



Case No. SCSL-2004-16-T  
THE PROSECUTOR OF  
THE SPECIAL COURT  
V.  
ALEX TAMBA BRIMA  
BRIMA BAZZY KAMARA  
SANTIGIE BORBOR KANU

TUESDAY, 13 SEPTEMBER 2005  
9.30 A.M.  
TRIAL

TRIAL CHAMBER II

Before the Judges:

Teresa Doherty, Presiding  
Julia Sebutinde  
Richard Lussick

For Chambers:

Mr Simon Meisenberg

For the Registry:

Mr Geoff Walker

For the Prosecution:

Ms Lesley Taylor  
Mr Jim Hodes  
Ms Melissa Pack  
Ms Maja Dimitrova (Case Manager)

For the Principal Defender:

Mr Ibrahim Foday Mansaray

For the accused Alex Tamba  
Brima:

Ms Glenna Thompson

For the accused Brima Bazy  
Kamara:

Mr Andrew William Kodwo Daniels  
Mr Mohamed Pa-Momo Fofanah

For the accused Santigie Borbor  
Kanu:

Mr Amadu Koroma  
Ms Karlijn van der Voort

1 Tuesday, 13 September, 2005

2 [AFRC130905A - AD]

3 [Open session]

4 [Accused Brima, Kamara and Kanu not present]

09:33:38 5 [Upon commencing at 9.30 a.m.]

6 PRESIDING JUDGE: Good morning and welcome back, everyone.

7 I note there are no defendants present in the Court this morning.  
8 Counsel, can you advise us why that is.

9 MS THOMPSON: Your Honour, on behalf of Alex Tamba Brima, I  
09:33:55 10 had a conversation with him yesterday and he informed me that he  
11 will not be attending Court this morning. I have to see him  
12 later to find out what the reasons are but I haven't seen him  
13 yet.

14 PRESIDING JUDGE: Thank you. Could we have an appearance?

09:34:16 15 I think you are a new face to us.

16 MR KOROMA: Yes, Your Honour, before I give an excuse on  
17 behalf of Kanu, may I first of all introduce myself, that I act  
18 as co-counsel in the team of Kanu. I am representing Knoop and  
19 partners, the firm that is responsible to appear for Kanu.

09:34:47 20 Unfortunately, our senior, Mr Knoop, is out of the jurisdiction  
21 on very important international assignments and then he is not  
22 expected to be back until the end of the month. Similarly,  
23 Mr Manly-Spain is also out of the country on vacation. He too  
24 will be in Freetown by the end of the month. So for the time  
09:35:15 25 being, Your Honour, we are holding the fort on their behalf.

26 Yesterday, late in the evening, I had a word with Mr Kanu.  
27 He said to me that he cannot be in court this morning, he said he  
28 is not in a better frame of mind to come to court this  
29 morning, although I tried to persuade him to come to court. But

1 that was what he told me that he cannot come, because he is not  
2 in a better frame of mind to come.

3 PRESIDING JUDGE: Thank you, counsel. Could you give us  
4 your appearance as well so we have your name on record.

09:35:53 5 MR KOROMA: Yes, Your Honour. My name is Amadou Koroma.

6 PRESIDING JUDGE: Thank you, Mr Koroma. Mr Daniels, your  
7 client.

8 MR DANIELS: Your Honours, firstly I wish to welcome all of  
9 you back.

09:36:12 10 PRESIDING JUDGE: Thank you, Mr Daniels.

11 MR DANIELS: Secondly, I had word this morning with my  
12 client and he was under the misimpression that we would start on  
13 Thursday, so maybe there is a more underlying reason; maybe like  
14 my sister colleague has said, we will meet with them later to  
09:36:29 15 find out if there are any matters to be thrashed out.

16 PRESIDING JUDGE: Thank you, Mr Daniels.  
17 Just a moment please.

18 [Trial Chamber conferred]

19 PRESIDING JUDGE: We have heard each of the counsel on  
09:37:58 20 behalf of each of the accused defendants. We accept that the  
21 accused defendants are aware of their right to be present and  
22 have waived that right, and pursuant to Rule 60(B), the matter  
23 will proceed.

24 Ms Taylor.

09:38:16 25 MS TAYLOR: Good morning, Your Honours. Thank you for the  
26 indulgence that you extended counsel this morning. We did use  
27 the time profitably. The witness that the Prosecution would like  
28 now to call is Witness TF1-150. That witness is an international  
29 witness who has once before travelled to Freetown and was unable

1 to give evidence before this Chamber. There are two legal issues  
2 that arise with respect to that witness and those are the matters  
3 that there have been some discussions between counsel.

4 This witness will give evidence about a time during which  
09:38:58 5 he was a staff member of the United Nations; he was a human  
6 rights monitor in Sierra Leone. The fact that he was a staff  
7 member of the United Nations has meant that it has been necessary  
8 for the Office of the Prosecutor to obtain permission from the  
9 United Nations for this witness to give evidence before this  
09:39:22 10 Court. That permission has been granted but it's been granted on  
11 a conditional basis. The condition being that he gives evidence  
12 in closed session. That is not meant to be impertinent to Your  
13 Honours of course, that being the condition that has been given  
14 to the Office of the Prosecutor. So the position of the  
09:39:42 15 Prosecution is that we now seek a closed session for this witness  
16 and if that closed session is not granted, then the Prosecution  
17 will simply not call this witness. I have had some discussions  
18 with my learned friends about this matter and counsel for the  
19 first and second accused do not oppose the application. I have  
09:40:06 20 had some email communication with Mr Knoops and he has indicated  
21 that he would prefer that Your Honours make a determination about  
22 the closed session.

23 The Prosecution puts the matter on the basis of Rule 79 as  
24 now amended, Rule 79(A)(iii), which is that the Trial Chamber has  
09:40:33 25 the power to exclude the press and the public for reasons of  
26 protecting the interests of justice. We would say that the  
27 interests of justice favour the hearing of this evidence which  
28 the Prosecution calls, the Prosecution being in a position that  
29 either the closed session is granted or the Prosecution cannot

1 call this evidence.

