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SCSL-03-01-T  
(30315 - 30336)

30315



**THE SPECIAL COURT FOR SIERRA LEONE**

**Trial Chamber II**

**Before:** Justice Julia Sebutinde, Presiding  
Justice Richard Lussick  
Justice Teresa Doherty  
Justice El Hadji Malick Sow, Alternate

**Registrar:** Ms. Binta Mansaray

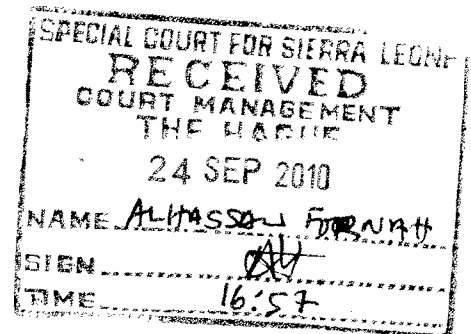
**Date:** 24 September 2010

**Case No.:** SCSL-03-01-T

**THE PROSECUTOR**

-v-

**CHARLES GHANKAY TAYLOR**



**PUBLIC WITH CONFIDENTIAL ANNEXES A-D**

**DEFENCE MOTION FOR DISCLOSURE OF EXCULPATORY INFORMATION  
RELATING TO DCT-032**

**Office of the Prosecutor:**

Ms. Brenda J. Hollis  
Mr. Nicholas Koumjian

**Counsel for Charles G. Taylor:**

Mr. Courtenay Griffiths, Q.C.  
Mr. Terry Munyard  
Mr. Morris Anyah  
Mr. Silas Chekera  
Mr. James Supuwood

## I. INTRODUCTION

1. This is a Defence application under Rule 68(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”) for the disclosure of certain exculpatory material in the Prosecution’s possession.
2. The Defence seeks the disclosure of the following information:
  - i) The details and results of an investigation that was conducted by the Prosecution into the alleged death of Johnny Paul Koroma, including DNA tests on corpses that were exhumed by the Prosecution during that investigation;
  - ii) Records of all the disbursements that were made to Defence Witness DCT-032 (estimated at \$1500);
  - iii) An original duplicate copy of the letter of indemnity against prosecution before the Special Court for Sierra Leone written by Stephen Rapp to Defence Witness DCT-032 or confirmation of such indemnity and the circumstances in which it was given;<sup>1</sup> and
  - iv) An explanation of why the above requested information was not disclosed to the Defence.

## II. APPLICABLE LAW

3. Rule 68 regulates the Prosecution’s disclosure obligation with respect to exculpatory material. Rule 68(B) reads:

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.

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<sup>1</sup> Note: a tattered personal copy of this indemnity letter was provided by DCT-032 to the Defence on 23 September 2010 and is attached to this Motion as Confidential Annex B.

4. This Trial Chamber has also determined that the Defence must satisfy the following for disclosure to be ordered under Rule 68(B):
- i) Identify the material sought with the requisite specificity,
  - ii) Make a *prima facie* showing of the exculpatory or potential exculpatory character of the material requested,
  - iii) Make a *prima facie* showing of the Prosecution's custody or control of the material requested, and
  - iv) Show that the Prosecution has in fact failed to disclose the targeted exculpatory material.<sup>2</sup>
5. The interpretation of this Rule and the Prosecution's disclosure obligations has been argued sufficiently in this case and does not warrant repetition. The Defence respectfully refers to the arguments in its "Confidential Defence Motion for Disclosure of Exculpatory Material pursuant to Rule 68", of 13 February 2008, paragraphs 7 to 16,<sup>3</sup> and adopts and incorporates the same herein.
6. Below, the Defence deals with each of these requirements with respect to the individual pieces of information requested as enumerated in paragraph 2.

