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SCSL-03-01-T
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SCSL

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 7 February 2011

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON LATE FILING OF DEFENCE FINAL TRIAL BRIEF

<u>Office of the Prosecutor</u>:
Brenda J. Hollis

<u>Counsel for the Accused</u>:
Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of a "Notice of Deficient Filing Form" dated 16:59hrs 3 February 2011 referred to the Trial Chamber on 4 February 2011 by Court Management Section under Article 12 of the "Practice Direction on dealing with Documents in The Hague" ("Practice Direction") containing a Defence request for the Trial Chamber to condone the late filing of its Final Trial Brief on the ground that the late filing "was not a deliberate disdain of the court's order. Rather it was on the Accused's instructions that in his considered view, it was not in his best interest to file the most important pleading in his case when there were outstanding decisions before the Trial Chamber and Appeals Chamber, which directly impacted on his capacity to do so. All the outstanding decisions have since been rendered; the last of which was handed down this morning";

RECALLING that the Trial Chamber, in its "Order Setting a Date for the Closure of the Defence Case and Dates for Filing of Final Trial Briefs and the Presentation of Closing Arguments",[1] dated 22 October 2010, ordered the parties to file their respective final trial briefs by 16:30 on 14 January 2011;

NOTING that the provisions of Article 12 of the Practice Direction are therefore inapplicable, since the Trial Chamber ordered a specific time limit for the filing of final trial briefs;[2]

RECALLING the "Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues",[3] filed on 10 January 2011, wherein the Defence requested a stay of proceedings or alternatively "a one month extension for filing of the parties' final briefs";

RECALLING the Trial Chamber's "Decision on Defence Request for a Status Conference Pursuant to Rule 65bis and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues",[4] dated 12 January 2011, wherein the Trial Chamber (by majority, Justice Sebutinde being absent) refused a stay of proceedings or an extension of time for the filing of the final trial briefs;

RECALLING the status conference on 20 January 2011 wherein 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;

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[1] SCSL-03-1-T-1105

[2] See *Prosecutor v. Brima et al.*, Decision of Urgent Defence Request Under Rule 54 with Respect to Filing Motion of Acquittal", dated 19 January 2006, page 2.

[3] SCSL-2003-01-T-1144

[4] SCSL-03-1-T-1154, page 4.

NOTING that the explanation given by the "Defence in the Notice of Deficient Filing Form" also does not provide any new grounds for rescinding the original filing order;

REFUSES to accept the late filing of the Defence Final Trial Brief;

NOTING INCIDENTALLY that Prosecution "Motion to Substitute Prosecution Final Trial Brief" was filed on 4 February 2011 after the majority of the Trial Chamber had reached its decision on the present issue and has not been considered.

Justice Sebutinde appends a separate dissenting opinion.

Done at The Hague, The Netherlands, this 7th day of February 2011.

Doherty J

Justice Teresa Doherty
Presiding Judge

Justice Richard Lussick

[Seal of the Special Court for Sierra Leone]

DISSENTING OPINION OF THE HON. JUSTICE JULIA SEBUTINDE

1) Introduction

1. The interests of justice and respect for the fair-trial rights of the Accused as guaranteed in Article 17 of the Statute of the Special Court, compel me to respectfully dissent from the view and holding of the Majority as found in the Trial Chamber's Decision on Late Filing of Defence Final Trial Brief to which this Opinion is appended. My reasons for this dissenting opinion are articulated below.

2) Background

2. The Trial Chamber at a Status Conference held on 22 October 2010 issued certain orders in which, *inter alia*, it set 14 January 2011 as the date by which the parties were to file their Final Trial Briefs. These Orders were subsequently reduced into writing and published.[1]

3. The Defence of Charles Taylor filed its Final Trial Brief on Thursday 3 February 2011, some 20 days after the date set down by the Trial Chamber for the filing of the parties' final trial Briefs. The issue is whether the failure of the Defence to file their Final Trial Brief within the time stipulated by the Trial Chamber can be interpreted as a flagrant breach for which the Accused should be penalised by being denied the opportunity to file his defence altogether. The Defence however, explains the reasons for the late filing as follows:

> "On 10 January, the Defence requested a stay of proceedings pending the resolution of several outstanding decisions before the Trial and Appeals 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-baked 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 exhausted all legal avenues to ensure that all the outstanding issues were resolved. As a result, the Defence did not file its Final Trial Brief on 14 January 2010, as scheduled and instead sought leave to appeal the Trial Chamber's refusal to stay the proceedings.

