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SCSL-03-01-T
(34678-34711)

34678

THE SPECIAL COURT FOR SIERRA LEONE

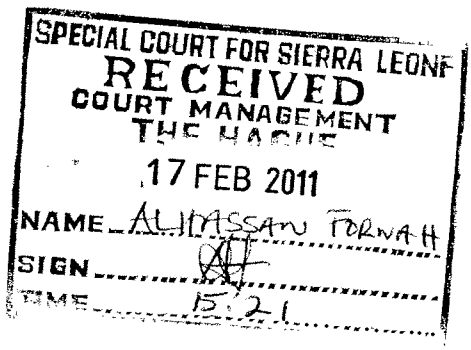
Appeals Chamber

Before: Justice Jon M. Kamanda, Presiding
Justice Emmanuel Ayoola
Justice Renate Winter
Justice George Gelaga King
Justice Shireen Avis Fisher

Registrar: Ms. Binta Mansaray

Date: 17 February 2011

Case No.: SCSL-03-01-T



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

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

Office of the Prosecutor:
Ms. Brenda J. Hollis

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick

NOTICE OF APEAL

I. INTRODUCTION & RELIEF SOUGHT

1. The Defence hereby files its Notice of Appeal, followed by its Submissions.[1]

2. The Trial Chamber, by majority, granted certification of this appeal in its 11 February 2011 *Decision on Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief*.[2]

3. The Decision that is the subject of this appeal is the Trial Chamber's 7 February 2011 *Decision on Late Filing of Defence Final Trial Brief*.[3] The majority of the Trial Chamber, Justice Julia Sebutinde dissenting, refused to accept the late filing of the Defence Final Trial Brief. This refusal resulted in the Defence's inability to participate meaningfully in closing arguments.[4]

4. The Defence respectfully 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.

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[1] This is done on an expedited basis in accordance with *Prosecutor v. Taylor*, SCSL-03-01-AR73-1203, Order for Expedited Filing, 14 February 2011 and generally in compliance with the Practice Direction for Certain Appeals Before the Special Court, dated 30 September 2004, paras. 10 and 11.

[2] *Prosecutor v. Taylor*, SCSL-03-01-T-1202, Decision on Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief, 11 February 2011 ("**Certification**"). Appended to the Certification was a Separate Opinion of Justice Doherty ("**Doherty Separate Opinion**"), a Separate Concurring Opinion of Judge Julia Sebutinde ("**Sebutinde Separate Opinion**"), and a Dissenting Opinion of Justice R. B. Lussick ("**Lussick Dissenting Opinion**").

[3] *Prosecutor v. Taylor*, SCSL-03-01-T-1191, Decision on Late Filing of Defence Final Trial Brief, 7 February 2011 ("**Decision**"), including the Dissenting Opinion of the Honorable Justice Julia Sebutinde ("**Sebutinde Dissenting Opinion**").

[4] *Prosecutor v. Taylor*, SCSL-03-01-T, Prosecution Closing Argument, 8 February 2011, p. 49137-8 (wherein Lead Counsel explained to the Court why the Defence could not participate in closing arguments in the absence of the Defence brief).

II. SUMMARY OF THE PROCEEDINGS REGARDING THE APPEALED DECISION

5. A summary of the relevant proceedings leading up to the appealed Decision has been chronicled to a great extent in a number of filings and decisions,[5] but for ease of reference and for the sake of completeness, the Defence recounts the procedural history as follows:

6. On 22 October 2010, the Trial Chamber convened a Status Conference to discuss the schedule relating to the filing of the parties' final trial briefs and closing arguments.[6] The scheduling order for that Status Conference ordered that several agenda items would be addressed, including the date for formal closure of the Defence case and issues in relation to Rule 86 of the Rules of Procedure and Evidence ("Rules"). The parties subsequently made representations to the Trial Chamber with respect to, *inter alia*, an extension of the length of their respective final briefs and an appropriate date for the filing thereof. The Defence proposed the date of 14 January 2011 for filing; at the time the proposal was made, the Defence considered this to be an appropriate and realistic date, even anticipating the Defence would work through much of the judicial recess. Additionally, at the Status Conference, the possibility of a written response was debated and ultimately accepted by the Trial Chamber, and dates of the parties' closing arguments were set for February 2011.[7] The Presiding Judge opined that the Trial Chamber expected "nothing less than comprehensive and well reasoned arguments, in the trial briefs and closing arguments, because these are the kinds of arguments that will assist us in our deliberations and judgment writing at the end".[8] The Trial Chamber's oral order was thereafter formally issued in a written Scheduling Order.[9]

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[5] See, ex, Sebutinde Separate Opinion, para. 4 and Lussick Dissenting Opinion, paras. 3-11.
[6] *Prosecutor v. Taylor,* SCSL-03-01-T-1103, Scheduling Order for a Status Conference, 19 October 2010.
[7] *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 22 October 2010, p. 48359-62.
[8] *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 22 October 2010, p. 48360.
[9] *Prosecutor v. Taylor*, SCSL-03-1-T-1105, Order Setting a Date for the Closure of the Defence Case and Dates for Filing of Trial Briefs and the Presentation of Closing Arguments, 22 October 2010.

7. After the Scheduling Order was issued but before closure of the Defence case on 12 November 2010, the Defence filed two motions requesting the admission of evidence pursuant to Rule 92*bis*.[10] Both motions were determined just before the close of the Defence case: one was granted[11] and one was denied ("JPK Admission Motion").[12] The outstanding Defence Contempt Motion[13] was also denied the same day.[14] The Defence consequently sought[15] (and were granted)[16] leave to appeal the dismissal of the Contempt Motion and the JPK Admission Motion. These appeals[17] and related filings, lodged before the Judicial Recess,[18] had not been anticipated when the Defence suggested 14 January 2011 as the date for the filing of final briefs, but the

[10] *Prosecutor v. Taylor,* SCSL-03-01-T-1108, Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the alleged Death of Johnny Paul Koroma, 27 October 2010 and *Prosecutor v. Taylor,* SCSL-03-01-T-1117, Public with Confidential Annexes A and B Defence Motion for Admission of Documents pursuant to Rule 92*bis* – Prince Taylor and Stephen Moriba, 11 November 2010.

