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SCSL-03-01-T  
(18364-18369)

18364



**THE SPECIAL COURT FOR SIERRA LEONE**

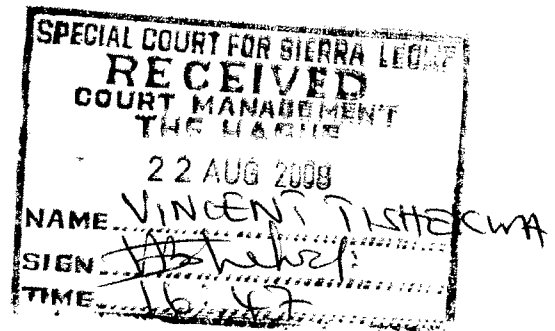
**In Trial Chamber II**

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

**Registrar:** Mr. Herman von Hebel

**Date:** 22 August 2008

**Case No.:** SCSL-2003-01-T



**THE PROSECUTOR**

-v-

**CHARLES GHANKAY TAYLOR**

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**PUBLIC**

**DEFENCE RESPONSE TO URGENT PUBLIC NOTICE OF CHANGE IN WITNESS  
STATUS OR IN THE ALTERNATIVE MOTION FOR LEAVE TO CHANGE WITNESS  
STATUS**

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**Office of the Prosecutor:**

Ms. Brenda J. Hollis  
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. This is the Defence's Response to the *Urgent Public Notice of Change in Witness Status or in the Alternative Motion for Leave to Change Witness Status*, filed on 12 August 2008 ("the Motion").
2. The Defence argues that the Motion properly falls under Rule 73bis (E) of the Rules of Procedure and Evidence. Irrespective of how the Prosecution characterises the Motion, its import is tantamount to a variation of the Prosecution's witness list within the meaning of Rule 73bis (E). Therefore, the Prosecution should obtain leave of the Court by demonstrating that it is in the interests of justice to do so. The Defence submits that the Prosecution has failed in this regard.

## II. ARGUMENT

### The Motion falls within Rule 73bis (E)

3. Rule 73bis (E) 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."

The Defence submits that what the Motion seeks to accomplish i.e. add to the number of witnesses that are to appear before the Trial Chamber to give evidence is tantamount to a variation of the Prosecution's Witness List within the meaning of Rule 73bis (E). That being the case, and bearing in mind that the trial has undoubtedly commenced, the Defence further submits that the requisite "interests of justice" standard under Rule 73bis (E) must be met in respect of each and every witness which the Prosecution now wishes to call live. The Prosecution has failed in this regard, notwithstanding the fact that it has pleaded and

argued (alternatively) why what it characterises as a “change in witness status” satisfies the interests of justice standard of Rule 73bis (E).

**The Motion seeks a variation of the witness list**

4. The Prosecution submits that it seeks nothing more than a change in the mode of presentation of evidence from witnesses already listed in its Pre-Trial Brief:

“The Prosecutor does not seek “to vary his decision as to which witnesses are to be called” pursuant to Rule 73bis (E) by either adding or removing witnesses. Instead, the Prosecutor wishes to change the manner in which the evidence of 7 witnesses currently included in the Amended Witness List will be presented”.<sup>1</sup>

5. The Defence argues that by proposing to call seven witnesses to give live evidence, this has the practical effect of varying the Prosecution’s Witness List, in that the number of witnesses to give evidence in court has changed (in this case, increased) and, as such, leave of the Court must be sought under Rule 73bis (E) to call these witnesses *viva voce*. For example, when the Prosecution has previously requested that witnesses categorized under Rule 92bis give their evidence live, this Trial Chamber has ruled that “...after the commencement of the Trial, the Prosecution may only vary its witness list...with leave of the Trial Chamber pursuant to the Rules 73bis ...”<sup>2</sup>. The Prosecution concedes this point in paragraph 1 of its Motion.

**The Prosecution fails to meet the interests of justice test**

6. The Prosecution argues in Paragraphs 10 and 11 of the Motion that it has satisfied the “interests of justice” standard of Rule 73bis (E) because any expediency which would be achieved by presenting the seven witnesses through Rule 92bis (instead of live) would be minimal, bearing in mind (i) its burden of proof, (ii) the state of the evidence currently on

<sup>1</sup> *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, para. 4. (“The Motion”).

<sup>2</sup> *Prosecutor v Taylor*, SCSL-03-01-T-367, “Order Pursuant to Rule 54 on Prosecution’s Notification of Amended Prosecution Witness List, 07 December 2007., p.2, para.9.

record before the Court, and (iii) the fact that a recent Decision of the Court (“Rule 92bis Decision”<sup>3</sup>) would in any event require that even if some of the seven witnesses were admitted to be heard under Rule 92bis, they would nonetheless be called to testify *viva voce*, if only for cross-examination.

