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SCSL-03-01-T
(26760 - 26769)

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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

Acting Registrar: Ms. Binta Mansaray

Date: 18 January 2010

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO PUBLIC *PROSECUTION RESPONSE TO DEFENCE MOTION FOR LEAVE TO VARY VERSION III OF THE DEFENCE RULE 73TER WITNESS LIST AND SUMMARIES*

Office of the Prosecutor:
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Mr. Courtenay Griffiths, Q.C.
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Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. This is the Defence's Reply to the "Public Prosecution Response to Defence Motion for Leave to Vary Version III of the Defence Rule 73ter Witness List and Summaries," filed on 11 January 2010.[1]
2. In its Response, the Prosecution opposes the Defence's request to include thirty-two (32) additional witnesses and summaries of their anticipated evidence in conjunction with the filing of Version IV of the Defence's Witness List, arguing that such addition would not be in the interests of justice.[2] The Response confirms no opposition by the Prosecution to the other request of the Motion: namely, that the Defence be allowed to drop forty-nine (49) of its currently listed witnesses in conjunction with the filing of Version IV of its Witness List.
3. The Defence submits (with little hesitation) that the objection to the addition of the thirty-two witnesses, as set forth in the Response, is ill-conceived and entirely lacking in merit. For reasons set forth below and in addition to those conveyed in the Motion, the Defence maintains that the interests of justice counsels strongly in favour of granting it leave to vary Version III[3] of its Witness List by, *inter alia*, the addition of thirty-two witnesses in conjunction with the filing of Version IV of its Witness List. It is further submitted that allowing the Defence to proceed as requested would be consonant with the Accused's right to "adequate time and facilities for the preparation of [his] defence" under Article 17(4)(b) of the Statute,[4] bearing in mind that the requests in the Motion arose from on-going Defence investigation and further analyses of testimony critical to the Defence Case -- factual occurrences that have consistently been alluded to by the Defence in representations to the Court and the Prosecution.[5]

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-873, "Public Prosecution Response to Defence Motion for Leave to Vary Version III of the Defence Rule 73*ter* Witness List and Summaries,"11 January 2010 (the **"Response"**).
[2] See, *Response*, paras. 2 and 23. See, also, *Prosecutor v. Taylor*," SCSL-03-01-T-869, "Public with Annexes A and B and Confidential Annex C Defence Motion for Leave to Vary Version III of the Defence Rule 73*ter* Witness List and Summaries," 11 December 2009 (the "**Motion**")
[3] See, *Prosecutor v. Taylor,* SCSL-03-01-T-809, "Public with Annex A and Confidential Annex B Updated and Corrected Defence Rule 73*ter* Filing of Witness Summaries – Version Three, 10 July 2009" ("Version III").
[4] *Statute of the Special Court for Sierra Leone*, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002 ("**Statute**"), see, Article 17(4)(b).
[5] *Motion*, paras. 4-9.

II. APPLICABLE LEGAL PRINCIPLES

4. It is acknowledged in the Response that Rule 73*ter*(E) governs requests to vary the Defence witness list.[6] The Parties are thus in agreement on that score. The Response suggests in paragraph 11 that no provision of the Rules explicitly permits the Defence to add witnesses to its witness list, after the commencement of the Defence case. Yet, and in that same paragraph 11, the Prosecution concedes that relevant jurisprudence requires the Defence to apply pursuant to Rule 73*ter*(E) whenever it seeks to add witnesses to its witness list, after the Defence case has commenced. The Defence has adopted precisely such an approach in the Motion.
5. Reference in the Response to Rule 66(A)(ii) and its "good cause" standard is done while explicitly conceding that no such *disclosure provision* (emphasis added) applies to the Defence.[7] This notwithstanding, the Response argues that a "good cause" standard must be applied to the requests contained in the Motion as part of, or in combination with, an "interests of justice" standard.[8] In this regard, the Defence firstly notes that only an "interests of justice" standard is explicitly set forth in Rule 73*ter*(E) as being applicable to the sort of application that the Motion represents. Secondly, unnecessary reference in the Response to Rule 66(A)(ii)'s "good cause" standard does not in any way make it applicable to the Motion; that standard no doubt exists independently of Rule 66(A)(ii) and is relevant to various jurisprudential evaluations not now before the Court. It nonetheless remains a disclosure provision that is applicable only to the Prosecution and its applicability to the Motion, if any, does not and cannot derive from Rule 66(A)(ii).
6. Moreover, and thirdly, if the Prosecution's position is that *Nahimana*[9] stands for the proposition that a "good cause" standard must be considered when evaluating the propriety of a request to vary a witness list after the commencement of a parties' case, the Defence agrees to the same extent as laid out in the Motion –