### III. SUBMISSIONS

#### Specificity requirement

7. The material sought is clearly identified in paragraph 2 of this Motion. The Defence only hastens to add that the information sought under paragraph 2(iv) above also falls within the definition of "material", which is not restricted to any form.<sup>4</sup>

#### Exculpatory or potential exculpatory nature of the information sought

8. The results of the investigation by the Prosecution into the alleged death of Johnny Paul Koroma, including DNA tests on corpses that were exhumed during that

<sup>2</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 23 September 2010, para. 15 ("**Disclosure Decision**").

<sup>3</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-416, Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule of the Rules of Procedure and Evidence, 13 February 2008.

<sup>4</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-184, Decision on Defence Application for Service of a Disclosure Statement Pursuant to Rule 68, 19 February 2007.

investigation are exculpatory in that, contrary to the allegation by the Prosecution, which allegation it continually made during its case-in-chief and while cross-examining Defence witnesses,<sup>5</sup> establish that there is no evidence that Johnny Paul Koroma is dead, let alone, that Charles Taylor killed him.

9. On the contrary, according to the affidavit of Defence Witness DCT-032 (attached hereto as Annex A), who by his own admission was also a potential witness for the Prosecution at one point, the Prosecution exhumed and conducted DNA tests on two corpses that were separately indicated to them as Johnny Paul Koroma's, and at least one of them turned out not to be that of Johnny Paul Koroma. Defence Witness DCT-032 got this information directly from one Mustapha who was an investigator for the Prosecution.<sup>6</sup> The details and results of the investigation, and in particular the DNA results on the supposed corpses of Johnny Paul Koroma would refute the Prosecution's allegation that he is dead and that Charles Taylor had a hand in his death.
10. Moreover, the mere fact that this information would, in whole or in part, contradict an allegation material or otherwise by the Prosecution against the Accused in this case makes the requested information exculpatory.
11. With respect to the request for the disclosure of a record of disbursements to DCT-032, the exculpatory nature of such information – payments to witnesses – is well established in jurisprudence and brokers no further litigation. This Trial Chamber has recently adopted the view of the ICTR in *Prosecutor v. Karemera et al* where the Trial Chamber in interpreting a rule similar to the Special Court Rule 68(B) stated:

Materials or information within the Prosecutor's knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably required [for the management of witnesses and victims] has a

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<sup>5</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 12 March 2008, pp. 5935-5937; 15 May 2008, pp. 9998-10000; 19 May 2008, p. 10221; 20 May 2008, p. 10282; 25 June 2008, pp. 12751-12766; 25 August 2008, pp. 14489-14528; 26 August 2008, pp. 14531-14539.

<sup>6</sup> Affidavit of DCT-032, Annex A, paras. 17-21.

different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68.<sup>7</sup>

12. The same applies to payments made to DCT-032 which are, on the face of it, beyond that which is reasonably required for the management of witnesses or victims. Based on the affidavit of DCT-032, he received approximately \$1000 from the Prosecution in small installments, most of which were given to him as an incentive to cooperate with their investigation, and not for any reasonable expense incurred while involved in the investigation. He was also given \$500 for showing the Prosecution the body. Furthermore, DCT-032 was promised \$5000 if he actually found the body of Johnny Paul Koroma for the Prosecution. On the face of it, this is a bribe rather than any reasonably required benefit.
13. The exculpatory nature of the Prosecution's indemnity letter to DCT-032 is also well-established in law and in jurisprudence.<sup>8</sup> Such letter at the time it was drawn – when DCT-032 was a potential Prosecution witness<sup>9</sup> – should have been disclosed as it was capable of affecting the credibility of information he gave to the Prosecution. That obligation is continuous.
14. In any event, such letter to DCT-032 when he was a potential Prosecution witness is exculpatory in relation to the Prosecution's case in general. That the Prosecution was offering its witnesses or potential witnesses indemnity, and on at least two occasions, not disclosing such to the Defence,<sup>10</sup> may affect the credibility of the Prosecution's case as a whole.
15. In this case, although the Defence is already in possession of a copy of the indemnity letter, it still requires the Prosecution's independent confirmation, as well as an explanation of the circumstances in which it was given.

