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SCSL-03-01-T
(30725 - 30743)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

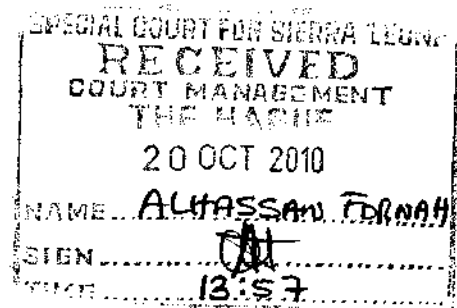
Case No.: SCSL-03-1-T

Date: 20 October 2010

PROSECUTOR

v.

Charles Ghankay TAYLOR



DECISION ON PUBLIC WITH CONFIDENTIAL ANNEXES A-D DEFENCE MOTION FOR
DISCLOSURE OF EXCULPATORY INFORMATION RELATING TO DCT-032

Office of the Prosecutor:

Brenda J. Hollis
Leigh Lawrie
Nathan Quick

Defence Counsel for Charles G. Taylor:

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

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);
 SEISED of the “Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032”, filed on 24 September 2010” (“Motion”);¹

NOTING the “Prosecution Response to ‘Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032’”, filed on 1 October 2010 (“Response”);²

NOTING ALSO the “Public with Confidential Annex A Defence Reply to Prosecution Response to Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032” filed on 5 October 2010 (“Reply”);³

COGNISANT of the provisions of Article 17(4) of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 66, 68 and 73(A) of the Rules of Procedure and Evidence (“Rules”);

HEREBY DECIDES AS FOLLOWS, based solely on the written submissions of the parties, pursuant to Rule 73(A) of the Rules:

I. BACKGROUND

1. As part of its case against the Accused, the Prosecution has sought to adduce evidence of the actions of the Accused “after the Indictment period”, in particular, that he systematically “murdered or eliminated persons who were in his inner circle and who were aware of the crimes perpetrated by the Accused” in order to prevent their turning against him and exposing him during his trial, which conduct the Prosecution maintains, is indicative of “consciousness of his criminal responsibility” for the crimes charged in the Indictment.⁴ One such individual who the Prosecution, through its evidence, maintains was murdered by or on the orders of Mr. Taylor in order to silence him is Johnny Paul Koroma, the former head of the AFRC/RUF Junta in Sierra Leone. In this regard, a number of

¹ SCSL03-01-T-1088.

² SCSL03-01-T-1096.

³ SCSL03-01-T-1098.

⁴ See Opening Statement of the Prosecutor, *Prosecutor v. Taylor*, SCSL03-01-T, Transcript 4 June 2007, pp. 276-280.

Prosecution witnesses including Moses Blah⁵, a former Vice-President of Liberia, Joseph 'Zig Zag' Marzah (TFI-399)⁶ and a protected Witness, TFI-375⁷, testified regarding the circumstances of Johnny Paul Koroma's alleged murder. While none of the said witnesses actually witnessed the alleged murder or saw the body of Johnny Paul Koroma, they gave evidence implicating a number of alleged subordinates of the Accused in the murder of Johnny Paul Koroma and in particular, the individual referred to in this Motion as Witness DCT-032, as the person or one of the persons who actually carried out the killing in Foya, Liberia, in 2003, on orders of the Accused.

2. As part of its investigations into the alleged death of Johnny Paul Koroma, the Prosecution contacted and interviewed DCT-032 in May, June, July and October of 2008.⁸ DCT-032 provided the Prosecution with information about the alleged death of Johnny Paul Koroma, and in particular, about his alleged burial site at a location in Lofa County, Liberia. Following information provided by DCT-032, the Prosecution had exhumations carried out at two separate locations, and DNA tests carried out on the bodies. According to the Defence, the DNA test or tests turned out negative in that the body or bodies were found to be not that of Johnny Paul Koroma. The Defence maintains, based on the information given to them by DCT-032, that Johnny Paul Koroma may in fact not be dead as alleged by the Prosecution. In addition, the Prosecution made certain payments to DCT-032 and wrote him a letter indemnifying him from criminal prosecution. The Defence claims, based on information from DCT-032, that the Prosecution payments and indemnity letter were intended to induce DCT-032 to cooperate with the Prosecution in fabricating evidence against the Accused and that consequently, the details and results of the DNA investigation as well as the Prosecution payments to DCT-032, are exculpatory in that they tend to "suggest the innocence of the Accused or mitigate his guilt or may affect the credibility of the prosecution evidence." As such, the Defence submits, they should have been disclosed by the Prosecution pursuant to Rule 68(B). While the Prosecution did not call or list DCT-032 as a witness or potential witness, the Defence listed him as a Defence witness but did not call him to testify.