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[6] *Response*, para. 10.
[7] *Response*, para. 11.
[8] *Response*, paras. 11 – 12.
[9] As is evident in footnotes 23 and 25 of the *Motion*, there are two relevant decisions from the *Nahimana* case: *Prosecutor v. Nahimana*, ICTR-99-52-T, "Decision on the defence's application under Rule 73ter(e) for leave to call additional defence witnesses," 9 October 2002 ("Nahimana Decision") and *Prosecutor v. Nahimana*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses," 26 June 2001 ("Nahimana Prosecution Decision"). The obvious distinction between the two decisions is the fact that one involves a Prosecution request to call additional witnesses which implicates provisions similar (if not identical) to our Rules 66(A)(ii) and 73*bis*(E), while the other involves a request by the Defence to call additional defence witnesses and is primarily concerned with a rule that is analogous to our Rule 73*ter*(E).

namely, that when the Prosecution makes such an application, it must satisfy both the "good cause" standard of Rule 66(A)(ii) (a disclosure provision that applies only to the Prosecution) and the "interests of justice" standard under Rule 73*bis*(E); and when such an application is brought by the Defence, the Defence must satisfy the "interests of justice" standard of Rule 73*ter*(E). As much is explicitly stated in the Motion in paragraphs 10 through 13 as being the import of both *Nahimana* decisions.

7. The Defence maintains that under Rule 73*ter*(E), the Defence is required to show that the requests in the Motion are in the "interests of justice." The *Nahimana Prosecution Decision* sets out the guiding principles as to what amounts to the "interests of justice."[10] Such guiding principles include "the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence."[11] It is, consequently, erroneous and irrelevant in the face of arguments set out clearly in the Motion to suggest, as does the Response,[12] that the Defence limits satisfaction of the "interests of justice" standard to a mere showing of relevance. Furthermore, and if the analytical exercise that is conveyed in both *Nahimana* decisions is deemed to implicate consideration of a "good cause" standard as being implicit in the "interests of justice" standard which the Defence must satisfy under Rule 73*ter*(E), the Defence avers that the Motion satisfies an "interests of justice" standard, conceived as such.

8. It is additionally noteworthy that Article 17(4)(e) of the Statute guarantees an accused the right to "obtain the attendance and examination of witnesses on his or her behalf *under the same conditions as witnesses against him or her*" (emphasis added).[13] Accordingly, it should go without saying that if the Prosecution may move the Trial Chamber to call additional witnesses after the commencement of its case, the same possibility must be afforded and be made available to the Defence.

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[10] *Nahimana Prosecution Decision*, at para. 20.
[11] Id. See, also, the Motion, para. 11, citing the same "guiding principles" from the *Nahimana Prosecution Decision*.
[12] See *Response*, para. 14.
[13] *Statute*, at Art. 17(4)(e).

