

**SPECIAL COURT FOR SIERRA LEONE**

OFFICE OF THE PROSECUTOR

FREETOWN - SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 6 April 2005

**THE PROSECUTOR****Against**

**ALEX TAMBA BRIMA  
 BRIMA BAZZY KAMARA  
 SANTIGIE BORBOR KANU**

Case No. SCSL - 2004 - 16 - T

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**PROSECUTION RESPONSE TO JOINT DEFENCE MOTION ON DISCLOSURE  
 OF ALL ORIGINAL WITNESS STATEMENTS, INTERVIEW NOTES AND  
 INVESTIGATORS' NOTES PURSUANT TO RULES 66 AND/OR 68**

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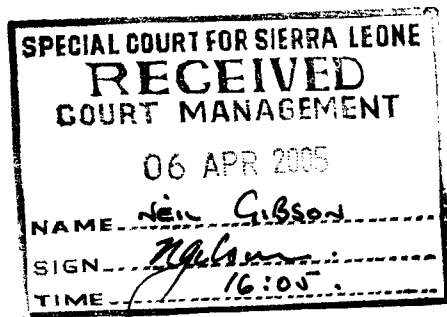
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**I INTRODUCTION**

1. The Prosecution files this response to the “Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68” dated 9 March 2005 (“the Joint Defence Response”).
2. The Joint Defence Response:
  - a) Notes that there are discrepancies between the disclosed witness statements and testimony of witnesses TF1-024 and TF1-277.
  - b) Seeks the notes of investigators pertaining to the interviews of these witnesses to “further verify the authenticity” of the initial witness statements.
  - c) Seeks the original witness statements and the original notes of the OTP investigator responsible for interviewing the 63 core witnesses.
  - d) Argues that b) and c) be ordered pursuant to Rules 66 and/or 68.

## II BACKGROUND

3. There were numerous investigators attached to the Office of the Prosecutor during the initial investigation phase. While some personal practices varied, evidentiary material and other material relevant to the functioning of the OTP was collected and recorded pursuant to OTP policy.
4. During the investigation, investigators obtained information of varying types from potential prosecution witnesses: some was evidence, both inculpatory and exculpatory, relevant to the various indictments, and some was relevant only to the internal functioning of the OTP, such as investigative leads. Given the circumstances in which the investigation was conducted, all such information was recorded without distinction in rough form. This rough form included both handwritten and typewritten material. All evidentiary material collected in rough form was then transferred to written witness statements (either handwritten or typewritten) and other non-disclosable material was transferred to Internal Memoranda. By this process the rough notes were rendered superfluous and were destroyed. The respective statements of the witnesses provide a guide as to the testimony of each of the witnesses.
5. Pursuant to the Rules the written witness statements have been disclosed to the Defence, in both redacted and unredacted form.

## III ARGUMENT

### **Witnesses TF1-024 and TF1-277**

6. In so far as the Joint Defence Motion seeks the original investigation notes specifically with respect to witnesses TF1-024 and TF1-277, the Prosecution notes that these witnesses have already given evidence, been cross-examined and released by the Court. Discrepancies from alleged prior inconsistent statements made by these witnesses have already been explored by the Defence.

7. The Joint Defence Motion refers to the statement of witness TF1-277 dated 25 November 2003 and states that the Defence is not in a position to verify the information given by the witness which clarified the circumstances surrounding the killing of Zainab. The Joint Defence Motion does not refer to the Interview Note dated 17 February 2005 (Exhibit D1) in which clarification of this incident is given.<sup>1</sup>
8. It is trite to observe that there will usually be discrepancies between the written statement of a witness and his/her subsequent testimony. A Court will usually assess any discrepancies and give appropriate weight to the evidence without reference to original investigation notes.
9. In *Prosecutor v. Niyitegeka*<sup>2</sup>, the issue of discrepancy between the testimony and the witness statements was addressed:
- “The Defence argued that in the interests of a fair trial, it was entitled to first-made records, or the handwritten notes, of Prosecution’s investigators, taken during interviews with the Prosecution witnesses, in order to use such notes during cross-examination to challenge the credibility of the witness. The Chamber ruled that such records are privileged documents that fall within Rule 70 and are not subject to disclosure. As Prosecution witness statements were disclosed to the Defence, the Defence, based on these statements, could raise discrepancies and other issues of credibility in cross-examination for the Chamber’s consideration. Finally, the Chamber notes that the Prosecution maintained that it did not have any handwritten notes of investigators in its possession.”
10. Similarly, in *Prosecutor v. Nahimana, Barayagwiza and Ngeze*<sup>3</sup>, it was said:
- “Counsel for Nahimana orally requested on 30 August 2001 the disclosure of the Prosecution investigators’ notes taken during the interviews of Prosecution Witness ABC for purposes of cross-examination. On the same day, the Chamber denied the application, noting that discrepancies between the testimony and the previous written statements and the inferences to be drawn from such discrepancies would be taken into account by the Chamber in the evaluation of the witness’s evidence.”

