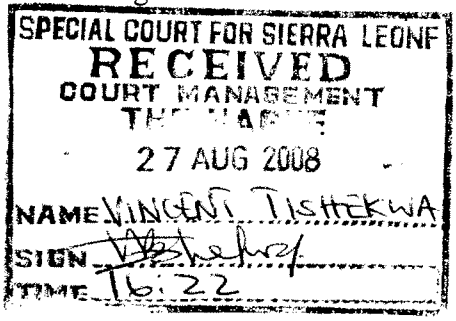
570) SCSL-03-01-T (18390 - 18396) 18390

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: 27 August 2008



THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO DEFENCE RESPONSE TO 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
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Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. The Prosecution files this reply to the "Public Defence Response to Urgent Public Notice of Change in Witness Status or, in the alternative, Motion for Leave to Change Witness Status ".[1]

II. SUBMISSIONS

2. The conflation of a request to change the mode of evidence presentation of witnesses already included on the Prosecution's witness list with a request to add new witnesses to this list is a fundamental error underlying all the arguments in the Response.

3. The seven (7) witnesses referred to in the Prosecution's filing are witnesses who have been included on the Prosecution's witness list since 4 April 2007.[2] The Defence argument that the proposal to call these witnesses to give evidence *viva voce* rather than by way of Rule 92*bis* has the practical effect of varying the Prosecution's witness list is without legal or logical merit. Further, the Response does not specifically identify in what way the change in evidence presentation falls within Rule 73*bis*(E) and thus amounts to the Prosecutor varying "his decision as to which witnesses are to be called". The change contemplated is to the way in which these witnesses' evidence will be presented (i.e. pursuant to a successful request under Rule 92*bis* or *viva voce*), a change not specifically falling within the scope of Rule 73*bis*(E).

4. Rule 92*bis* offers a different means of providing the evidence of a witness, but the person whose evidence is admitted under that Rule remains a witness. If the Defence argument is taken to its logical conclusion, should the Trial Chamber deny a motion to receive the evidence of a witness by way of Rule 92*bis*, the party wishing to present the evidence of that witness would be forced to move to have that person "added" to the witness list, as though the witness had never been identified as a witness. This cannot be what is meant by the language of Rule 73*bis*(E).

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-567, "Public Defence Response to Urgent Public Notice of Change in Witness Status or, in the alternative, Motion for Leave to Change Witness Status ", 22 August 2008 ("**Response**").
[2] See the witness list filed as part of the pre-trial conference materials filed with the Court on 4 April 2007 (*Prosecutor v. Taylor*, SCSL-03-01-PT-218, "Public Rule 73 *bis* Pre-Trial Conference Materials", 4 April 2007). See also the amended witness list filed with the Court on 7 February 2008 which list does not add or make any change to the 7 witnesses at issue save that TF1-065 was moved from the Back-up Witness List to the Core Witness List (*Prosecutor v. Taylor*, SCSL-03-01-T-410, "Prosecution's Amended List", 7 February 2008). While TF1-065 was moved in February 2008 from the back-up list to the core list, it is still clear that the witness had been identified as one the Prosecution might call.

5. The Defence argument is also disingenuous. In January this year, the Defence complained that the Prosecution was "attempting to make the trial against Mr Taylor a paper case".[3] The Defence also claimed that, by allowing the Prosecution to present evidence in the manner indicated (i.e. through the mechanism of Rule 92*bis*), the Accused was being deprived of a public hearing.[4] Now the Defence objects to the Prosecution's decision to call more witnesses to give *viva voce* evidence.

6. In addition, the Response misstates the position of the Prosecution, as the Prosecution makes no concession in paragraph 1 of its motion.[5] While the argument which the Defence attempts to make in paragraph 5 of the Response is unclear, it would appear to be attempting to link the Trial Chamber's decision of 7 December 2007[6] to submissions made in the Prosecution's filing. This link does not withstand scrutiny when the facts are considered in full. First, based on its interpretation of Rules 66(A)(ii), 73*bis*(B)(iv) and 73*bis*(E), the Prosecution initially gave notice of its intention to add new witnesses to its witness list in November 2007. Included in this filing was notice of its intention to also change the mode of presentation of evidence of four (4) witnesses.[7] In its 7 December 2007 decision, this Chamber interpreted the Rules differently. As a consequence, the Prosecution then filed a motion on 13 December 2007 to effect the aforementioned changes.[8] However, contrary to the Defence's assertions, the Prosecution makes no concession in paragraph 1 of its motion regarding the aforementioned filings. Indeed, the statement of the Trial Chamber taken from the December 2007 decision in respect of which the Prosecution is stated to have made a concession, when considered in full, would appear to concern the addition of new witnesses to the Prosecution's witness list filed with the court. This conclusion is drawn from the fact that the Trial Chamber's statement also addresses the disclosure of such new witnesses' statements.[9] The Trial

