

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

WEDNESDAY, 14 SEPTEMBER 2005
9.25 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 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 Kanuu:	Mr Amadou Koroma Ms Karlijn van der Voort (legal assistant)

1 Wednesday, 14 September 2005
2 [AFRC140905A - AD]
3 [Open session]
4 [Accused Brima, Kamara and Kanu present]
09:28:42 5 [Upon commencing at 9.25 a.m.]
6 PRESIDING JUDGE: Good morning. We are convening now to
7 hear the reply by counsel for the Defence on the question of
8 compellability. Ms Thompson, are you speaking first?
9 MS THOMPSON: Yes, Your Honour.
09:29:29 10 Your Honour, if I may start with my learned friend
11 yesterday relied on Rule 70 of the Rules of Procedure of the
12 Special Court. If I may start by saying that it is the Defence's
13 submission that Rule 70 does not apply to the current situation.
14 In the first place, the Defence contends that the sources
09:30:01 15 of the witness's information do not fall under Rule 70(B). That
16 Rule, Your Honour, speaks about -- or that Rule talks about
17 information itself. The Prosecution has disclosed -- it has
18 discharged it's duty under Rule 66 by disclosing all the
19 information it has from this witness to the Defence. Further
09:30:36 20 disclosure of information is not the issue here. The issue here
21 is the source of the information contained in the witness's
22 statement.
23 Under Rule 70 -- and I am talking now about Rule 70 in the
24 broad sense, because in my respectful submission you have to look
09:31:02 25 at the rules in Rule 70 in its entirety, A to F. Under Rule 70
26 the witness is allowed to withhold certain information, and in my
27 submission this in itself would not be detrimental to the
28 Defence's case, indeed because the witness is a Prosecution
29 witness. The Prosecution brings its case, the Prosecution

1 adduces the evidence it wants in support of its case; and if it
2 decides the Prosecution needs to withhold such information, in my
3 respectful submission that in itself does not make the Defence
4 any worse off.

09:31:38 5 But as regards the sources of information, this is
6 essential because it goes to the credibility of the witness. And
7 I say so in particular for this witness, because it is my
8 submission, and I say so unequivocally, that there are certain
9 parts of that statement which frankly did not happen. There are
09:32:05 10 certain assertions in this statement which are not true. And I
11 say so bearing in mind counsel's duty not to give evidence in a
12 case. But I know that there are certain issues in this which I
13 would take contention with.

14 Some of those stories were doing the rounds in the rumour
09:32:31 15 mill at the time Jan '99 -- that particular period, '98/'99, and
16 were later found to be incorrect. It is, therefore, imperative
17 that the source of his information is known, so that he can be
18 examined on it. I say so because one has to bear in mind that
19 the witness, on page three of his statement -- I am using the
09:32:56 20 pagination at the bottom of his statement, Your Honour. It just
21 says "page 3". The top is 00015172, paragraph 10. I will just
22 flag it. I am not going to read it, but I flag it so that Your
23 Honours know that in paragraph 10, when he is talking under the
24 rubric "Note on the information regarding methodology employed by
09:33:27 25 the UNOMSIL/UNAMSIL human rights team", he says that the findings
26 were based on primary and --

27 MS PACK: Your Honours, I apologise; we are in open
28 session.

29 MS THOMPSON: Your Honours, I flag it now. I do beg your

1 pardon. It merely says that his information was based on
2 secondary and primary information. I won't go into the
3 statement. But he also goes on -- and this is particularly
4 important. He also goes on to say that the secondary information
09:34:07 5 was subject to a process of verification and that corroborative
6 sources were sought. And, even more important, that close
7 attention was paid to the reliability of the information source.

8 Given what I have said about some of the information here
9 being inaccurate, then, in my submission, the Defence will have
09:34:32 10 to cross-examination him on the reliability of his sources, how
11 he came about those sources and who these sources were.

12 JUDGE SEBUTINDE: Sorry, could you repeat the number of the
13 paragraph?

14 MS THOMPSON: Paragraph 10. Simply being told, Your
09:34:58 15 Honours, that the information was obtained from an NGO, when they
16 were and there still is scores of NGOs operating in this country,
17 or that they were obtained from an individual working within an
18 NGO - there are hundred of them around - does not fulfil, in my
19 respectful submission, the duty of this witness to be full and
09:35:29 20 frank with this Court. And if he is allowed to withhold the
21 source of his information, then the accused would effectively be
22 barred from their right to examine the evidence against him as
23 laid down this Article 17(e) of the Statute.

24 Furthermore, Your Honour, in the conduct of a case,
09:36:05 25 especially -- I mean, for both sides, Prosecution and Defence, no
26 witness gives evidence in isolation. When a witness gives
27 evidence, you look at the evidence in the round, in the context
28 of the evidence that has gone before, and in the context of the
29 evidence that is to come. It may be that the evidence that this

1 witness gives will be used, may be used to cross-examine other
2 witnesses in future or to be valuated in the light of the other
3 evidence which has gone before. He is, after all, going to give
4 evidence of events which happened in the period stated in the
09:36:49 5 indictment which these defendants face. Therefore, to grant the
6 Prosecution's request will unnecessarily, in my submission,
7 interfere with the accused's right to cross-examine this witness.

8 My learned friend also mentioned the Milosevic decision
9 yesterday. That decision, Your Honour, with respect, does not
09:37:20 10 refer to the sources of information but to the actual information
11 provided to the Prosecution. With regard to the definition of
12 information in Rule 70, in paragraph 23 of the Milosevic
13 decision, it is stated that not only the informant's identity and
14 the general subject of his knowledge constitute information
09:38:04 15 shielded by Rule 70 but also the substance of the information
16 shared by the person. The substance, as I said before, of the
17 witness statement here is not at stake. It is the actual source
18 which we are seeking to know about. And in my submission, is
19 therefore not protected by Rule 70. If you agree with me, Your
09:38:39 20 Honours, then Rule 70 does not -- is not applicable here.

21 Secondly, if we look at Rule 70(B) of our Rules, it says,
22 Your Honour, that "If the Prosecutor is in possession of
23 information which has been provided to him on a confidential
24 basis," and I will stop there for now. The wording there assumes
09:39:21 25 that my learned friends are themselves in possession of the
26 initial information and its origin. And as far as I am aware,
27 this is what I know from them, is that they do not have that
28 information themselves. The witness has not divulged it to
29 anybody, so they do not have it. They are not in possession of

1 it. Therefore, Rule 70(B) assumes that the Prosecution are in
2 possession of the information and here they are not.

3 Secondly, still on Rule 70(B) --

4 PRESIDING JUDGE: Ms Thompson, why would that make a
09:40:11 5 difference to this situation if they do not have it?

6 MS THOMPSON: Your Honour, the Rules speak for themselves.
7 The Rule says the Prosecution is in possession of the information
8 and they do not have it. Especially because now were are talking
9 about not the information itself. What they have, they have
09:40:30 10 disclosed to us and we are not complaining about that. It is the
11 source of the information which they do not have, it is not in
12 their possession, and which this witness has used to compile his
13 statement is what we are complaining about. That is the
14 difference, Your Honour.

