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SCSL-03-01-T
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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before:	Justice Jon M. Kamanda, President Justice Emmanuel Ayoola Justice George Gelaga King Justice Renate Winter Justice Shireen Avis Fisher	
Registrar:	Binta Mansaray	
Date:	3 March 2011	
PROSECUTOR	**Against**	**CHARLES GHANKAY TAYLOR** (Case No: SCSL-03-01-T)

Public

DECISION ON DEFENCE NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION ON LATE FILING OF DEFENCE FINAL TRIAL BRIEF

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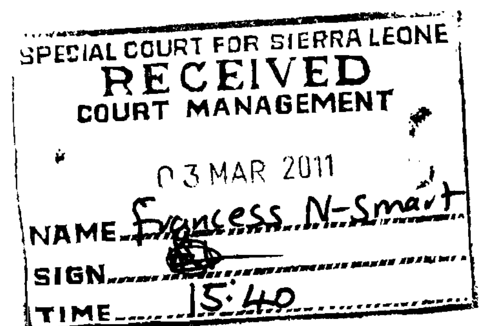

THE APPEALS CHAMBER of the Special Court for Sierra Leone ("Special Court");

NOTING the Trial Chamber's "Decision on Late Filing of Defence Final Trial Brief", filed on 7 February 2011 ("Impugned Decision") and the Dissenting Opinion of Hon. Justice Julia Sebutinde filed on the same day;

NOTING the Trial Chamber's Oral Decision of 11 February 2011, granting the Defence requests for leave to appeal the Impugned Decision and a stay of proceedings pending the determination of any appeal on the matter by the Appeals Chamber ("Oral Decision");

NOTING the written reasons for the Oral Decision contained in the "Decision on Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief", filed on 11 February 2011 ("Decision Granting Leave to Appeal") and the Dissenting Opinion of Hon. Justice Richard Lussick filed on the same day;

NOTING ALSO the "Corrigendum to Decision on Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief", filed on 15 February 2011 and the amended "Decision on Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief" dated 11 February 2011 and recirculated on 15 February 2011;

RECALLING the "Order for Expedited Filing", dated 14 February 2011, wherein the Appeals Chamber ordered an expedited filing schedule for any appeal, response and reply in relation to the matter;

BEING SEISED of the "Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief", filed on 17 February 2011 ("Appeal");

CONSIDERING the "Prosecution Response to Public Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief", filed on 21 February 2011 ("Response");

CONSIDERING the "Defence Reply to the Prosecution Response to the Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief", filed on 23 February 2011 ("Reply");

NOW DETERMINES THE APPEAL ON THE BASIS OF THE WRITTEN SUBMISSIONS OF THE PARTIES:

I. BACKGROUND

1. On 22 October 2010, the Trial Chamber heard both the Prosecution and the Defence on their requests for the timing for filing of final trial briefs and closing arguments.[1] The Defence requested eight weeks from the close of evidence to submit the final brief: 14 January 2011.[2] The Defence asked the Court to use its inherent authority to allow for reply briefs. The Defence additionally asked that the 200 page limit for the final brief be tripled to 600 pages.[3] The Defence requested that if the final trial briefs were scheduled for 14 January 2011, that oral closing arguments be delayed until the week of 7 February 2011, as the five days provided by Rule 86(B) between the submission of the written arguments and the oral arguments was "unrealistic", because additional time was needed to allow the parties to:

> digest each other's final briefs and be in a position to then follow it with oral argument. And so we would suggest two weeks later.[4]

2. The Defence also asked for a three week judicial recess, beginning at the close of business 17 December 2010 and concluding at the opening of business on 10 January 2011.[5]

3. The Court granted each of the Defence requests. It issued an oral Order,[6] followed by a written Order[7] on that same day, stating that both Parties shall file their final trial briefs of up to 600 pages by 16:30 hours on 14 January 2011, their reply briefs of up to 100 pages on 31 January 2011 and deliver their oral closing arguments on 8, 9 and 11 February 2011.

4. On 12 November 2010, the Defence concluded its case, in the presence of the Accused.[8] At this hearing, Defence Counsel acknowledged that they had received and reviewed the written denials on the merits of two motions, which they had been permitted to file out of time after the deadline previously set by the Court for 24 September 2010.[9] These were Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of

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[1] Transcript, 22 October 2010.
[2] Transcript, 22 October 2010, p. 48347.
[3] Transcript, 22 October 2010, p. 48349.
[4] Transcript, 22 October 2010, p. 48354.
[5] Transcript, 22 October 2010, p. 48354.
[6] Transcript, 22 October 2010, p. 48361- 48362.
[7] *Prosecutor v Taylor*, SCSL-03-01-T-1105, Order Setting a Date for Closure of the Defence Case and Dates for Filing Final Trial Briefs and the Presentation of Closing Arguments, 22 October 2010 ("Scheduling Order").
[8] Oral hearing of 12 November 2010. See Transcript, 12 November 2010.
[9] Transcript, 12 November 2010, p. 49114-49115.

Johnny Paul Koroma, ("Decision regarding Johnny Paul Koroma")[10] and Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators ("Contempt Decision").[11] They further represented that they intended to move for leave to appeal both of these decisions.[12]

5. The Presiding Judge concluded the hearing on 12 November 2010 by reiterating the dates of the mid-winter recess, which were consistent with the Defence request both for a recess and as to the dates; and restated the Scheduling Order of 22 October 2010 in which each of the Defence requests had been granted.[13] The Defence, having indicated their intention to file two interlocutory appeals, made no objections to this order or to the recess, nor raised any concerns about the timing for the conclusion of the case.

6. On 15 November 2010, the President of the Special Court, Justice Jon Kamanda, issued an Order recessing the Special Court from the close of business 17 December 2010 to the opening of business 10 January 2011.[14] Neither the Prosecution nor the Defence objected to the President's Order Scheduling Judicial Recess.

7. Also, on 15 November 2010, the Defence filed for leave to appeal both of the decisions denying its motions (.i.e. the "Contempt Decision" and the "Decision Regarding Johnny Paul Koroma") under Rule 73(B), as they had indicated on 12 November 2010 that they intended to do.[15] Rule 73(B) states that if leave to appeal is granted, it "shall not operate as a stay of proceedings unless the Trial Chamber so orders."[16] The Defence did not ask for a stay for either appeal, did not indicate that its ability to file its final trial brief on 14 January 2011 would be in any way impaired, and infact argued as part of the reasoning for granting the appeal that:

[10] *Prosecutor v. Taylor*, SCSL-03-01-T-1119, Decision on Public with Confidential Annexes A-D the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 11 November 2010 ("Decision Regarding Johnny Paul Koroma").

[11] *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 11 November 2010 ("Contempt Decision").

[12] Transcript, 12 November 2010, p. 49115.

[13] Transcript, 12 November 2010, p. 49118-49119.

[14] Prosecutor v. Taylor, SCSL-03-01-T-1120, Order Scheduling Judicial Recess, 15 November 2010, states that: "During [the recess] the Court Management Section of the Registry will not accept any documents for filing submitted before the Appeals Chamber and Trial Chamber II."

[15] *Prosecutor v. Taylor*, SCSL-03-01-T-1122, Defence Motion Seeking Leave to Appeal the Decision on Public with Confidential Annexes A-D the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 15 November 2010; *Prosecutor v. Taylor*, SCSL-03-01-T-1121, Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 15 November 2010.

[16] Rule 73(B) of the Rules.

The Defence therefore urges the Trial Chamber to exercise its discretion and grant leave to appeal as this would not delay proceedings in this case given a filing schedule relating to the Final Brief and Submissions has already been issued.[17] (Emphasis added)

8. The Trial Chamber granted the Defence leave to appeal both the Contempt Decision and the Decision regarding Johnny Paul Koroma on 3 December 2010.[18] The Defence filed their notice of appeal of both decisions on the last day within the period allowed by the Rules: 10 December 2010.[19]

9. On the last day before the judicial recess, 17 December 2010, the Defence filed yet another substantive motion: "*Prosecutor v. Taylor*, SCSL-03-01-T-1142, Public with Annexes A-H and confidential Annexes I-J Defence motion to recall four Prosecution witnesses and to hear evidence from the Chief of WVS regarding relocation of Prosecution witnesses" ("Motion to Recall Four Witnesses"). On 10 January 2011, the Defence filed two additional substantive motions entitled: (i) "*Prosecutor v. Taylor*, SCSL-03-01-T-1143, Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables" ("Investigation Motion"); and (ii) "*Prosecutor v. Taylor*, SCSL-03-01-T-1146, Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship Between the United States Government and the Prosecution of Charles Taylor" ("Wiki-Leaks Motion").