[11] *Prosecutor v. Taylor,* SCSL-03-01-T, Closure of Defence Case Transcript, 12 November 2010, p. 49113.

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

[13] *Prosecutor v. Taylor,* SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 27 September 2010.

[14] *Prosecutor v. Taylor,* SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 11 November 2010.

[15] *Prosecutor v. Taylor,* SCSL-03-01-T-1122, Public 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 Death of Johnny Paul Koroma, 15 November 2010; *Prosecutor v. Taylor,* SCSL-03-01-T-1121, Public 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; see also *Prosecutor v. Taylor,* SCSL-03-01-T-1123, Public Defence Motion for Reconsideration of 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] *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 Death of Johnny Paul Koroma, 3 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.

[17] *Prosecutor v. Taylor,* SCSL-03-01-T-1133, Notice of Appeal and Submissions 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, 10 December 2010; *Prosecutor v. Taylor*, SCSL-03-01-T-1134, 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.

[18] *Prosecutor v. Taylor,* SCSL-03-01-T-1120, Order Scheduling Judicial Recess, 15 November 2010 (determining that judicial recess should run from 20 December 2010 to 7 January 2011).

Defence nonetheless made best efforts to deal with the appeals process without disrupting the Scheduling Order.

8. Immediately prior to and during the Judicial Recess, information came to the attention of the Defence which it had a professional duty to address. The Defence learned that several Prosecution witnesses had been relocated post-testimony, and thus sought leave to recall and further cross-examine them.[19] The Defence further learned, through the Wikileaks United States Embassy Cables,[20] that sources in the Prosecution, Trial Chamber and Registry were communicating with the United States Government outside the official channels of communication; thus the Defence sought leave to admit the Cables as exhibits[21] and requested an investigation of the sources and their relationship with the United States Government.[22] These filings implicated the integrity of the evidence before the Trial Chamber as well as the integrity and independence of the proceedings and the Trial Chamber itself.

9. Conscious of the approaching deadline for filing its Final Brief, the Defence attempted to file the Wikileaks-related motions during the Judicial Recess, but were refused leave to do so by the President of the Court.[23] As these were fundamental issues that arose *ex improviso*, the Defence was obliged to act *post haste*, which it did. In so doing, as Justice Sebutinde observed, the Defence's actions were neither frivolous nor dilatory.[24] The Defence was merely doing what it is mandated to do: exhausting all legal options available to it to guarantee the Accused's right to a fair trial, and a formidable defence. Indeed, some of these processes were successful

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[19] *Prosecutor v. Taylor,* SCSL-03-01-T-1142, 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, 17 December 2010.
[20] Exhibits D-481 and D-482.
[21] *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, 10 January 2011.
[22] *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, 10 January 2011 ("**USG Cables Motion**").
[23] The correspondence between the Defence, the Registry and President Kamanda are contained in Annexes D and E of the USG Cables Motion.
[24] Certification, Sebutinde Separate Opinion, para. 5 ("In my view, none of the above defence applications can be described as 'frivolous' or 'a ploy by the defence to delay the trial'").

before the Trial Chamber and on Appeal.[25] In light of this, and with all due respect to the learned Justice Lussick, the Defence finds his characterization of its filings as "inundating" the Trial Chamber and "an excuse not to file its final trial brief on the date ordered", to be unduly harsh and prejudiced.[26] This attitude, it is respectfully submitted, is reflected in the learned Justice's entire determination of the matter on appeal, as is argued further herein.

10. On 10 January 2011, the first working day after the Judicial Recess, the Defence was faced with two outstanding appeals and three outstanding matters before the Trial Chamber. Aside from the time which had necessarily been expended in attending to those matters, the Defence was of the professional opinion that given the matters' significance to the evidentiary record and the integrity of the proceedings, it was not going to be in a position to file a well-reasoned and comprehensive final trial brief on behalf of Mr. Taylor by 14 January 2011. Thus, the Defence urgently filed a motion requesting a stay of proceedings pending resolution of all outstanding matters, and alternatively a one month extension of time.[27] Simultaneously, the Defence urgently requested the Trial Chamber to convene a Status Conference[28] in order to discuss a way forward.

11. On 12 January 2011, two days after the Defence's request for the stay, but before the Prosecution's response thereto, the Trial Chamber (in the absence of Justice Sebutinde), rather than convene a Status Conference to hear from the parties further, dismissed the Defence's request for stay and denied its alternative request for an

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[25] Certification, Sebutinde Separate Opinion, para. 4 (listing the various filings and noting whether they were granted or denied).
[26] Certification, Lussick Dissenting Opinion, para. 5. See also, comments by Justice Lussick at the Status Conference on 20 January 2011, at p. 49124, to the effect that the Defence was only raising these matters in order to delay the case, as they had all been filed at a time when "the Court was expecting you to be preparing your final brief".
[27] *Prosecutor v. Taylor,* SCSL-03-01-T-1144, Urgent and Public Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 10 January 2011.
[28] *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.

extension of time.[29] In its decision, the Trial Chamber suggested that the issues that were implicated in the Defence's outstanding motions and appeals were of an ancillary nature that could always be dealt with through supplemental filings after the filing of the final trial brief.

12. While some of the evidentiary issues could have been adequately dealt with through supplemental filings, this generalised and dismissive approach by the Trial Chamber was not consonant with the Defence's concerns regarding the integrity of the entire proceedings. Furthermore, and as Justice Sebutinde noted, given that the outstanding decisions affected the content of the Accused's final brief, it was a reasonable request to allow the judges to deliver their decisions before the parties were expected to file their briefs. The learned Justice stated, "...the accused ought, at the very minimum, to be afforded an opportunity to prepare his final defence with all the pieces before him...it is not fair to ask him to prepare piecemeal defences".[30]

13. Faced with the prospect of having a half-baked final brief filed on his behalf, and in the face of unresolved issues which undermined his faith in the integrity of the proceedings and the Court's ability to protect his fair trial rights, Mr. Taylor was of the view that it was not in his best interests for Defence counsel to file its brief at that time. He therefore instructed Defence counsel not to file, but to pursue all other legal avenues to ensure that the outstanding issues were adequately resolved first.

