218

SCSL – 2004 – 14 – T
(9653 – 9660)

9653

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

Before:	Hon. Judge Benjamin Mutanga Itoe, Presiding Judge Hon. Judge Bankole Thompson Hon. Judge Pierre Boutet
Registrar:	Robin Vincent
Date:	1st October, 2004

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-PT)

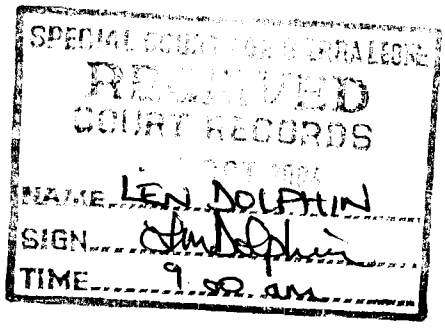
RULING ON DISCLOSURE OF WITNESS STATEMENTS

Office of the Prosecutor:
Luc Côté
James Johnson

Court Appointed Counsel for Sam Hinga Norman:
Dr Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.
Quincy Whitaker

Court Appointed Counsel for Moinina Fofana:
Michiel Pestman
Arrow Bockarie
Victor Koppe

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yadda Williams
Ansu Lansana



THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

SEIZED of a Request by Standby Counsel for the First Accused during the testimony of Witness TF2-162 at trial on the 8th of September, 2004, for the Prosecution to disclose handwritten interview notes taken by the Prosecution for this witness;

MINDFUL that the witness stated in his testimony that there were handwritten interview notes or statements taken by the Prosecution during at least two interviews the investigators had with him;

MINDFUL of the Letter from Defence Counsel for the Second Accused to the Prosecution, and copied to the Trial Chamber, dated the 8th of September, 2004, where the Defence sought an explanation from the Prosecution as to why it had failed to fully comply with its disclosure obligations;

MINDFUL of the request by the Defence that the interview notes prepared by investigators or prosecutors for Witness TF2-162 be made available to them;

CONSIDERING the submissions made during trial on the 10th of September, 2004, by the Defence Counsel for the First, Second and Third Accused, that included, *inter alia*, that:

(1) The handwritten interview notes taken for Witness TF2-162 are subject to disclosure within the meaning of Rule 66(A)(i), or alternatively, under, Rule 66(A)(ii), Rule 66(A)(iii) or Rule 68 of the Rules;[1]

(2) The handwritten interview notes taken for Witness TF2-162 do not fall within the meaning of Rule 70(A) of the Rules, as this Rule applies to privileged material that includes notes of the Prosecution on how to progress investigation, and does not apply to interview notes;[2]

NOTING that the Defence also observed that witnesses in the prior court session also gave similar evidence to Witness TF2-162, namely, that handwritten interview notes were taken by investigators or prosecutors when taking their statements and that these notes are also subject to disclosure pursuant to the rules stated in point (1);

CONSIDERING the Response of the Prosecution to the Defence Request made during trial on the 10th of September, 2004, where the Prosecution submitted that;

(1) If the Prosecution were only in possession of handwritten interview notes taken from a statement given by a witness, it would disclose these handwritten interview

[1] Trial Transcript, 8th September 2004, T.69-72.
[2] Trial Transcript, 8th September 2004, T.89.

notes and that it would disclose the statement of the witness in whichever form it had in its possession;[3]

(2) That it is not the policy of the Prosecution to keep handwritten notes and that the practice is to transcribe such notes into a statement on the computer and once the function of these notes no longer exists, the interview notes are destroyed;[4]

(3) That no handwritten interview notes exist for Witness TF2-162, nor does the Prosecution know if they ever existed;[5]

MINDFUL of the *Prosecution Authorities Filed in Support of its Position*, filed by the Prosecution on the 14th of September, 2004;

MINDFUL of Rule 66 of the Rules of Procedure and Evidence of the Special Court ("Rules") and Article 17 of the Statute of the Special Court for Sierra Leone ("Special Court");

HEREBY ISSUES THE FOLLOWING RULING:

THE APPLICABLE LAW

A. Disclosure Obligations

1. Rule 66 of the Rules provides as follows:

> **Rule 66: Disclosure of materials by the Prosecutor**
>
> (A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:
>
> (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial.
>
> (ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good clause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.
>
> (iii) At the request of the defence, subject to Sub-Rule (B), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control,

[3] Trial Transcript, 10th September 2004, T.85-87.
[4] Trial Transcript, 10th September 2004, T.79.
[5] Trial Transcript, 10th September 2004, T.80-82.

which are material to the preparation of the defence, upon a showing by the defence of categories of, or specific, books, documents, photographs and tangible objects which the defence considers to be material to the preparation of a defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(B) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to a Judge designated by the President sitting *ex parte* and *in camera*, but with notice to the Defence, to be relieved from the obligation to disclose pursuant to Sub-Rule (A). When making such an application the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential.

