

**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
Freetown – Sierra Leone

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

Registrar: Robin Vincent

Date filed: 19 September 2005

**PROSECUTOR**

**Against**

**Alex Tamba Brima**  
**Brima Bazzy Kamara**  
**Allieu Kondewa**  
(Case No. SCSL-04-16-T)

---

**PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION ON ORAL  
APPLICATION FOR WITNESS TF1-150 TO TESTIFY WITHOUT BEING  
COMPELLED TO ANSWER QUESTIONS ON GROUNDS OF CONFIDENTIALITY**

---

Office of the Prosecutor:  
Luc Côté  
Lesley Taylor  
Melissa Pack

Defence Counsel for Alex Tamba Brima  
Glenna Thompson  
Kojo Graham

Defence Counsel for Brima Bazzy Kamara  
Andrew Daniels  
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu  
Geert-Jan Alexander Knoop  
Carry Knoop  
Abibola E. Manly-Spain  
Amadu Koroma

SPECIAL COURT FOR SIERRA LEONE	
<b>RECEIVED</b>	
COURT MANAGEMENT	
19 SEP 2005	
NAME	GEORGE WALKER
SIGN	<i>[Signature]</i>
TIME	1630

## I. INTRODUCTION

1. The Prosecution files this application pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) seeking leave to appeal the Trial Chamber’s majority “Decision on the Prosecution’s Oral Application for Leave to be Granted to Witness TF1-150 to Testify Without Being Compelled to Answer Any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality pursuant to Rule 70(B) and (D) of the Rules” (“the Majority Decision”) dated 16 September 2005.<sup>1</sup>

## II. BACKGROUND

2. By a letter dated 23 May 2005, the United Nations (“UN”) waived the immunity from legal process attaching to witness TF1-150, a former employee of the UN (“UN Letter”).<sup>2</sup>
3. Witness TF1-150 was called by the Prosecution in the *Norman* and others proceedings before Trial Chamber I (as witness TF2-218) and testified in closed session on 7 and 8 June 2005. In the course of the witness’s cross-examination in the *Norman* and others case, he declined to disclose the name of an informant without the express consent of the informant, on the basis of confidentiality. By an oral decision delivered in closed session on 7 June 2005, the majority in the Trial Chamber held that it had the power to compel the witness to name his source. The confidential written majority decision was filed on 8 June 2005. The written dissenting opinion has not yet been filed.
4. As a consequence of the decision of Trial Chamber I, in oral submissions on 13 and 14 September 2005, the Prosecution sought an order from this Trial Chamber guaranteeing, before witness TF1-150 was called to testify, that he would not be compelled to answer any questions in cross-examination relating to the names of informants or sources of information whom he regarded as confidential on the grounds that he obtained information from these sources on conditions of confidentiality.

<sup>1</sup> The Prosecution files this application within 3 days of the majority decision, notwithstanding that the minority opinion has yet to be delivered. It has been the practice of parties before the Special Court to await receipt of a minority opinion before seeking leave to appeal and this is the accepted practice before Trial Chamber I. In light of the “Separate and Concurring Opinion of Justice RB Lussick Brima – Kamara Application For Leave to Appeal the Decision on the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel” dated 14 September 2005, which opinion comments upon this practice, and in the absence of a uniformly established procedure, the Prosecution is making the cautionary move of filing its application within three days of the majority decision. As a consequence, the Prosecution does not have the benefit of knowing the reasoning of the minority in this application.

<sup>2</sup> Letter from the United Nations (“UN Letter”), Attachment 1.