14. Caught between the Trial Chamber's Scheduling Order and its client's instructions, the Defence did not file its Final Trial Brief on 14 January 2011. Instead, and consistent with its obligations to its client and to the Court, the Defence sought leave to appeal the Trial Chamber's refusal to grant a stay of proceedings.[31] Therein, the

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[29] *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 Stay of Proceedings Pending Resolution of Outstanding Issues, 12 January 2011.

[30] *Prosecutor v. Taylor,* SCSL-03-01-T, Status Conference Transcript, 20 January 2011, p. 49134-5.

[31] *Prosecutor v. Taylor*, SCSL-03-01-T-1155, Public with Annex A Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference pursuant to Rule 65bis and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011 ("**Motion for Leave to Appeal the Refusal of Stay**").

Defence asked for ancillary relief in that the filing of the final brief be stayed pending the determination of the request for certification. Furthermore, the Defence refused service of the Prosecution final brief so as to avoid the appearance that it was taking undue advantage by looking at the Prosecution final brief before filing its own.[32]

15. On 18 January 2011, absent any indication from the Trial Chamber that the matter (and especially the request for a stay of proceedings), was receiving the Trial Chamber's urgent and deserved attention, the Defence again requested a Status Conference. Specifically, the Defence wanted to explain why it did not file its final brief and why it had refused service of the Prosecution's final brief.[33] This time around, the Trial Chamber ordered a Status Conference to be held on 20 January 2011.[34]

16. At the Status Conference, Lead Counsel explained that the nature of the outstanding decisions pending before both the Trial and Appeals Chambers were of such a nature that it could not properly and adequately litigate the Accused's case in its final trial brief until those issues were resolved. Lead Counsel indicated that those were the legitimate instructions from the client by which he was professionally bound. However, the majority of the Trial Chamber (Justice Sebutinde dissenting) was not moved by the Defence's explanation. The majority held that "they have not heard submissions that causes the Trial Chamber to review or amend the original orders rendered on 22 October 2010 and the majority decision of 12 January 2011".[35]

17. Between 21 and 28 January 2011, the Trial and Appeals Chambers rendered all the substantive decisions which were outstanding.[36] The Defence sought[37] (but were

[32] *Prosecutor v. Taylor,* SCSL-03-01-T, Status Conference Transcript, 20 January 2011, p. 49123.
[33] *Prosecutor v Taylor*, SCSL-03-01-T-1160, Urgent and Public with Annex A and B, Defence Request for A Status Conference Pursuant to Rule 65*bis*, 18 January 2011.
[34] *Prosecutor v. Taylor,* SCSL-03-01-T-1162, Scheduling Order for Status Conference on 20 January 2011, 18 January 2011.
[35] *Prosecutor v. Taylor,* SCSL-03-01-T, Status Conference Transcript, 20 January 2011, p. 49134.
[36] *Prosecutor v. Taylor,* SCSL-03-01-T-1166, Decision on Public 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

refused)[38] leave to appeal two of them. A decision on the final outstanding motion which had prevented the Defence from filing its final brief was issued on the morning of 3 February 2011, refusing the Defence's Motion for Leave to Appeal the Refusal of Stay.[39] Therein the Trial Chamber acknowledged that the motion had largely been overtaken by events, in that "the outstanding motions which the Defence claimed were of fundamental importance and needed to be decided before the preparation of its final trial brief have now been decided".[40]

18. That very afternoon, on 3 February 2011, the Defence filed its Final Trial Brief.[41] As the filing date of the final brief per the court's Scheduling Order had already passed, the Defence sought leave to file the final brief under Rule 86(B) of the Rules.[42] In the

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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 Notice of Appeal and Submissions 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 ("**JPK Appeal Decision**"); *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; *Prosecutor v. Taylor*, SCSL-03-01-T-1174, 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.

[37] *Prosecutor v. Taylor*, SCSL-1173, Public Defence Motion Seeking Leave to Appeal the Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 27 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1178, Public Defence Motion Seeking Leave to Appeal the 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, 31 January 2011.

[38] *Prosecutor v. Taylor*, SCSL-03-01-T-1188, Decision on Defence Motion Seeking Leave to Appeal the Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 4 February 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1193, Decision on Defence Motion Seeking Leave to Appeal the 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, 7 February 2011.

[39] *Prosecutor v. Taylor*, SCSL-03-01-T-1162, Decision on Public with Annex A Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant to Rule 65*bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 2 February 2011.

[40] *Id.*, p. 5.

[41] *Prosecutor v. Taylor*, SCSL-03-01-T-1186, Confidential with Annexes A-C Defence Final Brief, 3 February 2011, as corrected in Annex B of *Prosecutor v. Taylor*, SCSL-03-01-T-1194, Public with Annex A and Confidential Annex B Corrigendum to Defence Final Brief as filed on 3 February 2011, 8 February 2011 ("**Final Trial Brief**")

[42] 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.

application, which constituted the first part of the Final Trial Brief,[43] the Defence gave an explanation for the late filing of the Brief, acknowledging that it had missed the deadline imposed by the Scheduling Order, but submitting that its conduct was not meant to be a flagrant disregard of the Trial Chamber's order; the Defence went on to implore the Court, in the interests of justice, to accept the Brief.

