

361)

SCSL-03-01-T
(12794-12800)

12794



THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 16 November 2007

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
THE HAGUE	
16 NOV 2007	
NAME	RACHEL IRURA
SIGN	<i>[Signature]</i>
TIME	13:30

THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO "PUBLIC, WITH CONFIDENTIAL ANNEX D
NOTIFICATION OF AMENDED PROSECUTION WITNESS LIST"**

Office of the Prosecutor

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Leigh Lawrie

Counsel for Charles G. Taylor

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

I. Introduction

1. On 6 November 2007, the Prosecution filed a *Public, With Confidential Annex D Notification of Amended Prosecution Witness List* (“Notification”).¹
2. By way of the Notification, the Prosecution gave notice of the filing of its “Amended Witness List,” pursuant to Rule 73bis(B)(iv) of the Rules of Procedure and Evidence (“Rules”).² Notice of the Prosecution’s compliance with its disclosure obligations under Rule 66 (A)(ii) was also given through the Notification, in respect of witnesses that were listed for the first time by the Prosecution in its Amended Witness List.³
3. The Amended Witness List was annexed to the Notification and reflected changes to the witness list that was previously filed by the Prosecution in conjunction with its Rule 73bis Pre-Trial Conference materials on 4 April 2007 (“Witness List”).⁴ Those changes include the deletion of nine (9) witnesses from the Witness List and the addition of ten (10) new witnesses to the Amended Witness List, as well as the transfers of eight (8) witnesses from what the Prosecution calls its “core” category of witnesses to its “back-up” category of witnesses and five (5) witnesses from the “back-up” category to the “core” category of witnesses.⁵
4. The Prosecution avers in paragraph 6 of the Notification that “No Rule governs the deletion of witnesses from the Witness List nor a change to witness status...”⁶ Furthermore, and in relation to the addition of witnesses, the Prosecution indicates that “the limitations contained in Rules 66(A)(ii) and 73bis(E) are not applicable to the Prosecution’s disclosure of material relating to the additional witnesses nor to the amendment of its Witness List.”⁷
5. It is in response to the respective averments of the Prosecution that Rule 66(A)(ii) does not apply to the disclosure of material relating to its additional witnesses and Rule 73bis(E)

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-357, Public, with Confidential Annex D Notification of Amended Prosecution Witness List, 6 November 2007.

² Notification, paras. 1-2.

³ Notification, para. 4.

⁴ Notification, Paras. 1-2; See, also, *Prosecutor v. Taylor*, SCSL-03-01-PT-218, “Public Rule 73bis Pre-Trial Conference Materials: Pre-Trial Brief,” 4 April 2007.

⁵ Notification, para. 2.

⁶ Notification, para. 6.

⁷ Notification, para. 6.

does not apply to the amendment of its Witness List that the Defence brings forth this Response.

II. Applicable Rules and Legal Principles

6. Rule 66(A)(ii) of the Rules provides that:

Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:

...Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.

7. The Prosecution acknowledges in the Notification that “good cause” must be shown and an order issued by a judge of the Trial Chamber as prerequisites under Rule 66(A)(ii) to the disclosure of all statements by additional Prosecution witnesses within sixty (60) days of the date for trial.⁸ However, the Prosecution maintains in paragraph 7 of the Notification that its disclosure of the additional witness statements does not violate Rule 66(A)(ii) and no showing of “good cause” is required, inasmuch as the trial in this case has not commenced and moreover, its disclosure of all additional witness materials has been effectuated before sixty (60) days of the 7 January 2008 date of trial.⁹
8. With respect to Rule 73bis(E), that provision states that “After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.”
9. The Prosecution argues in paragraph 8 of the Notification that the amendment or variation to its Witness List which the Amended Witness List represents need not be justified and did not require leave of the Trial Chamber within the meaning of Rule 73bis(E). In the Prosecution’s view, the trial of this case has not commenced and it will only commence

⁸ Notification, para. 7.

⁹ Notification, para. 7.

with the presentation of evidence, therefore leave of the Trial Chamber was not required under Rule 73bis(E) for the amendment to become effective.¹⁰

III. Submissions

10. The Defence does not quarrel with the Prosecution's assertion that "good cause" and an order of a Judge of the Trial Chamber are prerequisites under Rule 66(A)(ii) to the disclosure of additional witness statements within sixty (60) days of trial.¹¹ Similarly, the Defence takes no exception to the Prosecution's averment that amendments or variations to its Witness List require leave of the Trial Chamber only when proposed after the commencement of the trial.¹²
11. However, the Defence does take exception to the Prosecution's submission that the trial of this case has not commenced and will only commence with the presentation of the Prosecution's evidence. The Defence is of the view that the trial commenced on 4 June 2007 with the Prosecution's Opening Statement¹³ and therefore, leave of the Trial Chamber was required under both Rules 66(A)(ii) and 73bis(E) as prerequisites to the disclosure of the additional witness statements by the Prosecution and for the amendments to the Prosecution's Witness List to become effective. This erroneous interpretation of the mixed question of fact and law of when exactly a trial commences has led the Prosecution to err further in the application of the straightforward requirements of both Rules 66(A)(ii) and 73bis(E).
12. Clarification on the subject of whether or not the trial of this case has commenced came forth from the Trial Chamber during the recent Status Conference on 13 November 2007. At the said Status Conference, the Prosecution sought guidance from the Trial Chamber regarding what course the proceedings on 7 January 2008 would take and the Presiding Judge of the Trial Chamber responded as follows¹⁴:

¹⁰ Notification, para. 8.