10. According to the Defence, it first learned of the two Wiki-Leaks cables, the basis for the two substantive motions filed on 10 January 2011, on 17 December 2010, the last day before the December recess.[20] However, it did not on that day alert the Court or the Prosecution that it might need leave to file further motions, or that it might be requesting any delay of the Scheduling Order of 22 October 2010. Nor did it indicate in its motion filed on 17 December 2010 ("Motion to Recall Four Witnesses") or its two appeals filed on 10 December 2010 - none of which were filed urgently- that it would require an extension of the deadline for filing the final brief, although it was obvious

[17] *Prosecutor v. Taylor*, SCSL-03-01-T-,1122, 15 November 2010, para. 15.
[18] *Prosecutor v. Taylor*, SCSL-03-01-T-1131, Decision on Defence Motion Seeking Leave to Appeal the 'Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 2 December 2010. *Prosecutor v. Taylor*, SCSL-03-01-T-1130, Decision on Defence Motion Seeking Leave to Appeal the 'Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 3 December 2010.
[19] *Prosecutor v. Taylor*, SCSL-03-01-T-1134, Defence Notice of Appeal and Submissions Regarding the Decision on Public with Confidential Annexes A-D the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 10 December 2010 ("Johnny Paul Koroma" Appeal); *Prosecutor v. Taylor*, SCSL-03-01-T-1133, Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 10 December 2010, ("Contempt" Appeal).
[20] Appeal, para. 8.

that no final resolution of these matters could be expected before 14 January 2011. As Defence points out, all three of these motions and both appeals addressed issues raised throughout the trial by the Defence and none of them represented a new argument or line of inquiry.[21]

11. On 10 January 2011, the Defence also filed urgently two procedural motions. The first procedural motion requested for the first time a stay of the proceedings until final resolution of all three outstanding motions (i.e. the "Motion to Recall Four Witnesses", the "Wiki-Leaks Motion" and the "Investigation Motion") and both appeals ("Johnny Paul Koroma" Appeal and the "Contempt" Appeal).[22] Alternatively, the Defence requested a one month extension of the 14 January 2011 deadline for filing the final briefs.[23] The second procedural motion requested a status conference to talk about the Defence bid for delay.[24]

12. It should be noted that at the time the Defence filed the motion for stay, the Defence had not yet filed its final pleadings in either its two appeals or in its three outstanding motions, without which neither the Appeals Chamber nor the Trial Chamber could in fairness to the Defence render its decisions.

13. On 12 January 2011, the Trial Chamber, in the absence of one of the Judges, acting in conformity with the Defence request for urgency and the provisions of Rule 7*bis* of the Rules of Procedure and Evidence, denied the motion for stay or extension, a decision which did not require a reply from the Prosecutor under Rule 7*bis*.[25]

14. In its written decision denying the delay requested by the Defence, the Trial Chamber made clear that in the event that the outcomes of the pending matters actually did impact on either the evidence or arguments of the Defence, the Chamber would entertain applications to supplement the

[21] *Prosecutor v Taylor*, SCSL-03-01-T-1144, "Urgent and Public Defence Motion for a Stay of Proceedings Pending Resolution of Outstanding Issues" 10 January 2011 ("Motion Requesting Stay of Proceedings") para. 23. See also, *Prosecutor v Taylor*, SCSL-03-01-T-1122, supra, footnote 15, para. 9.a; *Prosecutor v Taylor*, SCSL-03-01-T-1157, "Defence Reply to Prosecution Response to Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators", 14 January 2011, para. 18; *See also* footnote 8.
[22] Motion Requesting Stay of Proceedings, para. 1.
[23] Motion Requesting Stay of Proceedings, para. 7.
[24] *Prosecutor v Taylor*, SCSL-03-01-T-1145, "Urgent and Public Defence Request for a Status Conference Pursuant to Rule 65*bis*", 10 January 2011 ("Motion Requesting Status Conference").
[25] Rule 7*bis*: "A motion for an extension of time may be disposed of without giving the other party the opportunity to respond if a Judge or Chamber is of the opinion that no prejudice will be caused to the other party."

final brief.[26] Specifically, the Trial Chamber stated that "any outstanding issues on which the Defence may wish to make written submissions can be the subject of an appropriate application in accordance with the Rules" and further, that because "the Defence may seek leave to make additional submissions after the filing of the final trial briefs, there is no prejudice to the Accused's fair trial rights...."[27]

15. Notwithstanding: (i) the Trial Chamber's prompt written denial of the Defence request for a stay or extension; (ii) the Trial Chamber's assertion that it would entertain petitions for subsequent supplementation of the final written and/or oral arguments should the outcomes of the motions and appeals support additional argument; (iii) the oral and written Scheduling Orders granting the Schedule requested by the Defence on 22 October 2010; (iv) the restatement of that Order orally on 12 November 2010; and (v) the reaffirmation of that Schedule on 12 January 2011, in its Order denying the motion for stay; the Defence team nevertheless failed to file its final trial brief by the deadline ordered and confirmed by the Court.

16. The Prosecution filed its final brief on 14 January 2011, as ordered.[28]

17. On 20 January 2011, when the Defence final trial brief was still not filed, the Trial Chamber conducted a Status Conference in the presence of the Accused, The Trial Chamber requested an explanation for the Defence's failure to file:

> **PRESIDING JUDGE**: Thank you, Mr Griffiths. Mr Griffiths, you have requested this Status conference to, I quote, "give you the opportunity to explain why you failed to file your final brief." Before I ask you to address the Court, for purposes of record, I would ask if the Defence, since they are not mandated by Rule 86 to present any closing arguments or file a final submissions, if it was the Defence's intention to file a final brief.
>
> **MR GRIFFITHS**: Mr Taylor has provided us with written instructions that we are not to file a final brief until such time as decisions are reached on all outstanding motions and appeals. This is not meant to be a delaying tactic. It is a point, in our submission, of fundamental principle. Now, Mr Taylor is not saying that we should not file a final brief. He has no intention of walking away from these proceedings -(Emphases added)

18. After hearing the Defence oral submission, the Presiding Judge stated:

> The Trial Chamber has a duty of fairness to all parties and a duty to ensure an expeditious and fair trial. In this vein, the Trial Chamber has indicated that it will afford the Defence

[26] *Prosecutor v Taylor*, SCSL-03-01-T-1154, "Decision on Defence Request for a Status Conference Pursuant to Rule 65*bis* and Defence Motion for a Stay of Proceedings Pending Resolution of Outstanding Issues", 12 January 2011 ("Decision on Defence Requests for Status Conference and Stay of Proceedings"), p. 3.

[27] *Ibid*, at pp 3 -4.

[28] *Prosecutor v. Taylor*, *SCSL-03-01-T-1156*, Confidential Prosecution Final Trial Brief, 14 January 2011.

> the opportunity to apply for ancillary relief, if necessary, after the decisions on the very recently filed motions and appeals are rendered. The majority of the Trial Chamber, Justice Sebutinde dissenting, considers that they have not heard submissions that cause the Trial Chamber to review or amend the original orders rendered on 22 October 2010 and the majority decision of 12 January 2011.[29]

19. Contrary to the Defence representation that as a matter of "fundamental principle" it could not file a final trial brief until "final" resolution of all of its outstanding motions and appeals, it nonetheless did file a final brief on 3 February 2011, with final decisions on two of its three substantive motions still pending before the Trial Chamber.[30]

20. By delaying twenty days, the Defence had the advantage of twenty additional days to prepare its final trial brief. It further had the advantage of shutting off the Prosecution's ability to respond in writing to the brief, as the Defence final trial brief was filed three days past the response deadline. And finally, instead of the three weeks between filing of the briefs and closing oral arguments originally scheduled, at the request of the Defence, to allow adequate preparation for oral closing argument, the Prosecutor was given two working days to absorb the 842 pages the Defence submitted on 3 February 2011 at 16:59 hours.

