

564)

SCSL-03-01-T
(18345-18351)

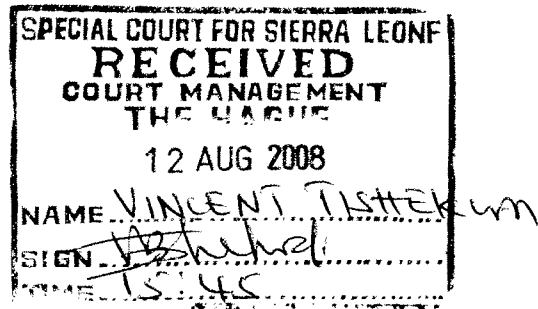
18345

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 12 August 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

URGENT PUBLIC
NOTICE OF CHANGE IN WITNESS STATUS OR IN THE ALTERNATIVE MOTION FOR
LEAVE TO CHANGE WITNESS STATUS

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Defence Counsel for Charles Taylor:

Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. On 4 April 2007 the Prosecution filed its “Rule 73bis Pre-Trial Conference Materials” which included *inter alia* a list of witnesses the Prosecution intends to call and identified the mode of presentation of each witness’ evidence.¹ On 13 December 2007, the Prosecution filed a motion pursuant to Rule 73bis(E) in which it sought leave to vary its decision as to which witnesses were to be called and requested leave to add and remove witnesses.² In the context of this motion, the Prosecution requested that it also be permitted to re-categorise 4 witnesses as *viva voce* rather than submitting their evidence pursuant to Rule 92bis of the Rules of Procedure and Evidence (“**Rules**”).³ This request was granted by the Trial Chamber on 5 February 2008⁴ and on 7 February 2008 the Prosecution filed an amended witness list (“**Amended Witness List**”).⁵
2. Following a review of the evidence presented to date in the current proceedings and the Chamber’s recent Decision relating to the admission of evidence pursuant to Rule 92bis dated 15 July 2008⁶, the Prosecution now wishes to call 3 predominantly linkage witnesses, TF1-041, TF1-045 and TF1-071, and 4 predominantly crime base witnesses, TF1-065, TF1-173, TF1-189 and TF1-459, to give evidence *viva voce* rather than pursuant to Rule 92bis. All 7 witnesses are currently included on the Amended Witness List but are identified in the Pre-Trial Conference Materials as being witnesses’ whose evidence the Prosecution would seek to present under Rule 92bis. In view of this change, the Prosecution wishes to give the Chamber and Defence fair notice in order to assist all parties in relation to case preparation.
3. This filing is made on an urgent basis as the Prosecution wishes to begin to call these witnesses to give evidence at the earliest during the last week of

¹ *Prosecutor v. Taylor*, SCSL-03-01-PT-218, “Public Rule 73 bis Pre-Trial Conference Materials”, 4 April 2007 (“**Pre-trial Conference Materials**”).

² *Prosecutor v. Taylor*, SCSL-03-01-T-374, “Public with Confidential Annex D, Motion for Leave to Vary the Witness List & to Disclose Statements of Additional Witnesses”, 13 December 2007 (“**December Motion**”).

³ December Motion, para. 5(v).

⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-408, “Decision on Public with Confidential Annex D, Motion for Leave to Vary the Witness List & to Disclose Statements of Additional Witnesses”, 5 February 2008.

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-410, “Prosecution’s Amended List”, 7 February 2008.

⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-556, “Decision on Prosecution Notice under Rule 92bis for the Admission of Evidence related to *inter alia* Kenema District and on Prosecution Notice under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence”, 15 July 2008 (“**Rule 92bis Decision**”).

September 2008. Therefore, for planning purposes and to assist the Registry and the Witness and Victims Section make the necessary arrangements, the Prosecution respectfully requests that the Chamber consider this filing on an urgent basis.

