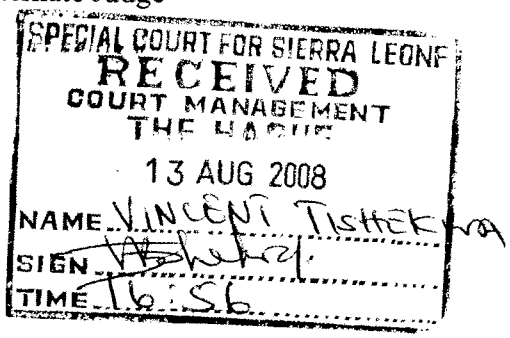
565) SCSL-03-01-T 18352-18358) 18352

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: 13 August 2008



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

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO DEFENCE RESPONSE TO "PROSECUTION MOTION FOR LEAVE TO CALL TF1-036 TO GIVE EVIDENCE-IN-CHIEF & CROSS-EXAMINATION *VIVA VOCE*"

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Counsel for the Accused:
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 'Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross-Examination *Viva Voce*'".[1]

II. SUBMISSIONS

Res Judicata

2. The *res judicata* argument raised by the Defence in the Response is not relevant. Contrary to the Defence's assertion, the issue raised in the Prosecution's motion[2] has not been litigated before in the current proceedings. Indeed, the Defence statement "that the Chamber has already pronounced itself on the question of whether TF1-036 can be called to give oral evidence"[3] misstates the facts. *Res judicata* would be a relevant argument if the Prosecution was requesting in its Motion that the Chamber consider again questions concerning the admission of the prior trial transcripts and related exhibits of TF1-036. It is obvious from a basic reading of the Motion that this is not what the Prosecution is requesting.

3. Save as requested in the Motion, the Prosecution has never sought permission to call TF1-036 to give oral evidence. Indeed, the Prosecution is not required to seek such permission provided it has complied with Rule 73*bis* of the Rules of Procedure and Evidence ("**Rules**"). Rather, in the Notice filed on 14 March 2008,[4] the Prosecution "gave notice under Rule 92*bis* of its intention to seek admission into evidence" of the prior trial transcripts and related exhibits of witness TF1-036.[5] On 15 July 2008, the Trial Chamber issued its decision ordering that the prior trial transcripts and related exhibits of the witness TF1-036 be admitted provided the Prosecution make available

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-562, "Public Defence Response to 'Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross-Examination *Viva Voce*'", 11 August 2008 ("**Response**").
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-558, "Public Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross-Examination *Viva Voce*", 17 July 2008 ("**Motion**").
[3] Response, para. 8.
[4] *Prosecutor v. Taylor*, SCSL-03-01-T-438, "Public with Confidential Annexes A & B Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence", 14 March 2008 ("**Notice**").
[5] See Notice, paras. 2 and 22.

TF1-036 for cross-examination by the Defence.[6] The Decision does not in any way prohibit TF1-036 being called to give evidence entirely *viva voce*, either pursuant to notice being given by the Prosecution or, if required, pursuant to leave of the Court.

4. Following a decision on a Rule 92*bis* notice, it is arguable that the method of evidence presentation is a matter of Prosecutorial discretion, provided that, if the Rule 92*bis* mode of presentation is chosen, the Prosecution comply with any conditions set by the Chamber. In this regard, the Prosecution refers to its alternative pleadings contained in its recent filing changing the mode of presentation of 7 witnesses' evidence.[7] In this filing, the Prosecution notifies the Court of the change to the mode of presentation on the understanding that the manner of the presentation of evidence is a purely Prosecutorial decision. Nevertheless, the Prosecution recognizes that the Trial Chamber may view the issue differently, so the alternative pleading seeking leave is included. In this instance, given the Decision, the Prosecution, acting in an abundance of caution, has filed the Motion seeking leave to call the witness to give evidence entirely *viva voce.*

5. The Defence assertions that the Prosecution has found fault with the Chamber's Decision[8] and that the Prosecution wants "the Chamber to turn back the clock to the pre-decision stage"[9] are without merit. Such assertions by the Defence exaggerate and misrepresent a simple request by the Prosecution regarding the mode in which it wishes to present its evidence. The submissions by the Defence regarding applications for leave to appeal and reconsideration are, therefore, irrelevant and should be dismissed.

6. The Prosecution understands and respects the Trial Chamber's judgment to make the admission of the prior transcripts and related exhibits of TF1-036 subject to making the witness available for cross-examination to ensure fairness in the proceedings, even though such a procedure is not explicitly contemplated in the Rules. However, it is clear that such a procedure in certain circumstances will place the party seeking admission of the prior transcripts at a disadvantage as only the opposing party is entitled to elicit additional evidence and also has the advantage that *viva voce* evidence is inherently more

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[6] *Prosecutor v. Taylor,* SCSL-03-01-T-556, "Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District And on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence", 15 July 2008 ("**Decision**"), p. 6.
[7] *Prosecutor v. Taylor,* SCSL-03-01-T-564, "Urgent Public Notice of Change in Witness Status or in the alternative Motion for Leave to Change Witness Status", 12 August 2008.
[8] Response, para. 9.
[9] *Ibid.*

memorable than written. Further, the witnesses themselves are likely to be at a disadvantage when confronted with prior evidence given years ago and asked to explain answers the context of which they may have forgotten.