[3] *Prosecutor v. Taylor*, SCSL-03-01-T- 391, "Public Defence response to Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*", 14 January 2008, para. 11.
[4] *Ibid*, para. 12.
[5] Response, para. 5.
[6] *Prosecutor v Taylor*, SCSL-03-01-T-367, "Order Pursuant to Rule 54 on Prosecution's Notification of Amended Prosecution Witness List", 7 December 2007.
[7] *Prosecutor v Taylor*, SCSL-03-01-T-357, "Public, with Confidential Annex D Notification of Amended Prosecution Witness List", 6 November 2007.
[8] *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.
[9] Paragraph 9 of *Prosecutor v Taylor*, SCSL-03-01-T-367, "Order Pursuant to Rule 54 on Prosecution's Notification of Amended Prosecution Witness List", 7 December 2007 in full reads as follows: "Considering that after the

Chamber's statement does not specifically consider the change to the mode of presentation of evidence of existing witnesses. Thus, paragraph 5 of the Response misrepresents the Prosecution and, once again, makes the erroneous conflation referred to in paragraph 2 above.

7. In relation to the interests of justice test, the Defence incorrectly equate the test to be applied in this instance with that to be applied where the Prosecution seeks to add new witnesses to its witness list.[10] The Defence's argument is unsupported by the authority on which it relies. The jurisprudence cited in support of the Defence argument concerns requests to add new witnesses to the witness list, not to changes in the mode of presentation of the evidence of existing witnesses.[11]

8. Further, a change in the means by which evidence is presented is properly a matter of Prosecutorial discretion. This is the Prosecution's position when it characterises the filing as a notification and when it makes the alternative argument regarding Rule 73(B) noting that "the term 'interests of justice' ... refers to a discretionary standard applicable in determining a matter given the particularity of the case."[12] This approach is consistent with the submissions made in December 2007 to re-categorise four (4) witnesses as *viva voce* when the Prosecution stated that the discretionary standard to be applied should be construed in favour of the Prosecution's determination.[13] This approach was confirmed by the Chamber in its February 2008 decision.[14]

9. Finally, the Defence argument that there must be "a limit as to how far the Prosecution can be allowed to approbate and reprobate" and that it "is expected to know its case before proceeding to trial and may not rely on its own shortcomings to mould its case as the trial progresses"[15] misrepresents the actions of the Prosecution and also ignores the reality of a criminal trial. The Prosecution filed a summary of the facts on which each of

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commencement of the trial the Prosecution may only vary its witness list and disclose statements of additional witnesses with leave of the Trial Chamber pursuant to Rules 73*bis*(E) and 66(A)(ii)."

[10] Response, para. 8.

[11] Response, footnote 4.

[12] *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, 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.

[13] *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, para. 5(v).

[14] *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.

[15] Response, para. 10.

the seven (7) witnesses in question were expected to testify on 4 April 2007 as part of the pre-trial conference materials and has also complied with its disclosure obligations in this regard. Therefore, the change to the way in which the evidence of the seven (7) witnesses will be presented, does not constitute a change to the nature of the case being brought against the Accused. Further, the reality of a criminal trial is that the Prosecution must review the state of its evidence at each stage of the case and on this basis make decisions as to how it will present its evidence. Where this evidence is not new and the Defence have been notified of its existence and inclusion in the Prosecution case since at least April 2007,[16] then it is clear that the Defence's claims that the Prosecution is moulding its cases at the trial progresses are without substance. It is also to be noted that, to the extent witnesses give evidence relating to matters not contained in original disclosure, be they *viva voce* witnesses or witnesses whose evidence is submitted via Rule 92*bis*, the remedy is to ensure that the Defence has sufficient time to meet the new matters.

III. CONCLUSION

10. A change in mode of evidence presentation for witnesses who are included on the witness list filed with the Court pursuant to Rule 73*bis* is completely different from a request to add new witnesses to this list. The Defence attempt to conflate these two matters is without merit, leads to illogical conclusions and seeks to force a higher standard on the Prosecution than is justified.

[16] While the pre-trial conference materials were filed with the court on 4 April 2007, the Defence have been in possession of the statements of the majority of the witnesses on the witness list since 17 May 2006.

11. On this basis, the Response should be dismissed. The Prosecution requests that the Trial Chamber accept the Notice of change in form of presentation of evidence or, in the alternative, grant the motion to change the form of presentation.

Filed in The Hague,
27 August 2008
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

LIST OF AUTHORITIES

SCSL Cases

***Prosecutor v. Taylor*, Case No. SCSL-03-01-T**

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

Prosecutor v Taylor, SCSL-03-01-T-357, "Public, with Confidential Annex D Notification of Amended Prosecution Witness List", 6 November 2007

Prosecutor v Taylor, SCSL-03-01-T-367, "Order Pursuant to Rule 54 on Prosecution's Notification of Amended Prosecution Witness List", 7 December 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- 391, "Public Defence response to Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*", 14 January 2008

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-567, "Public Defence Response to Urgent Public Notice of Change in Witness Status or, in the alternative, Motion for Leave to Change Witness Status ", 22 August 2008

ICTR Cases

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 73*bis*(E), 26 June 2003
http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/260603.pdf