore not pertinent to this case.

20. Secondly, 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 TF1-150 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. In this regard we agree with the view expressed by the witness's former employer in their letter referred to above. In our opinion it would be prejudicial to the rights of the accused persons if Witness TF1-150 were permitted to disclose certain information and withhold the names of the sources, as the Defence would be handicapped in their attempts to challenge the information disclosed without knowing the name of the source.

FOR ALL THE ABOVE REASONS the Trial Chamber dismisses the Prosecution request and rules that Witness TF1-150 can be compelled to answer questions relating to the sources of his information.

Honourable Justice Teresa Doherty will deliver a separate dissenting opinion.

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[2] *The Prosecutor v. Slobodan Milosevic*, Confidential Decision on Prosecution's Application for a Witness Pursuant to Rule 70 (B), 30 October 2003; *The Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AR108bis & AR 73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002.

[3] *The Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

Done at Freetown this 16th day of September 2005.

Justice Richard Lussick

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

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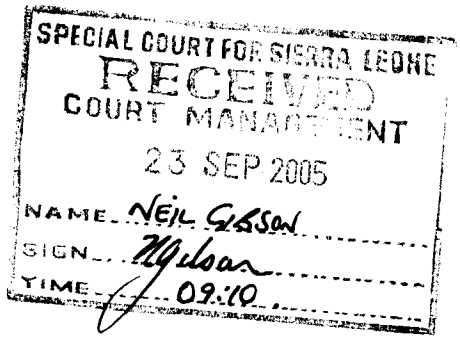
TRIAL CHAMBER II

Before:	Justice Teresa Doherty, Presiding Judge Justice Richard Lussick Justice Julia Sebutinde
Registrar:	Robin Vincent
Date:	22 September 2005

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

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

<u>Prosecution:</u>
Luc Cote
Lesley Taylor
Melissa Pack



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I have read the majority decision of my learned colleagues and, with the greatest respect, must dissent from their opinion.

The submissions of the Prosecution and Defence and the facts leading up to it are set out in the Majority opinion and it is unnecessary to repeat them herein.

Deliberations

1. The application by the Prosecution that Witness TFI-150 not be compelled to answer questions that would lead to naming of his sources of the information contained in his reports to the office of the United Nations Commissioner for Human Rights is based on:

(1) the provisions of Rule 70 in particular Rule 70D of the Rules of Procedure and Evidence; and

(2) a claim of priviledge from naming the source which "he regards as confidential".

2. The Defence jointly oppose the application. They argue answers identifying sources of information is not within the ambit of Rule 70(B) or Rule 70 of the Rules in its entirety and that the sources of information "go to credibility". They state that "those stories were doing the rounds in the rumour mill at the time [...], and were later found to be incorrect."[1] They submit that if the witness is "allowed to withhold the source of his information, then the accused would effectively be barred from their right to examine evidence against" as guaranteed under Article 17(4)(e) of the Statute.[2]

3. The Prosecution submission of priviledge is based on the balance of competing, public interest in the role of the Human Rights Officer to report and publish and the public interest in protecting their sources.

4. The Human Rights Officer's duty is to report in unstable and occasionally dangerous environments and such reports are part of the information that the Security Council depends upon to assess and decide on action in maintaining peace and security and upholding the rule of law. It is on these informations that international organisations and governments take political actions. In fact such information may be more vital to these bodies than media reports, as professional monitors gather information for mandated organisations. Further, in some cases the media may not show any interest to report about human rights abuses.[3] Government and International Organisations therefore rely heavily on such reports and there is an public interest in the work and the information of Human Rights Officers as there is in media reports.

5. Prosecution state that 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

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[1] Transcript, 14 September 2005, page 3 line 14.
[2] Transcript, 14 September 2005, page 4, line 20.
[3] On the absence of the international media in conflict situations and its effects see Richard Dowden, Comment: The Rwandan Genocide: How the press missed the story, 103 African Affairs (2004), pages 283 - 290.

Officer and his/her integrity that the Prosecutor seeks to enforce and protect and in so doing not to jeopardize future missions.

6. I consider this is an important, even fundamental, part of ensuring that Human Rights Officer can collect information that such information is given free from fear of reprisal and in a sense of safety by informants.

7. The Defence in reply say the Human Rights Officer and source will be fully protected by the name being written and given under seal. I do not consider that is the point. The point is the Human Rights Officer's relationship of trust with his/her source is based on his/her undertaking. His role depends on maintaining the integrity of that undertaking. Any revelation sealed or otherwise, breaches that undertaking.

