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

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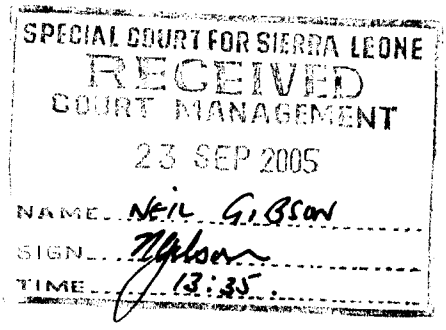

I have read the majority decision of my learned colleagues and, with the greatest respect, must dissent from their opinion.

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 privilege 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 privilege 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 such information 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 privilege. Privilege 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 privilege 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 privilege 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 privilege 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 privilege.

19. The Appeal Chamber of ICTY in *Prosecutor v. Brdjanin and Talic* dealt with privilege 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 not mean it must be excluded. This Trial Chamber has clearly ruled

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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.

that these are matters of weight which will be assessed in due course. As noted in a recent decision:

> "[...] 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 privilege.

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]

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[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.