21. The Majority of the Trial Chamber, (Justice Julia Sebutinde dissenting), refused to accept the brief, reasoning that it had received no submissions by the Defence which would cause the Trial Chamber to review or revise the original order.[31]

22. On 8 February 2011, closing arguments in the trial commenced with the Prosecution's closing arguments. During the oral hearing, Lead Counsel for the Accused advised the Trial Chamber that:

> ... we do not feel that it could be appropriate for us to take part in the oral presentation when a majority of you have refused to accept our written submissions. And we have Mr Taylor's instructions to that effect. We feel it is our professional duty to withdraw pending a decision on our motion to appeal yesterday's decision which will be filed today.[32]

23. The Defence subsequently filed a motion seeking leave to appeal the Trial Chamber's decision on late filing of Defence final trial brief;[33] and further requested the Trial Chamber to stay the

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[29] Transcript, 20 January 2011, p. 49133-49134.

[30] The Trial Chamber's Decisions on the Defence Application for leave to appeal the Decision on the Motion to Recall Four Witnesses and the Investigation Motion respectively were still pending.

[31] *Prosecutor v Taylor*, SCSL-03 -01-T-1191, "Decision on Late Filing of Defence Final Trial Brief", 7 February 2011.

[32] Trial Transcript 8 February 2011, p. 49138.

[33] *Prosecutor v Taylor*, SCSL-03 -01-T-1195, "Motion Seeking Leave to Appeal the Trial Chamber's Decision on Late Filing of the Defence Final Trial Brief", 8 February 2011.

proceedings until the determination of the motion for leave to appeal.[34] On 10 February 2011, the Prosecution filed its "Response to the Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial brief" wherein it submitted that it "takes no position regarding the (Defence) application (for leave to appeal)."[35] On 11 February 2011, the majority of the Trial Chamber [36](Justice Lussick dissenting) granted the Defence request for leave to appeal the impugned decision. The majority then ordered a stay of the proceedings until the determination of the matter by the Appeals Chamber.[37]

24. On 14 February 2011, the Appeals Chamber filed an "Order for Expedited Filing" for any appeal, response and reply in relation to the matter.[38] On 17 February 2011, the Defence filed this appeal.[39] The Prosecution filed its Response thereto on 21 February 2011;[40] and the Defence filed its Reply on 23 February 2011.[41]

II. SUBMISSIONS OF THE PARTIES ON APPEAL

A. Defence submissions

25. The Defence presents five grounds of appeal in which it alleges that the Trial Chamber committed several errors of law and/or fact and/or procedure.

26. First, the Defence submits that the majority of the Trial Chamber "erred on a point of law and/or procedure in that they solely based their decision on the CMS Deficient Filing Form and not the Defence's application for leave to file its final trial brief out of time ...."[42] The Defence argues that

[34] *Prosecutor v Taylor*, SCSL-03-01-T-1197, "Request for Ancillary Relief in Conjunction with the Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief" 9 February 2011.
[35] *Prosecutor v Taylor*, SCSL-03-01-T-1200, "Prosecution Response to Urgent and Public Motion Seeking Leave to Appeal the Trial Chamber's Decision on Late Filing of the Defence Final Trial Brief", 10 February 2011.
[36] Trial Chamber's Oral Decision of 11 February 2011, *See* Trial Transcript 11 February 2011, p. 20-21. The oral decision was subsequently put in writing and published on the same day. *See Prosecutor v Taylor*, SCSL-03-01-T-1202, "Decision on Defence Motion Seeking Leave to Appeal the Trial Chamber's Decision on Late Filing of the Defence Final Trial Brief", 11 February 2011.
[37] Trial Chamber's Oral Decision of 11 February 2011, *See* Trial Transcript 11 February 2011, p. 20-21. See *Prosecutor v Taylor*, SCSL-03-01-T-1202, "Decision on Defence Motion Seeking Leave to Appeal the Trial Chamber's Decision on Late Filing of the Defence Final Trial Brief", 11 February 2011.
[38] *Prosecutor v Taylor*, SCSL-03-01-T-1203, "Order for Expedited Filing", 14 February 2011.
[39] *Prosecutor v Taylor*, SCSL-03-01-T-1209, "Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief", 17 February 2011 ("Appeal").

[40] *Prosecutor v Taylor*, SCSL-03-01-T-1211, "Prosecution Response to the Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief", 21 February 2011 ("Response").
[41] *Prosecutor v. Taylor, SCSL-03-01-T-1214*, "Defence Reply to Prosecution Response to the Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief", 23 February 2011,
[42] Appeal, paras 26 and 36.

had the Trial Chamber considered its application for leave to file its brief, which was contained in the first part of its brief, in particular, the "interests of justice" argument upon which the application was primarily based, it would not have concluded that the Defence had not provided "any new grounds for rescinding the original filing order."[43]

27. Second, the Defence submits that the majority of the Trial Chamber erred on a point of law and/or procedure by failing to consider the Prosecution motion to substitute its final trial brief which was filed in response to the Defence final trial brief.[44] The Defence argues that in that motion, "the Prosecution did not oppose the late filing of the Defence final brief *per se*" but rather, that it requested ancillary relief to address the prejudice that it had allegedly suffered as a result of the late filing of the Defence final trial brief.[45] The Defence further argues that the Prosecution motion was properly before the Trial Chamber and had a direct bearing on the Defence application for leave to file its final trial brief out of time.[46] It submits that the Trial Chamber's failure to consider the said Prosecution motion rendered the motion irrelevant and resulted in a discernible error in the exercise of its discretion.[47]

28. Third, the Defence submits that the majority of the Trial Chamber erred in law in holding that the Defence's failure to file its final trial brief in terms of the Court's Scheduling Order amounted to a flagrant breach of the Court's order.[48] The Defence explains that it's "failure to comply with the Scheduling Order was a direct result of its pursuit of other legitimate and important legal issues before the Court;"[49] and that it is also manifested by the factual and procedural history of the appeal.[50] The Defence argues that the said factual and procedural history rendered the Scheduling Order obsolete, as it "could not reasonably have been expected to file its Final trial Brief in compliance with a Court order that was effectively being challenged before the same Court through an application that was filed on the same day as the deadline for the final brief."[51]

29. The Defence further submits that the majority of the Trial Chamber "failed to appreciate the Defence's legal and professional obligation to adhere to its client's instructions not to file a final trial

[43] Appeal, paras 26, 37.
[44] Appeal, paras 27,38, *referring to Prosecutor v. Taylor, SCSL-03-01-T-1189*, "Public with Confidential Annex Motion to Substitute Prosecution Final Trial Brief", 4 February 2011, ("Prosecution Motion to Substitute").
[45] Appeal, para. 38.
[46] Appeal, paras 27,38.
[47] Appeal, paras 27,38.
[48] Appeal, paras 28,40.
[49] Appeal, para. 40.
[50] Appeal, para. 43.
[51] Appeal, para. 43.

brief on his behalf on 14 January 2011, and the impact it had on the Defence's material ability to comply with the deadline."[52] It submits that even though the Trial Chamber mischaracterised the Accused's instructions as a case of the Accused attempting to "control" the proceedings or "run" the Court, the Accused was only seeking to preserve his fair trial rights and first be assured of the integrity of the proceedings.[53] It submits that the Accused's instructions were not for the Defence to ignore the Court's order, but rather, for the Defence to pursue other legal channels to ensure that the issue was resolved.[54] The Defence submits that the Court's Scheduling Order having thus been rendered obsolete by superseding events, it was proper and timely for it to file its motion under Rule 86(B) of the Rules.[55]

30. Fourth, the Defence submits that the majority of the Trial Chamber erred in the exercise of its discretion by imposing a drastic and disproportionate penalty;[56] and that alternatively, its decision did not serve the interests of justice.[57] It submits that the Trial Chamber's decision failed to take into account relevant considerations such as the principle of proportionality which applies even in cases where a party might be in breach of a Court order, the Accused's fair trial rights, judicial economy, the seriousness of the charges against the Accused and the crucial stage of the proceedings.[58]

31. Finally, the Defence submits that the Trial Chamber's decision constituted an abuse of discretion, was not in the interests of justice; and was "primarily spurred by the Majority's desire to show that the Court and not Mr. Taylor was in charge of running of the trial."[59] The Defence submits that "where a party gives a plausible explanation for a delayed filing and where the interest of justice so dictate, the Trial Chamber should allow a late filing"[60] and cites in support of this submission, jurisprudence from the *ad hoc* tribunals wherein late filings by a Party were accepted by the Court on the basis that it was "in the interest of justice to do so."[61]