¹¹ Notification, para. 7.

¹² Notification, para. 8.

¹³ See, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 4 June 2007, pages 27 - 90.

¹⁴ Counsel for the Prosecution inquired: "...We ask guidance as to what the Trial Chamber and the Defence contemplate would be the course of proceedings, the agenda, for the 7th of January." See, *Prosecutor v. Taylor*, SCSL-03-01-T, Draft Transcript of 13 November 2007 Status Conference, page 11, Lines 18 - 20 (time 11:25 a.m. to 11:26 a.m.)

Now, in my view, the Trial Chamber made it abundantly clear on the 20th of August, 2007... when we ordered that the trial was adjourned for hearing to Monday, the 7th of January, 2008. In my view, "hearing" is precisely that; hearing is not a Status Conference, it is the hearing of evidence. The Prosecution *has already commenced its case because they made their opening statement way back in the middle of the year*, and we do not expect that... the 7th of January will be a Status Conference. We expect to continue with the hearing of evidence. I think it's as clear as can be, and that is indeed what we intend to do. (Emphasis added.)¹⁵

13. It remains true that in Part III of the Notification, the Prosecution alternatively proffers why "good cause" exists under Rule 66(A)(ii) for the disclosure of additional witness materials at this stage of the proceedings and why the variation of its Witness List is "in the interest of justice" within the meaning of Rule 73bis(E).¹⁶ The Defence takes no position regarding the jurisprudential soundness of the Prosecution's interpretation of the "good cause" and "interests of justice" standards. In the Defence's view, and assuming *arguendo*, that both standards have been met by the Prosecution, that fact still does not obviate the legal necessity for the Notification to have taken the form of a Motion for Leave of the Trial Chamber to disclose additional witness statements (pursuant to an order of a Judge of the Trial Chamber) and to vary the Prosecution's Witness List after the commencement of the trial. Far from being a mere issue of choice of pleading nomenclature, what is at stake under the circumstances is the scope of the Prosecution's discretion under the Rules to amend its Witness List and/ or disclose additional witness statements without an order by a Judge of the Trial Chamber, *after* a trial has commenced and without leave of the Trial Chamber (emphasis added).

IV. Conclusion

15. In light of the foregoing, the Defence respectfully submits that the Prosecution was required to seek leave of the Trial Chamber under Rule 66(A)(ii) and 73bis(E) before proceeding with the disclosure of additional witness statements and the amendment of its Witness List. The Prosecution failed to seek or obtain such leave as is required by both Rules under prevailing circumstances where a trial has commenced. The alternative

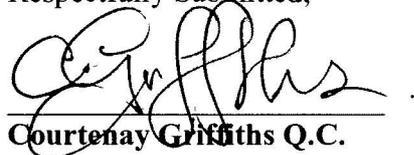
¹⁵ See, Prosecutor v. Taylor, SCSL-03-01-T, *Draft Transcript of 13 November 2007 Status Conference*, page 20, Lines 17 – 27 (time 11:48 a.m. to 11:49 a.m.)

¹⁶ Notification, para. 9.

request in the Notification suggesting that “good cause” exists for the disclosure of additional witness statements and that the amendment of the Witness List is “in the interests of justice” does not, in the Defence’s view, suffice to cure the failure by the Prosecution to seek leave of the Trial Chamber before pronouncing its actions effective as of 6 November 2007 when the Notification was filed.

15. As such, the Defence respectfully requests that the Trial Chamber:
- (i) strike the Prosecution’s Amended Witness List;
 - (ii) determine the disclosure of additional witness statements by the Prosecution to have been in violation of Rule 66(A)(ii); and
 - (iii) grant any other appropriate relief in the totality of the circumstances.

Respectfully Submitted,



Courtenay Griffiths Q.C.
Lead Counsel for Charles G. Taylor

Dated this 16th Day of November 2007
The Hague, The Netherlands

Table of Authorities**A. SCSL****Instruments**

Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 14 May 2007.

Jurisprudence

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-PT-218, "Public Rule 73bis Pre-Trial Conference Materials: Pre-Trial Brief," 4 April 2007;

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 4 June 2007.

Prosecutor v. Taylor, SCSL-03-01-T, Draft Transcript of 13 November 2007 Status Conference.