2 The second matter is a rather more complicated one. This  
3 witness has previously given evidence before Trial Chamber I in  
4 the CDF trial. An issue arose in that trial in a particular set  
09:41:17 5 of factual circumstances where under cross-examination, the  
6 witness was asked to name the source of information that he  
7 received as a human rights field monitor. He declined to do so.  
8 An issue arose whether the Trial Chamber had the power to compel  
9 him to name his source. There was some argument about that and a

09:41:48 10 confidential decision was issued by Trial Chamber I. Being a  
11 confidential decision, of course, one cannot go into the material  
12 aspects of it and nor have my learned friends seen a copy of it.  
13 I can say to Your Honours that it was a majority decision and  
14 that the majority was of the view that the Trial Chamber had the  
09:42:11 15 power to compel the witness to name the source. The dissenting  
16 opinion has not yet been delivered and once the dissenting  
17 opinion is delivered, the Office of the Prosecutor intends to  
18 seek leave to appeal that decision.

19 That has -- that then put the witness in the position of  
09:42:33 20 being asked a question. In the event the Trial Chamber I chose  
21 not to exercise the power that they said they had. Your Honours,  
22 the transcript of that evidence has been filed with the Court.  
23 So you are in a position to read the history of that. The  
24 witness has stated to the Office of the Prosecutor that he does  
09:42:58 25 not wish to put himself in a position where he will potentially  
26 expose himself to contempt of court because he will not reveal  
27 sources. He tells us under no circumstances will he name the  
28 name of sources. That being said, we have had some discussions  
29 with my learned friends about a way forward. Now the Prosecution

1 accepts that unless it can be agreed that he does not name his  
2 sources, the Prosecution simply will not call this evidence. He  
3 is willing to name the type of the source, that is, that it was  
4 an NGO or that it was an individual person or what have you, but  
09:44:02 5 not name the name of the organisation or the person. My learned  
6 friends and the Prosecution have, as I said, discussed this  
7 issue. They are quite rightly saying that until they conduct  
8 their cross-examination they may not know whether the naming of a  
9 source is important or not. So the Prosecution proposes a  
09:44:28 10 practical solution and in discussions with my learned friends it  
11 was agreed that this would be raised with Your Honours to see if  
12 we could find a way forward. Bearing in mind that this is an  
13 international witness who is in the jurisdiction this week. And  
14 that is that the Prosecution call this witness, that if my  
09:44:49 15 learned friends wish to ask a question that might mean that this  
16 witness names a source of his information, that he not be  
17 compelled to answer that question and at the conclusion of his  
18 evidence, if my learned friends are of the opinion that it is  
19 necessary and critical to their cross-examination that the source  
09:45:15 20 be identified, that we then have at that stage the legal argument  
21 as to whether Your Honours have the power to compel the answer,  
22 bearing in mind, of course, that the decision of Trial Chamber I  
23 is not binding on Your Honours.

24 If Your Honours find that you do not have that power, then  
09:45:38 25 my learned friends have lost nothing because the evidence is as  
26 the evidence would have been if we had the argument now or at the  
27 time the question was asked.

28 If Your Honours find that you do have the power to compel  
29 an answer and would exercise the power in those circumstances,

1 then the Prosecution would propose that the evidence of this  
2 witness be excluded from consideration by Your Honours and again  
3 by that proposal my learned friends have lost nothing, because if  
4 the argument was had now we simply would not call the witness.

09:46:18 5 That is the Prosecution's proposal. I know that my learned  
6 friends probably wish to say something about that. At this stage  
7 I do not know if I can assist Your Honours more.

8 PRESIDING JUDGE: Perhaps before I invite the counsel for  
9 the Defence to reply on both aspects of your submission, Ms  
09:46:40 10 Taylor, could you refer us to the relevant rules, et cetera,  
11 dealing with the closed session and the grounds.

12 MS TAYLOR: Yes, I will actually hand over to Ms Pack who  
13 will make the argument in respect of the closed session.

14 PRESIDING JUDGE: If you would, please, and then I will  
09:46:58 15 invite counsel to reply on all aspects together.

16 MS TAYLOR: Thank you, Your Honour.

17 PRESIDING JUDGE: My learned colleague wishes to clarify  
18 something, Ms Pack, just a moment.

19 JUDGE SEBUTINDE: Actually, this is for either Ms Pack or  
09:47:15 20 Ms Taylor. I am just curious to know the reluctance of this  
21 witness to disclose the identity of informants during closed  
22 session. What is that based upon, may the Court enquire?

23 MS TAYLOR: He would say that a privilege attaches to that  
24 information absolutely. It is not a question of who it is  
09:47:38 25 disseminated to, but it is a privilege almost analogous to a  
26 journalist's privilege with respect to protecting a source. Now,  
27 obviously, there is no international jurisprudence that we have  
28 been able to find that relates to that. It is one of the reasons  
29 why the Prosecution is interested in applying for leave to appeal

1 from Trial Chamber I's confidential decision. In short compass,  
2 Your Honour, the answer is that the Prosecution would say that it  
3 is an absolute privilege, it is not a question of dissemination  
4 to the public or the press.

09:48:20 5 PRESIDING JUDGE: Yes, Ms Pack.

6 MS PACK: Your Honours, perhaps if I may begin by having  
7 handed up to you the letter from the UN dated 23 May this year.  
8 My learned friends have a copy of it.

9 [Letter handed to Bench]

09:49:06 10 MS PACK: Perhaps I could also have one passed up for Your  
11 Honour's legal officer.

12 PRESIDING JUDGE: If you could give us a moment to read it,  
13 Ms Pack. Please have a seat.

14 Ms Pack, we have been able to read that document and if you  
09:53:05 15 would please proceed.

16 MS PACK: Your Honours, may I first apply for this  
17 application to be heard in closed session? I think that may be  
18 more appropriate given that I may go a little further into the  
19 nature of the witness's testimony and indeed into the contents of  
09:53:17 20 this letter.

21 PRESIDING JUDGE: Does counsel for the Defence have any  
22 reply to this preliminary application to have this submission  
23 made in closed session?