09:40:54 15 Also if we look at Rule 70(A), the inference from Rule
16 70(A) is that "reports, memoranda, or other internal documents
17 prepared by a party, its assistants or representatives in
18 connection with the investigation or preparation of the case are
19 not subject to disclosure or notification under the
09:41:17 20 aforementioned provisions." That is not what we are complaining
21 about.

22 If you go back to Rule 70(B), it says: "which has been
23 used for the purpose of generating new evidence." That is not
24 the issue here. In my respectful submission, this interpretation
09:41:43 25 or the interpretation which we give to this Rule, our
26 understanding of it is supported by the ICTY decision in the
27 Milosevic case.

28 Paragraph 25 of that case says that all that Rule 70
29 requires is that the information was provided to the Prosecution

1 on a confidential basis. It is for those reasons, Your Honour,
2 that we say that Rule 70 does not apply.

3 I now turn Your Honour to the UN letter. If Your Honours
4 do not agree with us on the issue of Rule 70, then we say that
09:42:38 5 the Prosecution cannot rely on the letter from the United
6 Nations, which Your Honours have, the letter dated the 23rd of
7 May. That letter gave certain conditions and, in my respectful
8 submission, those conditions do not make Rule 70 applicable. It
9 does not provide a basis for the Prosecution's application under
09:43:06 10 Rule 70. The letter is read carefully. What the United Nations
11 have said is that the witness's immunity from legal process is
12 waived so that he can testify before this Court. If you look at
13 page 2, the first paragraph of that letter, it says that waiver
14 was done in the interests of the United Nations and could be done
09:43:40 15 without prejudice to those interests.

16 In the second paragraph on that page, it is specifically
17 requested that the -- because that request -- sorry, that waiver
18 was made specifically because of the sensitive and confidential
19 nature of the information and, indeed, perhaps that is the reason
09:44:01 20 for the closed session.

21 PRESIDING JUDGE: Ms Thompson, is the Prosecution relying
22 on that letter for this particular application? Were they not
23 relying on that for the closed session?

24 MS THOMPSON: Your Honour, my understanding is it was used
09:44:18 25 to extend. I did not make copious notes of what my learned
26 friend said yesterday. I'm pretty sure she said something about
27 the -- the waiver extending to the confidentiality. It was
28 certainly used in her submission on confidentiality. I must say
29 I did not make notes --

1 PRESIDING JUDGE: I have a note, and I'm sure I can be
2 corrected by my learned colleagues, but I have a note here and I
3 quote: "The assertion it is not the UN's but is the witness's
4 own confidential," not the UN is what I have noted counsel for
09:44:59 5 the Prosecution to say.

6 MS THOMPSON: I will rely on your notes then, Your Honour,
7 but I haven't got the transcript with me and, as I say, I did not
8 make notes.

9 PRESIDING JUDGE: Sorry, Ms Thompson, please continue.

09:45:26 10 JUDGE THOMPSON: Continue with the letter, Your Honour?

11 PRESIDING JUDGE: Continue with your submission.

12 MS THOMPSON: Yes. Your Honour, I think I was where the
13 letter said sensitive and confidential nature to be provided in a
14 closes session, which the Chamber already ruled on yesterday.

09:45:48 15 The waiver explicitly mentions both closed session and
16 protective measures. There is no mention in that letter about
17 the withholding of the naming of sources and this is a letter
18 that, in my submission, mentions the sensitive and confidential
19 nature of the witness's evidence but does not go so far as to say

09:46:23 20 that that evidence should not contain certain revelations -- or
21 certain disclosures should not be made as a result of giving that
22 evidence. It should also be noted that the letter was written by

23 the Assistant Secretary-General for Legal Affairs of the UN. And
24 if he meant to include that fact that sources should not be
09:46:47 25 disclosed, he would have included that. In omission, in my

26 submission, was deliberate and therefore does not preclude this
27 witness from testifying to the sources of his information. If
28 the Assistant Secretary-General wanted that, in my respectful
29 submission, he would have explicitly made that clear in the

1 letter. It is also for that reason that I say that this letter
2 does not fall under Rule 70 and can in no way protect this
3 witness from his duty.

4 My learned friend also argued absolute privilege and sought
09:47:37 5 permission for this witness to withhold information on the basis
6 of the job that he did, that being the job of a human rights
7 officer and that he gained his information on the promise of
8 confidentiality of the source. Your Honours, in the first place,
9 there is no rule and the Prosecution did not mention any rule
09:48:05 10 upon which they based this application. There is no specific
11 rule which provides for this eventuality, and I think my learned
12 friend also said that yesterday. What the Rules provide for is
13 the protection of the witness or the victim's identity but not
14 the source of the witness. And it is my submission that the
09:48:25 15 closed session would actually allay those fears.

16 The general provision of the Trial Chamber II issue orders
17 under Rule 54, but in my subsequent submission, the Prosecution
18 would need to argue the application to be necessary for the
19 purpose of an investigation or for the preparation or conduct of
09:48:50 20 the trial, and that has not been done.

21 JUDGE SEBUTINDE: What rule is that?

22 MS THOMPSON: Rule 54 of the Rules. Furthermore, Your
23 Honours, this evidence would be mostly hearsay, especially where
24 the secondary information is concerned. If the witness cannot
09:49:18 25 verify its source, then in my submission it should not be
26 allowed. One of the reasons the International Courts have
27 allowed hearsay evidence is for the Prosecution to be able to
28 show systematic and widespread character of the conflict. This
29 particular witness, as indicated by my learned friend yesterday,

1 will also testify with this in mind to show the systematic and
2 widespread character of the conflict. The witness's information
3 will at least, in part, be based on hearsay evidence. It is the
4 Defence's submission that this would breach the accused's right
09:50:12 5 to examine the evidence against him, as I mentioned earlier under
6 Article 17(A) of the Statute, if this witness were to rely on
7 hearsay evidence, the source of which we do not know. Witnesses
8 who have appeared before this Court in the past have given
9 hearsay evidence, but at least we have been allowed to ask them:
09:50:37 10 How did you know about this? When did you hear about this? Who
11 told you? If the Prosecution's application is granted, we will
12 not be able to ask any such question, we will not be able to
13 verify anything. And, in my submission, that is the violation of
14 the basic rights of the accused. For that reason alone, Your
09:51:00 15 Honour, the application should be denied.

16 Yesterday also my learned friend gave an interpretation or
17 at least the witness's interpretation of his duties as a human
18 rights officer which appears to differ, judging from the letter
19 that was written, at least from the UN interpretation, of what a
09:51:28 20 human rights officer does. As I mentioned earlier, the UN has
21 not requested for this witness to withhold his sources. He, on
22 the other hand, has given an interpretation which he says is the
23 reason why he needs to withhold his sources. In my submission,
24 when the letter was written on the 23rd of May the UN must have
09:51:53 25 taken into account the specific duties and privileges of human
26 rights officers as set out in the training manual on human rights
27 monitoring. I will come back to that later, but may I just say
28 now that that document is dated 2001 on the front page of it,
29 Office of the High Commissioner for Human Rights, and at the

1 bottom it is 2001, which is after this witness's period in this
2 country.