19. The Defence was prepared to present oral arguments as scheduled on 9 February 2011, had the Trial Chamber accepted the Defence's Final Trial Brief. As such, there ultimately would have been no delay to the proceedings and the hearings could have formally closed pursuant to Rule 87(A)[44] on 11 February 2011.[45]

20. It is notable that the Prosecution did not request the Trial Chamber to refuse the Defence's Final Trial Brief. Rather, the Prosecution primarily approached the issue as one of fairness to the parties. On 4 February 2011, the Prosecution filed a motion to request permission to file a revised and refined version of its final brief, in the event that the Defence's Final Trial Brief was accepted.[46] The Defence did not oppose this request, finding it a reasonable way forward under the circumstances.[47]

21. In the afternoon of 7 February 2011, the Trial Chamber, by majority, Justice Julia Sebutinde dissenting, issued the impugned decision. The Majority essentially refused to accept the Defence's Final Trial Brief on the basis that the Defence was in willful

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[43] Final Trial Brief, paras. 1-5.
[44] Rule 87(A) states: After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private....
[45] In this regard, the Defence notes Justice Sebutinde's prudent comments that "In my view, the Trial Chamber in a bid to 'expedite the trial' often subordinated the 'interests of justice' and 'fair-trial rights of the accused' to judicial economy, with the result that now the proceedings ultimately have to be delayed whilst the Appeals Chamber deals with the ancillary appeal. In the aggregate, this is unnecessary delay that could have been avoided, had the Trial Chamber properly balanced judicial economy with the fair-trial rights of the accused, as required by Rule 26*bis*". Certification, Sebutinde Separate Opinion, para. 5.
[46] *Prosecutor v. Taylor,* SCSL-03-01-T-1189, Public with Confidential Annex Motion to Substitute Prosecution Final Trial Brief, 4 February 2011 ("**Motion to Substittute**").
[47] *Prosecutor v. Taylor,* SCSL-03-01-T-1190, Defence 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, 7 February 2011.

breach of a court order; therefore that it was in the interests of justice not to accept the late filing of the Defence's Final Trial Brief.[48]

22. The Majority reiterated their position in open court on the morning of 8 February 2011, the date set for the hearing of the Prosecution's Closing Arguments. Justice Lussick and Justice Doherty made remarks as recited below, which further underlined the learned Justices' reasoning behind their decision to refuse the Defence's Final Trial Brief. These remarks were made in response to Lead Counsel's submissions that, in the absence of the Defence's Final Trial Brief, the Defence was not going to take part in the oral submissions, as that was not in the best interests of the Accused.

23. The ensuing exchange between Lead Counsel and Justices Doherty and Lussick[49] is instructive as to the reasoning underlying the Majority decision:

> **Justice Lussick**: ...your final trial brief was not rejected at the 11th hour. Your client was ordered to file that final trial brief by the 14th of January and from the 14th of January on, you have not been entitled to file a final trial brief. And had the reason been that he couldn't file the final trial brief for circumstances beyond his control, then perhaps some latitude may have been given to him. But this Court was told he instructed you not to file a final trial brief, not only that he instructed you not to accept service of the Prosecution final trial brief which means you're not in a position to answer it and the only reason he gives is he thinks it's in his best interests not to do so.
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> **Lead Counsel:** In the interests of justice.
>
> **Justice Lussick**: No, let me finish. If Mr. Taylor thinks he can make orders or disobey orders of this Court at his will, simply on the basis that it's in his best interests to do so, then he's running this Court, not us. Now, don't tell us that you were at the 11th hour prevented from filing a final trial brief. From the 14th of January onwards, you have been in violation of a court order.

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[48] Decision, Sebutinde Dissenting Opinion, para. 3 (framing the issue before the Trial Chamber as follows: "[t]he 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 penalized by being denied the opportunity to file his defence altogether").

[49] *Prosecutor v. Taylor*, SCSL-03-01-T, Prosecution Closing Arguments Transcript, 8 February 2011, p. 49139-41.

Lead Counsel: Justice Lussick, can I respond, just to this limited extent? Because I really don't want to extend this. I have made a decision, so has my client, and we intend to leave but the point is bear in mind Rule 86, "A party shall file a final brief with the Trial Chamber not later than five days prior to the day set for the presentation of that" –

Justice Lussick: Look, that's the rule. You know we made an order, Mr. Griffiths, to file by the 14th of January. Don't tell me this you think Rule 86 supersedes our order. It doesn't.

Lead Counsel: And you also have a discretion to rethink previous orders made by the Court if it –

Justice Lussick: We have decided we are not going to do that, Mr. Griffiths, on more than one occasion. You will not accept the decision of this Court, and nor will your client. You're not running the Court, you know.

Lead Counsel: I'm not suggesting that.

Justice Doherty: Mr. Griffiths, could I remind you that the 14th of January was a date nominated by Mr. Munyard, well aware of the provisions of Rule 86 which he did not refer to when making a submission nominating the 14th of January. I am well aware that you're going to say there were interceding motions. You are well aware of the two decisions relating to that.

Lead Counsel: Madam President, I informed the Court from the outset I have no intention of rehearsing those earlier arguments. The fact is 20 days late, yes, but 20 days within the context of a trial lasting three years, is, in my submission, totally unreasonable.

24. The Defence filed the instant leave to appeal on the afternoon of 8 February 2011;[50] the Defence also sought ancillary relief in the form of a stay of proceedings pending the final resolution on the question of the Defence's Final Trial Brief.[51] Both requests were granted by a majority, Justice Lussick dissenting.

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[50] *Prosecutor v. Taylor,* SCSL-03-01-T-1195, Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief, 8 February 2011 (**"Leave to Appeal"**). See also, *Prosecutor v. Taylor,* SCSL-03-01-T-1200, Prosecution Response to Urgent and Public Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief, 10 February 2011; and *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 11 February 2011, p. 49306-7 (wherein the Defence stated it was unlikely to file a reply to its motion seeking leave).

[51] *Prosecutor v. Taylor,* SCSL-03-01-T-1197, Urgent and Public 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; see also, *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 11 February 2011, p. 49304-8 (the Trial Chamber heard from the parties regarding the Defence request for ancillary relief).