5. An oral decision (absent reasons) was delivered on 15 September 2005 (Justice Doherty dissenting) dismissing the Prosecution application and ruling that witness TF1-150 could be compelled to answer questions relating to the sources of his information. A written decision of the majority was handed down on 16 September (the Majority Decision).
6. As a result of the Trial Chamber's Decision, the Prosecution has been unable to call witness TF1-150.
7. The Prosecution seeks leave to appeal the Majority Decision and submits that exceptional circumstances exist for the following reasons:
  - a. The majority erred in law when it held that the provisions of Rule 70 of the Rules did not apply to witness TF1-150 or to his testimony. This conclusion was based on an error in the interpretation and construction of both Rule 70(B) and Rule 70(D). The majority also erred in finding that the Public Version of the Confidential Decision on the Interpretation and Application of Rule 70 in the *Milosevic* case<sup>5</sup> was distinguishable.
  - b. Having found that there exists a privileged relationship between a human rights officer and his informants, and having found that a public interest attaches to the work of human rights officers gathering information in the field, the majority erred in law in balancing the public interest attaching to the work of human rights officers with the rights of the accused to a fair trial. This was an incorrect formulation of the balancing exercise to be carried out by the Chamber.
  - c. The issue is novel and one of broad international significance with a potentially significant impact on the future cooperation between international courts and the UN and other human rights organizations engaged in the gathering of information relating to human rights abuses. As such, it requires a determination at the appellate level before an international court.

---

<sup>5</sup> *Prosecutor v. Milošević*, IT-02-54-AR108bis & AR 73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, ("Milošević Rule 70 Decision").

- d. This issue is one that has been the subject of dissenting opinions in proceedings before both Trial Chambers. As such, and as a result of the different approaches of the majority decisions, a determination at the appellate level would provide legal certainty for future proceedings before the Trial Chambers where the issue may well resurface.
8. The Prosecution submits further that it has suffered irreparable prejudice as a result of the Majority Decision.

### III. APPLICABLE LAW

9. Rule 73(B) of the Rules provides that leave to appeal may be granted in exceptional circumstances and to avoid irreparable prejudice to a party. The restrictive nature of Rule 73(B) has repeatedly been emphasized in the jurisprudence of the Special Court. The two limbs – exceptional circumstances and irreparable prejudice - are conjunctive and the Prosecution is aware that both must be satisfied if an application for leave to appeal is to succeed. The Appeals Chamber has noted that “The underlying rationale for permitting such appeals is that certain matters cannot be cured or resolved by final appeal against judgement.”<sup>6</sup>
10. The Prosecution submits that this high threshold has been met by exceptional circumstances consisting of what it argues are two fundamental errors of law in relation to an issue of great importance to this and other international criminal tribunals over which both Special Court Trial Chambers have been divided, and irreparable prejudice caused by the inability to present the testimony of an important witness on, *inter alia*, an element of crimes against humanity of relevance to a large part of the Indictment. These are matters that cannot be cured by way of a final appeal against judgment.

### IV. ARGUMENT

#### A. Exceptional Circumstances

##### (i) Errors of Law

---

<sup>6</sup> *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal, 17 January 2005, para. 29; see also *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T, Decision on Defence Applications for Leave to Appeal Ruling of the 3<sup>rd</sup> February, 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para 21.

11. The Prosecution is cognizant of the Trial Chamber's rulings that errors of law do not in themselves constitute exceptional circumstances.<sup>7</sup> However they are a relevant factor in this assessment.

The provisions of Rule 70 apply to Witness TF1-150 and to his testimony

12. The Prosecution submits that the Trial Chamber erred in holding that Rule 70 was not applicable to this witness or his testimony on the grounds that the witness's sources were not "*information which has been provided*" to the Prosecution within the meaning of Rule 70 (B). In so finding, the Trial Chamber erred in its interpretation of the provisions of Rule 70 (B). It wrongly failed to find that the provision of this witness' testimony fell within the terms of Rule 70 (B) and similarly that the form or content of his testimony fell within the terms of Rule 70 (D).

13. The Trial Chamber erred in finding that the Milosevic Rule 70 Decision was distinguishable and did not explain its reasoning in this respect. That decision provides persuasive guidance as to the application of Rule 70 in these circumstances, having particular regard to the fact that the Special Court's Rules 70(B) and (D) are identical to the ICTY Rules 70(B) and (D).

14. In the Milosevic case, the Appeals Chamber found as follows:

"The fact that information is provided in the form of testimony does not exclude it from being "information" or "initial information" provided under the Rule".<sup>8</sup>

15. What this finding means is that the provision of a witness on a confidential basis constitutes "*information ... provided ... on a confidential basis*" within the meaning of Rule 70 (B), and so triggers the application of the Rule in its entirety.