24 MS THOMPSON: Your Honour, we have no objections.

09:53:28 25 PRESIDING JUDGE: Thank you. We note the application and  
26 that the Defence do not object. We grant the application to have  
27 this submission and application made in closed session.  
28 Therefore, it will be closed and on this particular occasion we  
29 will also ask that the court monitors do not remain in the Court.

1 Mr Court Attendant, please implement that.

2 MR WALKER: Yes, Your Honour.

3 MS PACK: Your Honour, I was not sure whether we had gone  
4 into closed session or not. I was waiting.

09:59:41 5 PRESIDING JUDGE: I am trying to check.

6 MR WALKER: Your Honour, we are now in closed session.

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1 [Open session]

2 PRESIDING JUDGE: Mr Court Attendant, will there be  
3 somebody coming in, do you think or are they on their way?

4 MR WALKER: I don't think there is anybody outside at all,  
11:42:23 5 Your Honour.

6 PRESIDING JUDGE: I see. Even though there is no one in, I  
7 am obliged to make public the reasons which includes, of course,  
8 making it available in writing. I will merely, since there is no  
9 one here, say that the Court has considered both the Prosecution  
11:42:45 10 application, the Defence opposition, the provisions that the  
11 United Nations imposed in their letter and in the interests of  
12 justice, we are according the Prosecution this session to be a  
13 closed session and we consider that the rights of the Defence to  
14 cross-examine a witness have been fully protected under Article  
11:43:14 15 17 and will not be prejudiced by this ruling.

16 The session can then start. If someone can alert the  
17 monitors they may come in. I don't know who can do that, but if  
18 it can be done.

19 MR WALKER: I don't know if there were any monitors present  
11:43:32 20 before, but I will find out.

21 PRESIDING JUDGE: There appeared to be two people, but as  
22 long as they are aware of their right to be here if they want.

23 Ms Taylor, in light of the ruling, please proceed.

24 MR WALKER: Your Honour, we will need to go back into  
11:43:54 25 closed session.

26 PRESIDING JUDGE: We will, indeed. Please go back into  
27 closed session, Mr Court Attendant.

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1 [Open session]

2 PRESIDING JUDGE: Ms Pack, please proceed.

3 MS PACK: Your Honour, just to re-emphasise the point that

4 my learned friend Ms Taylor made, what it is that the witness

12:22:17 5 would not want to reveal to the Court, and that is the name of

6 sources whom he regards as confidential - that is, whose names he

7 regards as confidential. That is, the names of sources of

8 information that he obtained in the course of his employment as a

9 human rights officer and you know the details of that employment.

12:22:42 10 He obtained that information under conditions of confidentiality.

11 And it is his view that if he reveals the identity of certain of

12 the sources that this may lead to the safety or security of those

13 sources being compromised. But in any event, his view is that

14 having informed an informant that the information given or that

12:23:07 15 the identity of the informant would remain confidential that

16 that, as a matter of principle should remain the position.

17 It is often the case that the witness will be testifying

18 about information that has come to him from multiple sources, not

19 just the sources whom he now identifies as confidential sources.

12:23:31 20 There are situations where he will be able to identify the type

21 of sources my learned friend Ms Taylor has indicated, namely

22 international organisation, human rights organisation, that sort

23 of thing he will be able to provide, just not the name of the

24 confidential source.

12:23:54 25 I understand my learned friend for the first accused, the

26 position that is likely to be adopted is that it is of some

27 concern to the first accused, at least, that the name of the

28 source be revealed specifically. My learned friend hasn't

29 identified why, and perhaps will do, why it is so important in

1 cross-examination of this witness, or to the cases of any of the  
2 accused, that the name of a confidential source be revealed when  
3 the type of source is something that this witness will be  
4 prepared to identify in court in closed session.

12:24:32 5 The issue then before Your Honours is whether this witness  
6 will be compelled to testify as to the name of his confidential  
7 sources. The Prosecution, of course, says that he cannot and  
8 says so on two alternative bases. The first is under Rule 70 of  
9 the Rules of Procedure and Evidence and the second is this: That  
12:24:54 10 the Prosecution submits that as a matter of principle, the  
11 witness is privileged from revealing the identity of his  
12 confidential sources.

13 If I can deal with the Rule 70 issue first, I invite Your  
14 Honours to look at the provisions of Rule 70. This issue goes to  
12:25:17 15 the application of Rule 70 to this or any witnesses' testimony  
16 and to the proper construction of the provisions of that Rule.  
17 In my submission, the information about which this witness will  
18 testify falls within the meaning of Rule 70(B) and, therefore,  
19 that the witness's testimony is governed by the terms of the  
12:25:43 20 whole of Rule 70 and, in particular, Rule 70(D) of the Rules.

21 The first point is that this information, this witness and his  
22 testimony, were provided under Rule 70(B) of the Rules. I will  
23 just read out the beginning of Rule 70(B): "If the Prosecutor is  
24 in possession of information which has been provided to him on a  
12:26:15 25 confidential basis" -- I leave out the following phrase -- "that  
26 initial information and its origin shall not be disclosed to the  
27 Prosecutor without the consent of the person or entity providing  
28 the initial information and shall in any event not be given in  
29 evidence without prior disclosure to the accused."

1 Now, the position is, Your Honour, and Your Honours have  
2 seen the letter dated 23 May 2005 from the United Nations, the  
3 consent has been provided by the United Nations subject to  
4 conditions allowing this witness to testify. That letter deals  
12:26:50 5 with, simply, the question of allowing this witness to testify.  
6 It doesn't deal with the substance of that testimony, it deals  
7 with the question of whether he should be allowed to. That  
8 consent was required by the terms of Rule 70(B), because it was  
9 the UN's view -- and Your Honours have seen the third paragraph  
12:27:09 10 on page 2 of the letter -- it was the UN's view that all  
11 information that this witness will provide in the course of this  
12 testimony, or could provide, is deemed by the UN to be sensitive  
13 and confidential information, because it arises during the course  
14 of his employment with them. That is what brings this witness  
12:27:31 15 within the provisions of Rule 70(B) and, therefore, by extension,  
16 the whole of Rule 70 applies. The UN have provided their consent  
17 to the information the witness whose testimony is being  
18 provided -- disclosed by the Prosecution and provided.