[1] *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

> Between 14 and 28 January 2011, the trial and Appeals Chambers issued the bulk of the outstanding decisions. The final outstanding 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 of 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."[2]

4. On 4 February 2011, in response to the Defence Final Trial Brief, the Prosecution filed its "Public with Confidential Annex Motion to Substitute Prosecution Final Trial Brief" [3] in which the Prosecution responds to the size as well as timing of the Defence Brief. I differ from the Majority in that I have taken into account the submissions of the Prosecution in this latest filing. I consider that since the Prosecution submissions are before the Trial Chamber prior to its decision being published, they should be taken into account as they do concern the timing as well as size of the Defence Brief. I do, however, observe that due to the size of the filing the Trial Chamber was not yet served with the "refined and revised version" of the Prosecution's Final Trial Brief. This leaves me with the question as to whether the amendments that the Prosecution seeks to introduce are merely typographical or whether they are in fact substantive. In view of the fact that the Prosecution does not describe this second attempt at filing an amended version as a mere "corrigendum" it is safe to assume that the "revised and refined version" contains substantive rather than mere typographical changes. In its Motion, the Prosecution requests the Trial Chamber to do one of the following in relation to the Defence Trial Brief:

> (i) to exercise its discretion to accept the late Defence Brief on condition that the Trial Chamber permits the Prosecution to file a "revised and refined version" of its own Final Brief; or
> (ii) to disregard that part of the defence Final Brief in excess of the page limit specified in the Scheduling Order; or
> (iii) To reject the defence Final Brief as filed and order that the Defence has until Monday 7 February 2011 to file a brief of 600 pages or less.

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[2] *Prosecutor v. Taylor* SCSL-03-01-T-1186, Confidential with Annexes A-C Defence Final Brief, 3 February 2011, paras 2-5
[3] SCSL-03-01-T-1189

The Prosecution Motion falls short of rejecting the Defence Final Brief altogether.

5. On 7 February 2011, the Defence filed its "Response to Prosecution Motion to Substitute Prosecution Final Trial Brief and Notice of Intention to Seek leave to File a Corrected Copy of the Defence Final Trial Brief" [4] in which it does not oppose the Prosecution's request to file a "revised and refined version" of the Prosecution Final Brief and explains that the defence Final Trial Brief is in effect within the page limit prescribed by the Trial Chamber, excluding the Annexes. For the same reasons, I have taken into account the submissions contained in this latest Defence Response since they are before the Trial Chamber prior to its decision being published and since they are relevant to the issues now before us.

3) Arguments relating to the size of the Defence Final Trial Brief:

6. The Trial Chamber in its Scheduling Order of 22 October 2010 directed that "the length of the Final Trial Briefs as agreed by the parties will not exceed 600 pages". The Order did not refer to Annextures or Appendices to the Briefs. However, Article 6 (F) of the Practice Direction on Filings Documents Before the Special Court provides that "*Any appendices or authorities do not count towards the page limit*". The Defence Final Brief consists of 547 pages of substantive arguments and295 pages of appendices, making a total of 842 pages. In my view, the Defence Final Trial Brief is within the page limit prescribed by the Trial Chamber and Practice Direction. Accordingly I find no merit in the Prosecution objection to the size of the Defence Brief.

4) Reasons why the Defence should in this case, be allowed to file its Final Trial Brief:

7. Whilst a blatant breach of a Court Order should never be condoned, where as in this case, a party gives a plausible explanation for the delayed filing and where the interests of justice so dictate, the Trial Chamber should allow the late filing. I have taken the following points into consideration.