⁵ *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 15 May 2008, pp. 9998-10000.

⁶ *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 12 March 2008, pp. 5935-5937.

II. SUBMISSIONS

Motion

3. The Defence seeks orders for the disclosure pursuant to Rule 68(B), of the following information which it submits is in the Prosecution's possession and is exculpatory:

- (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; and
- (iv) an explanation of why the above requested information was not disclosed to the Defence;⁹

4. The Defence invites the Trial Chamber, subject to the disclosure requested above, to exercise its discretion and draw adverse inferences against the Prosecution's failure of its disclosure obligations.¹⁰

5. In support of its application, the Defence submits that it has satisfied the first prong of the applicable legal test for the disclosure of exculpatory information pursuant to Rule 68(B), as it has identified the requested information with sufficient specificity.¹¹

6. The Defence submits that the Prosecution contacted DCT-032 between May June and July of 2008¹² and that he gave them information about the alleged death of Johnny Paul Koroma, in particular regarding his alleged grave site in Foya, Liberia. The Defence claims that based on that information the Prosecution exhumed and conducted DNA tests on two corpses that were separately

⁷ *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 25 June 2008, pp. 12754-12766, 14489-14603
⁸ Motion, Confidential Annex A; Reply, Confidential Annex A.
⁹ Motion, para. 2.
¹⁰ Motion, para. 28.
¹¹ Motion, paras 4-7.

indicated to them to be the remains of Johnny Paul Koroma and that at least one of the DNA tests turned out negative.¹³ The Defence submits that the details and results of the said investigation and in particular the DNA results, are exculpatory in that they refute wholly or in part, the Prosecution's allegation that Johnny Paul Koroma is dead, or that the Accused was involved in his death.¹⁴ The Defence further submits that the Prosecution made payments to DCT-032 in small instalments amounting to approximately \$1000, most of which were given to him as an incentive to cooperate with their investigation. The Prosecution paid him an additional \$500 for showing them a body and promised him a further \$5000 if the body was confirmed to be that of Johnny Paul Koroma.¹⁵ The Defence maintains that the said payments are exculpatory as they were an intended as an inducement for DCT-032 to cooperate with the investigation and were not reasonably incurred while he was involved in the investigation.¹⁶

7. The Defence submits that in June 2008 DCT-032 received a letter from the Chief Prosecutor of the Special Court, indemnifying him from criminal prosecution.¹⁷ The Defence submits that such indemnity offered to DCT-032 when he was a potential witness, is capable of affecting the credibility of information DCT-032 gave to the Prosecution and the credibility of the Prosecution case as a whole. As such, the indemnity letter is exculpatory.¹⁸ Although the Defence is already in possession of a copy of the indemnity letter, it requires the Prosecution's independent confirmation of the same as well as an explanation of the circumstances in which it was given.¹⁹

8. Lastly, the Defence requests that the Prosecution provide an explanation for the failure to disclose the requested information and submits 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".²⁰ The Defence submits that all the exculpatory information sought is or should be in

¹² Motion, Confidential Annex C.

¹³ Motion, para. 9, Confidential Annex A.

¹⁴ Motion, para. 8-10.

¹⁵ Motion, para. 12, Confidential Annex A.

¹⁶ Motion, paras 11-12.

¹⁷ Motion para. 13, Confidential Annexes A and B.

¹⁸ Motion, paras 13-15.

¹⁹ Motion, para. 15.

²⁰ Motion, para. 16.

the possession or custody of the Prosecution²¹ and that despite earlier requests by the Defence for its disclosure²² and in breach of Rule 68(B), none of the information was disclosed to the Defence.²³

Response

9. The Prosecution opposes the Motion and requests that the Trial Chamber to dismiss it on the grounds that the Defence allegations therein are unfounded and the information requested is not exculpatory.²⁴ The Prosecution submits that it has discharged its disclosure duties in accordance with the relevant Rules and jurisprudence, but that such disclosure obligations do not mean that it must operate an “open files policy”.²⁵ The Prosecution challenges the Motion and makes submissions only in relation to the requirement that the Defence must make a *prima facie* showing of the exculpatory or potentially exculpatory nature of the materials requested.

