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SPECIAL COURT FOR SIERRA LEONE
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Appeals Chamber
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☐ President

☒ **Defence Counsel:**
for Sesay, Kallon and Gbao

☒ **Prosecution Counsel:**
Luc Côté, Peter Harrison

☒ **Defence Office:** Principal Defender
☒ **Others required:** Registrar, WVS

Filed by:	☒ **Trial Chamber I**	☐ Defence (name)	☐ Prosecutor (name)	☐ Other: (name)
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TRIAL CHAMBER I

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Mutanga Itoe

Interim Registrar: Lovemore Green Munlo

Date: 26th of October 2005

PROSECUTOR **Against** ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

DECISION ON THE GBAO AND SESAY JOINT APPLICATION FOR THE EXCLUSION OF THE TESTIMONY OF WITNESS TF1-141

Office of the Prosecutor:

Luc Côté
Lesley Taylor
Peter Harrison

SUSAN GUNSTONE
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Defence Counsel for Issa Hassan Sesay:

Wayne Jordash
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Defence Counsel for Morris Kallon:

Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao

Andreas O'Shea
John Cammegh

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

SEIZED OF the *Gbao and Sesay Joint Defence Application for the Exclusion of the Testimony of Witness TF1-141* filed on the 17th of May 2005 ("Application") by Counsel for the Accused Augustine Gbao and Issa Hassan Sesay ("Defence");

NOTING the *Prosecution Response to the Gbao and Sesay Joint Application for the Exclusion of Witness TF-141's Testimony* filed on the 27th of May 2005 ("Response") by the Office of the Prosecutor ("Prosecution");

NOTING the Defence Reply to the above-noted Response filed on the 1st of June 2005 ("Reply");

CONSIDERING that Witness TF1-141 indicated under cross-examination on the 19th of April 2005 that when he was being interviewed by Ms. Sharan Parmar of the Prosecution, she was writing with a pen;

CONSIDERING that the Prosecution indicated on the record on the 19th of April 2005 that there had been several meetings with Witness TF1-141 at which at least one woman, including Ms. Parmar, was present and during which notes were taken, probably on occasion with pen and on occasion by computer;

CONSIDERING FURTHER that the Prosecution also indicated at that time that these notes had been destroyed pursuant to an internal policy that exists within the Office of the Prosecutor;

MINDFUL OF Article 17(4) of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 66, 68, and 70 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

I. SUBMISSIONS OF THE PARTIES

A) Defence Application

1. Defence submit that the Prosecution has admitted that there were handwritten notes taken by the Prosecution during interviews with Witness TF1-141 that have since been destroyed. They contend that this constitutes a *prima facie* showing of a breach the Prosecution's disclosure obligations

pursuant to Rule 66 of the Rules and that the destruction of the notes causes obvious prejudice to the Defence since they are not able to ascertain the content of the notes.[1]

2. Defence submit that the Chamber has the authority under Rule 54 or Rule 89(C) to exercise its discretion to exclude evidence. Counsel refer to British and Canadian case law to assert that a judge may exclude evidence in order to ensure a fair trial, including when there has been a breach of the rules regulating the conduct of investigations.[2]

3. Defence submit that it is not necessary for the Chamber to find that there has been an abuse of process in order to exclude the testimony of Witness TF1-141. Moreover, the Defence argue that the destruction of material capable of being disclosable pursuant to Rules 66 or 68 constitutes an abuse of process in itself, without requiring evidence of knowledge or bad faith on the part of the Prosecution. The Defence also assert that the Prosecution was aware of the Chamber's *Ruling on Disclosure of Witness Statements* of the 1st of October 2004 which held that any notes taken during an interview fall within the definition of a witness statement. Defence note that the first mention by Witness TF1-141 of Augustine Gbao occurred in an interview dated the 9th of October 2004 and submit that the Prosecution knowingly or negligently destroyed the notes in question.[3]

B) Prosecution Response

4. In its submissions, the Prosecution elaborates on its internal policy regarding handwritten notes:

> Where hand-written interview notes were taken by investigators, pursuant to a policy, all information of any evidentiary value was transferred to a type-written statement, including exculpatory as well as inculpatory evidence, in order to fulfil the disclosure obligation of the Prosecution. Therefore all the evidence with respect to TF1-141 was disclosed. In the event other information is contained in the hand-written notes, such as investigative leads or the interviewer's impressions of the witness, that information is transferred to a typewritten internal memorandum. The Prosecution does not retain the hand-written notes since all of the information has been transferred to the typed format.[4]