3 Since that document, as I mentioned, stated after, but was
4 before the letter of 25th May 2005, it is our submission that by
09:52:49 5 not referring to any of the conditions that the witness should
6 not reveal his sources - or indeed to any of the conditions
7 contained in that manual - the UN's interpretation of what this
8 witness's duties were differ in no small way from this witness's
9 interpretation, and that it was content that once protective
09:53:16 10 measures and closed session are in place, then the witness can
11 give evidence unfettered.

12 I come back to the date which I mentioned earlier. Sorry.
13 My learned friend mentioned -- actually, she took us through
14 yesterday the last page, section J, of that manual on
09:53:44 15 confidentiality. Within that paragraph, I think it is about -- I
16 will flag it for Your Honours. Paragraph 11, the sentence on the
17 sixth line going down. Which says, "The HRO should ask persons
18 they interview whether they would consent to the use of
19 information they provide for human rights reporting or other
09:54:18 20 purposes." The statement we have before us does not tell us
21 whether this was ever done. In any event, it is our argument
22 that this manual was not in force at the time this witness was
23 carrying out his duties as an HRO, and, therefore, he could not
24 have been covered by it. Also, reading through the manual, we
09:54:52 25 have not been referred to any manual in force at the time this
26 witness was working in Sierra Leone. Indeed, if there was one in
27 force at all -- in fact, I would say on reading it, it seems to
28 me this was the very first manual that was ever done by this
29 office, because it refers to the reasons why this manual had to

1 be drafted.

2 It is, therefore, my submission that the witness is
3 belatedly relying on this manual and asking the Court to give the
4 manual retrospective effect. Therefore, the arguments that my
09:55:41 5 learned friend put forward yesterday relating to the witness's
6 credibility as an HRO, which job I believe he does not in fact
7 currently hold, and the confidentiality HROs enjoy, cannot in my
8 submission support their application.

9 My learned friend also referred us to the Talic case
09:56:10 10 yesterday. That was before the ICTY Appeals Chamber. In our
11 respectful submission, Your Honours, this comparison is not a
12 fair one. That case refers to a different situation, where the
13 question was whether a war correspondent of the Washington Post
14 could be compelled to reveal his confidential information.

09:56:46 15 First of all, the issue before the ICTY was whether a
16 reluctant witness could be subpoenaed to testify before the
17 Court. This here is a different problem. The witness wants --
18 or apparently is willing to testify, but is afraid that
19 information which he gives or which he may be compelled to give
09:57:17 20 during his testimony might leak out. On that basis this case can
21 be differentiated from the ICTY case.

22 The Prosecution yesterday referred to journalists in
23 general, but that decision narrows the application to war
24 correspondents only, and that can be seen in paragraph 29 of the
09:57:49 25 decision. In our submission, allowing human rights monitors in
26 general, like this witness, to withhold certain parts of their
27 evidence would jeopardise the accused's rights and cannot be
28 equated to the job of a war correspondent. Article 196 of the
29 Universal Declaration of Human Rights is quoted in the ICTY

1 decision to indicate the public's right to information. This
2 aspect is not comparable to the relevance of human right monitors
3 withholding information of their sources in closed sessions.

4 In any event, if -- and I hasten to say I do not accept
09:58:45 5 that it will, but if, for the sake of argument, as an HRO he
6 fears any difficulty in being able to obtain sensitive
7 information from those he interviews, or that his colleagues will
8 not be able to obtain sensitive information from those he
9 interviews, then he now has the manual which is now in force. He
09:59:04 10 now has the manual and he has in particular paragraph 11, which I
11 pointed out to you earlier. That is the issue of seeking the
12 interviewee's consent. But as I say, and I add again, that I do
13 not believe, and it is my submission that giving his evidence in
14 closed session, revealing his sources, would jeopardise the
09:59:32 15 future roles of HROs.

16 One obviously recognises, and my learned friend said that
17 yesterday, that human rights monitors in conflict areas do a very
18 important job, undeniably of high importance. But, as I said
19 earlier, it cannot be equated to the role of a war correspondent.

09:59:51 20 In the ICTY decision it is stated in paragraph 35 that "a
21 vigorous press is essential to the functioning of open
22 societies." Further in that paragraph, the European Court of
23 Human Rights is quoted as referring to war correspondents as
24 playing a vital public watchdog role. Paragraph 32 of the same
10:00:25 25 decision refers to the Simic case, where the Trial Chamber
26 indicated that the ICRC has a right under customary international
27 law to nondisclosure of information so that its workers cannot be
28 compelled to testify before international tribunals. Or the
29 International Tribunal, I beg your pardon.

1 It is our submission, Your Honour, that that point is a
2 special position reserved only for the ICRC and not for other
3 workers working within the human rights field in other conflict
4 areas, or in any conflict areas. The omission of other workers
10:01:21 5 in the human rights field is, in my submission, deliberate,
6 because workers of the UN could not have been far from the minds
7 of the International Tribunal. That rule, in my submission,
8 cannot therefore be extended to apply to this witness.

9 For those reasons, the Prosecution's application should be
10:01:43 10 denied.

11 I now turn to the issue of the closed session which was
12 granted yesterday. I for one, Your Honour, took a position of
13 not opposing because I thought the witness would feel comfortable
14 to give his evidence, if asked about his sources, within the
10:02:04 15 guarantees offered by a closed session. Although most witnesses
16 before this Court have been granted protective measures, the
17 specific measure of a closed session is an extraordinary one. On
18 the one hand, it affects the accused's rights and the public's
19 right to an open trial, but with it comes certain guarantees to
10:02:26 20 the witness in the witness box. Even as Defence we understand
21 that, that sometimes it is necessary to give certain witnesses
22 those guarantees in order for the case to go forward, in order
23 for them to give their evidence. And the closed session
24 yesterday was granted in part because of the conditions the UN
10:02:48 25 imposed on the Prosecution to allow this witness to testify. But
26 those conditions were only requested protective measures and
27 those have been satisfied by the closed session.

28 My learned friend went further, when she was making her
29 submission yesterday, to say that even with the closed session

1 there was a fear of the risk of leaking out of information that
2 this witness has, and also that the name of an informant would
3 leak out. As regards the first fear, the witness has already
4 provided confidential information to the Prosecution which has
10:03:37 5 been provided to Defence under Rule 66.

6 The second fear, the Defence holds that the closed session
7 sufficiently guarantees protection of the witness's evidence
8 against abuse. If the Prosecution or its witness has any
9 specific reason to distrust any person present in the closed
10:03:58 10 session of misusing evidence presented in closed session, then,
11 Your Honour, they should argue it. But simply referring to the
12 witness's wishes is not good enough in my submission. It is as
13 if the witness is saying I either have these guarantees or I go
14 away with my information. Well, that is not good enough, because
10:04:29 15 the Court has given him the guarantees that are usual in these
16 situations. He cannot say -- there has been no specific reason
17 put before this Court as to why he distrusts the closed session,
18 or why he thinks the guarantees given by a closed session are
19 insufficient.