8. Defence submit that the witness cannot rely on a letter from the United Nations, tendered in support of the Prosecution's application for a closed session, as it permits him to give evidence without any fetter. I accept the reports etc., made by the witness have been made in the course of his employment and may be deemed to be the property of his employer. The Prosecution do not rely on that letter and, in any event, it is not the issue. The issue here is a matter of principle he considers imposed upon him to fulfil the undertaking not to reveal his source and the duty of trust this imposes upon him. Further the letter does not specifically mention confidential information received by the witness and therefore it is unclear whether the United Nations also waived the confidentiality of such information. Contrary to the Defence submission the letter states that the waiver "does not relate to the release of confidential documents of the United Nations, which is subject to separate authorization by the Secretary-General." Asking the witness to testify about his confidential sources may deviate from the partially waived immunity.

9. Defence further submit that the matters of principle now put before the Court are in a manual (stating the obligations and duties of a Human Rights Officer) which did not exist when the witness was a Human Rights Officer and, in effect, the Trial Chamber is asked to "give the manual retrospective effect".[4]

10. The Prosecutor has made it clear that the witness gave these undertakings to his sources of information at the time. The date of publication of training manuals does not make any difference to that undertaking or, to my mind, undermine the submission. Moreover, the Manual is not a legal statute per se and there was a practice that the employees had to abide to ever before the manual was published.

11. Defence clearly have already assessed the standard of the evidence and decided it is in part, based on rumour and, hence unreliable. I am unclear from their submission why the actual name of the informant would vitiate or change that decision. Be that as it may, they stress that the witness information will be fully protected by a closed session and by writing the name which will be kept under seal.

12. Clearly the Trial Chamber is being asked to weigh two competing public interests:

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[4] Transcript, 14 September 2005, page 12, line 4.

(1) protecting the sources of information given to a Human Rights Officer, when he reports in an unstable environment, and

(2) the Accused's right to know the accusations against him and who is making those accusations.

13. I first ask if the Trial Chamber can grant such a priviledge. Priviledge of information is specifically preserved in Rule 90(E) and Rule 97. Neither apply here.

14. The Prosecution concede there is no precedent in the International Tribunals granting priviledge to Human Rights Officer. In *Prosecutor v. Simic* the ICTY has considered that there is an absolute immunity from testifying for a former employee of the International Committee of the Red Cross ("ICRC") in order to protect the impartiality of the ICRC.[5] As noted by the Appeal Chamber of the ICTY, "Trial Chambers have also granted or recognized privileges against testifying to employees and functionaries of the ICTY and to the Commander in Chief of the United Nations Protection Force".[6]

15. I note the Rules of ICTY recognising specific priviledge are similar to those of the Special Court for Sierra Leone. In those decisions the Trial Chamber went outside those Rules and its decisions were upheld by the Appals Chamber. I also note the ruling in *Prosecutor v. Simic* recognised that the ICRC is a mandated organization and it was the "principles which underlie its activities" that caused the ICTY to protect its confidentiality.[7]

16. 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 [...]".[8] This mandate was carried over to UNAMSIL which was established by the Security Council in 1999 under Chapter VII of the United Nations Charter.[9] As in the decision of the ICTY on the ICRC this witness also acted on behalf of a mandated organization charged with duties in the field of international law and human rights.

17. I bear in mind the provisions of Article 20 (3) of the Statute of the Special Court for Sierra Leone and I consider these persuasive authorities of the ICTY that a Trial Chamber may grant absolute or qualified priviledge to a witness even if they are not clearly set out in the rules.

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[5] *Prosecutor v. Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (Order Releasing ex parte Confidential Decision of the Trial Chamber - 1 October 1999), 27 July 1999.

[6] *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 referring to *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on the Motion *Ex Parte* by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter, 8 July 1997 and *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, 12 May 1999, para. 53.

[7] *Prosecutor v. Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (Order Releasing ex parte Confidential Decision of the Trial Chamber - 1 October 1999), 27 July 1999.

[8] U.N. Doc. S/Res/1181 (1998), para. 8.

[9] U.N. Doc. S/RES/1270 (1999).

18. It is in the interests of justice that a Trial Chamber is vested with a duty, on very rare occasions, not to compel a witness to answer certain questions on the grounds of priviledge.

19. The Appeal Chamber of ICTY in *Prosecutor v. Brdjanin and Talic* dealt with priviledge from testifying by war correspondents. As in the instant case the issue was "a novel one" and "there [did] not appear to be any case law directly on the point".[10] The Appeal Chamber considered the issue raised three subsidiary questions:

> "Is there a public interest in the work of war correspondents? If yes, would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work? If yes, what test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court and, where it is implicated, the right of the defendant to challenge the evidence against him?"[11]

Substituting a Human Rights Officer for a war correspondent, I apply these questions to the witness and the matter of principle he seeks to uphold.

20. The work of the Human Rights Officer in unstable and war environments involves collecting information that informs the United Nations Commission for Human Rights, the United Nations and the Security Council. There is ample indication on this in the number of reports prepared. Eight situation reports prepared between June 1997 and August 2000 have been sought to be admitted in this Court, these together with Security Council reports indicate the information and reports that must be prepared for the Security Council to intervene and uphold international peace and security, and therewith the rule of law and the protection of human rights.