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[52] Appeal, para. 44.
[53] Appeal, para. 44.
[54] Appeal, para. 44.
[55] Appeal, paras 45, 46.
[56] Appeal, paras 29, 47.
[57] Appeal, paras 29, 47.
[58] Appeal, paras 30 and 48-50.
[59] Appeal, para. 51.
[60] Appeal, para. 51, *citing*, Dissenting Opinion of Justice Julia Sebutinde, para. 7.
[61] Appeal, paras 52-55, *citing Prosecutor v Slobodan Milosevic*, IT-02-54-AR77.4, Decision on Prosecution Application to Strike Out Appellant's Brief in the Appeal of the Decision on Contempt of the Tribunal Kosta Bulatovic, 23 June 2004, paras 5-8 ("Milosevic Decision to Strike Out Appellant's Brief"); *Prosecutor v Bizimungu et al.*, ICTR-99-50-T, Decision on Casimir Bizimungu's Motion for Permission to Convey Protected Information to Defence Experts, 11 September 2006, paras 1-6; *Ngirumpaste v The Prosecutor*, ICTR-98-44-AR73.3, Decision on Prosecutor's Urgent Motion for Extension of Time Limit, 10 June 2004, paras 17-20; *Prosecutor v Brima et al.*, SCSL-04-16-T-456, Decision on Urgent Defence Request

32. It further submits that the safeguards contained in Article 17(4) of the Statute guarantee the right of the Accused *inter alia* "to have adequate time and facilities for the preparation of his defence"[62] and that in addition, Rule 26*bis* provides that the proceedings shall be conducted with full respect for the rights of the Accused.[63] The Defence further submits that if the Accused "having given good reasons for not filing his final brief by the date set by the Trial Chamber, is prevented from filing his final trial brief entirely, then he is effectively been denied his fundamental right to defend himself and this is clearly not in the interests of justice."[64] It submits that due to the seriousness of the charges against the Accused which makes the imperative to protect his fair trial rights even more compelling; the fact that the Accused will not have another chance to comprehensively articulate his arguments after the hearings are closed; and the fact that it would not serve the interests of justice for the Appeals Chamber to review the Trial Chamber's judgment *de novo* by considering the Defence's final trial brief on appeal, the Accused should be permitted to file a final trial brief on his behalf, notwithstanding any procedural irregularities.[65]

33. By way of ancillary relief, the Defence seeks a determination by the Appeals Chamber that it has not waived its right to participate in the oral closing arguments, and submits additionally that should the Appeals Chamber direct the Trial Chamber to accept the late filing of its brief, the entire brief, including the three annexes should be accepted.[66]

34. Consequently, the Defence requests the Appeals Chamber to order the Trial Chamber to (i) reverse its decision and to accept the Defence final trial brief including the annexes; and (ii) set a date for the Defence closing arguments and any rebuttal arguments.[67]

B. Prosecution submissions

35. The Prosecution responds that the Appeal should be dismissed as without merit based on the following arguments: (i) that trial judges have broad discretion to manage the trial; (ii) that Court orders are binding; (ii) that "a party's knowing and wilful election not to carry out optional actions on

under Rule 54 with Respect to Filing of Motion for Acquittal, 19 January 2006; *Prosecutor v Sesay et al.*, SCSL-04-15-T-1106, Order for the Filing of Final Trial Briefs and the Presentation of Closing Arguments, 29 April 2008.

[62] Appeal, para. 56.

[63] Appeal, para. 56, *citing* Dissenting Opinion of Justice Julia Sebutinde, para. 12.

[64] Appeal, para. 57.

[65] Appeal, paras 58.-60.

[66] Appeal, paras 61-68.

[67] Appeal, para. 4. *See also* para. 69.

the date(s) ordered by the Trial Chamber result in a knowing and wilful waiver.[68] It further develops these arguments in its responses to the Defence's specific grounds of appeal.

36. Regarding the first ground of appeal, the Prosecution refutes the Defence argument that the Majority of the Trial Chamber erred on a point of law and/or procedure by basing its decision on the CMS deficient filing form and not on the Defence application for leave to file out of time.[69] It submits that because on 3 February 2011, the Scheduling Order was still in effect and binding on the Parties, the Defence filed its final brief in breach of the Scheduling Order and the Trial Chamber properly considered the late filing of the Defence final trial brief in relation to the Scheduling Order,[70]

37. It also challenges the Defence submission that the Trial Chamber should have considered its explanation for the late filing in paragraphs 2 to 5 of its final brief, as a "new application"[71] and submits that (i) the CMS deficient filing form merely repeats the Defence arguments made improperly in paragraphs 2 to 5 of its brief, when infact such explanation, should have been properly included in a motion for leave to file an untimely brief, with the brief provided as an annex; (ii) the arguments contained in the CMS Form and paragraphs 2 to 5 of the Defence final brief do not amount to a "new" application because they merely repeat arguments made by the Defence in previous submissions before the Trial Chamber; and (iii) that in any event, any reliance by the Judges on the Defence arguments contained on the CMS Form, would have been consistent with Article 12 of the Practice Direction on Filing Documents.[72]

38. In response to the Defence second ground of appeal, the Prosecution submits that the majority of the Trial Chamber was not required to consider the Prosecution's Motion to Substitute its final trial brief.[73] It submits that contrary to the Defence assertion that "the Prosecution did not oppose the late filing of the Defence final brief *per se*" it argued in its Motion to Substitute, that the Defence arguments for acceptance of its brief were without merit; that "it is not in the interests of justice that this Accused's wilful and knowing violation of the Trial Chamber be rewarded" and that "it is this Trial Chamber's discretionary decision whether or not to accept the Defence's final trial

[68] Response, paras 1, 2.
[69] Response, para. 20, *citing* Appeal, paras 26, 36 and 37.
[70] Response, para 21.
[71] Response, paras 21, 22.
[72] Response, paras 21, 22.
[73] Response, para. 24.

brief."[74] It further submits that the suggestions, submissions and requests contained in its Motion to Substitute, were made on condition that they "need only be considered and/or implemented '*if* the Trial Chamber exercises its discretion to accept this flagrantly late filing."[75]

39. The Prosecution submits that the Defence arguments under its third ground of appeal is "disingenuous and must fail as it seeks to subordinate the Trial Chamber's authority to that of the Defence.[76] It submits that not only must a Trial Chamber's order prevail when there is a perceived conflict between a party's duties and any such order, but that absent an order suspending, amending or reversing the Scheduling Order, the Parties are bound by its terms and it is not for the Accused to unilaterally determine when an order is rendered obsolete.[77] The Prosecution further submits that the Trial Chamber "offered appropriate alternative forms of relief to deal with the situation" and move the proceedings forward other than a stay.[78] It cites the Defence filing of its brief before resolution of two outstanding motions as further proof that the Accused was seeking to control the proceedings;[79] and submits on this basis that the Accused was infact able to file a final brief absent resolution of the outstanding matters.[80] Additionally, the Prosecution submits that the Defence could have requested an expeditious filing schedule had it deemed it necessary for the outstanding matters to be resolved before the 14 January 2011 deadline for filing of final briefs.[81] The Prosecution rejects the Defence assertion that if it had abided by the Court's order, then a potential appeal arising from its Motion Requesting Stay would have been merely "academic".[82] It reiterates that the Majority did not abuse its discretion in refusing to accept the untimely filed Defence final brief, as the Defence failure to file its final trial brief was based on a wilful, knowing choice not to comply, thereby resulting in a waiver of its option.[83]

40. In response to the Defence fourth ground of appeal, the Prosecution submits that the Majority of the Trial Chamber exercised its discretion in view of several factors: (i) the Stay Decision provided a remedy to handle any outstanding matters resolved after filing of the briefs; (ii) due consideration was given to the Accused's several and redundant explanations in support of demands for a stay or extension; (iii) the Accused made wilful, knowing and strategic choices not to file his

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[74] Response, para. 22, *citing* Prosecution Motion to Substitute, para. 2.
[75] Response, para. 22, *citing* Prosecution Motion to Substitute, paras 2, 3, 8, 9, 13 and 14.
[76] Response, para. 26.
[77] Response, para. 28.
[78] Resppnse, para. 29.
[79] Response, para. 30.
[80] Response, para. 30.
[81] Response, para. 31.
[82] Response, para. 32, *citing* Appeal, para. 43.