16. This Trial Chamber wrongly considered that only the source of the information provided confidentially to witness TF1-150 would be protected by the provisions of Rule 70 (had the source provided that information to the Prosecution on a confidential basis) and

<sup>7</sup> *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T, Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay-Motion seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 15 June 2005, para. 20; *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T, Decision on Defence Applications for Leave to Appeal Ruling of the 3<sup>rd</sup> of February, 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 29.

<sup>8</sup> Milošević Rule 70 Decision, para. 23.

thereby failed to consider as two distinct issues: (i) the question whether the witness had been provided to the Prosecution on a confidential basis (the Rule 70 (B) issue) and (ii) the form or content of his testimony (the Rule 70 (D) issue).

17. It is the entity or person providing the information who determines its confidentiality.<sup>9</sup> In the Milosevic case, the Appeals Chamber found that the court's authority to determine whether information has been provided under the terms of Rule 70(B) is limited.<sup>10</sup> The court may examine whether information was provided on a confidential basis but must keep in mind that providing information may consist of a process involving several acts.<sup>11</sup>
18. There can be no doubt that this witness' testimony was provided as confidential information to the Prosecution in the first instance whether by or on behalf of himself (the "person" within the meaning of Rule 70 (B)) or his employer, the UN (the "entity" within the meaning of Rule 70 (B)). This conclusion is endorsed by the UN in their letter to the Prosecutor dated 23 May 2005 (the UN letter), by which they required the Prosecution to obtain a waiver from them before allowing the witness to testify as to the "sensitive and confidential information" that he might provide.<sup>12</sup>
19. Rule 70 (D) deals separately with the situation where information – in this case, witness testimony - is being presented in evidence.<sup>13</sup> That testimony might include both direct and hearsay evidence. Whether or not it does is not a question that falls to be considered under Rule 70 (B). That Rule deals with the basis upon which information (testimony) is provided to the Prosecution, as opposed to its form or content when it comes to be presented in court. The fact that a witness may give evidence as to information provided to him by third parties on a confidential basis does not mean that the witness may not remain protected by the provisions of Rule 70 insofar as his testimony was provided to

<sup>9</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14, Decision of Trial Chamber 1 on the Prosecutor's Motion for Video Deposition and Protective Measures, 11 November 1997, ("Blaskic Decision"), para. 15. The Trial Chamber held that "it is neither for the Chamber nor the parties to determine whether the information in the possession of the Prosecution is confidential or not; the person or entity having the information is the sole judge of what was deemed to be confidential and what must be kept so in whole or in part."

<sup>10</sup> Milošević Rule 70 Decision, para. 29.

<sup>11</sup> Milošević Rule 70 Decision, para. 29. It was held that the Tribunal may be satisfied by a consideration of the information itself, an assertion by the Prosecutor or confirmation from the information provider.

<sup>12</sup> UN Letter, p. 2.

<sup>13</sup> See Milošević Rule 70 Decision, para. 25.

the Prosecution, in the first instance, on a confidential basis within the meaning of Rule 70 (B).

20. It is apparent from Rule 70(D) that the consent of the information provider (in this case either the witness himself or his employer, the UN) to present the information as evidence does not deprive him of the right to claim confidentiality at trial.<sup>14</sup> If that were not the case, there would have been no need for the Rule which evidently seeks to preserve the right of information providers to claim confidentiality in respect of material they deem sensitive at trial.
21. This application of Rule 70(D) is in keeping with the rationale for its enactment. Given the intended purpose of the Rule, namely, to allow information providers the right to limit access to confidential information, the court does not have a discretion under Rule 70 to compel a witness to disclose information where he refuses to do so by reason of confidentiality. The ordinary meaning of the words “may not” in their context and in the light of the object and purpose of the Rule is to disallow a discretion.
22. The Rules are designed to ensure the smooth functioning of proceedings and can only serve their function if their correct interpretation is not in doubt. The Prosecution therefore submits that an error of law relating to the interpretation of Rule 70 constitutes an exceptional circumstance.