III. GROUNDS OF APPEAL

25. The Defence appeals those aspects of the majority Decision refusing the Defence's Final Trial Brief which constitute errors of law and/or fact and/or procedure in that the Trial Chamber made a discernible error in the exercise of its discretion by:

Ground One: Improper Focus on CMS Deficient Filing Form

26. In refusing to accept the Defence's Final Trial Brief, the Majority erred on a point of law and/or procedure in that they solely based their decision on the CMS's Deficient Filing Form and not the Defence's application for leave to file its Final Brief out of time, which was the first part of the brief itself. By so doing, the Majority deprived themselves of the full context of the Defence's submission, especially the "interests of justice" argument upon which the application was primarily based. Had the Majority considered the Defence's proper application for leave to file the Defence Final Trial Brief, it could not have come to the conclusion that the Defence had not provided "any new grounds for rescinding the original filing order";

Ground Two: Failure to Consider Prosecution Position

27. The majority erred on a point law and/or procedure by deliberately choosing not to consider the Prosecution's motion to substitute a revised and refined final trial brief, which the Prosecution filed in response to the filing of the Defence's Final Trial Brief. This Prosecution motion was properly before the Court and had a direct bearing on the Defence's application for leave to file its Brief out of time, yet the Majority purposefully refused to consider it;

Ground Three: Determination that the Defence was in Flagrant Breach of a Court Order

28. The majority erred in law in holding that the Defence, in failing to file its final trial 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 Four: Imposition of Drastic and Disproportionate Penalty

29. Following from the foregoing, the Trial Chamber erred in the exercise of its discretion in that it imposed a penalty that was drastic and disproportionate, and therefore not in the interest of justice;

30. Furthermore, the drastic penalty imposed failed to take into account relevant considerations such as the fair trial rights of the Accused, judicial economy, the seriousness of the charges against the Accused, and the crucial stage of the proceedings; and

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

31. 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.

SUBMISSIONS BASED ON GROUNDS OF APPEAL

IV. APPLICABLE STANDARDS OF REVIEW ON APPEAL

32. The SCSL Appeals Chamber has applied the provisions relating to appeals of a conviction to appeals of an interlocutory nature.[52] Article 20(1) of the Statute and Rule 106 of the Rules provide that the Appeals Chamber shall hear appeals on the following grounds: (a) a procedural error; (b) an error on a question of law invalidating the decision; and (c) an error of fact which has occasioned a miscarriage of justice.

33. Trial Chambers have wide discretion in the conduct of the proceedings before them,[53] including with respect to trial management and scheduling decisions. The Appeals Chamber typically accords deference to such discretionary decisions.[54] However, the Appeals Chamber will overturn the Trial Chamber's exercise of discretion if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[55] The scope of appellate review of discretion is limited. Even if the Appeals Chamber does not agree with the impugned decision, the decision will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously, in that the Trial Chamber made a discernible error in the exercise of discretion.[56] A discernible error has occurred if the Trial Chamber misdirected itself as to the legal principle to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the

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[52] *Prosecutor v. Taylor,* SCSL-03-01-AR73-799, Decision on "Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 29 June 2009", 23 June 2009, para. 4 ("***Taylor* Defence Case Appeal Decision**").
[53] JPK Appeals Decision, para. 29.
[54] JPK Appeals Decision, para. 29; *Taylor* Defence Case Appeal Decision, para. 13, citing *Prosecutor v. Norman et al,* SCSL-04-14-AR73-688, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, para. 5 ("***Norman* Subpoena Appeal Decision**").
[55] *Id.;* Norman Subpoena Appeal Decision, para. 6 and *Prosecutor v. Milosevic,* IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5.
[56] *Taylor* Defence Case Appeal Decision, para. 13, citing *Norman* Subpoena Appeal Decision, para. 5.

facts upon which it has exercised its discretion.[57] Where the Trial Chamber has made a discernible error in the exercise of its discretion, the Appeals Chamber will intervene, correct the error, and then exercise and substitute its own discretion.[58]

34. The burden is on the appellant to show that the Trial Chamber committed an error of law which invalidates the decision or an error of fact which resulted in an unreasonable conclusion.[59]

V. GROUNDS OF APPEAL

35. The Majority committed several procedural, factual and legal errors and abused its discretion in refusing the Defence's Final Trial Brief for having been filed late.

Procedural errors invalidating the decision

36. As indicated in the grounds of appeal, the first mistake the Trial Chamber made was to rely on the CMS's Defective Filing Form as the basis for the Defence's application for the late filing of its final trial brief, when that same form clearly stated that the reasons for the late filing of the brief were covered in more detail in the first part of the final trial brief itself. This, it can only reasonably be inferred, was actuated by the Majority's pre-determined position not to have anything to do with the final trial brief; for legally, there was nothing that prevented them from considering only that part of the brief that dealt with the late filing and basing their decision whether to accept the rest of the final brief or not on that part of the brief.

37. Had the majority considered the Defence submissions for the condonement of the late filing of its Final Trial Brief on the basis of the application that prefaced that brief, they would not have treated the Defence's application as merely one for a reconsideration of the deadline in their earlier Scheduling Order, as they did. Rather,

[57] *Taylor* Defence Case Appeal Decision, para. 13, citing *Norman* Subpoena Appeal Decision, para. 6.
[58] *Norman* Subpoena Appeal Decision, para. 5; see for ex., the JPK Appeals Decision, para. 49 (wherein the Appeals Chamber exceptionally exercised its appellate power to revise the Trial Chamber's decision and admitted two documents previously rejected by the Trial Chamber).
[59] *Norman* Subpoena Appeal Decision, para. 7.

they would have realised that the Defence's application was actually a new application in which the Defence acknowledged that it was in breach of the letter of the Court's Scheduling Order and was asking for the Court, in the interests of justice and given the circumstances of this case, to accept the brief out of time. The Trial Chamber therefore failed to address the principal basis of the application which was, namely that, notwithstanding the perceived breach of Scheduling Order, it was still in the interests of justice that the Trial Chamber accept the Defence's Final Trial Brief.

38. The Majority also made another procedural error by electing not to consider the Prosecution's Motion to Substitute its final trial brief (which was filed in direct response to the Defence's request regarding the late filing of its brief) only after they had handed down their decision on the Defence's request; the Prosecution request is still unresolved. A number of pertinent issues are noteworthy. Firstly, it is important to note that in Prosecution's said motion, the Prosecution did not oppose the late filing of the Defence's final brief *per se*.[60] Rather, it sought some ancillary form of relief to address the prejudice it alleged it had suffered as a result of the Defence's late filing of its brief; namely, that it be allowed to substitute its original trial brief filed of record with a revised and refined copy.[61] Secondly, it must be noted that this Trial Chamber was properly seized of the case before the Majority issued their decision. Thirdly, the Majority, by virtue of the fact that they acknowledged the Motion for Substitution in their impugned decision must have been aware that it had a direct bearing on their decision.[62] Indeed, Justice Sebutinde in her dissenting opinion made direct reference to it.[63] Despite all these factors, it can only be reasonably inferred that the Majority deliberately elected to hand down their impugned decision first before determining the Prosecution's motion despite its direct bearing on the said decision, and by so doing also rendered that motion irrelevant.