final brief on the date chosen by his Counsel, ordered by the Trial Chamber and affirmed by the Majority; (iv) a Trial Chamber has a broad and inherent discretion in matters of trial management; (v) orders, including the Scheduling Order are binding on the Parties unless and until revoked or amended; (vi) the Accused had remaining opportunities to argue his case to the Judges and (vii) Judges have an independent duty to apply the law to the evidence, determine if the evidence proves the Accused's guilt beyond reasonable doubt.[84] It argues on this basis that the Majority's refusal to accept the Defence final brief is proportionate and within its discretion.[85]

41. The Prosecution further submits that the Impugned Decision was a discretionary decision of the Trial Chamber which was reasonably opened to the Majority in the circumstances of the present case.[86] It submits that the Accused was not denied the opportunity to file a final brief, but rather, was denied the authority to substitute his decisions on timing for that of the Judges; that the Impugned Decision was the consequence of the Accused's wilful and knowing election not to file his final brief on the date ordered by the Trial Chamber and that rejection of the late brief was, in effect, a refusal to override the Accused's knowing, informed, calculated, deliberate and strategic waiver.[87]

42. It avers that the Defence reliance on the *Lubanga* Case and the Opinion of Judge Antonetti is misplaced and distinguished both cases from the present appeal.[88] According to the Prosecution, "Rule 86 indicates that while closing submissions from the Party bearing the burden of proof are required, the Accused's right to final submissions can be waived."[89] It argues that the Rules "purposely left open the opportunity for the Accused to strategically waive his right to final submissions," and that "this right to waiver is consistent with the rights of the Accused throughout the trial phase" including his ability to waive his rights to testify, cross-examine Prosecution witnesses and present a defence.[90] Additionally, the Prosecution submits that the Defence cannot claim an infringement of his right to a fair trial where he knowingly and deliberately elects not to file his final brief on the date ordered by the Court.[91]

[83] Response, para. 34.
[84] Response, para. 33.
[85] Response, para. 33.
[86] Response, para. 36.
[87] Response, para. 37.
[88] Response, paras 38,39, *citing Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 *OA 18*, 8 October 2010 (*Lubanga* Decision) and Judge Antonetti's Opinion.
[89] Response, para. 39.
[90] Response, para. 40.
[91] Response, para. 41.

43. The Prosecution adopts the arguments in its response to the Defence's first four grounds of appeal, in response to the Defence fifth ground of appeal. It submits that "it is in the interest of justice to enforce judicially mandated filing dates where those dates were set at the instance of the Defence and where the Defence chose for strategic reasons to wilfully and knowingly refuse to file on those dates in wilful disregard of orders of the Court"[92] and distinguishes the *Milosevic* Decision relied upon by the Defence from the present case.[93]

44. Additionally, the Prosecution submits that the Defence allegations of bias against the Trial Chamber in this Appeal are "unfounded and impertinent."[94]

45. The Prosecution contends that the Defence request that the Appeals Chamber sets a date rescheduling the Defence closing arguments and any rebuttal arguments[95] is outside the scope of the Appeal and should be rejected. It describes the Defence request as "an improper attempt (by the Defence) to revive an opportunity that has been waived by the Accused's wilful, knowing and conscious choices and refusals to participate in oral arguments on the dates set by order of the Court."[96] It refutes the Defence's assertion that it would have been impossible for the Defence to argue key points of its case without referring to related sections of its brief and denies that the Defence suffered any prejudice as a result of the Majority's decision.[97] Furthermore, the Prosecution submits that the Defence arguments regarding inadequate time to prepare its defence under Article 17(4)(b) contradicts its own admission that it had prepared its oral submissions.[98]

46. In consequence, the Prosecution requests that the Appeals Chamber denies the appeal, including all requests for relief; or alternatively, if the Appeals Chamber allows the appeal, that (i) the Prosecution's revised and refined final trial brief be substituted for that filed on 14 January 2011; and/or (ii) the Appeals Chamber order that the Defence final brief be limited to 600 pages total.[99] Additionally, the Prosecution requests that the Appeals Chamber dismisses the requested ancillary relief relating to oral arguments as it is outside the scope of the Appeal and without merit.[100]

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[92] Response, para. 43.
[93] Response, para. 44, *referring to Prosecutor v. Milosevic, IT-99-37-AR73*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002..
[94] Response, para. 44.
[95] See, Appeal, para. 4. See also para. 69.
[96] Response, para. 47.
[97] Response, paras 49, 50..
[98] Response, para. 51, *citing* Appeal, paras 66, 64.
[99] Response, paras. 53,54.
[100] Response, para. 55.

C. Defence reply

47. The Defence offers no additional arguments in its Reply.

III. DELIBERATIONS

48. The right to be heard at trial (Article 17.2) [101] and to present a defence (Article 17.4(d))[102] are fundamental rights of all those accused of criminal offences, and are protected by our Rules and Statute, and by major human rights instruments.[103] In the adversarial process, which is employed by the Special Court, those rights are expressed particularly in the right of the accused to present an argument at the close of the trial on the theory of the defence and the effect of the evidence.[104]

49. The right to be heard at the conclusion of the trial is the right of the accused, not his Counsel. The exercise of that right under Rule 86 is discretionary, but it is the discretion of the accused that must be exercised, not his Counsel.[105]

50. An accused who intends to be heard, either in person or through Counsel, at the conclusion of the trial is required to file a written submission of his arguments in advance of the oral presentations.[106] Rule 86(B) sets out the least amount of time permitted between the filing of the final

[101] Article 17.2 -" The accused shall be entitled to a fair and public *hearing* " (Emphasis added)

[102] Article 17.4 (d) : "[The Accused] shall be entitled to the following minimum guarantees, in full equality:...(d) ...to *defend* himself or herself in person or through legal assistance of his or her own choosing;" (Emphasis added)

[103] See Article 14 of the International Covenant on Civil and Political Rights, Article 6 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights. The African Charter on Human and Peoples' Rights provides no specification in this respect, but Article 60 of the Charter provides that the African Commission on Human and Peoples' Rights "shall draw inspiration" from other international instruments for the protection of human and peoples' rights,. See Also Articles 20 and 21 of the ICTR and ICTY Statutes respectively. National law: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact finding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Herring v. New York*, 422 U.S.853 at 862, 95 S.Ct. at 2555, 45 L.Ed. 2d at 600.

[104] Judge Antonetti has pointed out that final written and oral arguments are "a decisive phase of the trial" and the final brief a "key piece" in the Judges' understanding of the case. Although speaking specifically about the Prosecution's duty to present final arguments, the Judge's remarks are equally applicable to the Accused, should he choose to present closing argument. There are " two special moments for fully informing the Judge: the first is [the] final brief and the second which is [the} closing argument...." Separate Opinion of Judge Jean-Claude Antonetti, *Prosecutor v. Prlic et al, IT-04-74-T*, Amended Scheduling Order (Final Trial Briefs, Closing Arguments for the Prosecution and Defense), 22 November 2010.

[105] Rule 86(A) and Article 17.4(d) of the Statute. Rule 86(A) states: "After the presentation of all the evidence, the Prosecutor shall and the defence *may* present a closing argument" [Emphasis added]. The rights under Article 17.4(d) of the Statute are for the accused: first, to defend himself in person; or secondly, to defend himself or herself through legal assistance of his or her own choosing; and thirdly, to have legal assistance assigned to him or her in any case where the interests of justice so require

[106] Rule 86(B) states: "A party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for the presentation of that party's closing argument." The Rule requires that a final trial brief be filed in order to

brief and the presentation of oral arguments, but in no way limits the Court from granting the parties a greater amount of time between the two.[107] In this case, based on the requests of the Defence, the Trial Chamber delayed closing arguments to allow three weeks between the filing of the brief and oral presentations. Specifically, the Defence requested that the Trial Chamber orders the submission of final trial briefs for 14 January 2011 and further requested that the Trial Chamber postpones oral arguments beyond the five day minimum provided by the Rule and order their presentation during the week of 7 February 2011. The Trial Chamber granted both Defence requests in its Scheduling Order.[108] The Trial Chamber's Order was a legitimate exercise of its authority under Rule 54,[109] and the Parties were required to comply with the specific deadlines established by the Scheduling Order, which superseded the general default time limits provided in Rule 86(B).[110]

51. Under the practice of this Court, the final trial briefs of the Parties contain the entire closing argument and the oral argument is reserved for highlighting details from that brief. Filing the final trial brief is a condition precedent to presenting the oral argument and is an intrinsic part of that argument.[111]

52. Defence Counsel in this case refused to file the Accused's final trial brief on the date required by the Scheduling Order, in violation of the original Scheduling Order[112] and the Decision Denying Stay,[113] and made a representation to the Court that he did so, on the "instruction" of his client.[114]

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preserve the right to oral closing argument and provides the <u>latest</u> date by which it can be filed. However, nothing in the Rule precludes the Trial Chamber from ordering an earlier filing date. This is in accord with the interpretation of the identical Rule by the ICTY (Rule 86 (B)). See, *Prosecutor v. Prlic, IT-04-74-T*, Amended Scheduling Order (Final Trial Briefs, Closing Arguments for the Prosecution and Defence), 22 November 2010.