19 The situation then is this witness is now being called to  
12:28:04 20 testify by the Prosecution. The situation is that Rule 70(C) and  
21 (D) then govern the situation where information -- i.e. a  
22 witness in this situation -- provided under Rule 70(B) is  
23 presented in court or called to testify in court. Rule 70(D)  
24 covers this particular situation; that is, where the information  
12:28:33 25 is provided in the form of oral testimony. I will read Rule  
26 70(D): "If the Prosecutor calls as a witness the person  
27 providing or a representative of the entity providing information  
28 under this Rule, the Trial Chamber may not compel the witness to  
29 answer any question the witness declines to answer on grounds of

1 confidentiality." That is the provision upon which I will be  
2 relying; that's the provision upon which the Prosecution relies  
3 in support of the proposition that this witness cannot be  
4 compelled to testify to the names of those sources whom he  
12:29:11 5 identifies to be confidential. This is the provision which  
6 governs the oral testimony of witnesses who have been provided to  
7 the Prosecution under the terms of Rule 70(B). It is absolutely  
8 clear in its terms. It says that once, effectively -- the  
9 interpretation of that Rule is that once information has been  
12:29:40 10 provided under Rule 70(B), once the Prosecution has elected to  
11 call a witness to provide evidence as to information provided  
12 under Rule 70(B), that evidence in court is protected by Rule  
13 70(D), and the witness is protected in giving that evidence under  
14 Rule 70(d).

12:30:03 15 I repeat what the UN said in their letter, providing a  
16 precondition to the Prosecution's decision to call the witness,  
17 is about the decision to call the witness, not about the contents  
18 of that witness's testimony. It effectively related to the  
19 consent that had to be obtained by the Prosecution under Rule  
12:30:25 20 70(B), but didn't presume to go into the 70(D) protection that is  
21 afforded to the witness who is provided under 70(B).

22 Now, this witness regards his confidential sources as  
23 confidential. He will decline to answer any question requiring  
24 him to name them. Under the terms of Rule 70(D), so long as he  
12:31:05 25 declines to answer the question that might be put to him on the  
26 grounds of confidentiality, he may not be compelled to answer  
27 that question. That's what Rule 70(D) says. The right of the  
28 accused to cross-examine is necessarily limited by the terms of  
29 Rule 70(D), and Your Honours can see that in the language of

1 Rules 70(E), which says, "The right of the accused to challenge  
2 the evidence presented by the Prosecution shall remain unaffected  
3 subject only to limitations contained in sub-Rules (C) and (D)."

12:31:50 4 Now, the interpretation that I'm putting on the provisions  
5 of Rule 70 is supported by a decision in the Appeals Chamber in  
6 the Milosevic case at the ICTY. It is a public version of a  
7 decision under Rule 70. I will just read out the decision name.  
8 Your Honours, I do have copies of the decision which I can pass  
9 up to you and also my learned friends and your legal officer. It  
12:32:19 10 is called "Public Version of the Confidential Decision on the  
11 Interpretation and Application of Rule 70", and it is dated  
12 23rd October 2002. Your Honour, if I may ask the learned Court  
13 Attendant to assist and I can pass copies of that decision to my  
14 learned friends and Your Honours.

12:32:40 15 PRESIDING JUDGE: That Rule in the ICTY, Ms Pack, is it in  
16 the same terms as the Rule in our Court, or will you be  
17 addressing on that aspect?

18 MS PACK: Yes, Your Honour. In fact, I didn't check  
19 whether it is absolutely word for word, but my understanding is  
12:32:57 20 that if it is not absolutely word for word then almost. I will  
21 check it now.

22 PRESIDING JUDGE: Mr Court Attendant, please pass them  
23 around.

24 MS PACK: From my own recollection of the provisions of  
12:33:53 25 Rule 70 in the ICTY, they look to be identical, but I have asked  
26 the assistance of one of the Prosecution team to ensure we have a  
27 copy of that provision before us. If I can ask Your Honours to  
28 turn to paragraph 19 of the decision of the Appeals Chamber in  
29 Milosevic. That decision went to the application of Rule 70,

1 whether it could be applied to the testimony of a witness -- to a  
2 witness called by the Prosecution, it having been argued, amongst  
3 other things that the language in Rule 70(B) in which it is  
4 stated, "If the Prosecutor is in possession of information which  
12:34:47 5 has been provided to him on a confidential basis and which has  
6 been used solely for the purpose of generating new evidence",  
7 that that additional phrase barred a witness giving testimony  
8 from coming under the terms of Rule 70. Because it was argued  
9 that information provided under Rule 70 could only be deemed to  
10 be information that was used solely for the purpose by the  
11 Prosecution of generating new evidence. The Appeals Chamber in  
12 Milosevic said that wasn't the position, that a witness called by  
13 the Prosecution fell within the language of Rule 70 and, in  
14 particular, Rule 70(B) so that when consent had been provided by  
12:35:10 15 allowing that witness to give, that the rest of the language of  
16 Rule 70 then applied to the witness.

17 If I can read out paragraph 19: "The purpose of Rule 70(B)  
18 to (G)" -- the same subrules of the Rules that apply in this  
19 Court, Your Honours -- "is to encourage States, organisations and  
12:36:00 20 individuals to share sensitive information with the tribunal.  
21 The Rule creates an incentive for such cooperation by permitting  
22 the sharing of information on a confidential basis and by  
23 guaranteeing information providers that the confidentiality of  
24 the information that they offer and of the information sources  
12:36:18 25 will be protected."

26 Paragraph 20 -- I won't read the whole paragraph, but it  
27 deals with the objection raised in that case, whether the witness  
28 can fall under the terms of Rule 70. Looking at the bottom seven  
29 lines, about the end of the -- the bottom, from the seventh line:

1 "It becomes a matter of necessary textual interpretation,  
2 therefore, that the information referred to in paragraph (C) and  
3 (D), that is, of Rule 70, must be that which was provided to the  
4 Prosecutor on a confidential basis, the first option, and not  
12:37:04 5 that which was so provided and which has been used solely for the  
6 purpose of generating new evidence, the second option."