5. The Prosecution submits that its policy regarding the destruction of handwritten notes is logical, reasonable and fair. It asserts that the practice is based on the fact that handwritten notes are often illegible and include both disclosable evidence and non-disclosable matters including "such

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[1] Application, para. 6.
[2] *Id.*, paras 7-8.
[3] *Id.*, paras 10-11.
[4] Response, para. 5.

things as potential investigative leads, impressions, and advice on internal matters of concern to the Office of the Prosecutor."[5]

6. The Prosecution submits that the above policy was recently held to be "reasonable in the circumstances" by Trial Chamber II in *Prosecutor v. Brima, Kamara and Kanu*[6] and that the Defence have not established *prima facie* proof of a breach by the Prosecution of Rules 66 or 68 of the Rules. The Prosecution emphasises that since all of the evidence in the handwritten notes was transferred to the typewritten notes that were disclosed, no information was lost. Thus, the Prosecution submits that Rule 66 has not been breached, or if it has, it has only been breached in a technical manner and that there has also been no abuse of process.[7]

7. The Prosecution states that Witness TF1-141 was interviewed on several occasions in early 2003 by investigators of the Office of the Prosecutor and that statements from these interviews were disclosed. Legal counsel from the Office of the Prosecutor then met with the Witness in October 2004 and January 2005 in order to conduct "proofings". According to the Prosecution, the purpose of proofing sessions is for counsel to discuss matters, including the witness' proposed evidence, with the witness who has little experience appearing in court.[8]

8. The Prosecution states that proofing notes from these proofing sessions with Witness TF1-141 were disclosed to Defence and contained all relevant information that was not previously disclosed. The Prosecution notes that during proofings, the legal counsel records new information provided by the Witness "on the same note paper as a great deal of confidential and privileged information which is not subject to disclosure."[9]

9. The Prosecution submits that notes made during proofings are lawyer's work product that are protected from disclosure in accordance with Rule 70(A). In support of this assertion, the Prosecution relies on several decisions of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") which have interpreted Rule 70 of their respective Rules of Procedure and Evidence and prosecution notes.[10]

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[5] *Id.*, para. 9.
[6] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16, "Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68", 4 May 2005, para. 18.
[7] Response, paras 10 and 12-13.
[8] *Id.*, paras 15 and 17.
[9] *Id.*
[10] *Id.*, paras 17-23.

10. In conclusion, the Prosecution submits that the Application should be dismissed for the following reasons: Rule 70(A) protects Prosecution notes from proofing sessions from disclosure; the principle of orality means that it is the oral testimony of the witness that is most significant; there is no *prima facie* evidence of a Rule 66 breach since all material that should be disclosed has been disclosed in typewritten format and that there has been no loss of evidence and no abuse of process.[11]

C) **Defence Reply**

11. In their Reply, Defence submit that the discretion to exclude evidence under Rule 89(C) is confirmed by Rule 95 of the Rules requiring the exclusion of evidence where its admission would bring the administration of justice into serious disrepute and that evidence can also be excluded under other circumstances. Defence state that there are no legal authorities directly on point since there are no other situations in which the Prosecution has destroyed interview notes.[12]

12. The Defence reiterate that the Prosecution has the onus to explain the non-disclosure of the notes in the face of the *prima facie* proof that they have breached Rule 66. The Defence criticise the general nature of the Prosecution explanation which refers to general practice as opposed to Witness TF1-141 in particular. The Defence suggest that it appears that the Prosecution had no specific recollection or record of which handwritten notes were destroyed and what their content had been. As a result, the Defence submit that the Prosecution cannot establish that all of the relevant information in the handwritten notes for Witness TF1-141 were in fact transferred into the typed versions that were disclosed. Moreover, the Defence emphasise that the inculpatory or exculpatory nature of evidence may only become apparent at a later stage after the Prosecution has already destroyed the original notes.[13]

13. The Defence submit that the Prosecution's policy in destroying notes prevents it from complying with its continuing disclosure obligation and deprives the Defence and the Chamber of the opportunity to monitor the Prosecution's compliance. The Defence opine that there is no rational reason for destroying the handwritten notes and that they should be safely secured as is other sensitive material.[14]

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[11] *Id.*, paras 24-25.
[12] Reply, paras 1-3.
[13] *Id.*, paras 5-9.
[14] *Id.*, paras 8-10.