[107] Rule 86(B).

[108] Transcripts, 22 October 2010, p. 48362; *Prosecutor v Taylor*, SCSL-03-01-T, "Urgent and Public Defence Request for a Status Conference Pursuant to Rule 65*bis*", 10 January 2011 ("Motion Requesting Status Conference").

[109] Rule 54 states: "At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

[110] *See Prosecutor v Thomas Lubanga Dyilo*, ICC-01-04-01/06-0A, 18, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, paras 46- 54, on the binding nature of a Trial Chamber's Orders vis-a vis a Party's obligations or duties under the Statute or Rules. At paras 48, 53, the ICC Appeals Chamber stated: "Orders of a Trial Chamber are binding orders, to be implemented unless and until they are suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber... However, once a judicial order is made, those subject to it are obliged to comply with its terms."

[111] Rule 86(B): "A party **<u>shall</u>** file a final trial brief ...." [Emphasis added].

[112] *Prosecutor v Taylor*, SCSL-03-01-T-1105, Order Setting a Date for Closure of the Defence Case and Dates for Filing Final Trial Briefs and the Presentation of Closing Arguments, 22 October 2010 ("Scheduling Order").

[113] *Prosecutor v Taylor*, SCSL-03-01-T-1154, "Decision on Defence Request for a Status Conference Pursuant to Rule 65*bis* and Defence Motion for a Stay of Proceedings Pending Resolution of Outstanding Issues", 12 January 2011 ("Decision Denying Defence Requests for Status Conference and Stay of Proceedings).

53. An instruction by a client to violate two Court orders is an instruction to violate the law, since the orders of the Court are the law of the case. Counsel's representation that such instructions came from the Accused and Counsel's ongoing conduct based on those "instructions" should have raised serious questions in the minds of the Judges of the Trial Chamber regarding the understanding of the Accused as to his actions and those of his lawyer, as well as his understanding of the consequences.

54. Likewise, the Trial Chamber should also have been alerted to the possibility that the Accused failed to appreciate the consequences of his Counsel's actions when Counsel represented at the Status Conference held on 20 January 2011 that "Now, Mr Taylor is not saying that we should not file a final brief. He has no intention of walking away from these proceedings",[115] while at the same time refusing to file a final brief.

55. It was not unreasonable for the Trial Chamber to conclude that Counsel for the Accused, by failing to file the brief in violation of two Court orders, forfeited the opportunity to file a written closing argument and, by implication, to present an oral closing argument, as the filing of the former under our Rules is the condition precedent to the presentation of the latter.

56. Forfeiture is the failure to exercise an opportunity, in this case, the opportunity to file the final brief in the time prescribed by the Court. Forfeiture is the consequence of inaction, brought upon the party by his own failure. That consequence may be mitigated at the discretion of the Trial Chamber, but refusal to mitigate does not mean the Trial Chamber is imposing a sanction, it only means that the law, in this case the Scheduling Order, is operating as intended. There is no 'lesser sanction' that could or should have been considered, because enforcement of an order is not a sanction. In this case, the Majority of the Trial Chamber declined to modify their previous order and the brief, by operation of law, was not acceptable. Had the fundamental rights of the Accused not been at issue, given the broad discretion that the Trial Chamber has in overseeing its own scheduling,[116] the Trial Chamber would have committed no error in concluding that the Defence had forfeited its opportunity to file the final trial brief as ordered, and had no right to file at a later date of its own choosing.

[114] Transcript, 20 January 2011, p. 49133-49134.

[115] Transcript, 20 January 2011, p. 49122.

[116] Rule 54. *See Prosecutor v. Norman, Kallon, and Gbao*, SCSL-2003-07-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003. "That [the Special Court] was concerned to avoid undue delay in holding and conducting trials is plain from Security Council resolution 1315, the preamble to which recites the need to establish 'a strong and credible court [...] to expedite the process of brining justice and reconciliation to Sierra Leone and the region.'" (para. 10) "... It is clear that the judges must give full force and effect to the need for expeditious trial." (para. 11)

57. However, when, as in this case, the forfeiture signifies a waiver of fundamental rights of the Accused, there is an obligation on the Court to assure itself that the Accused understands that the consequences of the actions and representations of Counsel could be construed to be a waiver of the Accused's right to be heard and to defend at the conclusion of the trial.[117]

58. Given the circumstances of this case, it was unreasonable for the Trial Chamber to conclude from the silence of the Accused that he agreed with his Counsel's actions and representations and understood that by so doing he might be waiving fundamental rights.

59. Although the Accused is an educated man who previously held a position as a Head of State, he was nonetheless entirely reliant on Counsel to file the brief on time and could not himself have done so. Nor should the Trial Chamber have assumed that the Accused knew that the so-called "instruction" his lawyer claimed the Accused gave him might constitute a waiver of the Accused's right to subsequently have his written closing argument considered by the Trial Chamber and might also jeopardize the presentation of his oral closing argument; or for that matter, that it might be grounds for an allegation of contempt of court.[118]

60. Nor can it be assumed from the conduct of the Status Conference of 20 January 2011 when Defence Counsel represented that he had failed to follow the Court's two orders to file the final brief on 14 January 2011 on the "instructions" of his client, that the Accused, who was present in Court, could understand that he was waiving his rights. Although the Majority of the Trial Chamber made it clear that they refused to accept Defence Counsel's explanation for violating the orders, the Trial

[117] It is established law that in criminal proceedings, a waiver of a fundamental trial right must be made unequivocally, and done freely, intelligently and voluntarily, with knowledge of the consequences. In this regard, the jurisprudence of the European Court of Human Rights gives helpful guidance. See E.g., Case *of Colozza and Rubinat*, (ECHR 7A/1983/63/97) Judgment of 12.02.85, Series A No. 89, para. 28 "...waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner ..."; *Sejdovic v. Italy*, Application No. 56581/00, 1 March 2006, para 86: "Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. ... However, if it is to be effective for Convention purposes, a waiver [of a fundamental fair trial right] must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance...."; *Jones v. UK*, Application No. 30900/02, Decision of 9 September 2003. " The Court considers that the Applicant, as a layman, cannot have been expected to appreciate that his failure to attend on the date set for the commencement would result in his being tried and convicted in his absence and in the absence of legal representation. It cannot be said, therefore, that he unequivocally and intentionally waived his rights under Article 6 (see, *mutatis mutandis*, *Pfeifer and Plankl v. Austria*, Judgment of 25 February 1992, § 38). In accord, national law: *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970): "Waivers of [fundamental] rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"; R *v. Evans* [1991] 1 SCR 869, p. 891: "[A] person who does not understand his or her right cannot be expected to assert it."

[118] Rule 77(A).

Chamber never stated with any degree of clarity what, if any, consequences would flow from that violation.[119]

61. Under these circumstances, the Trial Chamber had an obligation to ascertain on the record that the Accused fully understood and agreed with his lawyer's actions and representations and that he was aware that the consequences of that agreement included the possibility that his right to be heard at the conclusion of the case could be considered waived.[120]

62. All three Judges based their majority and dissenting opinions on their assumption, from the silence of the Accused, that he had knowingly and voluntarily agreed with his lawyer's disregard of the Court's orders and the consequences this could have upon his rights, without ever ascertaining that this was true.

63. In some cases the representations of Counsel combined with the actions of the Accused and the circumstances of the situation may be sufficient to indicate unequivocally that the Accused is knowingly, intelligently and voluntarily waiving a fundamental right.[121] However, where the circumstances do not support such a waiver, or are ambiguous, a waiver cannot be assumed.[122] The circumstances in this case were at the least ambiguous, particularly in light of: (i) the so-called 'instruction' that Counsel represented he received from the Accused which was on its face invalid; and (ii) the representation by Counsel that his client still wanted to file a brief but would only do so at some indeterminate later point. From these facts, serious questions should have been raised as to the Accused's understanding of the seriousness of the actions taken on his behalf and the potential consequences of his position.