7. While Rule 92*bis* does not contemplate a live cross-examination, Rule 92*ter* does provide for making a witness available only for cross-examination, but Rule 92*ter* explicitly provides that this asymmetrical procedure can only be utilized with the consent of both parties. The Prosecution submits that where the Trial Chamber exercises its authority to require cross-examination as a condition of the admission of transcripts under Rule 92*bis*, the party seeking admission of the transcripts retains the right to either accept the conditional grant of the Rule 92*bis* motion making the witness available only for cross-examination or to present all of the witness' evidence *viva voce*.

Insufficiency of Prosecution Explanation of Change of Course

8. The legal basis of the Motion is clearly stated in paragraph 1. The Motion is a request for leave to present the evidence of TF1-036 entirely *viva voce*. The making of such a request is clearly within the ambit of Rule 73. No standard or test is imposed on parties when filing such a request for relief under this Rule. However, rather than a bare request for relief, the Prosecution provides the Chamber with an explanation of the reasons underlying the request.

9. It would appear from the Response that the Defence's arguments regarding the sufficiency of the explanation provided are based on the erroneous view that the Prosecution should be requesting a reconsideration of the Decision and, therefore, should be making submissions based on the standard required in the context of such a request.[10] For the reasons detailed above, such an understanding of the request is wrong. The Prosecution is not asking the Chamber to reconsider its Decision. It is making an entirely new request.

10. The bases on which the request is made are, first, the basic principal that the Prosecution bears the burden of proof. Secondly, that it is a matter of Prosecutorial discretion regarding the manner in which witness evidence is presented in order to discharge this burden. Finally, the balance struck by the Prosecution between expediting proceedings

[10] Response, para. 11.

and leading evidence when making determinations as to which witnesses to call *viva voce* and which to call under Rule 92*bis* (often subject to redaction) has changed as a result of the Decision.

11. In seeking to discharge its burden of proof, the Prosecution must carefully consider at each stage of the trial the state of the evidence on the Court record. Further, at each stage, the Prosecution must consider tactically how best to present its remaining evidence bearing in mind the current state of the evidence at that time. It goes without saying that it is incumbent on the Prosecution to know its case before the trial begins. However, the Prosecution cannot predict with complete accuracy how the evidence of each witness will eventually be recorded on the Court record. It must, therefore, be vigilant in monitoring the state of its burden of proof and ensure that it presents its evidence using the various mechanisms available in such a manner that it is able to effectively discharge this burden.

12. At the pre-trial stage, the Prosecution made initial determinations regarding the way in which it expected to present each witness' evidence and notified the Court of such determination in its pre-trial conference materials.[11] However, in making such determinations, especially in relation to predominantly linkage witnesses, a balancing exercise was undertaken in which the redaction of any evidence going to proof of the acts and conduct of the Accused (as is required under Rule 92*bis*) and the foregoing of the leading or eliciting of further information from witnesses was weighed against the benefit of expediting proceedings by using this alternative proof of facts. Further, such initial determinations were made against a blank court record. As the case has progressed, the on-going monitoring and assessment process has led the Prosecution to conclude that some evidence must be presented in different ways. In addition, as witness TF1-036 will now be called to testify before the Trial Chamber, the balance has changed so that the goal of expediency no longer outweighs the goal of eliciting all relevant evidence. The impact of evidence given *viva voce* is also not underestimated by the Prosecution.

Prosecution alternative to calling TF1-036 viva voce

13. The alternative course suggested by the Defence[12] should be dismissed as, for the reasons set out above, the Chamber has not already ruled on the matter and the submission of

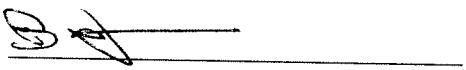
[11] *Prosecutor v. Taylor*, SCSL-03-01-PT-218, "Public Rule 73 *bis* Pre-Trial Conference Materials", 4 April 2007.
[12] Response, para. 15.

additional statements under Rule 92*bis* would not allow the Prosecution to admit any evidence it now wishes to present regarding evidence going to the proof of the acts and conduct of the Accused.

III. CONCLUSION

14. The arguments contained in the Response are based on a fundamental misunderstanding of what the Prosecution requested in its initial Rule 92*bis* Notice filed in relation to TF1-036, the subsequent Decision issued by the Chamber thereon and the Motion filed on 17 July 2008. The Defence also appear to fail to appreciate the Prosecution's burden of proof, the discretion which it requires to exercise throughout the case to discharge it and the balancing exercise it is required to undertake when considering issues of expediency, proof and impact. On this basis, the Response should be dismissed and the Prosecution respectfully requests that the Motion be granted.

Filed in The Hague,
13 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-438, "Public with Confidential Annexes A & B Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence", 14 March 2008

Prosecutor v. Taylor, SCSL-03-01-T-556, "Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District And on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence", 15 July 2008

Prosecutor v. Taylor, SCSL-03-01-T-558, "Public Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross-Examination *Viva Voce*", 17 July 2008

Prosecutor v. Taylor, SCSL-03-01-T-562, "Public Defence Response to 'Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross-Examination *Viva Voce*'", 11 August 2008

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