14. The Defence refer to the principle of *nemo tenetur ad impossibile* and assert that this is not relevant since they have not asked the Prosecution to produce the notes but rather seek the remedy of exclusion.[15]

15. In conclusion, the Defence submit that the Prosecution's reliance on a policy cannot justify this *prima facie* breach of Rule 66.[16]

II. APPLICABLE LAW

16. Rule 66 of the Rules of Procedure and Evidence provides that:

> **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, 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 and 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

[15] *Id.*, para. 11.
[16] *Id.*, para. 12.

the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential.

17. Rule 68 further provides for the disclosure obligations of exculpatory evidence by the Prosecution. It states:

> **Rule 68: Disclosure of Exculpatory Evidence**
>
> (A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.
>
> (B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

18. Rule 70 legislates exceptions to the general disclosure obligations and provides that:

> **Rule 70: Matters not Subject to Disclosure**
>
> (A) Notwithstanding the provisions of Rules 66 and 67, 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.

III. MERITS OF THE APPLICATION

A) Prosecution's Disclosure Obligations

19. As regards the Prosecution's disclosure obligations, this Court has made it abundantly clear that the Prosecution has an obligation to continuously disclose witness statements in accordance with Rule 66 of the Rules. In that context, this Chamber has given a broad interpretation as to what constitutes a witness statement within the meaning of Rule 66. Recently, in one of our Decisions, we stated as follows:

> *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.

> 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.[17] [Emphasis in original.]

20. It is noteworthy, however, that Rule 70(A) of the Rules provides that "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 under Rule 66. Thus, internal documents prepared by the Prosecution or the Defence "in connection with an investigation or the preparation of a case"[18] are not disclosable.

21. We held that, in accordance with these provisions, the Prosecution is therefore obligated to disclose all witness statements in its possession, in whatever form they may exist, unless the information contained therein is exempted in whole or in part from disclosure in accordance with Rule 70.

22. As to its disclosure obligation under Rule 66, this Chamber has ruled that in order to establish that the Prosecution has breached its disclosure obligations under the said Rule, the Defence must "make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution."[19]

23. This Chamber has also affirmed that additionally, Rule 68 of the Rules requires the Prosecution to disclose continuously exculpatory evidence, that is, "evidence that in anyway leads to suggest the innocence of the accused, or evidence that in anyway tends to mitigate the guilt of accused or evidence favourable to the accused that may affect the credibility of the prosecution evidence."[20]

24. We recall here that in the "Decision on Sesay – Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor", we ruled that in order to establish that the Prosecution has breached its Rule 68 disclosure obligations, the Defence must demonstrate, by *prima facie* proof:

> (1) that the targeted evidentiary material is exculpatory in nature, (2) the materiality of the said evidence, (3) that the Prosecution has, in its possession, custody, or control, the

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[17] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004, paras 22-23.

[18] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, "Ruling on Disclosure of Witness Statements", 1 October 2004, para. 15.

[19] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules", 9 July 2004, para. 27.

[20] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Decision on Sesay - Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor", 2 May 2005, para. 35.

> targeted exculpatory evidentiary material, and (4) that the Prosecution has, in fact, failed to disclose the targeted exculpatory evidentiary material.[21]

Our subsequent decisions on this issue have consistently applied this standard.

B) Investigators' Notes

25. In its Response, the Prosecution stated that the original notes taken by investigators of the Office of the Prosecutor during interviews contain different types of information. According to the Prosecution, all information of evidentiary value, including inculpatory and exculpatory evidence, is then transferred to a typed statement that is disclosed to Defence in accordance with Rules 66 and 68. The Prosecution further disclosed that any remaining information relating to investigative leads, the interviewer's impression of the witness and advice on internal matters is transferred to a typed internal memorandum that is not subject to disclosure in accordance with Rule 70(A), and the original handwritten notes are then destroyed.

26. The Defence argued that this destruction of the original notes is a breach of the Prosecution's obligation to disclose witness statements pursuant to Rule 66 and a potential breach of its obligation to disclose exculpatory evidence pursuant to Rule 68. The Prosecution, on the other hand, maintained that they have fully respected their disclosure obligations by disclosing all of the evidence contained in the original interview notes. Alternatively, the Prosecution submitted that if there had been a breach, it was merely of a technical nature and could not be considered as an abuse of process.