#### Balance of interests

23. The Prosecution submits that the majority erred in law in the manner in which it identified the balancing exercise to be carried out by the Chamber. The public interest that attaches to the work of human rights officers, including the privileged relationship between those officers and their informants, must be weighed against the public interest in having all information before the Chamber. It is incorrect to formulate the test as between the public interest attaching to the work of human rights officers and the Article 17 rights of accused persons.<sup>15</sup>

---

<sup>14</sup> Blaskic Decision, paras. 23 and 25 See also *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 28.

<sup>15</sup> See para. 20 of the Majority Decision.

24. The Article 17 rights of the accused necessarily envision situations where all available information will not be given to the Chamber. This is the effect of Rule 70(D). Irrespective of whether or not Rule 70 applies to witness TF1-150, the Rules of Procedure and Evidence contain a recognition of the fact that the non revelation of some information to the Chamber does not breach the fair trial rights of the accused *per se*. It follows that the correct formulation of the balancing exercise to be undertaken by the Chamber is as between competing public interests under the rubric of the Article 17 rights of the accused, rather than weighing the public interest attaching to the work of human rights officers against the Article 17 rights.
25. The Prosecution submits that the necessity for the correct identification of the competing public interests arising when human rights officers are called as witnesses before international tribunals amounts to exceptional circumstances given the importance of such testimony, both in the instant case and at large.
26. The protection of confidentiality is imperative if international tribunals are to foster information sharing with international bodies, particularly those engaged in humanitarian assistance work. Given the nature of their work, humanitarian aid workers often possess information that is not obtainable from other sources but which could assist the tribunals in the fair disposition of the cases before them. By compelling them to disclose their confidential sources in breach of their confidential undertakings, there is a real risk that these international entities might become less willing to present relevant or vital information, both at the investigative stage and during trial.
27. In addition, the potential risk posed to the security of informants living in post conflict areas cannot be underestimated and it may be essential to protect their identity. The security risk is especially pertinent as regards international tribunals as opposed to domestic courts. Moreover, it is not in the interest of justice for confidential sources, who give information to humanitarian workers under conditions of confidentiality at a time when a trial is not anticipated, to be made to assume the risk of exposure if the information is made the subject of testimony before international tribunals. Nor is it sufficient to say that humanitarian workers who agree to testify must undertake the risk of exposing their confidential sources. The harm to the functioning of an international



tribunal is obvious: humanitarian workers will be less willing to come forward with both incriminating and exculpatory evidence.

**(ii) Issue of Fundamental Legal Importance**

28. In a recent decision, this Trial Chamber held that exceptional circumstances may exist where:

the question is one of general principle to be decided for the first time, or is a question of public international law upon which further argument or decision at the appellate level would be conducive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious fundamental issues of fundamental legal importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general, or some novel substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.<sup>16</sup>

29. The issue of whether the Court may compel a humanitarian aid worker to disclose the identity of his confidential source is one of significance for international criminal law and one which has not been specifically determined by the existing international tribunals. International law has recognized a privilege against testifying that attaches to certain humanitarian organizations<sup>17</sup> but has not answered the question whether witnesses from such organizations may decline to disclose the names of their confidential sources should their immunity be waived.

30. The issue of the extent to which humanitarian workers who testify before international tribunals may claim confidentiality in respect of their sources is a novel one. It is far from a mere academic exercise. Rather, it is an issue that might arise again before this and other tribunals given the accessibility of humanitarian workers to information in conflict areas, including crucial information that could ensure the fair disposition of cases. There is a need for an authoritative statement of the law on the matter to serve as a guide to both humanitarian organizations and international tribunals in general.

---

<sup>16</sup> *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Decision on Defence Applications for Leave to Appeal Rulings of the 3<sup>rd</sup> February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para.26.

<sup>17</sup> *Prosecutor v Simic et al.*, Case No. IT-95-9, Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross, 7 June 2000, p. 2.

**(iii) Dissenting Opinion**

31. The jurisprudence of the Special Court shows that the fact that there is a dissenting opinion on the issue or issues forming the subject matter of an intended appeal does not, of itself, constitute an “exceptional circumstances” within the letter and spirit of Rule 73(B).<sup>18</sup> However, it is an additional factor that the Chamber may consider, especially in a case such as this where the two Chambers have each produced split decisions on the issue.

