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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: 7 May 2010

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
THE HABEEB	
07 MAY 2010	
NAME	ALHASSAN FARUKI
SIGN	
TIME	16:00

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON DEFENCE MOTION FOR LEAVE TO VARY VERSION IV OF THE DEFENCE RULE 73 *TER* WITNESS LIST AND SUMMARIES

Office of the Prosecutor:

Brenda J. Hollis
Kathryn Howarth
Sigall Horowitz

Counsel for the Accused:

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 Annexes A, B, C, and D Defence Motion for Leave to Vary Version IV of the Defence Rule 73ter Witness List and Summaries”, filed on 12 April 2010 (“Motion”),¹ wherein the Defence requests the Trial Chamber for leave to vary its witness list and to order the following, namely that:

- (i) the Defence may file Version V of its Rule 73ter witness list and summaries;
- (ii) the Defence may drop the 86 witnesses whose pseudonyms appear in Annex A from its Rule 73ter witness list and summaries;
- (iii) the Defence may add the four witnesses whose pseudonyms and summaries appear in Annex B to its Rule 73ter witness list and summaries when filing Version V;
- (iv) the Defence may reinstate one witness whose pseudonym and summary appear in Annex C to its Rule 73ter witness list and summaries when filing Version V;²

and submits that given that its investigations are ongoing, allowing the Defence to vary its witness list would be in the interests of justice, and would accord with the Accused’s rights, pursuant to Article 17(4)(b) of the Statute, to “adequate time and facilities for the preparation of his Defence”;³

NOTING the “Prosecution Response to Defence Motion for Leave to Vary Version IV of the Defence Rule 73ter Witness List and Summaries”, filed on 16 April 2010 (“Response”),⁴ wherein the Prosecution opposes the Motion in part and submits that:

- (i) it does not object to the removal of the 86 witnesses from the Defence witness list;⁵
- (ii) the Defence has not shown that it is in the interests of justice, at this late stage in the proceedings, to add four and reinstate one witness to the witness list since:

¹ SCSL-03-01-T-938.

² Motion, para. 16.

³ Motion, paras 14-15.

⁴ SCSL-03-01-T-943.

⁵ Response, para. 3.

- (a) the circumstances are different from those that prevailed when the Defence made previous requests to vary its witness list, as the present Motion has been made well after the end of the testimony of the Accused and nine months after the commencement of the Defence case;⁶
- (b) allowing the Defence to add witnesses at this late stage in the proceedings requires a new consideration of whether the standard of the interests of justice has been satisfied, including:

the sufficiency and time of disclosure of witness' information, the materiality and probative value of the proposed testimony in relation to existing witnesses, the ability of the other party to make an effective cross-examination of the witness, and the justification offered by the party for the addition of the witness;⁷

- (c) the anticipated evidence of the proposed additional witnesses will merely duplicate the evidence of witnesses already on the Defence witness list,⁸ and the Defence has not provided a justification as to why these witnesses are material to its case and have additional probative value in relation to existing witnesses;⁹
- (iii) in the event that the Trial Chamber grants the Defence request to add these witnesses, the Defence should be ordered to re-file the summaries of the 4 proposed witnesses and the witness it proposes to reinstate, to include:

detailed summaries of the incidents and/or events which a witness is called to testify upon, exact location and date (if available) of these alleged incidents and/or events, position and/or role of a witness in relation to the crimes charged in the Indictment, nexus between the Accused and the proposed testimony of a witness and other details as Counsel deems necessary and would clearly demonstrate the essence of that testimony;¹⁰

⁶ Response, para. 18.

⁷ Response, paras 13, 20, referring to *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List, 17 November 2006 ("Bagosora Defence Decision"), para. 2 and *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E), 26 June 2003 ("Bagosora Prosecution Decision"), para. 14 ("Bagosora Decisions").

⁸ Response, para. 22.

⁹ Response, para. 21.

¹⁰ Response, paras 25-27, referring to *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to the First Accused to Re-File Summaries of Witness Testimonies, 2 March 2006 ("Norman Decision"), p. 4; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Consequential Orders Concerning the Preparation and the Commencement of the Defence Case, 28 March 2007 ("Sesay Decision"), p. 7.

NOTING ALSO the “Defence Reply to Prosecution Response to Defence Motion for Leave to Vary Version IV of the Defence Rule 73ter Witness List and Summaries”, filed on 21 April 2010 (“Reply”),¹¹ wherein the Defence submits that:

- (i) under Rule 73ter E the Defence only has to show that varying its witness list is “in the interests of justice” and does not need to meet a “good cause” standard in order to add witnesses; accordingly, the four factors set out in the *Bagosora* Decisions do not apply in the instant case, as these factors only apply to a conjunctive “*interests of justice*” and “*good cause*” assessment;¹²
- (ii) in the alternative, the Defence has satisfied all of the *Bagosora* factors¹³ in that:
 - (a) the proposed additional witnesses will testify instead of those witnesses currently listed on the back-up witness list that it is unable or does not intend to call;¹⁴
 - (b) it is not improper for it to call more than one witness to testify regarding topics featuring prominently in the Defence allegations;¹⁵
 - (c) the Defence request to drop 86 witnesses, of which 23 are core witnesses, promotes judicial economy and that adding four witnesses and reinstating one does not significantly detract from it;¹⁶
- (iii) the Prosecution objection regarding the adequacy of the witness summaries is premature and unfounded, as the summaries of the five witnesses annexed to the Motion provided a reasonable indication of the evidential areas to be covered by the witness in his sworn evidence as required by the Trial Chamber;¹⁷

¹¹ SCSL-03-01-T-947.