10. In relation to the results of the investigations into the death of Johnny Paul Koroma, the Prosecution submits that although it led evidence that Johnny Paul Koroma was killed, it led no evidence suggesting that his remains were buried at a particular location. Consequently, the fact that the remains found at the locations named by DCT-032 were not those of Johnny Paul Koroma does not contradict existing Prosecution evidence and is therefore not exculpatory.²⁶

11. In relation to the disbursements made to DCT-032 the Prosecution submits that DCT-032 was never listed as a Prosecution witness or victim or regarded as a potential witness and was only used as source. The Prosecution argues that under the Rules, it has no disclosure obligation in relation to benefits paid or promises made to sources.²⁷

12. In relation to the indemnity letter, the Prosecution submits that it is under no obligation to disclose the indemnity letter as DCT-032 was not a witness or potential witness for the Prosecution at the time the letter was written.²⁸

²¹ Motion, paras 18-22.

²² Motion, Confidential Annex D.

²³ Motion, paras 23-26.

²⁴ Response, para. 3.

²⁵ Response, para. 14.

²⁶ Response paras 4-5.

²⁷ Response, paras 6-11.

²⁸ Response, para. 12.

13. The Prosecution concludes that as none of the material requested is exculpatory, the Defence request to draw adverse inference against the Prosecution for its failure to disclose the requested material should be refused.²⁹

Reply

14. In reply to the Prosecution Response, the Defence submits that the exculpatory nature of the requested information has to be seen in relation to the entire Prosecution case and in particular in relation to the testimony of Moses Blah, Joseph Marzah and TFI-375. Those witnesses implicated subordinates of the Accused, in particular DCT-032, in the murder of Johnny Paul Koroma and suggested that the killing was ordered by the Accused.³⁰ The Defence argues that any information that might suggest that Johnny Paul Koroma is still alive or that he was not killed on the orders of Charles Taylor as alleged by the Prosecution, is clearly exculpatory regardless of the fact that the Prosecution did not lead evidence of a particular burial site.³¹

15. The Defence asserts that in a summary of information that DCT-032 gave to the Prosecution in May, June July and October of 2008 which was disclosed to the Defence on 4 June 2010 ("Proffer"), the Prosecution purposely left out information regarding the negative results from the exhumation and DNA tests of Johnny Paul Koroma, which information the Prosecution knew to be exculpatory. The Defence asserts that in disclosing this "proffer" the Prosecution merely intended to use it to cross-examine DCT-032 and to discredit his testimony in the event that he was called by the Defence to testify.³²

16. In relation to the status of DCT-032, the Defence argues contrary to the Prosecution assertion that he was merely a source, that he was more than a source in that he did more than just point the Prosecution towards independent evidence. In this regard, the Defence claims that in the course of several months that the Prosecution interviewed him, DCT-032 was asked substantive questions going to his background, his role in the conflict and his alleged links to the death of Johnny Paul Koroma and that he provided the Prosecution with substantial information, albeit false, going to

²⁹ Response, para. 13.

³⁰ Reply, para. 6.

³¹ Reply, para. 7.

³² Reply, paras 9-10.

material allegations in the Prosecution case.³³ The Defence further argues that most importantly, members of the Prosecution told DCT-032 that they would want him to testify if the exhumed body turned out to be that of Johnny Paul Koroma, and that “in the plainest sense of the phrase, this makes him a potential Prosecution witness.”³⁴ The Defence also argues that the fact that the Prosecution issued DCT-032 with a letter indemnifying him from criminal prosecution is further indication that he was a potential witness and not just a source as the Prosecutions claims, and that the letter is exculpatory in that it served as an incentive for DCT-032 to cooperate and to fabricate a story that fed into the Prosecution case.³⁵

III. APPLICABLE LAW

17. Rules 66 and 68 of the Rules govern the disclosure of materials by the Prosecutor. Rule 66 provides in relevant part as follows:

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 cause 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.

18. Rule 68 relating to the disclosure of exculpatory materials provides as follows:

Disclosure of Exculpatory Evidence

³³ Reply, para. 13.

³⁴ Reply, para. 14.

³⁵ Reply, paras 18-19.

(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.