7. The Prosecution’s argument is essentially grounded in a rationale that speaks to “judicial economy,” in the light of the recent Rule 92bis Decision. However, the Defence submits that the Prosecution ought to illustrate how it would be in the interests of justice for *each and every* (emphasis added) of the seven witnesses to be called to give evidence in chief *viva voce*, in lieu of the Rule 92bis evidence.
8. Furthermore, and significantly, the Prosecution has not only failed to address the circumstances of each of the seven witnesses individually *vis à vis* the interests of justice standard, it has not elaborated in respect of each of the seven witnesses in question, what relevant facts currently on record before the Court counsel in favour of their evidence being lead *viva voce* in chief.<sup>4</sup>
9. On the contrary, the Prosecution merely argues that the Trial Chamber’s Rule 92bis decision<sup>5</sup>, which gives the Defence the right to cross-examine, defeats the judicial economy argument which underlined its decision not to call the seven witnesses in issue. Further, that the Decision, in so far as it allows the Defence to cross-examine witnesses whose evidence is adduced under Rule 92bis, puts the Prosecution at a disadvantage relative to the Defence. Therefore, leave must be granted. Respectfully, these submissions fail to meet the interests of justice standard as argued above. Further, the submissions presuppose that the Trial Chamber’s Rule 92bis decision cited above sets a precedent for all subsequent Rule 92bis motions.

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<sup>3</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-556, “Decision on Prosecution Notice under Rule 92bis for the Admission of Evidence related to *inter alia* Kenema District and on Prosecution Notice under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence”, 15 July 2008 (“Rule 92bis Decision”).

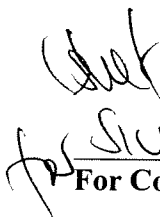
<sup>4</sup> See *Prosecutor v Bizimungu et al*, ICTR-99-50-T, “Decision on Prosecutor’s Very Urgent Motion Pursuant to Rule 73 bis (E) to Vary the Prosecutor’s List of Witnesses Filed on 25 May 2004”, 3 September 2004, para. 7 where the Trial Chamber held that the Prosecutor must, *inter alia*, demonstrate the justification for the addition of witnesses and the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment.

<sup>5</sup> See footnote 3 above.

10. Lastly, reliance on the fact that the Prosecution bears the burden of proof as a basis to suggest that it has satisfied the interests of justice standard is misplaced. In the Defence's view, there has to be a limit to how far the Prosecution can be allowed to approbate and reprobate. Indeed, and as the Appeal Chamber emphasised in *Niyitegeka*, the Prosecution 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.<sup>6</sup>

### CONCLUSION

11. For all of the foregoing reasons, the Defence respectfully requests that the Trial Chamber treat the Motion as an application to vary the Prosecution's Witness List within the meaning of Rule 73bis (E) and find that the alternatively-pleaded aspect of the Motion is lacking in merit for having failed to satisfy the interests of justice standard of Rule 73bis (E) in respect of each and every one of the seven witnesses in question.

  
SIVAS CHIKERA  
For Courtenay Griffiths, Q.C.

**Lead Counsel for Mr. Charles Taylor**

Dated this 22nd Day of August 2008

The Hague, The Netherlands

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<sup>6</sup> *Prosecutor v. Niyitegeka*, No. ICTR-96-14-A, "Appeal Chamber Judgement", 09 July 2004, para. 194

### List of Authorities

#### SCSL

1. *Prosecutor v. Taylor*, SCSL-03-01-T-367, “Order Pursuant to Rule 54 on Prosecution’s Notification of Amended Prosecution Witness List, 07 December 2007
2. *Prosecutor v. Taylor*, SCSL-03-01-T-556, “Decision on Prosecution Notice under Rule 92bis for the Admission of Evidence related to inter alia Kenema District and on Prosecution Notice under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence”, 15 July 2008
3. *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

#### ICTR

4. *Prosecutor v. Niyitegeka*, No. ICTR-96-14-A, “Appeal Chamber Judgement”, 09 July 2004. Internet :  
<http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/ae8b14e4f811c6b7c12571b5003803bb/6bd0d278582d0f26c12571fe004fa4f2?OpenDocument>
5. *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, “Decision on Prosecutor’s Very Urgent Motion Pursuant to Rule 73 bis (E) to Vary the Prosecutor’s List of Witnesses Filed on 25 May 2004”, 3 September 2004. Internet :  
<http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dcc0c12571b500379d39/96f113b22bef522cc12571fe004fa59d?OpenDocument>