**B. Irreparable prejudice**

32. The Prosecution submits that the decision compelling TF1-150 to disclose the identity of his confidential source has caused irreparable prejudice in that the Prosecution has been unable to call this witness to testify to an important issue at trial (the widespread and systematic nature of the attack on the civilian population in Sierra Leone).

33. Furthermore, the decision may have the added impact of making it difficult for the Prosecution to secure the cooperation of humanitarian organizations in another ongoing case before the Special Court, in that future witnesses might come from international organizations and there is a risk that they will re-evaluate their decision to testify.

**IV. CONCLUSION**

34. For the articulated reasons, the Prosecution submits that both the exceptional circumstances and irreparable prejudice limbs of the Rule 73(B) test have been satisfied and respectfully requests leave to appeal the Majority Decision that TF1-150 could be compelled to answer questions relating to the sources of his information.

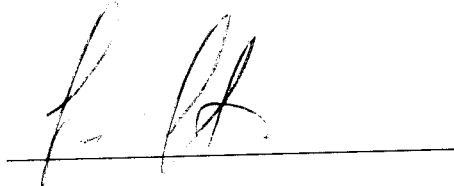
---

<sup>18</sup> *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T, Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay-Motion seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 15 June 2005, para. 19.

Filed in Freetown,

19 September 2005

For the Prosecution,

A handwritten signature in black ink, appearing to be 'L. Côté', written over a horizontal line.

Luc Côté

Chief of Prosecutions

A handwritten signature in black ink, appearing to be 'L. Taylor', written over a horizontal line.

Lesley Taylor

Senior Trial Attorney

## Index of Authorities

### A. Orders, Decisions and Judgments

1. *Prosecutor v. Blaskic*, Decision of Trial Chamber 1 on the Prosecutor's Motion for Video Deposition and Protective Measures, Case No. IT-95-14, 11 November 1997, para. 15, 23, 25.  
<http://www.un.org/icty/blaskic/trialc1/decisions-e/71113PM113320.htm>
2. *Prosecutor v. Brima et al*, Decision on the Prosecutor's Oral Application for Leave to Be Granted to Witness TF1- 150 to Testify Without Being Compelled to Answer Any Questions in Cross-Examination that the Witness Declines to Answer On Ground of Confidentiality Pursuant to Rule 70 (B) and (D) of the Rules, SCSL-04-16-T, 16 September 2005, par. 20.
3. *Prosecutor v. Brima et al.*, Separate and concurring opinion of Justice R.B. Lussick on Brima - Kamara application for leave to appeal from decision on the re-appointment of Kevin Metzger and Wilbert Harris as lead counsel, SCSL 04-16-T384, 14 September, 2005.
4. *Prosecutor v. Krstic*, Decision on Application for Subpoenas, Case No. IT-98-33-A, 1 July 2003, para. 28.  
<http://www.un.org/icty/krstic/Appeal/decision-e/030701.htm>
5. *Prosecutor v. Milošević*, IT-02-54-AR108bis & AR 73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 23, 25, 29.  
<http://www.un.org/icty/milosevic/appeal/decision-e/23102002.htm>
6. *Prosecutor v. Norman et al*, Decision on Prosecution Appeal Against the Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal, SCSL-04-14-T, 17 January 2005, para. 29.
7. *Prosecutor v. Sesay et al*, Decision on Defense Applications for Leave to Appeal Ruling of the 3rd February, 2005 on the Exclusion of Statements of Witness TF1-141, SCSL-2004-15-T, 28 April 2005, para. 21.

8. *Prosecutor v. Sesay et al*, Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay-Motion seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, SCSL-2004-15-T, 15 June 2005, para. 19, 20.
9. *Prosecutor v. Sesay et al*, Decision on Defense Applications for Leave to Appeal Ruling of the 3<sup>rd</sup> of February, 2005 on the Exclusion of Statements of Witness TF1-141, SCSL-2004-15-T, 28 April 2005, para. 26, 29.
10. *Prosecutor v. Simic et al*, Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross, Case No. IT-95-97, June 2000, p. 2.