19. The Trial Chamber has reiterated the continuing obligation upon the Prosecution to continuously disclose exculpatory material which in any way tends to suggest the innocence or mitigate the guilt of the Accused or which may affect the credibility of the Prosecution evidence.³⁶

20. The Trial Chamber has held that in order to establish that the Prosecution has breached its Rule 68(B) disclosure obligations, the onus is upon the Defence to:

- (i) identify the material sought with requisite specificity;
- (ii) make a *prima facie* showing of the exculpatory or potentially exculpatory nature of the materials requested;
- (iii) make a *prima facie* showing of the Prosecution's custody or control of the materials requested;
- (iv) show that the Prosecution has, in fact, failed to disclose the targeted exculpatory material.³⁷

³⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-770, Decision on Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call, 30 March 2009, para. 12; *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, 18 February 2009, para. 5; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigator's Notes pursuant to Rule 66 and/or 68, 4 May 2005, para. 16; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-363, Decision on Sesay Motion Seeking Disclosure of the relationship Between Governmental Agencies of the United States of America and of the Office of the Prosecutor, 2 May 2005, para. 35.

³⁷ *Prosecutor v. Taylor*, SCSL-03-01-T-516, Decision on Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence, 22 May 2008, p. 4; *Prosecutor v. Taylor*, SCSL-03-01-T-770, Decision on Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in redacted Witness Statements of Witnesses the Prosecution does not Intend to Call, 30 March 2009, para. 13; *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, 18 February 2009, para. 5; *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; See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-03-05-PT, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, paras 27, 43; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-436, Decision on Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witnesses TF1-141, 26 October 2005, para. 24.

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21. Further, in interpreting the provisions of Rule 68(B), the Trial Chamber has held that “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 different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68”.³⁸

22. Rule 68 has been liberally construed to apply to all exculpatory material that is in the custody or control of the Prosecutor, and is not limited to material relating to “Prosecution witnesses”.³⁹

IV. DELIBERATIONS

1) *Status of Witness DCT-032 prior to his listing as a Defence witness*

23. As the Motion largely turns of the status of Witness DCT-032 prior to his listing as a Defence witness, the Trial Chamber will start by making a determination on this issue. The Defence maintains that before it spoke to Witness DCT-032, he was in fact a potential Prosecution witness and not just a source as alleged by the Prosecution. As such, the Defence argues, the Prosecution had a duty as soon as it learnt of the true identity of DCT-032 from the Defence on 12 April 2010,⁴⁰ to disclose to the Defence “any material within its possession which is relevant to the named witness including but not limited to witness statements and/or disbursement records” and “any exculpatory material in relation to the witness.”⁴¹ The Defence assertion that DCT-032 was a potential Prosecution witness and not just a source is based on (a) his role in the alleged death of Johnny Paul Koroma as described by other Prosecution witnesses; (b) the content of the Prosecution’s interview with DCT-032 as summarised in the “Proffer”;⁴² (c) the payments made and/or promised to DCT-032 by the Prosecution during the course of the investigation;⁴³ (d) a promise by one of the Prosecution investigators for relocation of

³⁸ *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. 21, citing *Prosecutor v. Karemera, Ntirumpatse and Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005 para. 7.

³⁹ *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. 11.

⁴⁰ According to Confidential Annex D to the Motion, the Defence disclosed the real names of DCT-032 to the Prosecution on 12 April 2010.

⁴¹ Motion, paras 23-26, Reply paras 13-19.

⁴² Reply, Confidential Annex A.

⁴³ Motion, paras 11-12 and Confidential Annex A.



DCT-032;⁴⁴ and (e) a letter from the Chief Prosecutor of the Special Court indemnifying DCT-032 from criminal prosecution.⁴⁵

24. The Prosecution, while not disputing any of the facts relied upon by the Defence, maintains that DCT-032 has never been listed as a Prosecution witness or potential witness and that he was simply a source. As such, the Prosecution claims it has no disclosure obligation under Rule 68(B) in relation to this individual.⁴⁶ Firstly, the Trial Chamber recalls that a number of Prosecution witnesses including Moses Blah⁴⁷, a former Vice President of Liberia, Joseph 'Zig-Zag' Marzah (TFL-399)⁴⁸ and a protected Witness TFI-375⁴⁹, testified regarding the circumstances of Johnny Paul Koroma's alleged murder. While none of the said witnesses actually witnessed the alleged murder or saw the body of Johnny Paul Koroma, they gave evidence implicating a number of alleged subordinates of the Accused in the murder of Johnny Paul Koroma and in particular, the individual referred to in this Motion as Witness DCT-032 as the person or one of the persons that actually carried out the killing in Foya, Liberia in 2003, on orders of the Accused.⁵⁰ According to these witnesses, DCT-032 played a key role in the alleged murder of Johnny Paul Koroma, which role would qualify him as a potential Prosecution witness rather than a mere source.