[4] SCSL-03-01-T-1190

(i) **A Court has the discretion and inherent jurisdiction to review its earlier order where the interests of justice so require:**

8. Whilst a blatant and unjustifiable breach of a Court Order should never be condoned, where as in this case, a party gives a plausible or justifiable explanation for the delayed filing and where the interests of justice so dictate, the Trial Chamber should allow the late filing. For example, in a contempt proceeding in the case of the *Prosecutor v. Slobodan Milosevic*, the Appeals Chamber in a Scheduling Order ordered the Appellant to file his Brief "*no later than 17 June 2005*". However, the Appellant/ Accused submitted his Brief by fax to the Registry on Saturday 18 June 2005 and it being a weekend, the Registry only received it on Monday 20 June 2005. The Appellant/Accused did not submit a motion requesting that his Brief be considered as validly filed nor did he show good cause for the delay. The Appeals Chamber held:

> "The fact that Counsel for the Appellant has not sought to justify his late filing and has requested the Appeals Chamber to receive it as validly filed after the fact is sufficient grounds for the Appeals chamber to strike the Appellant's Brief as not validly filed, as is requested by the Prosecution. Indeed when clear time limits are transgressed without justifiable explanation, the Appeals Chamber is hesitant to do other than reject the filing. *In this case, however, the Appeals Chamber has determined that the interests of justice warrant it receiving the Brief as validly filed despite Counsel's breach of its Order....This particular contempt appeal also touches upon the fundamental due process rights of an Accused, Mr. Milosevic, charged with particularly serious offences* in a way that other contempt proceedings heard at this Tribunal have not....In these circumstances, if the Appeals Chamber refuses due to a procedural irregularity to accept the Appellant's Brief as validly filed, then *the Appellant is placed in the unfortunate position of being charged with contempt but denied the opportunity to respond fully to that criminal charge. Upon this basis, the Appeals Chamber has determined that the possible implications of this contempt proceeding for the rights of the Accused* Mr. Milosevic warrant some leniency to the Appellant despite his Counsel's failure to abide by the Scheduling Order of the Appeals Chamber" [5] [emphasis added]

9. Indeed this very Trial Chamber has in the past, permitted a party to file a late filing outside the time frame previously ordered by the Trial Chamber where it was "*in the interests of justice to do so*". In the *Prosecutor v. Brima et al*, the 'Joint Legal Part of the Defence Motion for Judgement of Acquittal under Rule 98' and the 'Kanu - Factual Part of the Defence Motion for Judgement of Acquittal under Rule 98' were both filed on 13 December 2005 outside the timeframe ordered by the Trial Chamber. However,

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[5] *Prosecutor v. Slobodan Milosević*, IT-02-54-A-R77.4, Decision on Prosecution Application to Strike out Appellant's Brief in the Appeal of the decision on Contempt of the Tribunal Kosta Bulatović, 23 June 2005, paras 5-8.

the Trial Chamber accepted the late filing because it was "in the interests of justice to do so", notwithstanding the breach of Court order. [6]

10. The interests of justice in the present case are more compelling than in a contempt proceeding or a Judgement of Acquittal proceeding, since in this case the Defence Final Trial Brief contains the very essence of the Accused's defence. To strike it out on a procedural irregularity has very serious implications for his fair trial rights. Moreover, in the present case, Defence Counsel has proffered an explanation justifying the delay and has "humbly requested" the Trial Chamber to accept the late filing of its Brief.

(ii) Fair trial rights of the Accused:

11. Article 17(4) of the Statute guarantees to the Accused certain minimum rights including the right "to have adequate time and facilities for the preparation of his defence[7] and to defend himself in person or through legal assistance of his choosing.[8]" These rights are inalienable. Furthermore, Rule 26*bis* of the Rules provides that:

> "The Trial 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 added]

12. In the instant case, the insistence by Mr. Taylor on waiting for all the pending motions to be decided by the Trial and Appeals Chambers before filing his Final Trial Brief, in breach of the Trial Chamber's Scheduling Order, including his several motions for stay of proceedings and extension of time, are in effect, a request for "adequate time to prepare" his defence. 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.

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[6] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-456, Decision on Urgent Defence Request under Rule 54 with Respect to Filing of Motion for Acquittal, 19 January 2006.
[7] Article 17.4.b
[8] Article 17. 4.d

(iii) **The seriousness of the charges in the Indictment warrant the filing of a Defence Final Trial Brief:**

13. Mr. Taylor stands charged with the most serious crimes including war crimes and crimes against humanity. The Defence Final Trial Brief contains his defence and represents the final stages of the proceedings before the Trial Chamber retires to deliberate upon the evidence and consider its verdict. The interests of justice dictate that he should be permitted to present his defence, notwithstanding the procedural irregularity.