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<sup>7</sup> Disclosure Decision, para. 21, citing *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005, para. 6.

<sup>8</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-516, Decision on Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68, 22 May 2008, p. 4.

<sup>9</sup> Affidavit of DCT-032, Confidential Annex A, para. 16.

<sup>10</sup> In relation to TF1-371 and now DCT-032.

16. In relation to the request for an explanation on why all the information requested in this Motion was not disclosed to the Defence, it is submitted that such information is exculpatory in that non-disclosure of Rule 68 material may result in the Trial Chamber drawing adverse inferences against the Prosecution.<sup>11</sup> The prospect that the Trial Chamber could draw adverse inferences against the Prosecution is at the very least potentially exculpatory.

17. For purposes of this argument, it is not relevant that this information is not in the form that could be admitted in evidence.<sup>12</sup>

Prima facie showing of custody or control of requested exculpatory material

18. According to DCT-032, the Prosecution carried out an investigation into the alleged death of Johnny Paul Koroma, which included a site visit by Prosecution investigators in his company,<sup>13</sup> exhumations<sup>14</sup> and DNA tests on two corpses that were separately indicated to be Johnny Paul Koroma's.<sup>15</sup> Clearly, this is information in the Prosecution's knowledge and/or possession.

19. With respect to the financial records relating to disbursements to DCT-032, by his own account, DCT-032 received varying amounts of money, which add up to more than \$1500, during the time that he was cooperating with Prosecution.<sup>16</sup> Unless the Prosecution is above the common accounting practices applicable to every other public institution, including all the other organs of the Special Court, it should have information relating to these financial disbursements. At the very least, the individuals in the Prosecution's employ who were involved in contacting DCT-032, some of whom are identified in his affidavit, should have that information in whatever form.

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<sup>11</sup> *Prosecutor v. Orić*, IT-03-68-T, Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules, 13 December 2005, at para. 35.

<sup>12</sup> *Prosecutor v. Kordić & Čerkez*, IT-65-14/2-A, Decision on Motion by Dario Kordić for Access to Unredacted Portions of October 2000 interviews With Witnesses AT, 23 May 2003, para. 24.

<sup>13</sup> Affidavit of DCT-032, Confidential Annex A, paras. 17-18.

<sup>14</sup> Affidavit of DCT-032, Confidential Annex A, para. 20. DCT-032 was personally informed by Mustafa of the Prosecution of the results of the first exhumation over the phone.

<sup>15</sup> Affidavit of DCT-032, Confidential Annex A, paras. 17-18.

<sup>16</sup> Affidavit of DCT-032, Confidential Annex A, paras. 10 and 18.

20. With respect to the indemnity letter, attached as Annex B is a copy of the same. The copy should be *prima facie* proof that the Prosecution has or should have the original duplicate in its records. The Prosecution should also be able to explain a letter under its letterhead, signed by the [former] Prosecutor to a witness with whom it acknowledges prior contact.<sup>17</sup>
21. With respect to the request for an explanation why the Prosecution has withheld exculpatory information, the Prosecution clearly must be capable of explaining its conduct.
22. The Defence therefore submits that all the exculpatory information sought is or should be in the possession or custody of the Prosecution.

*Showing of failure to disclose exculpatory material*

23. None of the information requested in this Motion has been disclosed to the Defence by the Prosecution. With respect to DCT-032 for instance, the Prosecution has disclosed to the Defence a summary of information given by him to the Prosecution, but the Prosecution has not disclosed records of any payments during that time.<sup>18</sup>
24. Furthermore, the general requests by the Defence to the Prosecution “for the disclosure of *any material* within its possession, which is relevant to [a] named [defence] witness, but not limited to witness statements and/or *disbursement records*”, including a request for information connected to DCT-032,<sup>19</sup> has been met by the Prosecution’s generic response that any information not disclosed is not in the Prosecution’s possession.<sup>20</sup>

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<sup>17</sup> Confidential Annex C, Disclosure Index for DCT-032.