25. Secondly, according to the "Proffer" disclosed to the Defence⁵¹, the Prosecution contacted and interviewed DCT-032 in May, June, July and October of 2008 as part of its investigations into the alleged death of Johnny Paul Koroma.⁵² DCT-032 provided the Prosecution with detailed information about his own role in the conflict, his role and that of other subordinates of the Accused in the alleged murder of Johnny Paul Koroma, and in particular, about the latter's burial site at a location in Lofa County, Liberia.⁵³ It is clear from the information provided by DCT-032 to the Prosecution that he did not merely provide information pointing the Prosecution to independent evidence. Rather, he went further by providing substantial information (whether true or false) not

⁴⁴ Motion, Confidential Annex A, para. 12.

⁴⁵ Motion, paras 2, 13-15.

⁴⁶ Response, paras 6-11.

⁴⁷ *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 15 May 2008, pp. 9998-10000.

⁴⁸ *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 12 March 2008, pp. 5935-5937.

⁴⁹ *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 25 June 2008, pp. 12754-12766, 14489-14603.

⁵⁰ *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 12 March 2008, pp. 5935-5937 and Transcript 25 June 2008, pp. 12754-14603.

⁵¹ Response, para. 9; Reply, Confidential Annex A.

⁵² Motion, Confidential Annex A; Reply, Confidential Annex A.

⁵³ Reply, Confidential Annex A.

only corroborating the testimony of other Prosecution witnesses, but also going to material allegations in this trial. In the Trial Chamber's view, the foregoing shows that DCT-032 was a potential witness rather than a source.

26. Thirdly, while the Prosecution describes the payments it made to DCT-032 as "recompense for his services as a source"⁵⁴ the Trial Chamber is of the view that these payments cannot be viewed or assessed in isolation but rather must be viewed in the context in which they were made. The Prosecution has not challenged the Defence assertion that these payments were paid to DCT-032 in order to encourage him to cooperate with the Prosecution by providing the required information about the death and burial place of Johnny Paul Koroma and that further payments were promised after the Prosecution confirmed that the body found was indeed that of Johnny Paul Koroma. Based on that information, the Trial Chamber opines that the Prosecution payments were not used to buy information from a source, but rather were given to a potential witness for his own benefit.

27. Lastly, in view of the alleged involvement of Witness DCT-032 not only in the conflict, but also in the alleged murder of Johnny Paul Koroma, the Trial Chamber is of the opinion that the letter from the former Chief Prosecutor of the Special Court, indicating that he did not intend to lay charges against him, supports the inference that the Prosecution wanted to ensure his cooperation, including his testimony if required. The granting of an indemnity from prosecution in such circumstances is not consistent with DCT-032 being considered to be a mere source. Accordingly, the Trial Chamber holds that prior to his listing as a Defence witness, Witness DCT-032 was for all intents and purposes, a potential Prosecution witness, notwithstanding that he was never listed by the Prosecution as such. The Trial Chamber will now examine the specific Defence requests for disclosure.

2) Disclosure of the results of the Prosecution investigation into the alleged death of Johnny Paul Koroma

28. The Prosecution, while not disputing that it conducted an investigation into the death of Johnny Paul Koroma, including the exhumation and DNA testing of a body or bodies, submits that nothing in the details or results of that investigation contradicts existing Prosecution evidence. The Prosecution argues that its evidence relates only to the killing and not to the burial of Johnny Paul Koroma. Accordingly, "no evidence is contradicted by the fact that the remains found at a particular

location were not those of Johnny Paul Koroma”.⁵⁵ As stated in the background to this Decision, the Prosecution has as part of its case against the Accused,⁵⁶ adduced evidence of the actions of the Accused “after the Indictment period” in particular, that he systematically “murdered or eliminated persons who were in his inner circle and who were aware of the crimes perpetrated by [him]” in order to prevent their turning against him and exposing him during his trial, which conduct the Prosecution maintains, is indicative of “consciousness of his criminal responsibility” for the crimes charged in the Indictment. One such individual that the Prosecution, through its evidence, maintains was murdered by or on the orders of Mr. Taylor in order to silence him is Johnny Paul Koroma. Furthermore, the Prosecution evidence on record specifically implicates DCT-032 as the person or one of the persons that actually carried out the alleged killing on orders of the Accused. The fact that the Prosecution interviewed this alleged murderer and that he led them to a grave site or grave sites that later turned out not to be that of Johnny Paul Koroma is relevant to the issue of whether Johnny Paul Koroma is dead or alive, and may affect the credibility of the Prosecution evidence.