[60] Motion to Substitute, para. 2 (stating that while the Defence's Final Trial Brief should not be accepted "in the interest of justice", it may be accepted if it will assist the Trial Chamber).
[61] Motion to Substitute, paras. 3 and 4.
[62] Decision, p. 3.
[63] Decision, Sebutinde Dissenting Opinion, para. 4.

39. For the foregoing reasons, it is therefore submitted that the Majority made a discernible error in the exercise of their discretion. The Majority took irrelevant factors into consideration, and failed to consider relevant factors into consideration in arriving at the impugned decision.

Error of law and/or fact: The Defence was not in flagrant breach of the Court's Scheduling Order

40. To the extent that the Majority decision to refuse the late filing of the Defence's Final Trial Brief was based on a finding that the Defence had deliberately violated the Scheduling Order, the Defence respectfully submits that the contrary is true. Indeed, while the Defence failed to meet the Court's deadline, there is a plausible explanation as to why it failed to do so. This explanation is clearly manifested in the procedural history of this matter as highlighted above, and especially in the Defence's contrite conduct throughout the entire episode. Noteworthy and germane for present purposes is the fact that the Defence'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.[64]

41. In this regard, it is important to recall the procedural history to this appeal and highlight that as soon as the Defence became aware that it would not be in a position to conclude a final, comprehensive and well-reasoned trial brief in view of the issues that awaited resolution before the courts, it urgently sought the intervention of the Court. During the Judicial Recess, the Defence *inter alia* sought to file its Wikileaks-related motions and thereafter would have filed its motion for stay of proceedings. When that was refused by the President of the Court, the Defence filed the motion for stay at the earliest available opportunity. At the same time, the Defence sought audience with the Court through the medium of a Status Conference. When the Motion for a stay of proceedings failed, the Defence exercised its right of appeal and immediately filed for leave to appeal the Trial's Chamber's refusal of stay. In the

[64] It is notable that the Prosecution has recently argued that its decision to prioritize other legitimate and important legal filings should excuse an otherwise untimely motion. *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-ES-684, Public with Confidential Annexes Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone, 31 January 2011, para. 14.

same Motion, the Defence also asked for interim relief in that the filing of the Final Trial Brief be stayed pending resolution of that motion. While, admittedly, the filing of the leave to appeal did not automatically stay the proceedings, as it would in some common law jurisdictions, the practical effect was that the Defence could not proceed to file its final trial brief while its motion for leave to appeal (including the ancillary interim relief to stay the filing of the final trial brief) was still pending. Filing the final trial brief would have rendered that request within the motion moot.

42. Furthermore, when the Defence realized that its Motion for leave to appeal was not receiving the Court's urgent and deserved attention, it again through the medium of a status conference sought audience with the Court precisely to reassure the Trial Chamber that its failure to file its final brief on the due date of 14 January 2011 was not done in deliberate disdain of the Court's order, but was rather one forced by significant legal imperatives. However, and notwithstanding the motion before the Court for leave to appeal the refusal for stay and the urgent interim ancillary relief for stay of the filing of the final trial brief, the Majority took the opportunity to reiterate their earlier decision refusing stay, leaving the issue of the interim relief untouched. This issue would remain unaddressed until the Majority's decision on 3 February 2011 dismissing the Defence's Motion for Leave to Appeal the Refusal of Stay as essentially moot and overtaken by events; the same day the Defence then filed its Final Trial Brief. On the basis of the foregoing, it is therefore submitted that the majority erred in holding that the Defence was in flagrant breach of the Scheduling Order.

43. The Defence further submits that given the factual and procedural history highlighted above, the Scheduling Order was essentially rendered obsolete. As argued above, the Defence 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. That would have rendered its legitimate legal challenge academic.

44. Furthermore, the Majority fails to appreciate the Defence's legal and professional obligation to adhere to its client's instructions not to file a final brief on his behalf on 14 January 2011, and the impact that had on the Defence's material ability to comply with the deadline. The Majority mischaracterizes this as a case of Mr. Taylor attempting to "control" the proceedings or "run" the Court.[65] Rather, Mr. Taylor, through that instruction, was only seeking to preserve his fair trial rights and first be assured of the integrity of proceedings. Further, Mr. Taylor's instructions were not for the Defence to simply ignore the Court's order; rather, his instructions were for the Defence to pursue other legal channels to ensure that the issue was resolved. Viewed objectively, Mr. Taylor's actions were reasonable in the totality of the circumstances.

45. In this regard, the Defence underscores that its Motion for Leave to Appeal the Refusal of Stay, while eventually unsuccessful, was neither frivolous nor dilatory.

46. In the overall context of the foregoing, it was therefore proper and timely for the Defence to file its Motion under Rule 86(B) of the Rules.[66] Once the Court's Scheduling Order had been rendered obsolete by superseding events, Rule 86(B) on the timing of the filing of the parties' final trial briefs again became operative.

Abuse of discretion: Refusal to accept the Defence's Final Trial Brief amounts to a Drastic and Disproportionate Penalty

47. The Defence submits that the Majority's decision refusing to accept the Defence's Final Trial Brief for all intents and purposes amounts to a penalty for failure to abide by a court order. In that context, the Defence submits that the penalty was drastic and disproportionate. Furthermore and/or in the alternative the decision does not serve the interests of justice.

[65] See various comments by the Majority: Status Conference Transcript, 20 January 2011, p. 49133. ("orders will be made by the Trial Chamber and not Mr. Taylor"); Prosecution Closing Arguments, 8 February 2011, p. 49140; Certification, Lussick Dissenting Opinion, para. 13-14.
[66] Decision, Sebutinde Dissenting Opinion, para. 14.

48. The Defence submits that it is established in the jurisprudence of international criminal tribunals that the principle of proportionality applies even in cases where a party might be in breach of a court order. Furthermore, it is also established that in cases where a penalty imposed by a Trial Chamber is manifestly disproportionate, the Appeals Chamber may in the interests of justice intervene and overturn that decision.