10:04:57 20 We are prepared on this side to go some way in fact, an
21 extra mile if you like, to allay his anxieties. And that is
22 which has been done in this Court before. If a specific question
23 is put to him about the identity of his source and he doesn't
24 want it on the transcript, he can write it down and it can be an
10:05:19 25 exhibit under seal. It has been done in this Court before and we
26 are prepared for that to happen again. That way, it is not on
27 the transcript and only those who are authorised by the Court
28 would have access to it.

29 Your Honours, I don't think the Defence can do any more

1 than that. For these reasons, Your Honour, I respectfully say
2 that the probative value of the Prosecution's request is
3 outweighed by the need to ensure a fair trial. Withholding
4 information, especially withholding the sources of his
10:05:58 5 information -- I should correct myself, because this is not
6 information. I have made a big deal about this being the source
7 of the information rather than the information itself. So
8 withholding the source of the information in my respectful
9 submission hinders the fair trial of the accused persons.

10:06:16 10 It is for those reasons the Defence opposes the
11 Prosecution's request and asks that it be denied in its entirety.
12 Unless I can help, Your Honour, that is all I propose to say at
13 this stage.

14 PRESIDING JUDGE: Thank you, Ms Thompson. Mr Koroma, do
10:06:35 15 you wish to address on this?

16 MR KOROMA: Your Honours, first of all I wish to say that
17 on behalf of the Knoops team we entirely adopt the submission
18 made by Ms Thompson this morning on behalf of the Defence, and we
19 do not wish to belabour the point that she has raised already.

10:07:08 20 But, Your Honour, I just want to make a quick reference to
21 Rule 70(D) which the Prosecution relied on yesterday. Your
22 Honour, it will appear in their submission that they are saying
23 that this honourable Court has no discretion in the matter.
24 My Lord, with your leave if I may read Rule 70(D). It says:

10:07:51 25 "If the Prosecutor calls as a witness the person providing
26 or a representative of the entity providing information under
27 this Rule, the Trial Chamber may not compel the witness to answer
28 any question the witness declines to answer on grounds of
29 confidentiality."

1 Your Honour, the operative word in this particular rule is
2 the word "may". Your Honour, my own understanding of the rule is
3 that it still leaves the Court with a discretion either to allow
4 or disallow, that right that is in Rule (D) is not absolute. The
10:08:49 5 Prosecution extraneously argued that yesterday. Your Honour,
6 I will take the point further to say that in fact there is
7 already a guarantee of confidentiality, so there is no point in
8 raising the issue. Like I said, my learned friend has already
9 dealt with very seriously the issue of the closed session. I do
10:09:28 10 not wish to belabour that, but I just want to point out that the
11 whole essence of the closed session is to enable the witness to
12 open up and not to keep back any information to the Court. That
13 information is, or should be made available to the Court, court
14 officials, as well as the Bench. They expressed the fear
10:09:57 15 yesterday that that information might leak. But, Your Honour,
16 since the inception of this trial there have been so many cases
17 in which confidentiality has been granted and there is no single
18 instance, the Prosecution has not pointed out to the Court any
19 single instance wherein confidentiality is granted and that it is
10:10:28 20 breached. There has never been any breach of confidentiality.

21 Your Honour, we, on our part, are fully aware of the
22 consequences of the punitive measures that go with
23 confidentiality.

24 Again, quickly, Your Honour, I just want to buttress the
10:10:56 25 arguments of my learned friend to say that the Prosecution, in
26 this particular application, have failed to show to this
27 Honourable Court that the interests that they are seeking to
28 seeking to protect -- the Prosecution has not convinced the Court
29 on the interests it sought to protect. Again, Your Honour, like

1 I have pointed out, the interests of all witnesses has already
2 been protected as contained in the letter of the Assistant
3 Secretary-General of the United Nations.

4 Finally, Your Honour, I just want to crave your indulgence
10:11:55 5 that when you consider your decision I want you to bear in mind
6 that there is already a decision on this point, on the same
7 argument, on the same application, by Trial Chamber I. Your
8 Honour, I want to say that that decision is persuasive, though
9 not binding on this Court, but I want to urge you to consider
10:12:23 10 that mostly respectfully in your rule. That is all I wish to
11 say.

12 PRESIDING JUDGE: Thank you, Mr Koroma. Mr Daniels, have
13 you any submissions on this matter?

14 MR FOFANAH: Your Honours, on behalf of the Kamara team I
10:12:43 15 will just make one or two comments in order to strengthen the
16 position already taken by my learned colleagues for Brima and
17 Kanu.

18 Your Honour, we are submitting in particular that the
19 present application is an attempt to impeach Rule 79 of the Rules
10:13:03 20 of the Special Court.

21 Your Honour, the witness who is about to testify has
22 already been granted full protective measures under Rule 69 of
23 the Rules of the Special Court. In order to allay his fears,
24 Your Honours have already bent backwards to further give him an
10:13:36 25 additional protective measure under Rule 79 that I have just
26 referred to.

27 Your Honours, the reason why I indicated that the present
28 application is an attempt to impeach Rule 79, but as the
29 provisions of Rule 79 itself, which, with your leave, I will read

1 quickly, especially Rule 79 sub-Rule (A). It says, "A Trial
2 Chamber may order that the press and the public be excluded from
3 all or part of the proceedings for reasons of: (i) national
4 security; or (ii) protecting the privacy, security or
10:14:24 5 non-disclosure of the identity of a victim or witness as provided
6 in Rule 75; or (iii) protecting the interest of justice."

7 Your Honour, the point is taken that our learned colleagues
8 came under Rule 79(A)(iii) in particular, protecting the
9 interests of justice. But it is our submission that when Your
10:14:46 10 Honours granted the application for closed session, everything
11 under that Rule was subsumed. In particular, you granted the
12 application for closed session, which indicates that all the
13 provisions of closed session were to apply. And for that I
14 particularly refer Your Honours to Rule 79, sub-Rule (A)(ii),
10:15:13 15 which I have just read. It says, "protecting the privacy,
16 security or non-disclosure of the identity." That is the word I
17 would like to emphasise, the identity of a victim or witness as
18 provided in Rule 75.

19 Your Honours, the sources which the witness is about to be
10:15:37 20 called is restraining himself from disclosing is basically about
21 the identity of those who were victims or at least whom he
22 interviewed in the course of his research, as well as even people
23 who might be called before this Court as witnesses. That has
24 been fully dealt with in Rule 75 to which reference is made.

10:16:04 25 Your Honours, if I may refer you to Rule 75, which Rule 79
26 refers to, Rule 75(A) in particular. It says, with your leave,
27 that, "A Judge or a Chamber may, on its own motion, or at the
28 request of either party, or of the victim of witness concerned,
29 of the Witnesses and Victims Section, order appropriate measures

1 to safeguard the privacy and security of victims and witnesses,
2 provided that the measures are consistent with the rights of the
3 accused."