7 If one looks over at the following paragraph -- paragraph  
8 22 -- in the third subparagraph under paragraph 22 beginning with  
9 "Thus, the Trial Chamber", dealing with what the Trial Chamber  
12:37:36 10 ruled in that case: "Thus, the Trial Chamber suggested that  
11 three characteristics of the testimony at issue, either  
12 individually or in combination, prevented it being information  
13 provided under Rule 70 and thus subject to the Rules protections.  
14 It was testimony that is provision of a witness rather than  
12:37:51 15 information. The witness was one the Prosecution could have  
16 found in any case and the testimony corroborated other evidence  
17 the Prosecution already had. The Appeals Chamber considers that  
18 none of these characteristics is relevant to determining whether  
19 information qualifies under Rule 70."

12:38:10 20 And paragraph 23: "The fact that information is provided  
21 in the form of testimony does not exclude it from being  
22 information or initial information provided under the Rule.  
23 Indeed, paragraph (C) of the rule expressly refers to the  
24 testimony, document or other material so provided. That, again,  
12:38:32 25 reflects precisely the language that is used in the Rules of the  
26 Special Court. The Trial Chamber appears to have adopted an  
27 overly narrow interpretation of the term "information". When a  
28 person possessing important knowledge is made available to the  
29 Prosecutor on a confidential basis, not only the informant's

1 identity and the general subject of his knowledge constitute the  
2 information shielded by Rule 70, but also the substance of the  
3 information shared by the person often as, as in this case,  
4 presented in summary form in a witness statement."

12:39:06 5           Going down to paragraph 25: "All that Rule 70 requires is  
6 that information was provided to the Prosecutor on a confidential  
7 basis. As mentioned in paragraph 20 supra for purposes of  
8 paragraph (B), the information must also be used solely for the  
9 purpose of generating new evidence." Then this is the important  
12:39:29 10 bit for these purposes: "But for paragraph (C) and (D), that  
11 requirement necessarily drops out. For once the information is  
12 introduced as evidence at trial, it, by definition, is no longer  
13 used solely for the purpose of generating new evidence."

14           So the short point from all of that is, of course, that it  
12:39:49 15 is not a precondition of this witness's testimony being included  
16 within the ambit of Rule 70 that the information or that his  
17 testimony be used by the Prosecutor solely for generating new  
18 evidence. Rather, the precondition is that it was information  
19 provided confidentially, and so it was, and Your Honours have  
12:40:08 20 seen the letter from the UN which supports that view.

21           It is my submission, then, that there are no reasons for  
22 grounds for challenging the Prosecution's submission that this  
23 witness's testimony was provided under Rule 70(B) and thus that  
24 Rule 70(D) applies to it. I would ask Your Honours to note from  
12:40:48 25 the Milosevic decision, paragraph 29 of that decision, which says  
26 this: "The appeal Chamber agrees with the Government that  
27 Chambers of the tribunal" - it's the government from whom the  
28 witness had come in that case - "the Chambers of the Tribunal do  
29 indeed have the authority to assess whether information has been

1 provided in accordance with Rule 70(B) and so benefits from the  
2 protections afforded by that Rule. However, such enquiry must be  
3 of a very limited nature: it only extends to an examination of  
4 whether the information was in fact provided on a confidential  
12:41:24 5 basis, bearing in mind that the providing of information may not  
6 be confined to a single act..." and so on. "This is an objective  
7 test. The Chamber may be satisfied of this simply by  
8 consideration of the information itself, or by the mere assertion  
9 of the Prosecution, or they may require confirmation from the  
12:41:45 10 information provider..." and so on.

11 Your Honours, just reading that paragraph, in my  
12 submission, makes clear the limited scope of inquiry by this  
13 Chamber is to question whether this information was provided  
14 under Rule 70. I would ask Your Honours to accept the  
12:42:04 15 Prosecution's assertion that that is the position and, indeed,  
16 that assertion and its support provided by the letter from the UN  
17 which Your Honours have seen.

18 Your Honour, that is the position under Rule 70 and so far  
19 as whether this decision in Milosevic and the Rule 70 that is  
12:42:28 20 addressed in that case - whether it mirrors the Rule 70 that is  
21 part of the Rules of this Court -- yes, it does, in that (B), (D)  
22 and (E) are absolute mirrors of the terms of Rule 70 at the ICTY.  
23 There is a difference in the language of Rule 70(C), as I  
24 understand it, the latter two sentences. It's the latter half of  
12:43:06 25 the penultimate sentence and the last sentence of Rule 70(C) of  
26 these Rules that are not contained in the Rules of the ICTY. But  
27 I repeat that 70(B), (D) and (E) are framed in exactly the same  
28 terms. So the Milosevic Appeals Chambers decision and its  
29 interpretation of those provisions of Rule 70, in my submission,

1 do assist Your Honour.

2 Now, Your Honour, the second issue, of course, that I  
3 identified is the question of privilege. That is a separate  
4 issue from the application of Rule 70. If Your Honours find that  
12:43:41 5 this witness wasn't provided under Rule 70, that, therefore, Rule  
6 70(D) doesn't apply to allow him to not be compelled to answer  
7 questions which he considers will involve the provision of  
8 confidential information, then, what the Prosecution says is  
9 this, that he is privileged from revealing the identity of his  
12:44:04 10 confidential sources. The reason why is because of the  
11 relationship that he had with the information provider.

12 I've identified and Your Honours are aware of the position  
13 that this witness held in the relevant period and the post as a  
14 human rights officer and what he did in that position. There are  
12:44:29 15 basic principles of human rights monitoring. Those basic  
16 principles are, in fact, set out in a training manual of the  
17 Office of the High Commissioner for Human Rights, which manual  
18 was endorsed by the former High Commissioner Mary Robinson. I  
19 have got a copy of relevant sections of that manual and that has  
12:44:54 20 been, as I understand it, filed with the Court, but certainly  
21 served on my learned friends for the Defence. I have further  
22 copies. If I may just pass that up to Your Honours, it may  
23 assist.