27. In its Response to a Defence Application in the case of *Prosecutor v. Norman*, the Prosecution had contended that the entirety of the handwritten notes taken by the investigator while interviewing Witness TF2-162 were protected from disclosure under Rule 70(A). This Chamber, in its "Ruling on Disclosure of Witness Statements" did not accept this assertion and we found instead that interview notes recorded by the Prosecution, in whatever form, are the witness' statements and were thus disclosable under Rule 66(A)(i) of the Rules.[22] In its Submission that was filed in response to this Decision ordering the disclosure of copies of all handwritten interview notes taken for or from Witness TF2-162, the Prosecution thereafter clarified their position by stating that there were no such notes as they had been destroyed in accordance with the Prosecution internal policy after all disclosable information had been transferred to an "Interview Report" that was disclosed to the Defence.[23]

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[21] *Id.*, para. 36.

[22] *Prosecutor v. Norman, Fofana and Kondewa*, *supra* note 18, paras 10 and 16.

[23] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, "Prosecution Submission Regarding

28. The Chamber reiterates its findings of the 1st of October 2004 that investigators' notes, in whatever form they may be, taken during interviews with witnesses constitute witness statements and are thus disclosable. However, this Court recognises that investigators' notes may also contain, in addition to the witness statements, information that should be protected from disclosure pursuant to Rule 70(A) when the information relates solely to matters internal to the investigation or prosecution.

C) **Proofing Sessions**

29. The records show that the original notes that are the object of this Application were taken by counsel with the Office of the Prosecutor, Ms. Sharan Parmar, during "proofing" sessions in October 2004 and January 2005 with Witness TF1-141 and that supplemental statements or proofing notes containing new evidence or amendments to previously disclosed evidence were disclosed to the Defence while the original notes were destroyed.[24]

30. It is instructive to note that the Trial Chamber of the ICTY examined the practice of Prosecution proofing sessions in the case of *Prosecutor v. Limaj*.[25] It observed that there was a widespread practice of proofing witnesses by both the Prosecution and the Defence in adversary systems. The Chamber then identified a number of advantages that the practice of proofing has for the judicial process in these terms:

> It must be remembered that when a witness is proofed this is directed to identifying fully the facts known to the witness that are relevant to the charges in the actual Indictment....
>
> ... The process of human recollection is likely to be assisted, in these circumstances, by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness. Proofing will also properly extend to a detailed examination of deficiencies and differences in recollection when compared with each earlier statement of the witness. In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.
>
> Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise.[26]

31. The Prosecution submitted that notes made by counsel during proofing sessions are lawyer's "work product" not subject to disclosure in accordance with Rule 70(A).

'Ruling on Disclosure of Witness Statements' Dated 1 October 2004", 15 October 2004.

[24] Response, para. 15.

[25] *Prosecutor v. Limaj, Bala and Musliu*, IT-03-66-T, "Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses", 10 December 2004.

[26] *Id.*, p. 2.

32. The Chamber is mindful of the decision of the Trial Chamber of the ICTY in the case of *Prosecutor v. Blagojevic* where it was stated that:

> Rule 70(A) aims to protect work product from disclosure, as it is in the pubic interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party.[27]

33. The Chamber finds that proofing witnesses prior to their testimony in court is a legitimate practice that serves the interests of justice. This is especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in an environment that can be entirely foreign and intimidating for them.

34. We consider, however, that notes taken by counsel from the Office of Prosecutor during these proofing sessions may contain a combination of material, some of which is disclosable under Rules 66 and 68 of the Rules and some of which may not be subject to disclosure in accordance with Rule 70(A). It is our view that any new evidence elicited during these proofing sessions must be disclosed on a continuing basis in accordance with Rules 66 and 68. Furthermore, we hold that those portions of the notes that relate to the internal preparation for the Prosecution case that constitute work product, however, are not disclosable.

D) Application in this Case

35. The Defence accept the Prosecution's assertion in this case that it is not in possession of any of the original handwritten notes taken by Ms. Parmar since they were destroyed in accordance with the internal policy of the Office of the Prosecutor. As a result, the Defence are not seeking disclosure of these notes, but rather the alternative remedy that the entire testimony of Witness TF1-141 be excluded.

36. This Chamber has already noted that whilst "as a general rule, the judicially preferred remedy for a breach of disclosure obligations by the Prosecution is an extension of time to enable the Defence to adequately prepare their case" and not an exclusion of the evidence, in some circumstances, however, the remedy of exclusion could be appropriate.[28] Therefore, if disclosure cannot be ordered due to the destruction of the original notes and there has been a demonstration of bad faith, a lack of due diligence or an otherwise serious breach of Rule 66 or 68 that would unfairly

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[27] *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, "Decision on Videoje Blagojevic's Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolic & Request for an Expedited Open Session Hearing", 13 June 2003.