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<sup>1</sup> The Prosecution notes that the issue of prior inconsistent statements with respect to witness TF1-277 has been raised in other pleadings before the Court. See Confidential Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95, filed 11 March 2005 and the Prosecution Response thereto filed 6 April 2005.

<sup>2</sup> “Judgement and Sentence”, ICTR-96-14-T, 16 May 2003 at para 41.

<sup>3</sup> “Judgement and Sentence”, ICTR-99-52-T, 3 December 2003 at para 61.

**Rule 70 of the Rules of Procedure and Evidence**

11. Rule 70 establishes that not all material within the custody and control of the Prosecution is subject to disclosure. Rule 70 has been interpreted at various occasions. In *The Prosecutor v. Blaskic*, the Trial Chamber ruled that “the notes of the investigations (stipulated in C1 of the Defence Motion of 26 November 1996) as well as the internal reports at the Office of the Prosecutor from any expert witness (stipulated in C4 of that same Motion) must fall within the scope of Sub-rule 70(A) and not be the subject of any disclosure or exchange.”<sup>4</sup>
12. The Prosecution submits that Rule 70 applies to extant Internal Memoranda arising from the investigation in the present instance.<sup>5</sup>
13. As noted above in paragraph 4, the original interview notes no longer exist. In *Niyitegeka v. The Prosecutor* it was held that “The Prosecution is obliged to make the witness statement available to the Defence in the form in which it has been recorded. However, something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to impossibility).”<sup>6</sup>

**III CONCLUSION**

14. No original investigators notes are extant. Accordingly, the Prosecution cannot disclose such material. All witness statements within the possession or control of the OTP have been disclosed to the Defence. In the future, the Prosecution will provide handwritten statements as well as typed versions thereof, where such handwritten versions exist. The Prosecution submits that any internal memoranda containing information that cannot be characterized as evidence gained from potential prosecution witnesses are privileged and not subject to disclosure.

<sup>4</sup> *The Prosecutor v. Blaskic*, Decision on the Production of Discovery Materials, IT-95-14-PT, 27 January 1997 at para 40.

<sup>5</sup> *The Prosecutor v Norman, Fofana and Kondewa*, SCSL-04014-PT, Ruling on Disclosure of Witness Statements, 1 October 2004, paras. 13 and 14.

<sup>6</sup> *Niyitegeka v. The Prosecutor*, ICTR-96-14A, 9 July 2004, at para 35.

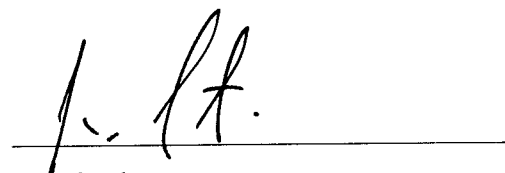
15. The Prosecution respectfully submits that the motion should be dismissed.

Dated this 6<sup>th</sup> day of April 2005

In Freetown,

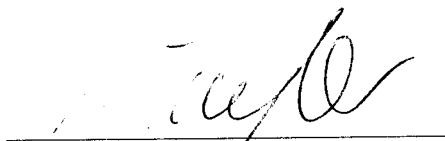
Sierra Leone.

For the Prosecution,



Luc Côté

Chief of Prosecutions



Lesley Taylor

Senior Trial Counsel

**PROSECUTION INDEX OF AUTHORITIES**

*Prosecutor v Norman, Fofana and Kondewa*, Ruling on Disclosure of Witness Statements, SCSL-04014-PT, 1 October 2004.

*Prosecutor v. Niyitegeka* “Judgement and Sentence”, ICTR-96-14-T, 16 May 2003.  
<http://www.ictr.org/default.htm>

*Niyitegeka v. The Prosecutor*, ICTR-96-14A, 9 July 2004  
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*Prosecutor v. Nahimana, Barayagwiza and Ngeze*, “Judgement and Sentence”, ICTR-99-52-T, 3 December 2003.  
<http://www.ictr.org/default.htm>

*The Prosecutor v. Blaskic*, Decision on the Production of Discovery Materials, IT-95-14-PT, 27 January 1997  
<http://www.un.org/icty/cases/indictindex-e.htm>