64. The Trial Chamber should have determined whether the Accused understood that he was waiving his rights to present written and/or oral closing arguments and could have done so in a

[119] *Prosecutor v. Taylor*, SCSL-03-01-T, Status Conference Transcript, 20 January 2011, p. 49133.

[120] The ICTY has recognised the obligation of the Trial Court to satisfy itself as to the Accused's understanding of his trial rights throughout the trial and to go beyond the representations of his Counsel, including inquiring directly of the Accused. See e.g., *Prosecutor v. Momcilo Krajišnik, Case No. IT-00-39-A*, "Decision on Momcilo Krajišnik's Motion to Present Additional Evidence", 4 November 2008 (public redacted version) para.12.

[121] *Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A*, Judgement 28 November 2007, page 14: "... the Appeals Chamber concludes that waiver by an accused of his right to be present at trial must be free and unequivocal (though it can be express or tacit) and done with full knowledge."

[122] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C), 14 October 2004, para. 19. When considering the Accused's fundamental right to have counsel present during interrogation, the ICTR concluded that Accused's contradictory assertions regarding his desire to have counsel was sufficient to make his waiver of counsel invalid.

variety of ways, including with a simple colloquy that did not in any way invade the attorney-client privilege.[123]

65. The Trial Chamber did not establish that there was a knowing, intelligent and voluntary waiver by the Accused. Absent facts sufficient to determine a waiver, the Trial Chamber erred in assuming that the Accused had waived his rights and in proceeding as if he had.

66. Had it been established that the Accused understood and agreed with the representations and actions of his Counsel and understood that the consequences of that agreement constituted a waiver of his right to present written and oral arguments, then there would have been no error in concluding that the Accused had forfeited his opportunity to file a final trial brief and the Trial Chamber's refusal to accept the deficient filing would have been justified. However, in the face of the silence of the Accused, and given the ambiguous and contradictory representations made on his behalf, the conclusion that the Accused had waived his right to have his written final argument considered by the Court was an error of fact which, if uncorrected, could occasion a miscarriage of justice.[124] To rule otherwise would be to disadvantage the uninformed Accused for the actions of his Counsel, which would be unfair, particularly as there are other means by which the Trial Chamber can sanction Counsel without affecting the Accused's fundamental rights.[125]

IV. CONCLUSION

67. Without a clear waiver from the Accused, the decision of the Trial Chamber is reversed. The Accused's final trial brief is ordered accepted subject to the Trial Chamber's determination on issues of length and format[126] and the Trial Chamber is instructed to expeditiously set a date to hear the Defence closing argument and rebuttal arguments of the Prosecution and the Defence. If Counsel for the Defence attempts by word or action to waive the Accused's right to oral argument, the Trial Chamber is instructed to assure itself that the Accused himself is knowingly, intelligently and voluntarily waiving this right.

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[123] See e.g., Prosecutor *v. Prlic et al.*, IT-04-74- PT, Decision n Requests for Appointment of Counsel, 30 July 2004, paras 41 and 52.

[124] Rule 106(C): "Pursuant to Article 20 of the Statute, the Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on ... an error of fact which has occasioned a miscarriage of justice."

[125] Rule 46 and Rule 77.

V. DISPOSITION

68. Accordingly, pursuant to Rule 106 of the Rules, the Appeals Chamber hereby:

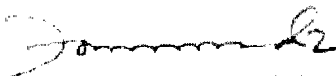
(i) **GRANTS** the Motion and **REVERSES** the decision of the Trial Chamber;

(ii) **DIRECTS** the Trial Chamber to accept the Defence Final Trial Brief, subject to its further determination as to length and format; and

(iii) **DIRECTS** the Trial Chamber to set a date for the Defence closing arguments and any rebuttal arguments.

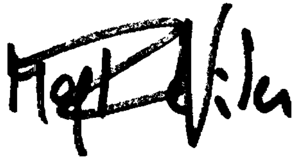
Hon. Justice George Gelaga King appends a Separate Concurring Opinion.

Done this 3rd day of March 2011 in Freetown, Sierra Leone.

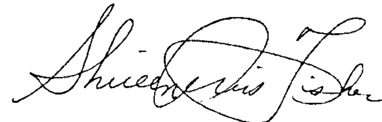


Justice Jon M. Kamanda,
President

Justice Emmanuel Ayoola



Justice Renate Winter



Justice Shireen Avis Fisher

[Seal of the Special Court for Sierra Leone]

[126] This Chamber is seized only of the appeal certified to it by the Trial Chamber and makes no ruling as to any outstanding motions regarding the length of the brief or the acceptability of annexes to the brief, as these are matters for the Trial Chamber's determination.

SEPARATE OPINION OF JUSTICE GEORGE GELAGA KING

1. I agree that the appeal must be allowed and that the Decision of the Trial Chamber majority (the Impugned Decision) in which it "refuses to accept the late filing of the Defence Final Trial Brief"[1] reversed and the Accused's Final Trial Brief accepted. I also agree that the Trial Chamber be directed to fix a date to hear the Defence closing argument, and rebuttal arguments, if any, of the Prosecution and Defence.

2. I opine that the Appeals Chamber is under a duty to identify the main issues raised in an appeal, more especially so in an interlocutory appeal as this one and then deliver a reasoned judgement for the guidance of the Trial Chamber and all interested parties.

3. As I see it, taking into consideration the procedural history and background of the case, particularly the Trial Chamber's Order of 22nd October, 2010[2], the main issues which arise for determination in this appeal are:

(a) How should the Trial Chamber's Order that "the Parties shall file their respective final briefs by 16.30 on 14 January 2011"[3] be viewed in the light of the provision in the Rules of Procedure and Evidence (the Rules) that "a party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for presentation of that party's closing argument."[4]

(b) Where the Defence wishes to present its closing argument and the Trial Chamber has, consequently, set a date for that purpose - "Wednesday, 9 February 2011"[5] - should the Defence Final Trial Brief not be accepted by the Trial Chamber on the ground that the Defence "did not file its final trial brief until 3rd February 2011, 20 days out of time when all outstanding decisions had been received "[6], that is to say 20 days later than 14 January 2011 - the date ordered by the Trial Chamber - but earlier than five days prior to the date set for presentation of the Defence closing argument, as provided in the Rules?

(c) The Prosecution takes issue on the question of page limit of the Defence Final Trial Brief, submitting that "the Accused, through his Defence Counsel, filed a brief 228 pages over the 600-page limit, falsely claiming that it was now able to do so as all Outstanding Matters had been resolved."[7] Was the Defence in breach then of the Trial

[1] Page 33946 para2 of Impugned Decision
[2] Order setting date for closure of Defence case and dates for filing of final trial briefs and the presentation of closing arguments, 22nd October, 2010
[3] Ibid page30745, order 2
[4] Rule 86 (B) of the Rules
[5] Ibid page 30746, order 9
[6] Para 11 of Justice Lussick's Dissenting Opinion in Decision on Defence Motion Seeking Leave to Appeal the Decision on late filing of Defence final trial brief
[7] Para 14, Prosecution Response

Chamber's Order that "the length of the final trial brief filed by each party shall not exceed 600 pages"?[8]

4. In resolving those issues, I shall begin by referring to the reliefs sought by the Defence and the Grounds of Appeal in this Interlocutory Appeal. I refer also to the Prosecution submission that "the Majority did not err in fact or in law, or abused its discretion in refusing to accept the late filing of the Defence Final Brief. The Appeal, including all requests for relief, should be denied"[9]

The Defence, in its reliefs sought, requests "the Appeals Chamber to order the Trial Chamber:

i. To reverse its decision and to accept the Defence Final Trial Brief (including the annexes); and .

ii. To set a date for Defence closing arguments and any rebuttal arguments."[10]

5. With regard to the Grounds of Appeal, I refer to Grounds 3 and 5.

Ground 3: *Determination that the Defence was in Flagrant Breach of a Court Order* states:

The majority erred in law in holding that the Defence, in failing to file its final brief in terms of the Court's scheduling order, was in the circumstances of this case, in flagrant breach of the Court's order.