<sup>18</sup> Prosecution disclosure of 4 June 2010 in relation to DCT-032.

<sup>19</sup> Confidential Annex D, Letter from Defence to Prosecution disclosing the identity of DCT-032, dated 12 April 2010 and requesting any material relating to DCT-032.

<sup>20</sup> See for instance the Prosecutor’s letter to the Defence at Confidential Annex. D of *Prosecutor v. Taylor*, SCSL-03-01-T-1039, Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 13 August 2010.

25. The Defence understands the Prosecution position stated in that Letter to apply to all instances where disclosure has not been and made and therefore submits that this is a *prima facie* showing of the Prosecution's failure to effect disclosure as required under this heading.
26. In any event, the Defence avers that, in fact, the Prosecution has not disclosed any of the information requested in this Motion and thus it would be difficult to, as a matter of law, prove a negative; in this case, the Prosecution's failure to effect disclosure.

#### **IV. CONCLUSION AND RELIEF REQUESTED**

27. The Defence therefore requests the Trial Chamber to order disclosure of the information enumerated in paragraph 2 of this Motion.
28. The Defence also observes the disturbing trend where the Prosecution has not always been forthright in its disclosure obligations in this case<sup>21</sup> and invites the Trial Chamber to, subject to the disclosure requested under paragraph 2(iv) hereto, exercise its discretion and draw adverse inferences against the Prosecution's failure to disclose information requested in paragraph 2(i)-(iii).

Respectfully Submitted,



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**Courtenay Griffiths, Q.C.**  
**Lead Counsel for Charles G. Taylor**

Dated this 24th Day of September 2010,  
The Hague, The Netherlands

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<sup>21</sup> For instance, the Prosecution's failure to disclose over \$40,000 worth of payments to a potential witness. See Disclosure Decision.



**LIST OF AUTHORITIES****Prosecutor v. Taylor**

*Prosecutor v. Taylor*, SCSL -03-01-T-184, Decision on Defence Application for Service of a Disclosure Statement Pursuant to Rule 68, 19 February 2007

*Prosecutor v. Taylor*, SCSL-03-01-T-416, Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule of the Rules of Procedure and Evidence, 13 February 2008

*Prosecutor v. Taylor*, SCSL-03-01-T-516, Decision on Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68, 22 May 2008

*Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 23 September 2010

**ICTR**

*Prosecutor v. Karemera, Nzirorera and Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005  
<http://www.unictr.org/Portals/0/Case%5CEnglish%5CKaremera%5Ctrial%5C230805.pdf>

**ICTY**

*Prosecutor v. Kordić & Čerkez*, IT-65-14/2-A, Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2000 Interviews With Witnesses AT, 23 May 2003

[http://www.icty.org/x/cases/kordic\\_cerkez/acdec/en/030523.htm](http://www.icty.org/x/cases/kordic_cerkez/acdec/en/030523.htm)

*Prosecutor v. Orić*, IT-03-68-T, Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules, 13 December 2005

<http://www.icty.org/x/cases/oric/tdec/en/051213.htm>



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Court Management Section – Court Records

**CONFIDENTIAL DOCUMENT CERTIFICATE**

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**

Case Number: **SCSL-03-01-T**

Document Index Number: **1088**

Document Date: **24 September 2010**

Filing Date: **24 September 2010**

Document Type: - **Confidential Annexes A-D**

Number of Pages: **13** Number from: **30324 - 30336**

Application

Order

Indictment

Response

**Motion**

Correspondence

Document Title:

**Public with confidential Annexes A-D Defence motion for disclosure of exculpatory information relating to DCT-032**

**Name of Officer:**

Alhassan Fornah

Signed: