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SCSL-03-01-T

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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:** 18 August 2010

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

SPECIAL COURT FOR SIERRA LEONE
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**THE PROSECUTOR**

**–v–**

**CHARLES GHANKAY TAYLOR**

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PUBLIC

# DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION FOR DISCLOSURE OF STATEMENT AND PROSECUTION PAYMENTS MADE TO DCT-097

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## I. Introduction

1. The Prosecution Response[1] to the Defence *Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097*[2] is a blatant attempt by the Prosecution to use semantics in order to evade its responsibility to disclose exculpatory information.
2. The Prosecution does not deny knowledge of the Statement given by DCT-097 to Global Witness, nor does the Prosecution deny making payments of almost $30,000 to DCT-097 during the time it conducted interviews with him. Instead, the Prosecution uses a very narrow definition of what is "in its possession" and what constitutes a "Prosecution witness" in an attempt to avoid fulfilling its mandatory disclosure obligation.
3. In this instance, where the Defence has provided the Court with *prima facie* evidence of the Prosecution's failure to disclose an exculpatory statement and an accounting of payments in relation to an individual known alternatively as Prosecution Witness TF1-354 or Defence Witness DCT-097, the Trial Chamber should not allow the Prosecution to hide behind semantics in order to evade its disclosure obligations.

## II. Submissions

*The Prosecution knew of DCT-097's Statement to Global Witness, which DCT-097 says is exculpatory, and failed to disclose this information to the Defence*

4. It is not enough for the Prosecution to simply claim that they do not have the requested material in their possession, or know of the existence of any exculpatory evidence in such material.[3]
5. The Defence sequence of events, taken at face value, makes clear the exculpatory nature of the statement given to Global Witness, the Prosecution's investigative link to DCT-097. Based on the information he has given to the Defence,[4] DCT-097 told Global Witness that the RUF was not involved in trading diamonds with Charles Taylor or the Liberian Government. This is clearly exculpatory since the crux of the Prosecution case rests on

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1046, Prosecution Response to Pubic with Public Annex F and Confidential Annexes A, B, C, D, E, G, H, I, Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 13 August 2010 ("**Response**").
[2] *Prosecutor v. Taylor,* SCSL-03-01-T-1039, Pubic with Public Annex F and Confidential Annexes A, B, C, D, E, G, H, I, Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 4 August 2010 ("**Motion**").
[3] Response, para. 4.
[4] Motion, para. 10(v) and Confidential Annex E.

allegations of blood diamonds provided by the RUF to Charles Taylor in exchange for his support of their revolution.

6. Jurisprudence in relation to disclosure under Rule 68 tends to suggest that the Prosecution must have actual physical possession of exculpatory material before it is required to disclose it. This is because "In the absence of possession of the evidence in question, knowledge of the exculpatory character of evidence will seldom be imputed to the Prosecution".[5] However, it is only logical that Global Witness must have given the Prosecution some summary or indication of what DCT-097 told them, before the Prosecution decided to contact DCT-097, and thus knowledge of this exculpatory material should be imputed to the Prosecution in this instance.

7. The Defence accepts that the Prosecution does not have an obligation to search for exculpatory material, but where exculpatory material comes into its purview, it should make efforts to obtain it, or at a minimum, inform the Defence of its existence, placing the Defence in a position to attempt to obtain it themselves. This proposition is supported by a decision in *Prosecutor v. Bizimungu et al,* wherein the Trial Chamber found:

> "The Prosecution is duty bound to disclose 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 the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that **where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession** where the circumstances suggest that the Prosecution is in a better position than the Defence to do so..."[6]

8. Given the demonstrated level of cooperation between Global Witness and the Prosecution in investigating the conflicts in West Africa, the Prosecution is clearly better placed than the Defence to obtain this Statement from Global Witness. The ICTR Appeals Chamber has found it "disconcerting" that the Prosecution could claim that it is not obliged to search for material impacting the credibility of its own witnesses.[7]

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[5] Ultimately, the Trial Chamber while not ordering disclosure under Rule 68 used its discretion, *propio motu*, to order the production of the requested evidence under ICTR Rule 98 (which is the equivalent to the general powers of the Trial Chamber contained in SCSL Rule 54). See *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, Nsengiyumva,* ICTR-98-41-T, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003, paras. 4-8.

[6] *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka, Mugiraneza,* ICTR-99-50-T, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, 23 April 2004, para. 9.

[7] *Prosecutor v. Karemera et al,* ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 9, fn. 31.

9. There is also ample case law from the ICTR to put the Prosecution on notice that it should have obtained this Statement of its witness from Global Witness even under Rule 66 and thereafter disclosed it to the Defence. In *Prosecutor v. Kajelijeli,* the Trial Chamber determined that:

> "in preparation for the trial, the Prosecutor would have be [*sic*] expected to find out and obtain all prior statements [...] that such witnesses might have made in other similar investigations and judicial proceedings, in so far as they could be relevant to the issues with which the Chamber is seized".[8]

The Prosecution have acknowledged that Global Witness and themselves were "two organizations investigating similar events".[9] In such instances, the *Kajelijeli* Trial Chamber held that since these witnesses were to be called by the Prosecutor:

> "it was incumbent upon her to have had, in her possession, the said statements, particularly as the said statements might be used in weighing the credibility of the said witnesses. Accordingly, in the interests of justice, the Chamber finds that the Prosecutor bears the responsibility of obtaining the said statements".[10]

*The Prosecution disingenuously claims that Payments made by them to DCT-097 do not need to be disclosed under Rule 68*

10. The Prosecution does not deny making payments to and/or conferring other benefits on DCT-097 during the course of the Prosecution's interactions with him.[11] Rather they attempt to argue that these Payments do not need to be disclosed because DCT-097 is not a Prosecution witness as envisaged by Rule 68. This argument is simply specious. The disclosure of

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[8] *Prosecutor v. Kajelijeli,* ICTR-98-44A-T, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001, para. 17 (**"*Kajelijeli* Decision"**). This decision, requiring the Prosecution to make efforts to obtain the prior statements, was subsequently reaffirmed and followed in *Prosecutor v.* Prosecutor v. Élie Ndayambaje and Sylvain Nsabimana, ICTR-96-8-T and ICTR-97-29A-T, Decision on the Defence Motions Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses, 15 November 2001, para.24.

[9] Response, para. 6.

[10] *Kajelijeli* Decision, para. 20, but see also paras. 17-22. The Defence acknowledge that in *Kajelijeli,* the issue of disclosure was determined under Rule 66, and not Rule 68, but the Defence submit that the obligation on the Prosecutor remains the same, especially since DCT-097 was initially a Prosecution witness and should have first discharged these obligations under Rule 66.

[11] Response, paras. 7-10.

exculpatory evidence is one of the most onerous responsibilities of the prosecution and shall be interpreted *broadly* since it is essential to a fair trial.[12]

11. Of late, it seems to be the Prosecution's habit to disown its witnesses when it finds it convenient to do so.[13] The fact remains that DCT-097 is a Prosecution witness whom the Defence now intend to call as a Defence witness. The Prosecution was in contact with and interviewed DCT-097 from (according to the Prosecution's disclosure index)[14] May 2004 until January 2006. The Prosecution assigned DCT-097 the pseudonym TF1-354.[15] In the RUF Trial, the Prosecution requested pre-trial protective measures for TF1-354 as an insider witness, including a provision wherein the Defence could not contact TF1-354 without first seeking permission from the Trial Chamber.[16] Furthermore, the Prosecution made payments to DCT-097, worth almost $30,000, from a fund administered by the Prosecution's *Witness* Management Unit (emphasis added). In those circumstances, for the Prosecution to now disown DCT-097 simply to avoid a potentially embarrassing disclosure of excessive payments to this witness, is with all due respect, disingenuous.
12. In *Prosecutor v. Karemera* the Trial Chamber noted its concern with a similar set of circumstances, in which the Prosecution considered that the Defence's intention to call an individual as a witness somehow relieved it of its obligations to disclose materials under Rule 66 and/or 68 relating to that witness.[17] The fact that the Defence now intends to call a witness who has also been considered a Prosecution witness does not relieve the Prosecution of its obligation to disclose materials under either Rule 66 or 68.

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[12] *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures, 29 November 2007, para. 7.
[13] Note the Prosecution's recent attempts to suggest that Naomi Campbell was not actually a Prosecution witness. See, ex, *Prosecutor v. Taylor,* SCSL-03-01-T-1032, Prosecution Response to Urgent Defence Motion for Stay of Evidence Pending Disclosure of the Statement of Naomi Campbell, 3 August 2010, para. 2; *Prosecutor v. Taylor,* Trial Transcript, 5 August 2010, p. 45513-4.
[14] Motion, Confidential Annex A.
[15] Motion, Confidential Annex A.
[16] These protective measures granted to TF1-354 (as a Category 1(C) insider witness) at the Prosecution's request have never been rescinded. Nor has the Prosecution indicated that it has dropped TF1-354 as a witness. See *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004 and *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-102, Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004, 4 May 2004 (TF1-354 is listed in Annex A as number 23 on the list of Category C Witnesses Insiders).
[17] *Prosecutor v. Karemera et al*, ICTR-98-44-T, Oral Decision on Disclosure of Material from Joseph Serugendo, 30 May 2006.

13. In his letter, former Prosecutor Stephen Rapp does not draw a distinction between what kind of a witness someone is when he acknowledged that "information about payments made by the WMU for support of witnesses is evidence that 'may affect the credibility of prosecution evidence' under Rule 68(B)" and promised that such information would be disclosed to the Defence.[18] When stating his understanding of the Prosecution's obligations, former Prosecutor Rapp did not distinguish between Prosecution nor Defence witnesses, nor whether the witness was actually called to testify by the Prosecution or was used more as a source or informant. Therefore, whether the Prosecution was using DCT-097 more as an informant and thus would attempt to categorize him as a source or a potential witness[19] rather than an actual testifying witness is not significant for these purposes.
14. At paragraph 9 of the Response, the Prosecution suggests that "at this stage" the Prosecution is not under an obligation to disclose material relating to payments made to or benefits conferred on DCT-097, as if the exculpatory nature of any material is determined by the stage of the proceedings. The Prosecution does not have unfettered discretion in determining what kind of material is exculpatory, or when they chose to disclose it. A Trial Chamber at the ICTR has determined that when the Prosecution decides whether to disclose materials under Rule 68, the Prosecution "abuses its discretion when it passes judgement on the significance of character evidence or evidence of possible motives for testifying" and decides not to disclose the material.[20] The Defence submits that the same rationale should apply wherein the Prosecution are in possession of exculpatory material (i.e., accounts of payments it has made to a witness) wherein those payments are connected to the possible motives of that witness for making statements to the Prosecution.
15. It is the nature and/or content of the material which determines whether it is exculpatory and not some indefinite timing at the whim of the Prosecution. In this case, now that it is aware that the Defence would like to call the same witness, the Prosecution cannot chose to wait until they begin to cross-examine DCT-097, and put to him the excerpts of the statements he previously made to them, before disclosing to the Defence all the payments they made to the

[18] Motion, para.20 and Confidential Annex I.
[19] Per the terms of Rule 39(ii). See also Letter from Stephen Rapp, Motion, Confidential Annex I.
[20] *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka, Mugiraneza,* ICTR-99-50-T, Decision on Jerome Clement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material, 9 February 2009, para. 9.

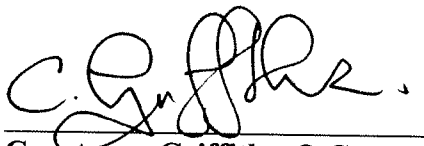
witness. In order to have adequate time to prepare for calling this witness, the Defence must be able to evaluate this witness' evidence in its fullest context.

16. In any event, the mere fact that the Prosecution was in the habit of paying such large sums of money to its witnesses is in itself exculpatory in relation to the entire Prosecution case. It is indicative of the manner in which the Prosecution lured and recruited its witnesses, especially the insider witnesses.

**III. Conclusion**

17. For all the foregoing reasons, the Trial Chamber should grant the Defence request and compel the immediate disclosure of the Statement given by DCT-097 to Global Witness and a full accounting of benefits conferred on and payments made to DCT-097.

Respectfully Submitted,



**Courtenay Griffiths, Q.C.**
**Lead Counsel for Charles G. Taylor**
Dated this 18th Day of August 2010
The Hague, The Netherlands

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