THE MERITS OF THE APPLICATION

APPLICABLE JURISPRUDENCE

2. The jurisprudence of the Court so far makes it abundantly clear that Rule 66(i) of the Rules requires the Prosecution to disclose to the Defence, copies of the statements of all witnesses it intends to call to testify within 30 days of the initial appearance of the Accused; that Rule 66(ii) of the Rules imposes an obligation of continuous disclosure on the Prosecution to the Defence, and that the statements of all additional Prosecution witnesses that it intends to call, should be disclosed no later than 60 days before the date of trial, or otherwise ordered by the Trial Chamber, upon good cause being shown by the Prosecution. The jurisprudence also reveals that reciprocal disclosure is mandated by Rule 67 of the Rules while Rule 68 requires the disclosure of exculpatory evidence within 30 days of the initial appearance of the Accused, and thereafter to be under a continuing obligation to disclose exculpatory material.

3. The overriding principle is that the parties must act *bona fides* at all times when exercising disclosure obligations under the Rules. The Trial Chamber has in this regard, held in a previous *Decision on Disclosure of Witness Statements and Cross-Examination*, issued on the 16th of July, 2004, that any allegation by the Defence as to a violation of disclosure by the Prosecution must be substantiated with *prima facie* proof of such a violation. In that Decision, the Trial Chamber stated:

> "It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. [6] There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation. This Chamber in recent decisions has indeed ruled that the Defence must "make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution".[7] It is of course the role of the Trial Chamber to enforce disclosure obligations in

[6] *Prosecutor v. Delalic*, Decision on the Applications Filed by the Defense for the Accused Zejnil Delalic and Esad Landzo, 14th February 1997 and 18th February 1997, 21 February 1997, para 14.

[7] *Prosecutor v. Sesay*, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Para. 27. See also *Prosecutor v. Kondewa*, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and materials Pursuant to Rule 68, 8th July 2004.

> the interests of a fair trial, and to ensure that the rights of the Accused, as provided in Article 17(4)(e) of the Statute, to examine or have examined, the witnesses against him or her, are respected and where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Trial Chamber will apply appropriate remedies which may include the exclusion of such evidence."[8]

4. Guided by these principles, we would now proceed to consider the issue in question which is whether the Defence has made out a *prima facie* showing with respect to the alleged breach of disclosure rules by the Prosecution on the grounds of failure to produce handwritten interview notes of Witness TF2-162, in its custody and control, which it should have disclosed or ought to disclose under the provisions of Rule 66 of the Rules of Procedure and Evidence. In addressing this matter, the Chamber needs to be satisfied that the Defence has, on the basis of the evidence so far adduced, proved that handwritten notes were taken by investigators and or Counsel or officials of the prosecution, in the course of their interviews with this witness.

5. In this regard, the records show that in his testimony on the 8th of September, 2004, this witness TF2-162, affirmed that the Prosecution took handwritten notes of interviews they conducted with him. In their response, the Prosecution averred that it is not its policy to keep handwritten notes. Furthermore, the Prosecution has stated that no handwritten interview notes exist for Witness TF2-162, nor does it know if they ever existed.[9] Based on the foregoing, the Trial Chamber finds, on a *prima facie* showing by the Defence, that handwritten interview notes were taken by the investigators and/or Prosecution for Witness TF2-162.

6. In the absence of any further clarification or proof by the Prosecution as to the chain of custody of the interview notes taken by the Prosecution for this witness, and the witness clear statement that handwritten notes were taken in the course of interviews with him conducted by the Prosecution, the Trial Chamber concludes that the Defence have established that the handwritten interview notes in question are within the custody and control of the Prosecution, and further, that such notes are not only material to their case, but also constitute witness statements within the meaning of Rule 66(A)(i)of the Rules.

7. In a recent Decision on this subject, the Trial Chamber noted that handwritten interview notes do constitute witness statements within the meaning of Rule 66(A)(i) of the Rules and had this to say:

> "In the light of the foregoing analysis, the Trial Chamber finds no merit in the Defence contention that the Prosecution interview notes, prepared from oral statements of witnesses, do not in law constitute witness statements. *The fact that a witness statement is not, grammatically or, from the point of view of syntax, is not in the 'first person' but in the 'third person' goes more to form than to substance,* and does not deprive the materials in question of the core quality of a statement. The Trial Chamber agrees with the assertion given by the Prosecution at the 1 June 2004 Status Conference that a statement can be, "anything that comes from the mouth of the witness" regardless of the format. By parity of reasoning, the fact that a statement does not contain a signature, or is not witnessed does not detract from its substantive validity."[10]

---

[8] See *Prosecutor v. Furundzija*, Scheduling Order, 29th April 1998; *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision on Disclosure of Witness Statements and Cross-Examination, 16th July 2004, para. 7
[9] Trial Transcript, 10th September 2004, T. 80-82.
[10] Para. 22.