(iv) **Rule 86 makes it mandatory for the parties to file their Final Trial Briefs before their respective closing arguments:**

14. While it is optional under Rule 86 (A) for the Defence to present a closing argument, sub-Rule (B) of the Rule provides that "A party *shall* file a final trial brief with the Trial Chamber not later than five days prior to the date set for the presentation of that party's closing argument." [emphasis added] In the present case, while the Defence Final Trial Brief was filed out of the time stipulated in the Trial Chamber's Scheduling order, it was filed within the period prescribed by Rule 86 (B), namely "not later than five days prior to the date set for the presentation of that party's closing argument." In my view, it is not too late to accept the Defence Final Trial Brief.

(v) **The Accused has presented a plausible / justifiable reason for the delay:**

15. The Defence explains that the timely filing of Mr. Taylor's Final Trial Brief was hampered by the fact that as of the 14 January 2011 (the date set by the Trial Chamber for the filing of Briefs) there were several outstanding Defence motions and appeals pending before the Trial and Appeals Chambers, respectively, the outcome of which was likely to affect his defence. The defence submits that:

> "Faced with the prospect of filing a half-baked 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 exhausted all legal avenues to ensure that all the outstanding issues were resolved. As a result, the Defence did not file its Final Trial Brief on 14 January 2010, as scheduled and instead sought leave to appeal the Trial Chamber's refusal to stay the proceedings.
>
> Between 14 and 28 January 2011, the trial and Appeals Chambers issued the bulk of the outstanding decisions. The final outstanding 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 of 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."

16. It is a fact that as at the 14 January 2011, there were several Defence motions and appeals pending before the Trial and Appeals 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 - 28th January 2011.[9] 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 penalised for opting to wait for the outcome of his motions and appeals before filing a comprehensive Brief or alternatively whether he should be penalised 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.

(vi) The proceedings are at a crucial stage:

17. After gathering evidence for over three and a half years, the trial is now in its final stages with the Trial Chamber set to receive the parties' Final Trial Briefs and hear their closing arguments before it retires to deliberate and consider its verdict. It is not unusual at this crucial stage of the trial, for parties to want to ensure that their Final Briefs are as comprehensive and accurate as possible as they may not have another

[9] *Prosecutor v. Taylor*, SCSL-03-01-T-1166, Decision on Public 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, 21 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1167, Decision on Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 24 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1168, Decision on Defence Appeal Regarding 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, 25 January 2011 ("Appeals Chamber Decision on Admission of Documents"); *Prosecutor v. Taylor*, SCSL-03-01-T-1171, Decision on the 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, 27 January 2011 ("Trial Chamber Decision on Admission of Documents"); *Prosecutor v. Taylor*, SCSL-03-01-T-174, Decision on 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, 28 January 2011.

chance to articulate their arguments. Thus while the Defence may prefer to file a comprehensive Brief after resolving all outstanding issues, the Prosecution which filed its Final Trial Brief on time, has since sought to amend its Final Trial Brief twice, with the latest request being one for "leave to substitute the entire Brief with 'a more refined and revised version,' a sign that they too were perhaps not altogether ready or happy with what they filed earlier. Be that as it may, the hearing has not yet been declared "closed" in accordance with Rule 87 (A). It is therefore not too late for the Defence to file its Final Trial Brief or the Prosecution to file a revised and refined version" of their own Brief, if that is what the interests of justice so require. Moreover, as the Prosecution rightly observes, well-written final arguments only assist the Trial Chamber in its deliberations and Judgement writing.

5) **Conclusion:**

18. For all the above reasons I would in the interests of justice, permit the Accused to file his Final Trial Brief belatedly. I would also, in the interests of justice grant the latest Prosecution Motion to substitute its Final Trial Brief with its "revised and refined version", which Motion is not opposed by the Defence.

Done at The Hague, The Netherlands, this 7th day of February 2011.

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]