49. The scenario presently before the Appeals Chamber is in some ways analogous to the situation in which the ICC Appeals Chamber found itself in the *Lubanga* case. The *Lubanga* case involved a continuous failure by the Prosecution to abide by a Trial Chamber's decision to effect certain material disclosures to the Defence, in consequence of which the Trial Chamber was forced to order a permanent stay of the proceedings as a result of the said breach. But on appeal, the Appeals Chamber overturned the Trial Chamber's decision for a permanent stay of proceedings, *inter alia*, on the basis that the decision was drastic and disproportionate as the alleged breach of the court order could have been addressed by other less drastic measures such as contempt proceedings.[67]

50. Likewise, in this case, the Defence submits that even if it were held that the Defence were in breach of the court's order, the decision by the Trial Chamber to accept the Defence's Final Trial Brief, given the importance of the brief to the Accused, its implications on the accused's fair trial rights as well as its importance in assisting the Court in the determination of the ultimate issues in this case, as emphasized below, is drastic and disproportionate and should be overturned. Indeed, as Justice Sebutinde has opined, it would be contrary to the tenants of a fair trial and to the interests of justice for the Accused to be penalized for opting to wait for the outcome of his

[67] In the *Lubanga* case, the Appeals Chamber determined despite the Prosecution's willful default or breach of a Court order regarding disclosure, the Trial Chamber had erred by choosing a "drastic remedy" without first seeking to bring about compliance through less drastic measures. *Prosecutor v. Lubanga,* ICC-01/04-01/06 OA 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, p. 7-8. http://www.icc-cpi.int/iccdocs/doc/doc948677.pdf.

motions and appeals before filing a comprehensive brief, or alternatively to be penalized for the time taken by the Chambers in deciding the outstanding issues.[68]

Abuse of Discretion: Trial Chamber's Decision is not in the Interests of Justice

51. With all due respect, the Defence submits that the Majority decision was primarily spurred by the Majority's desire to show that the Court and not Mr. Taylor was in charge of the running of the trial.[69] In so doing, the Majority blinded itself to other judicial imperatives they ought to have taken into account in determining the Defence's application for the late filing of the brief. Yet where a party gives a plausible explanation for a delayed filing and where the interests of justice so dictate, the Trial Chamber should allow a late filing.[70] This is especially true where the delayed filing, as in the instant case, does not result in any overall delay to the proceedings as a whole; the Defence was prepared to make closing arguments on 9 February 2011 as scheduled, had its brief not been rejected.[71]

52. There is ample case law to demonstrate that late filings by a party have been accepted when doing so is deemed to be in the interests of justice. For instance, in contempt proceedings in *Prosecutor v. Slobodan Milosevic*, the Appeals Chamber accepted a late filing of the Defence without justifiable explanation for the breach of the court order, because the appeal touched on "the fundamental due process rights of an Accused, Mr. Milosevic, charged with particularly serious offences".[72]

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[68] Decision, Sebutinde Dissenting Opinion, para. 16.
[69] See various comments by the Majority: Status Conference Transcript, 20 January 2011, p. 49133 ("orders will be made by the Trial Chamber and not Mr. Taylor"); Prosecution Closing Arguments, 8 February 2011, p. 49140; Certification, Lussick Dissenting Opinion, para. 13-14.
[70] Decision, Sebutinde Dissenting Opinion, para. 7.
[71] In any event, the Defence notes in this vein that the Trial Chamber in *Prlic et al* held that "considerations of economy should never violate the right of the Parties to a fair trial". *Prosecutor v. Prlic et al*, IT-04-74-T, Decision on Adoption of New Measures to bring the Trial to an End Within a Reasonable Time, 13 November 2006.
[72] *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; Decision, Sebutinde Dissenting Opinion, para. 8.

53. At the ICTR, there are two noteworthy cases wherein the Prosecution sought leave to file a response out of time and the Chamber granted permission, citing the interests of justice. In *Prosecutor v. Bizimungu et al,* the Defence had filed a motion pertaining to disclosure of protected information. The Prosecution filed a response, some three months out of time, due to "inadvertence". The Trial Chamber chose to accept the grossly-late response despite the length of and reason for the delay, considering it "in the interests of justice to consider the Prosecution's submissions on such an important issue [witness protection]".[73] In *Ngirumpatse v. the Prosecutor,* the Appeals Chamber decided that it was in the interests of justice to allow the Prosecution to respond more than three weeks out of time, despite the fact that the Prosecution could not demonstrate good cause for an extention of the time limit, given the difficulties the Appeals Chamber would otherwise have in deciding an appeal based solely on a one-sided briefing.[74]

54. At the Special Court, this Trial Chamber has previously permitted a party during Rule 98 proceedings 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".[75] As Justice Sebutinde noted:

> "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 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".[76]

55. Perhaps more closely analogous to the current situation, the Defence notes that in the *RUF* Trial, the parties were scheduled to file their briefs on 29 July 2008,[77] but the

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[73] *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.
[74] *Ngirumpatse 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.
[75] *Prosecutor v. Brima, Kamara, 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.
[76] Decision, Sebutinde Dissenting Opinion, para. 10.
[77] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-1106, Order for the Filing of Final Trial Briefs and the Presentation of Closing Arguments, 29 April 2008 (**"RUF Scheduling Order"**).

Sesay Defence did not file its final trial brief until 31 July 2008.[78] The late filing of the Sesay Defence brief was apparently accepted without much ado as reference is made to the brief in the RUF Trial Judgement without prejudice.[79]

56. Furthermore, the safeguards contained in Article 17(4) of the Statute guarantees certain minimum rights to the Accused, among which is the right "to have adequate time and facilities for the preparation of his defence". Additionally, Rule 26*bis* of the Rules provides that proceedings shall be conducted with full respect for the rights of the accused. As Justice Sebutinde rightly noted:

> "In the instant case, the insistence by Mr. Taylor in 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 extention 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".[80]

57. The Defence does not suggest that respect for the fair trial rights of the accused means that Mr. Taylor should be able to "control" the proceeding. The Defence, however, does submit that if Mr. Taylor, having given good reasons for not filing his Final Brief by the date set by the Trial Chamber,[81] is prevented from filing his Final Brief entirely, then he has effectively been denied his fundamental right to defend himself, and this is clearly not in the interests of justice.