8. The Chamber further emphasized:

> "In this regard, we are of the opinion and we so hold, that any statement or declaration made by a witness in relation to an event he witnessed and recorded in any form by an official in the course of an investigation, falls within the meaning of a 'witness statement' under Rule 66(A)(i) of the Rules. When confronted with matters of legal characterization, this Chamber must also take cognisance of the socio-cultural dynamics at work in the context of the legal culture in which it functions, for example, the limited language abilities and capabilities of potential prosecution witnesses, and their level of educational literacy. In addition, and in the particular circumstances of this case, the witness who we have on record as an illiterate, certainly depended largely on the investigator to record all the information that he disclosed to him during his interrogation."[11]

9. We find no reason to depart from the above ruling and accordingly consider it unnecessary to further examine the arguments of the Defence in respect of Rule 66(A)(ii) and (iii) and Rule 68.

10. In another argument and submission, the Prosecution contends that handwritten notes taken from witness TF2-162, fall within the meaning of Rule 70(A) of the Rules and are therefore, notwithstanding the provisions of Rules 66 and 67, not subject to disclosure.

11. Rule 70(A) of the Rules provides as follows:

> Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistant or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

12. While there is no doubt that the Prosecutor under whose control investigations are undertaken is a party to the proceedings within the meaning of Article 15 of the Statute and of Rule 70 (A) of the Rules of Procedure and Evidence, the Prosecution in making this submission, seeks to further establish that interview notes recorded by an investigator in the course of an interview with a witness or in preparation for the case, is either a report, a memorandum or an internal document prepared by a party in preparation for the case and therefore, not susceptible to disclosure under Rule 66.

13. In responding to this submission put forward by the Prosecution, the Chamber observes that the preservation of confidentiality of some internal memoranda, notes, and other sensitive information is predicated upon the notion of functional effectiveness which is a vital element of the very existence of modern institutions.

14. The Chamber is, however, of the opinion that for such information to be protected, as contended by the Prosecution, it must constitute part of the mechanism for the internal strategic planning and functioning of the Office of the Prosecutor, and that its disclosure could threaten or disrupt the very foundation on which it functions. This information would

[11] Para. 23.

include an internal report or exchange on how the interview notes have to be used and any other internal documents prepared by a party in connection with the investigation or the preparation of the case.

15. By parity of reasoning, it is the view of the Trial Chamber that the handwritten interview notes taken for Witness TF2-162 logically do not fall within the meaning and contemplation of Rule 70(A) of the Rules. We are of the view that the aforesaid Rule is restrictive in scope, and therefore applies only to internal documents prepared by a party in connection with an investigation or the preparation of a case. We draw support for this reasoning from the decision of the Trial Chamber of the ICTR in the *Niyitegeka*[12] case where it was held as follows:

> "Questions that were put to a witness – thus being part of the witness statement – have to be distinguished from "internal documents prepared by a party", which are not subject to disclosure under Rule 70(A) of the Rules, as an exception to the general disclosure obligation pursuant to Rule 66(A)(ii) of the Rules. A question once put to a witness is not an internal note any more; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules. If, however, counsel or another staff member of the Prosecution notes down a question prior to the interrogation, without putting this question to the witness, such a question is not subject to disclosure. Similarly, any note made by counsel or another staff member of the Prosecution in relation to the questioning of the witness is not subject to disclosure, unless it has been put to the witness.
>
> The fact that a particular witness statement does not correspond to the standard set out above does not free a party from its obligation to disclose it to the other party pursuant to Rule 66(A)(ii) of the Rules. Furthermore, a witness statement which does not correspond to the standard set out above does not necessarily render the proceedings unfair. 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 an impossibility)."

16. The Trial Chamber would like to underscore here, 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 as provided for in Article 17(2) of the Statute and that in the 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 by Witness TF2-162 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.

---

[12] *Niyitegeka v. Prosecutor*, Judgement, 9th July 2004, paras 34-35.

17. Furthermore, the Trial Chamber finds that there is no *prima facie* showing by the Defence that the Prosecution has failed to comply fully with Rule 66(A)(i) as regards the disclosure of witness statements for all other witnesses who have testified, as submitted by the Defence.

FOR ALL THE ABOVE-STATED REASONS, THE TRIAL CHAMBER

FINDS AS FOLLOWS:

1. That the Prosecution has in its control and custody, the handwritten interview notes for Witness TF2-162;

2. That these notes constitute witness statements, pursuant to Rule 66(A)(i) of the Rules; and;

3. That the Prosecution has failed to disclose these notes pursuant to its disclosure obligations.

ORDERS the Prosecution to provide copies of all handwritten interview notes taken for or from Witness TF2-162 by 15th of October, 2004.

Done in Freetown, Sierra Leone, this 1st day of October, 2004

Hon. Judge Pierre Boutet | Hon. Judge Benjamin Mutanga Itoe | Hon. Judge Bankole Thompson

Presiding Judge,
Trial Chamber

[Seal of the Special Court for Sierra Leone]