

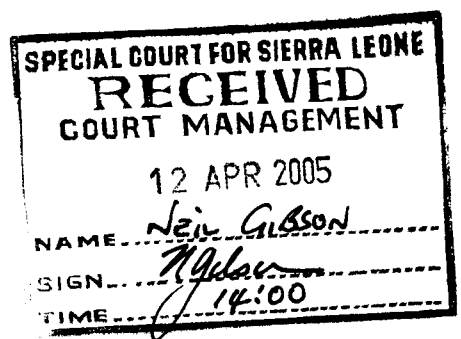
**SPECIAL COURT FOR  
SIERRA LEONE**

Case No. SCSL-2004-16-T

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

Registrar: Robin Vincent

Date filed: April 12, 2005



**THE PROSECUTOR**

against

**ALEX TAMBA BRIMA**

**BRIMA BAZZY KAMARA**

and

**SANTIGIE BORBOR KANU**

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**JOINT DEFENCE REPLY TO 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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Office of the Prosecutor:  
Luc Coté  
Robert Petit

Defence Counsel for Kanu:  
Geert-Jan A. Knoops, Lead Counsel  
Cary J. Knoops, Co-Counsel  
A.E. Manly-Spain, Co-Counsel

Defence Counsel for Brima:  
Kevin Metzger  
Glenna Thompson  
Kojo Graham

Defence Counsel for Kamara:  
Wilbert Harris  
Mohamed Pa-Momo Fofanah

## I INTRODUCTION

1. On March 9, 2005, the Defence filed its “Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rule 66 and/or 68” (“**Motion**”). On April 6, the Prosecution filed its “Prosecution Response to Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rule 66 and/or 68” (“**Response**”). This “Joint Defence Reply to Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68” (“**Reply**”) is in reply thereto.

## II REBUTTAL OF PROSECUTION ARGUMENT

### 2.1 Request Pertains to All Prosecution Witnesses

2. In para. 6 of its Response, the Prosecution indicates that the witnesses TF1-024 and TF1-277 referred to by the Defence in its Motion, have already testified before the Court, and were subsequently released. However, the Defence wishes to emphasize that the requested relief concerns not only the information relating to those specific witnesses, but “to release all the original materials pertaining to the interviews of the Prosecution witnesses which are called to testify in chief.”<sup>1</sup> The motion therefore extends to the release of said materials of all Prosecution witnesses.

### 2.2 Interpretation of Rule 70

#### *Rule 68*

3. The Prosecution invokes Rule 70, which indicates that notwithstanding Rule 66, “reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.”

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<sup>1</sup> See para. 14 of the Motion.

4. However, as already indicated by the Defence in its Motion, the Defence bases its request on Rules 68 and/ or Rule 66 of the Rules.
5. In the first place, Rule 70 only mentions “[n]otwithstanding the provisions of Rules 66 and 67 (...),” and thus not refer to Rule 68. The Defence therefore presumes that the Prosecution, in its subtitle only relies on Rule 70 but not on disclosure obligations pursuant to Rule 66/68.
6. Therefore, the Defence motion as to Rule 68 stands uncontested as clearly formulated in section 2.1 of the Motion.

*Rule 66*

7. Regarding the requested disclosure of information under Rule 66 of the Rules, the Defence wishes to add the following.
8. In its Prosecution Response, the Prosecution refers to certain ICTR jurisprudence relating to Rule 70 of the Rules of the ICTR. However, it should be noted that the Special Court has developed specific case law on this matter.
9. As already mentioned in the Motion, the Defence first of all refers to *Prosecutor v. Sesay et al.*, where Trial Chamber I stated that interview notes do fall under the disclosure obligation of the Prosecution under Rule 66.<sup>2</sup>
10. Secondly, the Defence wishes to draw the honorable Trial Chamber’s attention to another ruling of Trial Chamber I in the case of *Prosecutor v. Norman et al.*,<sup>3</sup> where the Trial Chamber held that:

the fact that the interview notes were recorded by the Prosecution from a potential Prosecution witness who was to be called to testify against an Accused in what should be and is indeed, a fair and public hearing (...) and that in the

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<sup>2</sup> See para. 8 of the Motion.

<sup>3</sup> *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, Ruling on Disclosure of Witness Statements, 1 October 2004, also referred to by the Prosecution in para. 12 of its Response.

circumstances, a factual confrontation on all issues is a major and an essential element of such a process. We also reiterate that the contents of the interview notes in whatever form, are the witness's statements (...) even if the investigator is their custodian. It is therefore our opinion, in the light of the above, and we so hold, that those notes neither form part of the reports, memoranda or other document of an investigator, nor do they by any stretch of the imagination, come within the purview and contemplation of Rule 70(A) of the Rules of Procedure and Evidence. It is, therefore, the considered view of the Trial Chamber that the Prosecution has failed in fulfilling its disclosure obligations under Rule 66(A)(i) of the Rules.<sup>4</sup>

11. The Prosecution was subsequently ordered to provide the Defence with the requested interview notes.<sup>5</sup>
12. The Defence thus submits that, on the basis of this case law of the Special Court, it is entitled, at least under Rule 66 of the Rules, to have access to the requested materials under (a), (b) and (c) of the Relief Sought.
13. Moreover, a recent Appeals Chamber decision of the ICTR supports this view. Although the ICTR did not accept a general duty on the Prosecution to make available to the Defence its own internal material created at the time of an interview, it confirmed that records of questions put to witnesses by the Prosecution and of the answers given, constitute witness statements pursuant to Rule 66(A)(ii).<sup>6</sup> Accordingly, also based on this jurisprudence, the particular interview notes should be disclosed to the Defence.

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<sup>4</sup> *Id.*, para. 16.

<sup>5</sup> *Id.*, p. 8.

<sup>6</sup> See *Prosecutor versus Niyitegeka*, Appeals Chamber Judgement ICTR 9 July 2004, para. 31-36, Case No. ICTR-96-14-A.

### 2.3 Documents No Longer Exist

14. In paras. 4, 13 and 14 of its Response, the Prosecution indicates that none of the requested materials is available anymore, and that thus, this cannot be subject to disclosure.
15. The Defence is mindful of this observation made by the Prosecution. However, given the fact that the disclosure issue at stake amounts to a fundamental principle of fairness and fact-finding, the Defence respectfully requests the honorable Trial Chamber to nonetheless adjudicate upon the Defence Motion. Despite the notification by the Prosecution that it is no longer in possession of said documents, the Defence believes it to be in the interests of justice that the Trial Chamber renders a decision on the relevance of these documents to the Defence, in the AFRC case in which context it may seem as being in the interest of justice that an assessment is made on whether the Prosecution has fulfilled its disclosure obligations under Rules 66 and 68 of the Rules. After all, the underlying rationale of disclosure obligation is compliance to fair trial notions, specially also to provide the Defence with an equal opportunity to challenge the Prosecution's evidence.

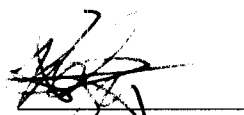
### III RELIEF SOUGHT


16. It is for the above reasons that the Defence modifies its Relief Sought as formulated in its Motion, and respectfully requests the honorable Trial Chamber to order that the Prosecution, by destroying the materials requested by the Defence in its Motion, has failed to fulfill its disclosure obligations under Rules 66 and 68 of the Rules.

Respectfully submitted,

On April 12, 2005

  
 Geert-Jan Knoops

  
 Kevin Metzger

  
 PP: Wilbert Harris