II. NOTICE OR, IN THE ALTERNATIVE, REQUEST FOR LEAVE TO CHANGE THE MODE OF PRESENTATION OF EVIDENCE

4. As noted above, the Prosecutor does not seek “to vary his decision as to which witnesses are to be called” pursuant to Rule 73bis(E) by either adding or removing witnesses. Instead, the Prosecutor wishes to change the manner in which the evidence of 7 witnesses currently included on the Amended Witness List will be presented. In this regard, it is to be observed that the admission of evidence under Rule 92bis is not a matter of right but is a decision to be made by the Trial Chamber on receipt of a notice filed by a party under the Rule. Therefore, the fact that the Prosecution has identified in the Pre-trial Conference Materials that its preferred mode of presentation of a witness’ evidence is under Rule 92bis is simply notification of an intention and is subject to the Trial Chamber’s decision. Further, the Prosecution bears the burden to prove its case beyond reasonable doubt and must, therefore, be able to present its witnesses in the manner it considers will allow it to discharge this obligation.
5. Finally, the change in mode of presentation of evidence also reflects the Prosecution’s analysis of this Chamber’s recent Rule 92bis Decision regarding the basis on which evidence will be admitted under Rule 92bis. As noted in this Decision, certain evidence will be considered “sufficiently proximate to the Accused that its admission in the absence of an opportunity to cross-examine the makers of the statements would unfairly prejudice the Accused”⁷ notwithstanding the cross-examination of the makers of such statements in prior proceedings. In determining to present this evidence via Rule 92bis, the Prosecution balanced the potential loss of relevant evidence (i.e. evidence going to proof of the acts and conduct of the Accused or evidence expanding on or clarifying existing evidence) with the expediency and efficiency afforded

⁷ Rule 92bis Decision, page 5.

by the Rule and concluded that the loss was outweighed by the expediency offered by the Rule. The effect of the Rule 92*bis* Decision is that certain witnesses will be called to testify, thereby changing, in the Prosecution's assessment, the balance in favor of adducing additional relevant evidence.

6. Therefore, considering the Rule 92*bis* Decision, the Prosecution's burden of proof and the Prosecutorial discretion such burden provides, the Prosecution hereby notifies the Court that the predominantly linkage witnesses TF1-041, TF1-045 and TF1-071 and the predominantly crime base witnesses TF1-065, TF1-173, TF1-189 and TF1-459 will give evidence *viva voce*. The Prosecution, therefore, will not seek the admission of these witnesses' evidence under Rule 92*bis*.
7. Should the Trial Chamber consider that the change is one which may only be made with the leave of the Court, then, for all the reasons discussed above, in the alternative and pursuant to Rules 73(A) and 73*bis*(E) the Prosecution hereby seeks leave to identify TF1-041, TF1-045, TF1-065, TF1-071, TF1-173, TF1-189 and TF1-459 as witnesses who will give evidence *viva voce* rather than under Rule 92*bis*.

III. APPLICABLE LAW

8. The Rules do not address the procedure for changing the mode of presentation of witness evidence when such information has been provided as part of the Pre-trial Conference Materials. Should the Chamber consider that leave is required to make such change, then the Rule which would seem most appropriate to regulate such an issue is Rule 73*bis*(E) which governs requests to vary the Prosecution's witness list. This Rule provides that:
 - (E) After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber ... to vary his decision as to which witnesses are to be called.
9. The requirement of Rule 73*bis*(E) is that the Prosecutor consider it to be in the interests of justice to make certain variations to the witnesses to be called. When considering the standard imposed by the Rule the Prosecution notes the observations referred to in the *Nahimana* Decision that "the term 'interests of justice' ... refers to a discretionary standard applicable in determining a matter