Ground 5: *Impact of the Request for Leave to Appeal and Stay of Proceedings*

Given the overall circumstances of this case, including the fact that on 14 January 2011 at the time it was scheduled to file its final brief, the Defence instead filed for leave to appeal which included a request for a stay of proceedings (necessarily including that of the final brief deadline), the Trial Chamber erred in refusing, in the interests of justice, to accept the Defence's final trial brief under Rule 86(B) of the Rules.

6. I shall deal with Grounds 3 and 5 together. Was the late filing of the Defence Final Trial Brief on 3 February 2011, instead of 14 January 2011, a flagrant breach of the Chamber's order? The Defence exculpates itself as follows:

> "On 10 January, the Defence requested a stay of proceedings pending the resolution of several outstanding decisions before the Trial and Appeal Chambers, which it respectfully submitted, significantly impacted on the Accused's ability to present a conclusive and well-reasoned Final Brief. The Trial Chamber however refused the Motion on 12 January 2011.
> Faced with the prospect of filing a half-backed Final Brief, which is the most significant stage of this three and a half year old trial, Mr Taylor was of the considered view that it was not in his best interests to do so. Thus he instructed his Defence team not to file a Final Brief on his behalf until the defence had

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[8] Ibid Order of 22 October 2010, order 4

[9] Para 53, Prosecution Response

[10] Para4, Notice of Appeal

exhausted all legal avenues to ensure that all the outstanding issues were resolved. As a result, the Defence did not file its Final Brief on 14 January 2011 as scheduled and instead sought leave to appeal the trial Chamber's refusal to stay proceedings.
Between 14 and 28 January 2011, the Trial and Appeal Chambers issued the bulk of the outstanding decisions. The final decision on the Defence's request for leave to appeal the Trial Chamber's refusal of its Motion for stay was only issued this morning, the 3rd February 2011. As all of the outstanding Decisions have now been rendered, the Defence is now in a position to file its Final Trial Brief.
The Defence is aware that its Final Trial Brief is being filed out of time in terms of the Trial Chamber's Scheduling Order. In that regard, the Defence humbly requests the Trial Chamber to condone its conduct, given the circumstances, and submits that it is in the interests of justice that the Trial Chamber considers this Final Trial Brief."[11]

7. The Prosecution was unimpressed by that Defence plea. It was forthright in its disapproval of the late filing of the Defence Final Brief and castigated it as a "deliberate disregard of court orders", calling it an "attempt to hijack these proceedings", but submitting, however, that "it is this Trial Chamber's discretionary decision whether or not to accept the Defence final trial brief notwithstanding that it is 20 days late and 228 pages in excess of the page limit"[12]

8. The Majority recalled the status conference on 20 January 2011 when the Trial Chamber (by a majority, Justice Sebutinde dissenting) held "that no submissions had been heard from the Defence which would cause the Trial Chamber to review or amend the original orders made on 22 October 2010 and the majority decision of 12 January 2011."[13]

9. Justice Sebutinde, who presided when the Scheduling Order was made on 22 October 2010, in her Dissenting Opinion of 7 February 2011, maintains that "the Accused has presented a plausible/justifiable reason for the delay"[14]. She posits:

> "It is a fact that as at the 14 January 2011, there were several Defence motions and appeals pending before the Trial and Appeal Chambers, none of which were foreseeable on the 22 October 2010 when the Scheduling Order was issued. The bulk of these decisions were issued by the Chambers between 14th and 18th January 2011. The last of the said decisions was issued on 3 February 2011, the same day the Defence filed its Final Trial Brief. In my view, none of the said motions or appeals can be described as "frivolous" or "a calculated attempt by the Defence to delay the trial". Quite to the contrary, some of these were resolved in favour of the Accused, resulting in additional Defence evidence being admitted into the record, which evidence no doubt, would impact Mr Taylor's defence as contained in his Final Trial Brief. The issue now is whether the Accused should be penalized for opting to wait for the outcome of the motions and appeals before filing a comprehensive Brief or alternatively whether he should be penalized for the time taken by the Chambers in deciding the outstanding issues. In my view, both would be contrary to the interests of justice and to the tenets of a fair trial"[15]

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[11] Para 2-5, Prosecutor v Taylor SCSL-03-01-T-1186, Confidential with Annexes A-C Defence Final Brief, 3 February 2011
[12] Para 15 of Prosecution Response
[13] Page 2, Decision on Late Filing of Defence Final Trial Brief
[14] Ibid Para 14 (v)
[15] Para 16, Dissenting Opinion of Sebutinde J., Decision on Late Filing of Defence Final Trial Brief

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10. It is clear to me that Justice Sebutinde has hit the nail squarely on the head, factually and legally, succinctly and accurately. I agree entirely with her even-handed and correct reasoning and endorse it. As she rightly holds in respect of the Accused, "to ultimately strike out, on a procedural basis, his Final Trial Brief that essentially contains his Defence to the charges in the indictment is to deny him his fundamental right to defend himself."[16]

11. That apart, it is also crystal clear to me that the aforesaid Order of the Trial Chamber of 22 October 2010 that "the Parties shall file their respective final trial briefs by 16.30 On 14 January 2010" cannot supersede the provisions of Rule 86(B) which states:

> "A party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for the presentation of that party's closing argument."

As I pointed out supra, the Trial Chamber had set Wednesday 9 February 2011 for the Defence to present its closing argument. The Defence filed its Final Trial Brief on 3 February 2011 - six days prior to 9 February 2011 - the date set for the presentation of the Defence closing argument. It is beyond argument, therefore, that under the provisions of Rule 86(B) the Defence filed its Final Trial Brief within the time stipulated in Rule 86(B).

12. It is my considered opinion that the Trial Chamber, when setting 14 January as the date for filing Final Trial Briefs and 9 February 2011 as the date for the Defence closing argument, should have taken cognizance of the provisions of Rule 86(B) and added to its Order for filing Defence Final Trial Brief the words: 'in any event not later than five days prior to 9 February 2011', or words to that effect.

13. I am reinforced in this view by Rule 26bis which provides:

> "The Trial Chamber and the Appeals Chamber **shall ensure** that a trial is fair and expeditious and that proceedings before the Special Court **are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused** and due regard for the protection of victims and witnesses." (Emphasis mine)

"The Agreement" is, of course, 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone'; the Statute is 'Statute of the Special Court for Sierra Leone'.

14. The Rules, undoubtedly, derive their efficacy from Article 14 of the Statute of the Special Court for Sierra Leone which provides:

> "1. The Rules of Procedure and Evidence of the International Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of legal proceedings before the Special Court."

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[16] Ibid, Para 12

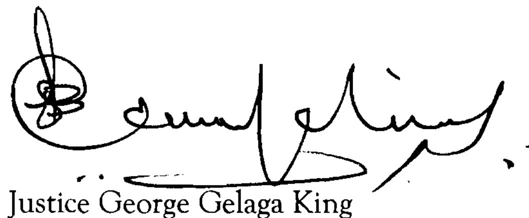
15. It necessarily follows from all I have said that the Majority were wrong in law to refuse to accept the Defence Final Trial Brief which was filed on 3 February, 2011.

16. The Prosecution complains, strenuously, that the Defence Final Trial Brief is 228 pages over the 600-page limit.[17] The Trial Chamber in its Scheduling Order of 22 October 2010 had ordered that "the length of the final trial briefs shall not exceed 600 pages"[18]. A perusal of the Defence Final Trial Brief reveals that it is made up of 547 pages of arguments and submissions plus 295 pages of appendices, giving a total of 842 pages. The total number of pages is within the provisions of the Practice Direction on Filing Documents before the Special Court for Sierra Leone (Practice Direction) which states: "Any appendices or authorities do not count towards the page limit"[19] There is, therefore, no merit in the Prosecution's complaint.

17. As I have finally come to the conclusion that Grounds 3 and 5 cover the main issues, there is now no need for me to consider the other Grounds of Appeal.

For all the reasons I have given, I allow the appeal and reverse the Majority Decision of the Trial Chamber in which it refuses to accept the Defence Final Trial Brief. I order that the Defence Final Brief as filed be accepted. I further order that a date be fixed by the Trial Chamber to hear the Defence closing argument, also rebuttal arguments, if any, of the Prosecution and Defence.

Done this 3rd day of March 2011 in Freetown, Sierra Leone



Justice George Gelaga King

[Seal of the Special Court for Sierra Leone]

[17] See Para 7, supra
[18] Order 4
[19] Article 6 F of Practice Direction