9. The Response further argues that a "close analysis of each additional witness" should be imposed on each party wishing to add witness to its witness list.[14] The Prosecution cites jurisprudence from the SCSL and the ICTR in support of that proposition.[15] However, it is noteworthy that the cases relied on by the Prosecution for that standard all involves motions by Prosecutors to add witnesses, and integral in the Trial Chambers' requirement for a "close analysis of each additional witness" from the Prosecution is that such a requirement helps assure that the Accused's fair trial rights are upheld.[16] When read in its entirety, the Trial Chamber in *Bagasora* explained that the requirement to make a close analysis of each proposed additional witness derives from the requirements of "interest of justice" and "good cause" that arise from Rule73*bis*(E) and Rule 66(A)(ii), respectively. Consequently, and because that requirement arises from an analysis of a combination of Rule73*bis*(E) and Rule 66(A)(ii), it is questionable whether that requirement applies with equal force to an application being brought by the Defence pursuant to Rule 73*ter*(E).[17]

III. ARGUMENT

10. The Response refers to the current stage of the proceedings in support of the Prosecution's position that the Motion should be denied, suggesting that it is too late for the Defence to add further witnesses to its witness list.[18] As was pointed-out in the Motion, this very Prosecution sought and was granted leave on 5 February 2008 to add additional witnesses to its witness list, after the commencement of its case on 4 June 2007 and the commencement of testimonial evidence on 7 January 2008 (the Trial Chamber allowed the addition of 11 new

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[14] *Response*, at para. 13.
[15] *Response*, at FN 15.
[16] *Response*, at FN 15. citing *Prosecutor v. Brima et al.*, SCSL-04-16-T-365, "Decision on Prosecution request for Leave to Call an Additional Witness (Zainab Hawa Bangura) Pursuant to Rule 73bis(E) and on Joint Defence Notice to Inform the Trial Chamber of its position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) Pursuant to Rule 94*bis*," 5 August 2005, at para. 19-22. see also. *Prosecutor v. Bagosora*, ICTR-98-41-T, "Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E), 26 June 2003, at para. 12-14.
[17] *Prosecutor v. Bagosora*, ICTR-98-41-T, "Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis*(E), 26 June 2003, at para. 12-14.
[18] *Response*, paras. 15 and 16, *et seq.*

"core" Prosecution witnesses),[19] notwithstanding that the Prosecution had had since before the original Indictment in March 2003 to prepare its case.

11. While the Prosecution concedes that the Trial Chamber allowed it leave to add further witnesses after the commencement of its case,[20] it finds a distinction between its request and that being made in the Motion, in the sense that its request was "filed before the Prosecution even called its first witness," whereas the Motion was filed "some five months after the first Defence witness (the Accused) was called."[21]

12. The Response ignores the fact that the "interests of justice" standard is one which must be applied on a *case-by-case* basis. Significantly, and in this regard, the Trial Chamber noted orally on 4 May 2009 that the calling of Mr. Taylor as a witness and his giving of evidence would provide "a substantial amount of time which could be used for the preparation of other Defence witnesses."[22] That observation by the Trial Chamber no doubt envisioned the fact that the Defence case preparation would continue during the period of time while Mr. Taylor would be testifying. And, as stated previously, the Defence has maintained a clear position regarding the fluidity of its investigations and has updated the Court and the Prosecution as to its progress regularly.[23] Indeed, it is the on-going nature of the Defence investigations and case preparations that have rendered it impossible for the Defence to bring the Motion any sooner.

13. The Prosecution argues that "Permitting Additional Witnesses to be added at this stage of the Defence Case would result in Undue Delay of the Proceedings."[24] However, and if granted in its entirety, the overall effect of the Motion (facilitating both the removal of 49 witnesses from the witness list and inserting 32 new witnesses) would be the reduction of the number of Defence witnesses by seventeen (17). That would result in a vast amount of time being saved and the

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[19] *Prosecutor v. Taylor*, SCSL-03-01-T-408, "Decision on Public with Confidential Annex D Motion for Leave to Vary the Witness List and to Disclose Statements of Additional Witnesses", 05 February 2008.
[20] Para. 15 of the Response.
[21] *Response*, para. 15.
[22] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 4 May 2009, p.24220.
[23] *Prosecutor v. Taylor*, SCSL-03-01-T, "Defence Reply to the Public Prosecution Response to the Defence Motion for Leave to Vary Version III of the Defence Rule 73*ter* Witness List and Summaries", 18 January 2010, para. 3.
[24] See sub-topic under Section IV, above para. 15 of the *Response*.