24 PRESIDING JUDGE: Thank you.

12:45:49 25 MS PACK: Your Honours, I have just taken a couple of  
26 pages. I haven't got the whole manual here, but the front page  
27 and the first couple of pages, the endorsement on the third page  
28 that Your Honours have by the former High Commissioner. The  
29 contents page which sets out what the manual deals with in terms

1 of the basic principles of monitoring, which is on the fourth  
2 page Your Honours have before you. I would ask Your Honours then  
3 to turn to the last page of the stapled handout, which is the  
4 page which deals with the principles of, number 1, credibility;  
12:46:34 5 and, secondly, (j), confidentiality. If I can just read out what  
6 this manual says about confidentiality. At (j), paragraph 11 of  
7 the manual, "Respect for the confidentiality of information is  
8 essential because any breach of this principle could have very  
9 serious consequences: (a) for the person interviewed and for the  
12:47:02 10 victim; (b) for the human rights officer's credibility and  
11 safety; (c) for the level of confidence enjoyed by the operation  
12 in the minds of the local population; and thus (d) for the  
13 effectiveness of the operation. The HRO" - which I shall call  
14 the human rights officer, "should assure the witness that the  
12:47:23 15 information she/he is communicating will be treated as strictly  
16 confidential. The HRO should ask persons they interview whether  
17 they would consent to the use of information they provide for  
18 human rights reporting or other purposes" and so it goes on.

19 Paragraph 12, "Special measures should also be taken to  
12:47:45 20 safeguard the confidentiality of recorded information, including  
21 identity of victims, witnesses, et cetera. The use of coded  
22 language and passwords, as well as keeping documents which  
23 identify persons in separate records and facts about those  
24 persons, may be useful means to protect the confidentiality of  
12:48:03 25 information collected."

26 And if I ask Your Honours to look at the (i), credibility,  
27 paragraph 10 of the manual. "The HRO's credibility is crucial to  
28 successful monitoring. HROs should be sure not to make any  
29 promises they are unlikely or unable to keep and to follow

1 through on any promise that they make. Individuals must trust  
2 the HROs or they will not be as willing to cooperate and produce  
3 reliable information. When interviewing victims and witnesses of  
4 violations, the HRO should introduce him/herself, briefly explain  
12:48:46 5 the mandate, describe what can and cannot be done by the HRO,  
6 emphasize the confidentiality of the information received, and  
7 stress the importance of obtaining as many details as possible to  
8 establish the facts." And so on.

9 Now, your Honour, the assertion by the witness of this  
12:49:10 10 privilege is not about the UN's relationship with the information  
11 obtained by him in the course of his employment, but about the  
12 witness's relationship with it. In so far as this witness is  
13 concerned, certain information was obtained by him under  
14 conditions of confidentiality and Your Honours can see, as a  
12:49:35 15 HRO - a human rights officer - why it was that that information  
16 was obtained under those sorts of -- that sort of condition that  
17 is reflected in the language of paragraphs 10, 11 and 12 of the  
18 manual that I've addressed, Your Honour.

19 Your Honours, the Rules of this Court make no direct  
12:50:01 20 provision for this issue and offer no guidance on it. Your  
21 Honours have Rule 90(F), which provides for the exercise of  
22 control over the mode and order of interrogating witnesses and  
23 presenting evidence, so as to make interrogation and presentation  
24 effective for the ascertainment of truth and avoid the wasting of  
12:50:23 25 time. That is the only provision relating to the giving of  
26 testimony by witnesses. Under Rule 89(C), of course, Your  
27 Honours may admit any relevant evidence.

28 There is no case law internationally which directly  
29 addresses this issue, save, of course, for a decision to which my

1 learned friend referred earlier, a confidential decision, the  
2 details of which I'm obviously unable to go into, but my learned  
3 friend has identified its existence and the outcome of it.

4 I should add, in any event, that in this case - and I think  
12:51:05 5 my learned friend has already identified this - the situation may  
6 be different, we don't know what it is that the Defence -- what  
7 sort of information the Defence will be seeking to know the name  
8 of sources, providers of that information. In any event, the  
9 principle still stands, this isn't a matter of principle whether  
12:51:25 10 or not a human rights officer should be obliged to name those  
11 sources identified by him or her as confidential.

12 In my submission, the issue requires the balancing of  
13 competing public interests and those public interests are these:  
14 On the one hand, the public interest, in protecting the  
12:51:46 15 confidentiality of sources of information provided to human  
16 rights officers, whose role is to monitor and report human rights  
17 abuses, and the competing public interest, what may be regarded  
18 as a competing public interest, which is in having all relevant  
19 evidence before the Court. There is an issue, Your Honours,  
12:52:12 20 which precedes that determination which is whether Your Honours  
21 take the view or find that there is a public interest in  
22 protecting the confidentiality of sources of information provided  
23 to human rights officers in the course of their work and, of  
24 course, the Prosecution says there is, of course there is, a  
12:52:31 25 public interest in so protecting the work of a human rights  
26 officer. The reason why there is a public interest is because of  
27 the immense importance of the work of human rights officers in  
28 monitoring and reporting human rights abuses in generally  
29 insecure unstable environments so that the public at large, the

1 world at large, may know what is going on in these environments.  
2 There is also an important public interest in protecting human  
3 rights officers in their information-gathering function.

4 What the Prosecution says is that the preservation of the  
12:53:15 5 confidentiality of confidential sources is integral to the  
6 effectiveness of human rights officers in their  
7 information-gathering function. Absolutely integral to it. The  
8 reason why it is integral to it, is because of the importance of  
9 a human rights officer being able to credibly say to a source,  
12:53:49 10 "The information which you are providing me is confidential and I  
11 will not be revealing your name to everyone so that you are able  
12 to provide absolute full and frank disclosure of all information  
13 known to you." So that human rights officers won't feel  
14 constrained in their ability to gather information from  
12:54:08 15 informants by a concern that that information, or the names of  
16 the providers of that information, might have to be revealed at  
17 some point in the future.