4 Your Honours, when you in particular granted the
10:16:45 5 application for closed session, it was as an exception to the
6 norm. The norm is that Your Honours should hold every trial in
7 open court and that closed sessions are exceptions to the Rules
8 provided by the Special Court and, in particular, the right by
9 the accused to be heard in open Court.

10:17:18 10 So, to summarise on that point, in particular, we are
11 saying that closed session takes note of the fact that a witness
12 who is about to testify is protected if he is about to disclose
13 the identity of a victim, not just a witness, but the identity of
14 a victim in closed session. That is why it was clearly stated
10:17:41 15 under Rule 79 that Your Honours can grant leave for closed
16 session in order to ensure that there is non-disclosure of the
17 identity of a victim. So that is the operative position we are
18 taking that if Your Lordships have already granted this witness
19 protective measures under Rule 79 and have gone further, bent
10:18:00 20 backwards and have granted additional protective measures under
21 Rule 79, it would be burdensome on the Court and it would
22 interfere with the rights to fair trial. Especially the right to
23 be heard on the balance of information which we will need to
24 cross-examine the witness with if Your Honours go further to say
10:18:32 25 that we cannot cross-examine this witness about his sources. In
26 in particular, just to add to what my learned colleague Ms
27 Thompson said, the omission by the legal officer of the United
28 Nations in not indicating that this witness can withhold sources
29 of his information, was based on the fact that they had already

1 asked this Court for closed session. Like I said, the closed
2 session assumes the fact that the witness will be under an
3 obligation to make every disclosure relating to the testimony
4 that he will be given.

10:19:18 5 Your Honours, I was just going through my record, but I
6 recall in particular when one witness was testifying, I was just
7 trying to find out the name of that witness, the pseudonym,
8 sorry. I think it was TF1-045. I was about to put the name of
9 somebody to him and then the witness initially indicated that he
10:19:48 10 had some fears, although he later on said if Your Honours were
11 willing he can disclose, but then I said out of caution I will do
12 it in closed session and Your Honours rightly granted us the
13 opportunity when we were examining TF1-045. I had to put the
14 name of a lady to him in closed session and that was all in a bid
10:20:16 15 to protect him. So it has been the case that Your Honours always
16 bend backward to grant closed session in order to protect
17 confidentiality. In fact, that is what I was going to conclude
18 on that the entire concept of closed session is to ensure that
19 confidentiality is guaranteed. So any attempt by our colleagues
10:20:45 20 on the other side to further ask this Court to restrain the
21 rights guaranteed under closed session would be an attempt to
22 impeach the very principles of confidentiality. That is our
23 submission.

24 Before I sit down, may I respectfully ask Your Honours to
10:21:07 25 permit one of our clients, Mr Kanu, to use the convenience?

26 PRESIDING JUDGE: I will deal with that immediately,
27 Mr Fofanah. Mr Kanu can go out under escort. Thank you,
28 Mr Fofanah, for that submission.

29 [Trial Chamber confers]

1 JUDGE LUSSICK: I don't really have a question of Defence
2 counsel. I would just like to correct something that Mr Koroma
3 said. Mr Koroma said that thus far there has been no breach of
4 confidentiality. This is in relation to closed sessions. Well I
10:21:55 5 am well aware of the fact, Mr Koroma, that you have only just
6 come into this case, but in fact there has been a breach of
7 confidentiality and it resulted in contempt of court proceedings.

8 MR KOROMA: As My Lord pleases.

9 PRESIDING JUDGE: Reply, Ms Pack?

10:22:18 10 MS PACK: Yes, Your Honour, I do.

11 If I can just deal firstly with the latter point made by my
12 learned friend for Mr Kamara, the second accused. The point was
13 made by my learned friend, I think, that the application thwarted
14 the terms of Rule 79(A)(iii). This is not an application that
10:22:39 15 has anything to do with Rule 79(A)(iii), Your Honours have made a
16 decision under that Rule and, in particular, that subrule
17 relating to closed session and this application has nothing to do
18 with that.

19 My learned friend for the first accused raised an argument
10:23:01 20 under Rule 70 and if I can deal with the Rule 70 arguments
21 together. The point made by my learned friend Ms Thompson was
22 that Rule 70(B) does not extend its protection to the identity of
23 sources of information, as opposed to information. The point,
24 Your Honours, of the application that the Prosecution has made is
10:23:25 25 not under Rule 70(B), but under Rule 70(D). What Rule 70(B)
26 does is bring this witness under the protection of Rule 70.
27 Because the information he has provided is regarded as
28 confidential information so, Rule 70(B) serves to bring him under
29 the protection of Rule 70 and the whole of that Rule. What Rule

1 70(B) deals with as distinct from Rule 70(D) is the disclosure
2 position.

3 Once a witness or information comes under Rule 70, because
4 it is confidential information, was provided under conditions of
10:24:14 5 confidentiality to the Prosecution; that is, once this witness
6 was provided there was consent required of the UN, or whatever
7 organisation, to have that information or that witness disclosed
8 to the Defence and that consent is required so that that witness
9 can testify. 70(B) goes to the decision as to whether or not
10:24:50 10 that witness can be allowed to testify and makes that subject to
11 the consent of the provider of that information/witness.

12 70(D) is the Rule that Your Honours have to consider, in my
13 submission, because that relates to this witness's oral
14 testimony. That Rule deals with the separate issue of when this
10:25:11 15 witness is in court and this witness declines to answer a
16 question on the grounds of confidentiality. It is a different
17 issue as to whether it comes within the section at all under Rule
18 70(B). They are two separate questions. 70(B) is about his
19 status, 70(D) and in fact (C). But (D), which is what we are
10:25:36 20 dealing with today, is about what he says when he is asked
21 questions during his testimony. That is affirmed, actually, in
22 the paragraph to which my learned friend referred. Paragraph 25
23 of the Milosevic decision supports my proposition. Paragraph 25
24 says, "All that Rule 70 requires is that the information was
10:26:00 25 provided to the Prosecutor on a confidential basis. As mentioned
26 in paragraph 20 supra, for purposes of paragraph B, the
27 information must also be used solely for the purpose of
28 generating new evidence, but for paragraph C and D, that
29 requirement necessarily drops out, for once the information is

1 introduced..." and so on.

2 Paragraph 25 deals with whether or not evidence or --
3 sorry, whether or not information or a witness can come within
4 the terms of Rule 70 at all. I would pray in aid paragraph 25 to
10:26:38 5 support my proposition as opposed to my learned friend's
6 proposition.