29. The fact that DCT-032 was not able to provide the Prosecution with adequate information in relation to the burial site of Johnny Paul Koroma, despite being promised \$5000 and indemnity against criminal prosecution, is potentially exculpatory in that it may affect the credibility of the Prosecution evidence implicated him in the killing. This information with respect to the Prosecution investigation should therefore also have been disclosed to the Defence. The Trial Chamber therefore agrees with the Defence and finds that the details and results of the Prosecution investigation into the alleged death of Johnny Paul Koroma are potentially exculpatory in nature. The Prosecution neither disputes the fact that it has this material in its possession, nor the fact that it has not disclosed the material to the Defence. The Trial Chamber accordingly holds that this material should be disclosed pursuant to Rule 68(B) of the Rules.

⁵⁴ Response, para. 11.

⁵⁵ Response, paras 4-5.

⁵⁶ See Opening Statement of the Prosecutor: *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 4 June 2007, pp. 276-280; 15 March 2008.

3) *Disclosure of Records of all the disbursements made to Defence Witness DCT-032*

30. The Prosecution, while not disputing that it made payments to DCT-032, describes the payments as “recompense for his services as a source” and submits that it has no obligation to disclose them under Rule 68(B).⁵⁷ The Trial Chamber has previously held that:

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 different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68.”⁵⁸ [emphasis added]

31. Having found above that DCT-032 was in fact a potential Prosecution witness, the Trial Chamber needs to determine whether or not the said payments were “*reasonably required for the management of the witness*”. According to information provided to the Defence, which information is not disputed by the Prosecution, the funds provided to DCT-032 amounting to \$1500 were used for such things as buying a phone, food, rent and school fees. A further \$5000 was promised to DCT-032 “if the body exhumed was confirmed to be that of Johnny Paul Koroma”. More importantly, DCT-032 admits that he was “making up a story in order to get money from the Prosecution”.⁵⁹ The Trial Chamber finds that these payments made by the Prosecution to DCT-032 went beyond that which is reasonably required for the management of a witness and assumed a potential exculpatory character. The Prosecution does not dispute that it has the records of these payments and that it has not disclosed them to the Defence. The Trial Chamber accordingly holds that this material should be disclosed pursuant to Rule 68(B) of the Rules.

4) *Disclosure of the ‘original duplicate copy’ of the indemnity letter to DCT-032 or a confirmation of such indemnity*

32. The Defence has annexed a photo copy of the letter of indemnity written by the former Prosecutor of the Special Court to DCT-032 on 12 April 2008, submitting that the copy in the possession of DCT-032 is “tattered”. The Prosecution, while not denying the existence of this letter,

⁵⁷ Response, paras 6-11.

⁵⁸ *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, where the Trial Chamber adopted the jurisprudence in *Prosecutor v. Karemera, Ndirumpatse, Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005 para.6. See also *Prosecutor v. Nzirorera et al*, ICTR-98-44-I, Decision on Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para.16 and *Prosecutor v. Bizimungu, Mugeni, Bicamumpaka and Mugiraneza*, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para. 13.

⁵⁹ Motion, Confidential Annex A.

claims that such a letter is not exculpatory within the meaning of Rule 68(B), as DCT-032 was only used as a source and not as a potential witness. The Trial Chamber having already held that prior to his listing as a Defence witness, DCT-032 was a potential Prosecution witness finds that the indemnity letter is potentially exculpatory and is satisfied that it is in the Prosecution's possession and has not been disclosed to the Defence. The Trial Chamber accordingly holds that this material should be disclosed pursuant to Rule 68(B) of the Rules.

5) Request for an explanation as to why information was not disclosed to the Defence, and request to Trial Chamber to draw adverse inferences for the non-disclosure

33. The Trial Chamber notes the submissions of the Prosecution in its Response justifying, albeit wrongly, its non-disclosure of the requested material, namely that the Prosecution considered DCT-032 a source and not a witness or potential witness, in respect of whom it had no Rule 68 disclosure obligation.⁶⁰ Consequently, the Trial Chamber considers that no additional "explanation" is warranted. Furthermore, at this stage of the proceedings the potentially exculpatory material has not yet been disclosed, and it is therefore pre-mature to consider whether it is appropriate for the Trial Chamber to "draw adverse inferences" from the Prosecution's non-disclosure. Accordingly, the Trial Chamber declines the fourth Defence request.