18 There is an analogy which can be drawn here, of course,  
19 with national jurisdictions, which is the news-gathering function  
12:54:28 20 of journalists in national jurisdictions and how that is often  
21 protected by a testimonial privilege afforded in many of those  
22 jurisdictions when it comes to naming confidential sources.  
23 There is a further analogy that might be drawn nationally with  
24 the naming of police informants. Again, those cases in national  
12:54:48 25 jurisdictions have involved balancing public interest. What I  
26 will ask Your Honours to do is look at an international decision  
27 at the ICTY in the Brdjanin and Talic case, which dealt with the  
28 balancing interests in the case of a journalist who was under  
29 threat of a subpoena from the Prosecution to testify in that

1 case.

2 In my submission, Your Honours, the scope of the privilege  
3 that the human rights officer has rests upon Your Honours'  
4 assessment of the need to protect the information-gathering by  
12:55:30 5 him. That was the position adopted in the Brdjanin and Talic  
6 case. If I can pass that decision up to Your Honours. Its title  
7 reads "Decision on Interlocutory Appeal". It is dated 11  
8 September 2002, and it is a decision of the Appeals Chamber at  
9 the ICTY.

12:56:21 10 If I can just ask Your Honours to firstly look at paragraph  
11 34 of that decision. Again, Your Honours, as I've said, it  
12 related to an appeal by a war correspondent, Jonathan Randall,  
13 against a subpoena that had been issued by the Trial Chamber  
14 compelling him to testify about matters that he, in fact,  
12:56:51 15 publicly reported in a news article. If I can just read from  
16 paragraph 34. These are the questions that the Appeals Chamber  
17 thought it fit to consider in that appeal, and, in my submission,  
18 what the Appeals Chamber is saying here echoes what I say the  
19 Prosecution says is a test which Your Honours should apply in  
12:57:14 20 considering the Prosecution submission on privilege; namely, the  
21 balance of public interest. The Appeals Chamber says: "In the  
22 Appeals Chamber's view, the basic legal issue presented raises  
23 three subsidiary questions. Is there a public interest in the  
24 case of war correspondents? If yes, would compelling war  
12:57:37 25 correspondents to testify before a tribunal adversely affect  
26 their ability to carry out their work? If yes, what test is  
27 appropriate to balance the public interest in accommodating the  
28 work of war correspondents with the public interest in having all  
29 relevant evidence available to the court and, where it is

1 implicated, the right of the defendant to challenge the evidence  
2 against him?" The Appeals Chamber then goes on to consider each  
3 of those questions in turn.

4 Now, Your Honours, I have dealt with the issue whether  
12:58:03 5 there is a public interest in the work of human rights officers.  
6 Just looking then at the scope of the privilege which the  
7 Prosecution says attaches to the -- in this case, if I can ask  
8 Your Honours to look at paragraph 41 of this decision: "The  
9 Appeals Chamber recognises, as did the Trial Chamber, that many  
12:58:29 10 national jurisdictions afford a testimonial privilege for  
11 journalists only when it comes to protecting confidential  
12 sources. It notes, however, that in some countries some  
13 privilege from testifying is also given in cases of  
14 non-confidential information. In either case, the scope of the  
12:58:43 15 privilege rests on the legislature's or the courts' assessment of  
16 the need to protect the news-gathering function. By analogy, the  
17 Appeals Chamber considers that the amount of protection that  
18 should be given to war correspondents from testifying being the  
19 International Tribunal is directly proportional to the harm that  
12:59:05 20 it may cause to the news-gathering function."

21 I would apply that test to the question before Your Honours  
22 in ascertaining the scope of the privilege, albeit in different  
23 circumstances, but the scope of the privilege that attaches, in  
24 this case to the identifying of confidential sources by this  
12:59:26 25 witness. This witness, in my submission, should be protected  
26 from having to reveal the identity of confidential sources to the  
27 extent that such protection is necessary to protect the function  
28 of human rights officers, generally, in gathering information of  
29 alleged human rights abuses. It's a question of principle in the

1 first instance. Will compelling this human rights officer to  
2 name a confidential source jeopardise the effectiveness of future  
3 human rights missions? Is it the case, Your Honours, and in my  
4 submission it is, that a human rights officer in the future may  
13:00:05 5 feel constrained in the information that he gathers from sources  
6 and where the potential informants in the future will be  
7 constrained in the information that they feel they are able to  
8 provide. Because, of course, the outcome of any decision which  
9 compels this witness to provide the name of a confidential source  
13:00:24 10 may be, and I say will be, that a human rights officer in the  
11 future will be obliged to inform a source that any information  
12 given at the information-gathering stage may lead to the identity  
13 of the source being revealed in a court in the future, possibly  
14 in a court trying a perpetrator named by that source. That  
13:00:58 15 necessarily will constrain what information informants would give  
16 in the future and necessarily constrain human rights officers in  
17 their work.

18 There is another point on the question of principle, which  
19 is this: If this witness is compelled to name his confidential  
13:01:14 20 sources, he has indicated to the Prosecution that he will refuse  
21 to do so. In those circumstances, of course, the Prosecution  
22 wouldn't call the witness. But the impact of this, Your Honours,  
23 would be considerable in that it is likely to have an enormous  
24 impact on the cooperation in the future between human rights  
13:01:38 25 officers involved in monitoring and reporting matters on the  
26 ground in conflicts in the future and their cooperation with  
27 future tribunals or evidence-gathering mechanisms set up in the  
28 future. There would be an enormous impact on the future  
29 cooperation between these sorts of institutions. That, in my

1 submission, is again a matter which Your Honours ought to weigh  
2 in the balance when considering the public interest of whether or  
3 not to allow this witness not to be compelled to name his  
4 confidential source.

13:02:11 5 Another matter, Your Honours, which again I would urge Your  
6 Honours to weigh in the balance, is this: This witness is a  
7 human rights officer and it's essential to his proper performance  
8 of his functions if he takes up that sort of work again in the  
9 future that he is credible in carrying out his work. In my  
13:02:37 10 submission, compelling him to name sources to whom he has given  
11 guarantees of confidentiality in court would totally undermine  
12 his credibility as a human rights officer were he to take up that  
13 function again in the future because it would undermine the  
14 guarantee he had given to informants. And who is to say that  
13:03:00 15 future informants wouldn't say that he would do that again in the  
16 future?