7 The other point that was made on the terms of Rule 70 were
8 made by my learned friend for the second accused which was that
9 Rule 70(D) contains in its language - it confers a discretion
10:26:57 10 upon Your Honours because of the words "may not". In my
11 submission, that is an incorrect interpretation of the language
12 of that subrule. The words "may not" are absolutely prohibitive,
13 in my submission. If it was intended by that Rule to confer a
14 discretion upon Your Honours, then I would suggest language that
10:27:20 15 would have been used would have been "should not", save in
16 exceptional circumstances, or something of that order. Just
17 because the word "may" is used in that phrase doesn't - it
18 usually confer upon Your Honours a discretion. "May not" is
19 absolutely prohibitive. The Rule would not and could not have
10:27:36 20 used the words "shall not" because that would have been a
21 directive to Your Honours, and that would have been inappropriate
22 language to use in a rule. It would have been in the manner of
23 an order.

24 If I can address Your Honours on the UN letter just very
10:27:59 25 briefly. My learned friend for the first accused suggested, I
26 think, that that was relied upon by the Prosecution to support an
27 argument on the confidentiality of sources. I didn't do that.
28 The argument that the Prosecution is making addresses the
29 relationship between the witness and the source and isn't -- I

1 didn't rely upon what the UN have stated in their letter as
2 supporting the argument in relation to this witness's testimony
3 and his assertion of a confidential relationship between himself
4 and his sources, and his assertion of a privilege.

10:28:44 5 If I can move on to the privilege argument. That was a
6 separate argument not under Rule 70, but a separate argument.
7 I'll just start with making it very clear to Your Honours, and I
8 think I did this when I made my submissions in the first
9 instance, that the question of leaking is not the basis upon
10:29:04 10 which this application is made. The application is made on the
11 question of principle. I raise the issue of leaking as a
12 peripheral matter. It is absolutely a peripheral matter. This
13 is about the question of principle, the balance of public
14 interest and the principle of protecting a human rights officer
10:29:26 15 in the field in his guarantees of confidentiality to informants
16 when they provide information of human rights abuses to him.

17 Now my learned friend for the first accused, and I'll just
18 deal with this briefly, suggested, I think, that there was no
19 basis under the Rules for an application being made by the
10:29:52 20 Prosecution save under Rule 70, and there was reference to Rule
21 54. What I suggest is that Rule 54 is probably the rule that
22 gives Your Honours the power to compel a witness to answer
23 questions. My point about the Rules not being explicit in
24 dealing with this issue was to say to Your Honours that there
10:30:16 25 isn't a rule which explicitly provides a power to Your Honours to
26 compel a witness to answer questions. In fact, it would be my
27 learned friends, probably, if we were dealing with this argument
28 during the course of a witness's testimony, who would be inviting
29 Your Honours on an application to compel the witness to answer

1 the question.

2 This argument has arisen and I have argued first - perhaps
3 I shouldn't have - because the Prosecution is obviously
4 anticipating such an application being made presumably by the
10:30:43 5 Defence under Rule 54 where Your Honours are conferred with
6 powers which Your Honours have in the course of conducting a
7 trial generally. Your Honours see the latter phrase in that
8 provision of Rule 54, "...the powers necessary for the purpose of
9 an investigation or for the preparation or conduct of the trial,"
10:31:08 10 and the powers that Your Honours have there, of course, to issue
11 such orders, summonses, subpoenas, warrants and transfer orders
12 as may be necessary for the purposes of an investigation for the
13 preparation of conduct of the trial.

14 The language of Rule 54 in fact does not deal specifically
10:31:40 15 in terms of compelling a witness. It deals with subpoenas, which
16 is obviously an entirely different matter. I suspect my learned
17 friends would argue that Your Honours had an inherent power to
18 compel a witness to testify under your powers under the Rules.
19 Rule 54 does not explicitly deal with compellability.

10:32:08 20 JUDGE SEBUTINDE: Ms Pack, are you saying that the trial
21 Chamber does not have such powers --

22 MS PACK: No, I'm not saying that at all. There is not --

23 JUDGE SEBUTINDE: -- to compel a witness to answer
24 questions?

10:32:16 25 MS PACK: I would suggest that Your Honours do have such
26 powers, but I would suggest it is not a power that is explicitly
27 identified in the Rules. It is a power that is certainly
28 envisaged by the Rules because, of course, there is the rule that
29 deals explicitly with the right of a witness not to incriminate

1 himself. The Rule, broadly speaking states that if Your Honours
2 order a witness to answer a question, then the content of that
3 answer can't be used to incriminate him in the future. So there
4 clearly is envisaged in the Rules a power to compel a witness to
10:32:54 5 answer questions.

6 Just dealing with the public interest argument, what I
7 understood from my learned friend's absence of submissions to the
8 contrary is that they do not differ with the Prosecution's view,
9 the Prosecution's proposition that there is a public interest in
10:33:21 10 protecting the work of human rights officers in the field. There
11 is a public interest and I don't think my learned friends would
12 suggest to the contrary.

13 I took my learned friend's for the first accused submission
14 to be that confidentiality was not an integral part of that
10:33:45 15 function that human rights officers have in the field of
16 gathering information and therefore that was something that did
17 not need to be protected.

18 MS THOMPSON: I hate to interrupt my learned friend in her
19 submission, but I think she has got me wrong. That was not what
10:33:59 20 I said. What I said was, in my submission, I do not think that
21 this witness divulging in his evidence in closed session would
22 impinge on the work of human rights officers - not in telling
23 those words, but certainly that is what I was driving at -
24 impinge on the work of human rights officers. And I did go on to
10:34:16 25 say, if my memory serves me correctly - I would have to look at
26 my notes again - but I did go on to say that they can always look
27 to paragraph 11 of the manual, which is the issue of consent. In
28 interviews they could actually ask them, "Would you consent to
29 using this information for other purposes?" That is what that

1 paragraph says. I did say that they could use the manual for
2 guidance, which they are now covered by, but which he was not
3 covered by when he was making his report all those years ago
4 prior to 2001.

10:34:53 5 MS PACK: I thank my learned friend for assisting my
6 understanding of the submission, which then appears to be that
7 because a manual is issued in 2001, stating in terms that a
8 respect for the confidentiality of information is essential, that
9 perhaps that does not mean the respect for confidentiality was
10:35:14 10 essential in 1998 or 1999. In my submission, that proposition
11 cannot possibly --

12 MS THOMPSON: I hate to interrupt my learned friend again.
13 That is not what I said.

14 MS PACK: Perhaps my learned friend -- Your Honours have
10:35:35 15 heard my learned friend's submissions.

16 MS THOMPSON: I'm sure Your Honours --

17 PRESIDING JUDGE: Counsel do not let us get into --

18 JUDGE LUSSICK: If I solves anything at all, I understood
19 Ms Thompson to say that, simply, the witness would not be allowed
10:35:50 20 to rely on a post-dated manual.

21 MS PACK: If I may deal with the consequences of that
22 submission, which is this: The effect of that submission is the
23 suggestion that this witness is now belatedly asserting a
24 relationship of confidentiality with his sources. Of course,
10:36:15 25 he's not suddenly decided today or yesterday that he is going to
26 view the sources that he interviewed in 1998 or 1999 as
27 confidential sources. He is asserting a privilege, because he
28 says that in that period, certain sources - not all of them - are
29 regarded by him as confidential sources. Clearly if they

1 consented to the release of their names then the witness would
2 provide the release of their names. But they are confidential
3 sources just because they wanted their names to be held back from
4 release to third parties. Your Honours can see from the
10:36:55 5 manual -- Your Honours may find the manual assists you in seeing
6 why that respect for confidentiality is so important. The
7 witness can give evidence about the creation of that manual. I
8 don't want to go into what the witness might say about the
9 genesis of that manual and how it was written but it is clearly
10:37:12 10 the position, in submission that the principles that were later
11 enshrined in that training manual dated 2001 were principles that
12 applied to the conduct of human rights officers' work in
13 the early 1990s, mid-1990s. That is what the witness's view
14 clearly is because he is asserting a confidentiality
10:37:41 15 relationship; a relationship of confidentiality with his sources
16 who didn't want their names revealed. That principles which he
17 is relying on is later enshrined in the training manual for the
18 purposes of all human rights officers.

19 The point that I made in relation to this paragraph J was
10:38:04 20 that the effect of a ruling today, or this week, made in public,
21 on argument made in public, will send a message to human rights
22 officers and potential informants in conflict situations in the
23 future that the confidentiality of their name or identities may
24 not be protected in future criminal proceedings pursued, perhaps,
10:38:34 25 against perpetrators whom they name. It might very well
26 constrain a human rights officer in the future from even
27 obtaining from these sorts of sources where they had fears for
28 those sources.

29 I deal with the balance argument, the competing interest,

1 which was the right of the accused to cross-examination
2 witnesses, made a point about that, that the cross-examination of
3 this witness would be impeded if Your Honours granted an
4 application in terms that the witness wouldn't be compelled to
10:39:18 5 name a source, the actual name of a source as opposed to the type
6 of source. My learned friend cited three questions that she
7 might ask, or did ask, of witnesses, earlier in this trial: How
8 do you know that? When did you know that? Who told you? Those
9 are all questions that my learned friends can ask of this
10:39:35 10 witness. It is no different, in my submission, from a crime base
11 witness from whom you have heard, who might have said, "Well,
12 someone came and told me in so and so did this. I don't know the
13 name of that person, but that is what they told me." Your
14 Honours can then exercise the function which Your Honours have to
10:39:55 15 balance the quality of that evidence at the end of the trial
16 after hearing all the evidence in the case. It is not just about
17 the evidence of this witness alone, of course, but all the
18 evidence that Your Honours will hear, and decide whether Your
19 Honours consider that the quality of the evidence is such that
10:40:11 20 you would want to place any weight upon it.

21 One moment, Your Honour, while I see whether there is
22 anything else I need to deal with. I am grateful.

23 There are just a couple of other matters, Your Honour. The
24 other point on the issue of cross-examination of the witness, my
10:41:28 25 learned friend made the point that the absence of identification
26 by this witness of the name of a source and the allowing this
27 witness to refuse to answer questions as to the identity of
28 sources would have some impact over the Defence's ability to
29 challenge that evidence. My learned friend said that the sources

1 of the information provided by this witness were essential as
2 they went to the credibility of this witness. In my submission,
3 the Defence aren't limited in their ability to challenge this
4 evidence by the information provided by this witness that was
10:42:27 5 given to him by an unnamed source if he refuses to name the
6 source. My learned friends are still able to put contrary
7 information to the witness and will be in a position to when they
8 come to call witnesses during the Defence case to call their own
9 evidence to challenge any information provided by the witness
10:42:48 10 during his own evidence. So it is absolutely not the case that
11 they will not be in a position to challenge information provided
12 by this witness -- provided to him by unnamed sources, because
13 they will do and they can do through cross-examination.

14 I will deal again with letter from the United Nations. My
10:43:15 15 learned friend made the point that there is no mention in the
16 letter about withholding of naming sources. Therefore, had the
17 UN meant to have included that in the letter they would have been
18 done so. Insofar as there is no explicit mention of the
19 withholding of names of confidential sources then Your Honours
10:43:43 20 can rely as support for the proposition that it is the UN's view
21 that this witness should name all confidential sources. Your
22 Honours, that is beside the point. The point here, and I repeat
23 it again, is that this application is made in relation to this
24 witness's assertion of privilege and this witness's relationship
10:44:01 25 between him and his sources, whom he regards as confidential.

26 I will just deal with another point about omission. My
27 learned friend for the first accused made some reference to a
28 failure to mention other UN workers in a decision concerning the
29 ICRC in the Simic and others case, which is referred to again in

1 the Brdjanin and Talic decision at paragraph 12. I will just
2 deal with that peripherally. The Simic case dealt with the
3 situation of an ICRC employee, so, clearly wasn't going to then
4 make any deliberations or any findings about the privilege
10:44:53 5 attaching to any other employees in any other NGO or UN agencies.

6 Your Honours, I repeat that the Prosecution's position is
7 under the balance of interest argument the is balance clearly is
8 weighted in favour of allowing an absolute privilege to be
9 asserted by this witness to refuse to answer a question which
10:45:27 10 will name confidential source. Those are my submissions unless I
11 can assist any further.

12 JUDGE SEBUTINDE: Ms Pack, I think it was Ms Thompson who
13 alluded to the practice that we have had in this Chamber whereby
14 witnesses that are literate and able to write names on pieces of
10:45:53 15 paper have done so and we have admitted those pieces of paper in
16 evidence as exhibits under seal. And she suggested, I think, in
17 her submissions that this could work as an alternative or as a
18 compromise. I would particularly like to hear your thoughts on
19 this.

10:46:12 20 MS PACK: Yes, Your Honour. In my submission it is the
21 same point that I made, or the Prosecution makes, in relation to
22 the position, which will be that this witness is testifying in
23 any event in closed session. It is the same or similar point.
24 What the Prosecution says is that this issue is one of principle
10:46:29 25 as opposed to practical outcomes. That is why I said the
26 question of leaking of information is absolutely peripheral to
27 it. There are two limbs to the application, one under Rule 70,
28 which is a mandatory under 70(D) which says that once this
29 witness has asserted confidentiality it follows that he may be

1 allowed to decline to answer a question on that ground. And he
2 has made that assertion of confidentiality. On the second limb
3 of the balance of interest argument, the Prosecution says that
4 this is a question of principle for Your Honours to decide; it is
10:47:06 5 the principles of whether the interests of human rights officers
6 in the field to have protected the confidentiality of their
7 sources is one that outweighs in the circumstances other
8 competing interests before this Chamber. What needs to be
9 protected in these circumstances is the fact of human rights
10:47:31 10 officers, or one of the things that needs to be protected, is the
11 fact of human rights officers being forced to name their
12 informant, that principle being one that is found by a court
13 after hearing argument. That would carry then as a matter of
14 principle to the knowledge and practice of human rights officers
10:47:54 15 and potential informants in the future. That is the point; that
16 is why it is a question of principle not so much whether or not
17 it leaks out in the circumstances of this Court or whether or not
18 Your Honours could think of alternative ways in which the
19 information could come before this Court.

10:48:11 20 JUDGE LUSSICK: Ms Pack, I am asking you about Rule 70(D)
21 and you are saying that the witness would be asserting
22 confidentiality. It follows that he then does not become
23 compellable to reveal the source. But it seems to me that Rule
24 70(D) would not apply to your witness. You see, Rule 70(D)
10:48:47 25 provides that when the Prosecution calls as a witness the person
26 providing, or representative of the entity providing information
27 under this Rule, it seems to me that the person providing or his
28 or her representative would be the source. Your witness is not
29 the person providing or his representative; your witness is the

1 recipient of the information. It is only the source, the person
2 providing or his representative who can claim confidentiality.
3 That is the way I read the Rule.

4 MS PACK: In my submission, that is not the way in which
10:49:35 5 the Rule should be read. I draw an analogy here with a situation
6 where, for example, a police officer is giving evidence as to the
7 identity -- information from a confidential source back in
8 national jurisdiction. One wouldn't ever require the source to
9 come forward and say, "I have a confidential relationship with
10:49:56 10 the police officer, therefore, he should not be compelled to
11 answer questions identifying me." Rule 70 in my submission is
12 geared towards the protection of providers of information to the
13 Office of the Prosecutor in the first instance. That is what
14 Rule 70(B) does; it says if an entity or an individual provides
10:50:17 15 information to the Office of the Prosecutor, and by information
16 the Milosovic decision has said information includes a witness,
17 so if a witness is provided under Rule 70(B) then the whole of
18 the provisions of Rule 70 apply. So, what I say is this witness
19 comes within the language of Rule 70(B) in that he has been
10:50:42 20 provided, or the information that he will testify about he has
21 been provided under the provisions of that Rule, it follows that
22 once he is in court, Rule 70(D) is triggered. It is not
23 necessary that Your Honours then invite the source to provide the
24 information or decline to provide the information.

10:51:01 25 JUDGE LUSSICK: Just on that point, and I am sorry to
26 interrupt you. But we would not invite anybody. But Rule 70(D)
27 seems to me to go out of its way to refer to a specific person on
28 the question of claiming confidentiality, and it refers to the
29 person who provides the information or his representative. Now,

1 your witness would be, as I said before, a recipient of that
2 information, but he is not providing the information in respect
3 of which he would claim confidentiality. In fact, he is not the
4 person referred to in Rule 70(D).

10:51:48 5 MS PACK: What I say is that that is not the position.
6 Because if one reads the first phrase, "If a Prosecutor calls as
7 a witness the person providing or a representative of the entity
8 providing information under this Rule", it is referring back to
9 70(B). It is saying that if you call your witness, provider of
10:52:07 10 confidential information, information has been provided to the
11 Prosecution because it is confidential under Rule 70(B) then that
12 witness, when he is in court, is protected by Rule 70(D) and then
13 he can then assert separately the confidentiality as allowing him
14 to refuse to answer questions. The first phrase of Rule 70(D) is
10:52:29 15 referring back to the provision of this witness in the first
16 instance as a witness provided under conditions of
17 confidentiality to the OTP, which is what one sees reflected in
18 the UN's letter. The UN's concern related to the whole of the
19 information that its employees obtain in the course of their
10:52:51 20 employment and regarded as confidential. So that when a witness
21 is provided, or when a former employee, or employee of the UN
22 gives information to the Office of the Prosecutor, there is
23 required consent before that information is disclosed. That is
24 what brings this individual under the terms of Rule 70(B). That
10:53:13 25 is the confidential information that is meant by Rule 70(B) --
26 the whole of the testimony -- the fact of the witness testifying,
27 which is the subject of waiver. 70(D) deals with something
28 different, which is what this witness will say when he is
29 testifying. Then he can assert separately, effectively a

1 privilege, and that is his relationship with the evidence that he
2 will give and what I say is his relationship with the names of
3 the sources provided to him confidentially.

4 My learned friend has raised the point that it does not
10:53:58 5 matter that the information that he will testify about is hearsay
6 evidence, it is still information about which he testifies.
7 Whether it comes from another source or whether it is the naming
8 of a source, that is not the point. The point is that this
9 section is directed towards his testimony in all its forms.

10:54:18 10 I should just deal again with the point on the issue of
11 privilege and the possible ways around the assertion of the
12 privilege. In my submission there isn't a way around the
13 privilege that this witness has in relation to refusing to answer
14 questions naming his sources because it is an absolute privilege.
10:54:42 15 So there is no way that, once asserted, and once he has refused
16 to answer questions, there is no way one can try and qualify that
17 by saying, "Well, put it down on a bit of paper." He is
18 asserting a privilege on the grounds of a relationship between
19 him and source, and there is not any qualification of that.

10:55:13 20 JUDGE LUSSICK: I see that.

21 PRESIDING JUDGE: Ms Pack, it has been submitted by the
22 Defence that the decision in Talic applies only to war
23 correspondents and has no application to a human rights officer.
24 What is your comment on that submission?

10:55:35 25 MS PACK: What I say is that this is an absolutely novel
26 point before Your Honours; the situation relating specifically to
27 a human rights officer. It is a very important and novel point.
28 What I have relied upon in the Brdjanin and Talic case is that it
29 provides some guidance. In my submission it may assist Your

1 Honours in deliberating on this novel point. But what it does do
2 is deal with the question of balancing of public interest, which
3 in my submission it is authority for the proposition that when
4 faced with these questions of assertions of privileges by war
10:56:11 5 correspondents, journalists, human rights officers, any sort of
6 assertion of privilege, then Your Honours may look to Brdjanin
7 and Talic providing support for the way in which those questions
8 may be resolved and the balancing of those interests. And in my
9 submission that authority is useful in setting out how that was
10:56:37 10 conducted, the balancing exercise, was conducted in that case.

11 But, of course, it was a question of the balances of interests in
12 those circumstances, the circumstances of war correspondents. I
13 would say that the public interest in protecting human rights
14 officers in their field of operations may be regarded by Your
10:56:54 15 Honours as even more important than protecting the rights of war
16 correspondents because of the quality and importance of the work
17 that these officers are doing.

18 PRESIDING JUDGE: Thank you, Ms Pack. Just allow us to confer.

19 [Trial Chamber confers]

10:57:24 20 PRESIDING JUDGE: Thank you, counsel. There are obviously
21 numerous issues, and as you have noted, it is a novel point. We
22 will give a decision tomorrow morning, bearing in mind that this
23 afternoon there are other commitments and we don't normally sit
24 on Wednesdays. Even if it is not fully annotated, reasoned, it
10:58:24 25 will be a decision. Thank you. In the circumstances, we will
26 therefore adjourn the Court until tomorrow morning.

27 [Whereupon the hearing adjourned at 10.50 a.m.
28 to be reconvened on Thursday, the 15th day of
29 September 2005, at 9.15 a.m.]