FOR THE ABOVE REASONS

GRANTS THE MOTION IN PART; and

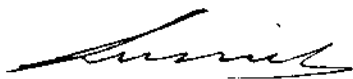
ORDERS the Prosecution to disclose forthwith to the Defence, pursuant to Rule 68(B):

1. 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 during that investigation;
2. Records of all disbursements that were made to Defence witness DCT-032; and
3. An original duplicate copy of the letter of indemnity against the prosecution before the Special Court for Sierra Leone written by Stephen Rapp to Defence witness DCT-032;

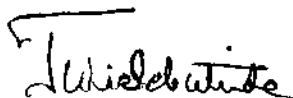
⁶⁰ Response, paras 6-15.

Justice Julia Sebutinde appends a Separate Concurring Opinion hereto.

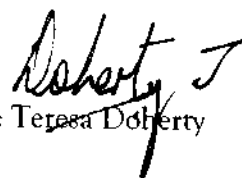
Done at The Hague, The Netherlands, this 20th day of October 2010.



Justice Richard Lussick



Justice Julia Sebutinde
Presiding Judge



Justice Teresa Doherty



SEPARATE CONCURRING OPINION OF JUSTICE JULIA SEBUTINDE

1. I agree with all aspects of the Trial Chamber's reasoning, findings, conclusions and Orders as contained in the Decision to which this Opinion is appended. However, I am judicially compelled to include this Separate Concurring Opinion in relation to the fourth request of the Defence, namely, that the Trial Chamber should in addition to ordering disclosure of the exculpatory material, draw adverse inferences against the Prosecution's failure to disclose the said information.¹ I do so in order to point out and underscore the effect of the Prosecution's non-compliance of its Rule 68 obligations upon the fair-trial rights of the Accused, particularly at this late stage of the trial, which effect is not necessarily cured by any late disclosures that may ensue pursuant to the Trial Chamber's Orders herein. In this regard, it is pertinent to examine the timeline of events leading up to this Motion.
2. Firstly, the Prosecution closed its case on 27 February 2009,² while the Defence has indicated to the Trial Chamber on several occasions that it is "unlikely that [it] would call any other live witnesses."³ It is therefore fair to assume that at this stage of the proceedings, neither party is likely to be calling or recalling any more witnesses. Secondly, it is apparent from the Prosecution Proffer disclosed to the Defence⁴ that the Prosecution interviewed Witness DCT-032 as far back as May, June, July and October of 2008; while the record of proceedings has Prosecution Witnesses Joseph 'Zig-Zag' Marzah, Moses Blah and TFL-375 as testifying over two years ago, in March, May and June of 2008, respectively. Thus, despite its continuing disclosure obligations under the Rules, and despite a specific Defence request for disclosure in relation to Witness DCT-032 in April 2010,⁵ the Prosecution did not disclose any information in relation to this individual until as late as 4 June 2010, two years after Prosecution witnesses had already testified. Even then, the selected material that the Prosecution chose to disclose to the Defence in its "Proffer" contained little that would put the Defence on notice about the existence of any exculpatory material in relation to DCT-032.
3. The Defence, on the other hand, most probably learnt of the existence of the exculpatory material only after interviewing Witness DCT-032 in September 2010, as is apparent from the information in Confidential Annex A to the Motion, but none-the-less filed this Motion without

¹ Motion, para. 28.

² Transcript 27 February 2009, p. 24057.

³ Transcript 13 September 2010, p. 48312; see also Transcript, 27 February 2009, p. 24057, where Defence Counsel stated that: "I'm not ruling it out completely, but I think it's unlikely that we would call any other live witnesses."

⁴ Reply, Confidential Annex A.

undue delay in September 2010.⁶ In these circumstances, it is clear that in failing to disclose the exculpatory information in a timely manner, the Prosecution not only failed in its duty to assist in the administration of justice, but also clearly violated the fair trial rights of the Accused by denying him the right to use the said exculpatory information in cross-examining the Prosecution witnesses referred to in this Decision. Considering that the disclosures ordered by the Trial Chamber in this Decision come at a very late stage in the proceedings, such a violation should not go without a remedy.

4. In this regard, I am persuaded by the approach of the ICTR Trial Chamber in the *Prosecutor v. Nindiliyimana et. al.* Case⁷ where, in considering the Prosecution's disclosure obligations under a rule similar to our Rule 68, the ICTR held:

The Prosecution's obligation to disclose exculpatory material is essential to a fair trial. In determining whether Rule 68 has been violated, considerations of fairness are the overriding factor. According to the Appeals Chamber, the obligation to disclose exculpatory material forms part of the Prosecution's duty to assist in the administration of justice, and is as important as the obligation to prosecute. The duty to disclose exculpatory material under Rule 68(A) is of a positive and continuing nature notwithstanding the public or confidential character of the material. In discharging its obligation under Rule 68(A), the Prosecutor will be presumed to be acting in good faith, unless the moving party adduces prima facie evidence proving otherwise.⁸ [...] However, not every violation of the duty to disclose exculpatory material warrants a remedy. Before granting a remedy for a breach of Rule 68 obligations, the Chamber must ascertain that material prejudice has been caused to the accused, amounting to an infringement of his or her right to a fair trial. Likewise the choice of remedy is a matter falling within the Trial Chamber's discretion and must be determined on a case by case basis taking into account the scope and significance of the violation vis-à-vis the allegations in the Indictment, the persistence of the Prosecution's non-compliance, and the timing of any late disclosure in light of the stage of the proceedings. For example where the Prosecution shows persistent disregard or lack of diligence in discharging its Rule 68 obligation to such an extent that he could be deemed to be obstructing the proceedings or the interests of justice, the Trial Chamber may consider imposing sanctions against the Prosecutor. On the other hand, where the Prosecution delays the disclosure of exculpatory material until its case closes, the Trial Chamber may consider recalling some prosecution witnesses for further cross-examination by the Defence based on the lately - disclosed material. In addition, or in the alternative, the Trial Chamber may allow the Defence to submit a list of additional witnesses it wishes to call in order to testify on the specific areas relevant to the lately - disclosed exculpatory material...[a] Trial Chamber may, where the violation of the disclosure is so extensive or occurs at such a late stage of the proceedings that it would violate the right of the accused to trial without delay, or where it would be impossible or impracticable to recall prosecution witnesses without effectively re-opening the case in its entirety, opt to draw

⁵ Motion, Confidential Annex D.

⁶ The See Confidential Annex A; the affidavit of DCT-032 is dated 23 September 2010.

⁷ *Prosecutor v. Nindiliyimana et al.*, ICTR-00-56-T, Decision on Defence Motions Alleging Violations of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008 ("*Nindiliyimana Case*").

⁸ *Ibid.*, para. 12.

reasonable inferences from the disclosed material at the stage of its definitive evaluation of the evidence.⁹ Where material requested by the Defence under Rule 68 is known and could be retrieved by the Defence with relative ease, then material prejudice cannot be shown.¹⁰

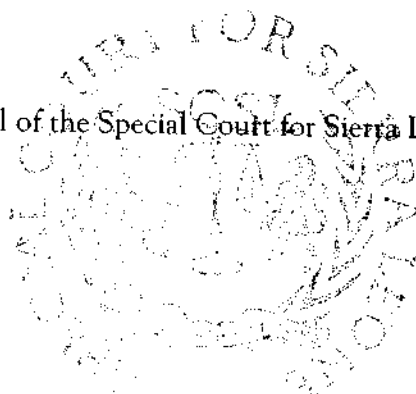
5. Taking into account the seriousness of Prosecution allegations implicating the Accused in the alleged murder of Johnny Paul Koroma, the impracticability of recalling the said Prosecution witnesses for cross-examination at this late stage of the proceedings, as well as the right of the Accused to be tried without undue delay, I am of the view that the Trial Chamber not only has the discretion, but also the responsibility at this stage, to secure justice and ensure a fair trial for the Accused by determining a suitable remedy following the late disclosures ordered. The Chamber must consider a remedy that is appropriate in the circumstances; that preserves the integrity of the judicial process; and that assists the Trial Chamber in ascertaining the events surrounding the alleged murder of Johnny Paul Koroma.¹¹ That said, I do however, agree that at this stage of the proceedings when the potentially exculpatory material has not yet been disclosed, it may not be practicable for the Trial Chamber to “draw adverse inferences” from the Prosecution’s non-disclosure of the same without knowing the full content of this material. Rather, it is more realistic to consider the appropriate remedy at the stage of evaluation of the evidence and Judgement deliberations, having taken into account the nature and effect of the exculpatory material disclosed.

Done at The Hague, The Netherlands, this 20th day of October 2010.



Justice Julia Sebutinde
Presiding Judge

[Seal of the Special Court for Sierra Leone]



⁹ *Ibid.*, para. 14.

¹⁰ *Ibid.*, para. 15.

¹¹ See *Ndindilyimana Case*, para. 61.