17 Now, I'm moving away to the question of principle. Your  
18 Honours, I would ask you to consider again another matter to  
19 weigh in the balance of interest. The reality, or what may be  
13:03:18 20 the reality of the situation here, is, yes, this Chamber will be  
21 hearing this evidence in closed session. But, Your Honours, I  
22 would say, even so, there is a real risk of there leaking out to  
23 the public, or to other human rights officers in the pursuit of  
24 their work that, number 1, the fact of this individual revealing  
13:03:46 25 the identity of a source, which, again, could lead in my  
26 submission, or will in all likelihood lead to damaging the  
27 effectiveness of future human rights operations and the  
28 credibility of this witness. So, number 1, the fact of his  
29 revealing his source may necessarily leak out. The other matter,

1 Your Honours, is that there is a real risk of the name of an  
2 informant leaking out into the public arena. I raise those  
3 matters peripherally, because in my submission this is a matter  
4 of principle more than a matter of the particular factual  
13:04:31 5 situation in this case. I understand in addition that the  
6 OHCHR -- the Officer of the High Commissioner -- shares this  
7 witness's concerns on the matter of principle.

8 The competing interest, Your Honours is --

9 PRESIDING JUDGE: How do we know that, Ms Pack?

13:04:55 10 MS PACK: It is something the Prosecution only understands  
11 from the witness, and I can take it no further than that. I  
12 don't have anything in writing. It may be in another arena that  
13 submissions might be made by the Officer of the High Commissioner  
14 on this issue, but I have nothing further to add on that and I  
13:05:14 15 can't either confirm or deny what the Prosecution has been  
16 informed of by the witness.

17 The competing interest, of course, is the public interest  
18 that this Chamber has before it all relevant evidence. Of  
19 course, the interests of the accused, or the rights of the  
13:05:33 20 accused, to cross-examine fully and effectively. It is of course  
21 the position that the Chamber ought to have before it all  
22 relevant evidence in being able to make a proper assessment of  
23 the culpability of these accused. It may be that the Chamber  
24 will consider that it is unable to determine to a limited extent,  
13:05:57 25 or limited in its ability to determine the quality of some  
26 limited aspects of this witness's evidence, because Your Honours  
27 don't know the name of the source. In my submission, that is  
28 unlikely, because this witness is going to be able to identify  
29 the type of source. But let's say there is a possibility that

1 Your Honours may take that view. It is of course then the  
2 position that Your Honours would be in a position to discard any  
3 evidence that you consider to have a lesser quality because you  
4 don't know the name of the source of that information. That's  
13:06:37 5 the answer to that competing public interest. That concern, in  
6 my submission, is remedied by Your Honour being in a position to  
7 make appropriate findings and assess the quality of evidence  
8 during the course of the witness's testimony.

9 The other argument that may be raised is that the accused  
13:06:58 10 may be limited in their ability to cross-examine by an order  
11 saying that this witness is not going to be compelled to answer a  
12 question as to the name of a witness. Again, I would say that --  
13 I raise the query as to how it is that a name is going to have  
14 any impact upon the rights of the accused when the Chamber has  
13:07:17 15 before it the type of informant. Again, that is a competing  
16 public interest, potentially. I would say that these accused  
17 represented by counsel will be able to fully conduct their  
18 cross-examination, will be able to ask this witness about the  
19 names of informants, just won't receive an answer. But there  
13:07:42 20 won't be any constraint in their ability to cross-examine this  
21 witness imposed by an order in the terms sought by the  
22 Prosecution. In my submission, the balance of interest then  
23 clearly favours allowing this witness to refuse to answer  
24 questions going to the names of confidential informants. I would  
13:07:58 25 ask Your Honours on the two alternative bases upon which this is  
26 put by the Prosecution to go on to order in terms that he be  
27 allowed to refuse to answer questions. Those are my submissions.

28 PRESIDING JUDGE: Thank you, Ms Pack.

29 JUDGE LUSSICK: Just one thing I'd better make clear before

1 we adjourn. The Prosecution's stance is that you're not asking  
2 that the witness be allowed to refuse to answer questions  
3 relating to the source generally, but only questions going to the  
4 name of the source?

13:09:05 5 MS PACK: Yes. Where the source is regarded by him as  
6 confidential, he be allowed to refuse to name that source.

7 JUDGE LUSSICK: I see.

8 MS PACK: He can broadly identify the type. I don't know  
9 how broad the identification of the type will be, but that's what  
13:09:22 10 I would ask; it be limited to the name of the organisation.

11 JUDGE LUSSICK: I see.

12 PRESIDING JUDGE: We will adjourn now for the lunchtime  
13 break. We have gone over our normal time. I would have thought  
14 it was more convenient to let you finish your submission,

13:10:07 15 Ms Pack, rather than to butt in part way through it. I will then  
16 invite counsel for the Defence to reply and if there are any  
17 issues, we will address them in the course of the submissions.

18 Mr Daniels, you are wanting to get on your feet there.

19 MR DANIELS: Your Honours, we were wondering if we could be  
13:10:34 20 given a bit more time in order to respond since we have been  
21 given some of the cases just while we were hearing the  
22 Prosecution's submissions -- in order that we can prepare  
23 properly and adequately.

24 PRESIDING JUDGE: How big is a bit, or how small is a bit?

13:10:48 25 MR DANIELS: The consensus, Your Honour, is that we respond  
26 tomorrow morning.

27 PRESIDING JUDGE: Just allow me to consult with my  
28 colleagues, please.

29 [Trial Chamber conferred]

1           PRESIDING JUDGE: Yes, we accept you will require a bit of  
2 time and we will allow it be tomorrow morning to reply. I would  
3 also like Defence counsel, if they are relying on authorities  
4 other than those referred to by counsel for the Prosecution, they  
13:12:02 5 have those prepared and extend the courtesy to the Prosecution in  
6 letting them know what they are in advance.

7           MR DANIELS: We are most grateful.

8           PRESIDING JUDGE: In the light of that, Mr Court Attendant,  
9 the Court will adjourn to tomorrow morning for continued  
13:12:16 10 argument.

11                       [Whereupon the hearing adjourned at 1.08 p.m.  
12 to be reconvened on Wednesday, 14th day of  
13 September 2005, at 9.15 a.m.]

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