<http://www.un.org/icty/simic/trialc3/decision-e/00607PN512852.htm>

## **B. Rules of Procedure and Evidence**

1. Rules of Procedure and Evidence of the Special Court, Rule 70, 70 (B), 70 (D), 73 (B), Amended 14 May 2005.

ANNEXURE 1

14854

UNITED NATIONS  NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017  
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE.

23 May 2005

Dear Mr. Crane

Special Court for Sierra Leone: The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Alieu Kondewa; The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao; and The Prosecutor v. Alex Tamba Brima; Ibrahim Bazy Kamara and Santigue Kanu.

I wish to refer to your letters dated 29 April 2005 (received on 5 May 2005) and 12 May 2005 respectively requesting that the Secretary-General waive the immunity from legal process which is enjoyed by Mr. Michael O'Flaherty so that he can appear before the Special Court as a witness in the cases of *The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Alieu Kondewa*; *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*; and *The Prosecutor v. Alex Tamba Brima; Ibrahim Bazy Kamara and Santigue Kanu*.

Mr. Michael O'Flaherty was a staff member serving with the United Nations Assistance Mission for Sierra Leone (UNAMSIL), at the time of the events in respect of which you wish that he should testify and was therefore an official of the United Nations.

As such, Mr. O'Flaherty enjoyed, and continues to enjoy, the privileges and immunities set out in Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946 pursuant to Article 105 of the Charter. These privileges and immunities include immunity from legal process in respect of all words spoken or written and all acts performed by him in the course of the performance of his official functions.

Mr. David Crane  
Prosecutor  
Special Court for Sierra Leone  
Freetown

At the same time, the privileges and immunities which Mr. O'Flaherty enjoys as a former United Nations official are granted to him in the interests of the United Nations. The Secretary-General has the right and the duty to waive those immunities in any case where, in his opinion, they can be waived without prejudice to those interests.

That being so, I am pleased to advise you that, subject to what is said below, the Secretary-General hereby waives the immunity from legal process which is enjoyed by Mr. Michael O'Flaherty to the extent that is necessary to permit him to appear as a witness for the prosecution in the cases of *The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Alieu Kondewa*; *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*; and *The Prosecutor v. Alex Tamba Brima; Ibrahim Bazy Kamara and Santigue Kanu* and, for that purpose, to testify freely as to the existence or otherwise of any of the elements of any of the crimes set out in the Statute of the Special Court or other matters which, in the opinion of the Court, are relevant to the individual criminal responsibility of an accused or of any circumstance of an exculpatory or mitigatory nature, as well as to be asked and to answer questions which seek to establish the existence or inexistence of any such element or circumstance.

In view of the sensitive and confidential information which Mr. O'Flaherty may provide, it is a condition of this waiver that he testify in closed session, that transcripts and recordings of his testimony be restricted to the Trial Chambers and their staff, to the Prosecutor and her staff and to the Accused and their counsel and expert advisers, and that the Prosecutor and her staff and the Accused and their counsel and expert advisers be prohibited from divulging the contents of such testimony to the media or to any other third party.

It is also a condition of this waiver that you seek and obtain from the Trial Chambers before which the cases of *The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Alieu Kondewa*; *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*; and *The Prosecutor v. Alex Tamba Brima; Ibrahim Bazy Kamara and Santigue Kanu* are to be heard orders of protective measures giving effect to the condition set out in the preceding paragraph.

I should emphasize that the waiver hereby granted is limited to the appearance of Mr. O'Flaherty as a witness for the purposes which are set out above and that it does not relate to the release of confidential documents of the United Nations, which is subject to separate authorization by the Secretary-General.



Finally, I would appreciate it if you would provide Mr. O'Flaherty – with whom you are in contact with a copy of this letter.

Yours sincerely,



~~Ralph Zacklin~~

Assistant Secretary-General for Legal Affairs

cc: Judge Ayoola, President of the Special Court for Sierra Leone ✓  
Mr. Jean-Marie Guéhenno  
Mr. Michael O'Flaherty