given the particularity of the case.”⁸

IV. SUBMISSIONS

10. The Prosecution identified certain witnesses in its Pre-Trial Conference Materials as being witnesses’ whose evidence might be submitted under Rule 92*bis*. In making this determination in relation to the predominantly linkage witnesses, the Prosecution considered *inter alia* that any evidence which went to proof of the acts and conduct of the Accused might be redacted from the evidence to be submitted under the Rule, and that any additional evidence would not be elicited on the basis that it was prepared to remove or forego leading such evidence if it assisted to expedite proceedings. However, as noted above, the effect of the Rule 92*bis* Decision is that certain witnesses will be called to testify *viva voce*, if only for cross-examination. Therefore, any benefit in terms of expediency is reduced. Moreover, the Prosecution believes that if only one party is able to adduce evidence *viva voce*, the other party will be at a disadvantage as the *viva voce* evidence given in the current proceedings will naturally be more memorable than the evidence presented only in written form from prior proceedings. Therefore, in the considered view of the Prosecution, the balance now favours the witnesses identified in this filing being called to testify entirely *viva voce* on *all* matters including evidence relevant to the acts and conduct of the Accused.
11. The variations detailed in this filing concern determinations regarding the presentation of witness evidence. As noted above, the Prosecution bears the burden of proof. In seeking to discharge this burden, the Prosecution has carefully considered the state of the evidence on the Court record as it presently stands. The Prosecution considers that its case would best be served and, therefore, that it is in the interests of justice, that the evidence of 3 of its predominantly linkage witnesses and 4 of its predominantly crime base witnesses be presented entirely *viva voce* in the current proceedings rather than under Rule 92*bis* as any expediency achieved in using this mechanism would now be minimal and the Prosecution would be required to redact evidence

⁸ *Prosecutor v. Nahimana*, ICTR-99-52-I, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses”, Trial Chamber, 26 June 2001, para. 19 (“**Nahimana Decision**”), which was cited with approval in *Prosecutor v. Bagosora*, ICTR-98-41-T, “Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis*(E)”, 26 June 2003, para. 13.

going to proof of the acts and conduct of the Accused and/or forego the clarification or expansion of evidence by leading the witness in direct *viva voce*. On this basis, the discretionary standard to be applied should, therefore, be construed in favour of the Prosecution's determination.

V. CONCLUSION

12. The Prosecution hereby notifies the Court that 3 predominantly linkage witnesses TF1-041, TF1-045 and TF1-071 and 4 predominantly crime base witnesses TF1-065, TF1-173, TF1-189 and TF1-459 will give evidence *viva voce* rather than pursuant to an application Rule 92*bis*.
13. Should the Trial Chamber consider that the change is one which may only be made with the leave of the Court, then in the alternative and as the Prosecution considers it to be in the interests of justice the Prosecution hereby seeks leave to identify 3 predominantly linkage witnesses TF1-041, TF1-045 and TF1-071 and 4 predominantly crime base witnesses TF1-065, TF1-173, TF1-189 and TF1-459 as witnesses who will give evidence *viva voce* rather than under Rule 92*bis*.

Filed in The Hague,

12 August 2008

For the Prosecution



Brenda J. Hollis

Senior Trial Attorney

LIST OF AUTHORITIES**SCSL*****Prosecutor v. Taylor*, SCSL-03-01-T**

Prosecutor v. Taylor, SCSL-03-01-PT-218, “Public Rule 73bis Pre-Trial Conference Materials”, 4 April 2007

Prosecutor v. Taylor, SCSL-03-01-T-374, “Public with Confidential Annex D, Motion for Leave to Vary the Witness List & to Disclose Statements of Additional Witnesses”, 13 December 2007

Prosecutor v. Taylor, SCSL-03-01-T-408, “Decision on Public with Confidential Annex D, Motion for Leave to Vary the Witness List & to Disclose Statements of Additional Witnesses”, 5 February 2008

Prosecutor v. Taylor, SCSL-03-01-T-410, “Prosecution’s Amended List”, 7 February 2008.

Prosecutor v. Taylor, SCSL-03-01-T-556, “Decision on Prosecution Notice under Rule 92bis for the Admission of Evidence related to *inter alia* Kenema District and on Prosecution Notice under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence”, 15 July 2008

ICTR

Prosecutor v. Nahimana, ICTR-99-52-I, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses”, Trial Chamber, 26 June 2001
<http://69.94.11.53/ENGLISH/cases/Nahimana/decisions/260601.htm>

Prosecutor v. Bagosora, ICTR-98-41-T, “Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E), 26 June 2003
<http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/260603.pdf>