21. As noted in *Prosecutor v. Brdjanin and Talic*:

> "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."[12]

I consider the collecting of that information by a mandated Human Rights Officer in order to alert the international and national authorities about human rights abuses so that they can take appropriate political action is in the public interest.

22. Would compelling a Human Rights Officer to reveal the sources of their information adversely affect their ability to carry out their work? The Witness through the Prosecution submission made clear his concern that revealing a source would be such a breach of confidentiality that it would jeopardise the relationship between Human Rights Officer and their informants and hamper their ability to work. The potential impact this will have upon the gathering of information and, in turn the decision making process, is grave. As stated in *Prosecutor v. Brdjanin and Talic*:

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[10] *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 30.
[11] *Ibid.*, para. 34.
[12] *Ibid.*, para. 36.

> "Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information."[13]

23. I note that the Appeal Chamber noted this in the context of the interviewee being charged with an offence, a situation that could also have eventuated here. Moreover, the factual situation remains the same: the interviewee must decide to trust the Human Rights Officer.

24. I paraphrase the words of the Appeal Chamber in *Prosecutor v. Brdjanin and Talic* and apply it to the instant case:

> "That compelling [a Human Rights Officer] to [reveal sources] before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern."[14]

25. The Appeal Chamber stated the International Tribunal "will not unnecessarily hamper the work of professions that perform a public interest"[15] and, with respect, I adopt and apply that to the instant case.

26. What test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court? The Appeal Chamber in *Prosecutor v. Brdjanin and Talic* stated:

> "A Trial Chamber must conduct a balancing exercise between the differing interests involved in the case. On the one hand, there is the interest of justice in having all relevant evidence put before the Trial Chambers for a proper assessment of the culpability of the individual on trial. On the other hand, 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."[16]

27. It is only when the evidence sought is direct and important to the core issues in that case that a Trial Chamber may compel a witness to answer. I am not satisfied on the submissions of the Defence that the naming of the Non-Governmental Organisation or the individual informant is important to the core issue in the case. They have not said so, on the contrary, they have already noted parts of the reports were "assertions [...] which were not true"[17] "those stories were doing the rounds in the rumour mill at the time"[18]. Their assessment of the report verges on derisive.

28. The reports are hearsay and the inability of the Defence to challenge the original source in cross-examination does mean it must be excluded. This Trial Chamber has clearly ruled that these are matters of weight which will be assessed in due course. As noted in a recent decision:

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[13] *Ibid.*, para. 43.
[14] *Ibid.*, para. 44.
[15] *Ibid.*
[16] *Ibid.*, para.46.
[17] Transcript, 14 September 2005. page 3, line 10.
[18] Transcript, 14 September 2005. page 3, line 14.

"[...] evidence may be excluded because it is unreliable, but it is not necessary to demonstrate the reliability of the evidence before it is admitted."[19]

29. Therefore, in my view by admitting the evidence no prejudice would have been done to the defence as the Trial Chamber could have admitted it on the basis of Rule 89(C) of the Rules.

30. Further, I disagree with the purely textual interpretation of Rule 70 of the Rules by my learned colleagues. They have stated that Rule 70 is not applicable as it was not shown that the Prosecution was in possession of the information which has been provided to the witness on a confidential basis. The rationale of the Rule was recognised by the ICTY Appeals Chamber in the case of the *Prosecutor v. Oric*, where it stated that Rule 70 encourages third parties to provide confidential information to the Parties, regardless of any further disclosure of that confidential information.[20] The same decision clarified that a Party did not need to be in the possession of the confidential information in order to seek its application.

31. I consider that the public interest in ensuring a Human Rights Officer can maintain the confidentiality of his/her informants and so can seek information in the knowledge that the trust will not be betrayed in order to report fully to the United Nations and the International Community is of such importance that I would have granted qualified priviledge.

32. I am not satisfied by the Defence argument that the evidence sought is of direct and important value in determining a core issue in the case or that evidence on the facts stated cannot reasonably be obtained elsewhere.

33. For the foregoing reasons, I would have allowed the Prosecution application.

Done at Freetown this 22nd day of September 2005.

Justice Teresa Doherty
Presiding Judge

[Seal of the Special Court for Sierra Leone]

[19] *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, Decision on Joint Defence Application for Leave to Appeal from Decision on Defence Motion to Exclude all Evidence from Witness TF1-277, 2 August 2005, para. 6.
[20] *Prosecutor v. Oric*, Case No. IT-03-68-AR-73, Public redacted Version of 'Decision on Interlocutory Appeal Concerning Rule 70' issued on 24 March 2004, para. 6.