Defence submits that rather than causing "undue delay," the variation being sought by the Motion would result in more expeditious proceedings.

14. The Prosecution observes that the presentation of its evidence took twelve-and-a-half (12.5) months and claims that the fact that "the Defence has seen fit to spend nearly half this time (to date) on the testimony of the Accused ought not to provide an excuse for the timing of this application."[25] This assertion is objectively incorrect. The Defence only spent thirteen weeks (14 July through 10 November 2009)[26] examining the Accused in-chief. The balance of the six-month period of the Defence case has thus far been spent by the Prosecution cross-examining the Accused. More significantly, the Defence submits that time spent examining the Accused in-chief was the Accused's only opportunity to answer the significant allegations against him and that in doing so the Accused was simply exercising his legitimate and fundamental Article 17 rights.[27] Indeed, this Court has previously noted that a testifying accused does not stand in the same place as other witnesses.[28]

15. Specific exception is taken in the Response to the addition of certain radio operators in the Defence witness list, on grounds that permitting such would lead to cumulative evidence.[29] This argument ignores the fact that the Prosecution called at least eight radio operators to give *viva voce* evidence during its case.[30] It is submitted that the needs of the Defence to adduce the evidence of several radio operators should mirror the similar needs of the Prosecution during its case – needs which no doubt derive, in large measure, from the fact that each such witness provides a unique perspective which is vital to piecing together an accurate account of often different events encompassing several locales and timeframes. And of course, one individual's memory of a specific event will invariably vary from the next individual and it would be impossible for a witness summary to explicate the nuances from one witness' evidence to another's. Needless to say, the Defence submits that each witness, which it proposes to add

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[25] *Response*, para. 16.
[26] This period of time includes the Court's three-week judicial recess period in October 2009.
[27] *Statute*, at Art. 17(b) and (e).
[28] *The Prosecutor v. Taylor*, SCSL-03-1-T, "Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross- Examination," 20 November 2009.
[29] *Response*, para. 22.
[30] Examples include TF1-274, TF1-275, TF1-360, TF1-516, TF1-568, TF1-577, TF1-584 and TF1-585.

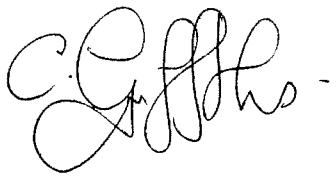
will provide evidence that is highly relevant to the case and uniquely distinct from that of other Defence witnesses.

16. Finally, the Defence takes exception to the Prosecution's allegation that the Accused's testimony is "obviously rehearsed."[31] As was specifically noted by the Trial Chamber in a recent decision, there "has been no suggestion that Defence Counsel have acted unethically or inappropriately in their communication with the Accused during the course of his examination-in-chief and that the Trial Chamber has indicted that there is a rebuttable presumption of bona fides when counsel deals with his witness while the witness is giving testimony." [32] The Defence submits that the making of such an allegation without any foundation is improper, wholly unnecessary, and is little more than a desperate distraction that is simply untenable.

IV. CONCLUSION

17. For all of the foregoing reasons, the Defence respectfully submits that the Motion should be granted in its entirety, given that it would result in a more expeditious trial and is certainly consonant with the interests of justice.

Respectfully Submitted,



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

[31] *Prosecutor v. Taylor*, SCSL-03-01-T-873, "Public Response to Defence Motion for Leave to Vary Version III of the Defence Rule 73*ter* Witness List and Summaries", 11 January 2010, para. 18.
[32] *The Prosecutor v. Taylor,* SCSL-03-1-T, "Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross- Examination," 20 November 2009, at pg. 3-4.

List of Authorities

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CDF

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