¹² Reply, paras 6-7.

¹³ Reply, paras 8-15.

¹⁴ Reply, paras 10-11.

¹⁵ Reply, para. 12.

¹⁶ Reply, para. 15.

¹⁷ Reply, para. 16.

RECALLING that on 29 January 2010 the Defence filed Version IV of its Rule 73ter witness list and summaries (“Defence witness list”) which list the Defence now seeks to vary;¹⁸

RECALLING the statement by the Defence on 18 February 2010, that it would be seeking leave to withdraw three expert witnesses from Version IV of its Rule 73ter witness list and summaries¹⁹ and noting that the Defence now seeks to drop these witnesses by way of this Motion;

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

NOTING that the Prosecution does not oppose the Defence application to withdraw 86 witnesses from its Defence witness list;²⁰

MINDFUL OF Rule 73ter(E), which provides that “after the commencement of the defence case, the defence may, if it considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called”;

RECALLING that the Trial Chamber has previously held that the “good cause” standard is not applicable to a defence request to add witnesses pursuant to Rule 73ter(E), and that the Defence need only demonstrate that such addition is “in the interests of justice”;²¹

FINDING therefore, that the factors outlined in the *Bagosora* Decisions, which relate to a conjunctive application of the “good cause” and the “interests of justice” test, are not instructive in the instant case;

FINDING ALSO that the application by the Prosecution for an order that the Defence re-file the allegedly deficient summaries of the evidence of the four proposed new witnesses and of the witness

¹⁸ *Prosecutor v. Taylor*, SCSL03-01-T-897, Public with Annex A and Confidential Annex B, Defence Rule 73ter Filing of Witness Summaries – Version IV, 29 January 2010.

¹⁹ Annex D to the Motion; see *Prosecutor v. Taylor*, SCSL03-01-913, Decision on Prosecution Motion for Orders Concerning the Confidentiality of the Defence Expert Witness List and Prosecution Motion to Withdraw Motion for Orders Concerning the Confidentiality of the Defence Expert Witness List, 22 February 2010. See also Motion, para. 8.

²⁰ Response, paras 3, 28.

²¹ *Prosecutor v. Taylor*, SCSL03-01-885, Decision on Defence Motion for Leave to Vary Version III of the Defence Rule 73ter Witness List and Summaries, 22 January 2010 (“Decision on First Motion to Vary”), p. 3; *Prosecutor v. Nahimana*, ICT-99-52-T, Decision on the Defense’s Application under Rule 73ter(E) for Leave to Call Additional Defense Witnesses, 9 October 2002.

to be reinstated,²² is premature and without foundation. This is because witness summaries cannot be evaluated in the abstract and their sufficiency can only be assessed *vis-à-vis* the witnesses' actual testimony. Moreover, should the Prosecution show any prejudice caused by additional information elicited during the witnesses' testimony which was not contained in the summary of the facts, it remains open to the Trial Chamber at that stage to determine the appropriate remedy on a case-by-case basis,²³

RECALLING that in its Decision on First Motion to Vary, the Trial Chamber held that it "has previously acknowledged that the Defence investigations were in a state of transition,"²⁴ and accepting that the Defence investigations are still ongoing, and that there have been developments in court since the commencement of the Defence case which have caused the Defence to revise its witness list;²⁵

SATISFIED accordingly that the Defence has met the requirements of Rule 73ter(E) by showing that the proposed variation of its witness list at this stage of the proceedings is in the interests of justice and would promote the efficiency of the trial;

NOTING, however, that in the instant Motion, the Defence has not identified whether the witnesses it proposes to add will be on its "core" or "back-up list";

FOR THE ABOVE REASONS

HEREBY GRANTS THE MOTION and

ORDERS as follows:

- (i) The Defence may file Version V of its Rule 73ter witness list and summaries;
- (ii) The Defence may drop the 86 witnesses whose pseudonyms appear in Annex A from its Rule 73ter witness list and summaries when filing Version V;

²² Response, paras 25 - 27.

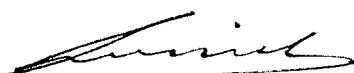
²³ *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecutor's Submissions Concerning Edouard Karemera's Compliance with Rule 73ter and Chamber's Orders, 2 April 2008, para. 4.

²⁴ Decision on First Motion to Vary, p. 5.

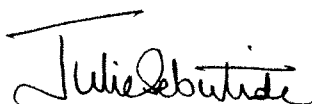
²⁵ Motion, para. 11.

- (iii) The Defence may add the 4 witnesses whose pseudonyms appear in Annex B to its Rule 73ter witness list and summaries when filing Version V;
- (iv) The Defence may reinstate the witness whose pseudonym appears in Annex C to its Rule 73ter witness list and summaries when filing Version V;
- (v) The Defence shall file Version V of its Rule 73ter witness list and summaries no later than close of business on 12 May 2010;
- (vi) The Defence shall identify, in Version V of its Rule 73ter witness list and summaries, which witnesses are on its “core” and “back-up” lists;

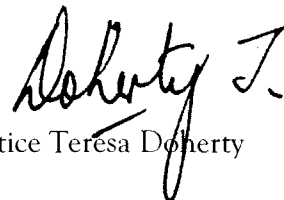
Done at The Hague, The Netherlands, this 7th day of May 2010.



Justice Richard Lussick



Justice Julia Sebutinde
Presiding Judge



Justice Teresa Doherty