[28] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Ruling on Disclosure Regarding Witness TF1-195", 4 February 2005, para. 7.

prejudice the Defence, the Chamber recognises that the exclusion of the evidence in question may be the appropriate remedy.

37. The Defence submitted that the Prosecution's policy in destroying the original notes taken during interviews prevents it from complying with its continuing disclosure obligations and deprives the Defence and the Chamber of the opportunity to monitor the Prosecution's compliance with its obligations.[29] The Prosecution, for its part, contended that the original handwritten notes are often illegible and that the notes essentially serve no purpose once all of the material contained therein is transferred to other Prosecution documents. It maintained that its policy is "logical, reasonable and fair".[30]

38. Based on the relevant considerations herein on this issue, and in particular the assertion by the Prosecution that it had in fact disclosed all the information disclosable under Rules 66 and 68, the Chamber finds, and accordingly rules, that the Defence have failed to establish on a *prima facie* basis that there was any disclosable material in the handwritten notes that was not subsequently disclosed in the typewritten form. The Chamber opines strongly that the right of the Defence to disclosure pursuant to Rules 66 and 68 does not entitle the Defence to a particular form in which the material must be disclosed

39. We conclude, therefore, that the Defence has not established that the Prosecution has breached its obligations under Rules 66 and 68 by disclosing a typewritten version of the interviews with Witness TF1-141 instead of the original handwritten notes.

40. Furthermore, the Defence submitted forcefully that the very fact of destroying disclosable material constitutes an abuse of process since it scars the "integrity of the proceedings".[31] The Defence also argued that the Prosecution exhibited bad faith by continuing to destroy the original notes from the proofing sessions with TF1-141 that occurred after the release of the Chamber's *Prosecutor v. Norman*[32] decision which found that handwritten investigators' notes constitute witness statements and should therefore be disclosed.[33]

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[29] Reply, paras 8-10.
[30] Response, para. 9. The Prosecution relies on the finding of Trial Chamber II "that the procedure adopted by the Prosecution to separate disclosable and non-disclsoable material by reducing the disclosable material to the form of a witness was reasonable in the circumstances." *Prosecutor v. Brima, Kamara and Kanu, supra* note 7, para. 18.
[31] Application, para. 9.
[32] *Prosecution v. Norman, Fofana and Kondewa, supra* note 18.
[33] Application, paras 10-11.

41. This Chamber does not accept that the Prosecution's destruction of original notes, after ensuring that all of the information contained therein is transferred either to typewritten statements that are disclosed or to internal memoranda that contain Rule 70(A) material, would constitute an abuse of process in the circumstances.

42. We acknowledge that the notes in question in this Application were taken by Prosecution counsel during proofing sessions with Witness TF1-141 after the release of the *Norman* decision. It is clear from the submissions made during the trial against the Accused Sesay, Kallon and Gbao on the 4th of October 2004 that the Prosecution was drawing a distinction between investigators' notes and notes taken by counsel in the preparation and conduct of a case that are protected from disclosure as work product under Rule 70(A) of the Rules.[34] As a result, this Chamber is not satisfied that the destruction of the notes of counsel in accordance with the existing policy after the 1st of October 2004 demonstrates any bad faith on the part of the Prosecution. The Chamber therefore finds no legal basis for the contention of prosecutorial bad faith, and accordingly reject it.

43. In conclusion, therefore, the Chamber finds that the Defence has not established *prima facie* evidence that the Prosecution has breached its disclosure obligations under Rules 66 and 68 or committed an abuse of process by destroying the original notes in accordance with a policy adopted by the Office of the Prosecutor.

44. Notwithstanding the foregoing findings, the Chamber views with some concern the internal Prosecution policy to destroy original notes once the contents of the notes have been transferred to other documents and is of the opinion that the said policy be reassessed.

45. The Chamber observes that copies of the original handwritten notes should, where possible, be disclosed with those portions that are protected under Rule 70(A) redacted as necessary.

IV. DISPOSITION

46. Accordingly, the Application for the exclusion of the testimony of Witness TF1-141 is **DENIED**.

Done at Freetown, Sierra Leone, this 26th day of October 2005

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

[34] Transcripts of Trial Proceedings, 4 October 2004, p. 28-35. While no conclusion was reached on that day as submissions by the parties were invited, Hon. Justice Thompson indicated that the *Norman* decision left open the possibility that work product may be immune from disclosure.