58. The seriousness of the charges against Mr. Taylor makes the imperative to protect his fair trial rights even more compelling. As Mr. Taylor is charged with war crimes and crimes against humanity, and this is at the stage of the proceedings just before the

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[78] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-1210, Confidential Filing of Sesay Defence Final Brief, 31 July 2008.
[79] See, for ex., *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-1234, Trial Judgement, 2 March 2009, fn. 644 (referencing arguments made in the Sesay Defence Final Brief).
[80] Decision, Sebutinde Dissenting Opinion, para. 12.
[81] Decision, Sebutinde Dissenting Opinion, paras. 15 and 16 (accepting that the Defence has given a plausible explanation for filing out of time, in that it was hampered by the fact that there were several outstanding motions and appeals pending before the Trial and Appeals Chambers, the outcome of which was likely to affect his defence; furthermore that none of the motions or appeals were "frivolous" or "a calculated attempt by the Defence to delay the trial").

Trial Chamber makes its final deliberations on his guilt or innocence, he should be permitted to file a final brief on his behalf, notwithstanding any procedural irregularity.[82] The Defence's Final Trial Brief contains Mr. Taylor's defence. It is his last opportunity to challenge the Prosecution's case against him, before the Trial Chamber retires to deliberate and consider its verdict. It is patently unfair for the Judges to have before them the Prosecution's road-map to conviction, without being in a position to critically analyze the sufficiency of the evidence through the assistance of the Defence's Final Trial Brief.[83]

59. The importance of the final brief in international criminal cases cannot be over-emphasized. It has been described as the decisive phase in the trial process,[84] as it, among other things, summaries a party's legal arguments, highlights the strength of a party's case, while pointing out the weaknesses of the other's, and tries to point the Trial Chamber to the relevant evidence. A final brief is ever so imperative in a case of this nature, spanning over three years of testimony and involving about 50,000 pages of evidence and over a 1,000 exhibits.

60. As Mr. Taylor will not have another chance to comprehensively articulate his arguments after the hearings are closed in accordance with Rule 87(A), the Defence's Final Trial Brief should be accepted at this stage.[85] It would not sufficiently protect Mr. Taylor's fair trial rights to wait until the appellate stage for his final brief to be considered. It would not serve the interests of justice for the Appeals Chamber to review the Trial Chamber's judgement *de novo* taking into account the Defence's Final Trial Brief on final appeal, as it is well-recognized that the Appeals Chamber is not the primary trier of fact.

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[82] Decision, Sebutinde Dissenting Opinion, para. 13.
[83] *Contra* Certification, Lussick Dissenting Opinion, para. 20 ("The responsibility of the judges to decide on the evidence whether the Prosecution has discharged its burden is in no way diminished by the fact that the accused has not filed a final trial brief").
[84] Presiding Judge Jean-Claude Antonetti of the ICTY has stated that the parties final trial briefs represent the final and "decisive phase of the trial" hence it is very important that the parties be accorded the best possible options for arguing their theories of the case, as may best suit their interests. *Prosecutor v. Prlic,* IT-04-74-T, Trial Chamber Order, Separate Opinion of Judge Jean-Claude Antonetti, 22 November 2010, p. 15.
[85] Decision, Sebutinde Dissenting Opinion, para. 17.

Ancillary Issues with Respect to Oral Submissions and Inclusion of Annexes

61. This Appeal also raises another ancillary issue, which it is submitted, requires disposition at this stage: whether the Defence by not participating in the oral closing arguments on the 8th and 9th of February 2011 should be deemed to have waived its right to make oral submissions. The Defence submits that it has not waived its right and indeed seeks an order from the Appeals Chamber, directing the Trial Chamber to reschedule its date for closing arguments.

62. Rule 86(A) envisions that *after the presentation of all the evidence,* the Defence may and the Prosecutor must present a closing argument (emphasis added). Rule 86(C) states that the parties shall inform the Trial Chamber of the anticipated length of closing arguments and that the Trial Chamber may limit their length in the interests of justice. The Rule does not suggest that a party would be required to present a closing argument before all of the evidence has been presented. The contrary is indeed true. The Defence submits that while *stricto sensu* the term "evidence" within the context of Rule 86(A) does not include the parties' final briefs, it nonetheless would have been inappropriate for the Trial Chamber to hear closing submissions from the Defence on 9 February 2011, when the Defence's Final Trial Brief had not yet been accepted by the Court.

63. The principle which undergirds Rule 86(A) is important, separate and apart from its plain language. That principle is one of finality, in that the Rule envisions oral arguments occurring only when there is essentially nothing outstanding vis-à-vis the evidentiary phase of the case. Given that the Defence's Final Trial Brief was not in the hands of the Court, it was thus contrary to the spirit of Rule 86(A) to require the Defence to proceed to oral arguments in the circumstances that obtained.

64. In any event, it would have been unfair to presume that the Defence could have sufficiently encapsulated the arguments contained in an almost 600 page brief in a mere six hours on 9 February. The Defence had prepared its oral submissions on the

basis of its written brief; it would have been impossible for the Defence to argue key points without referring back to related sections of its brief. The Defence would have short-changed its client had it attempted to present closing arguments while handicapped as to the arguments it could make.

65. On 8 February 2011, Lead Counsel indicated that the Defence would challenge the Majority's refusal of the brief. The Defence subsequently sought certification of this appeal and ancillary to its request for certification, the Defence sought (and was granted) a stay of proceedings pending the outcome of this appeal. Thus the Defence cannot be said to have waived its rights to make closing arguments.

66. As it stands, the Defence is doubly-prejudiced by the Majority decision – not only is its brief rejected, but its opportunity to make submissions before and respond to questions from the Judges and the Prosecution brief has been curtailed. Furthermore, this eviscerates the Accused's right to a public hearing under Article 17(2) of the Statute as well as his right to have adequate time to prepare his defence under Article 17(4)(b).

67. Additionally, the Defence submits that should the Appeals Chamber direct the Trial Chamber to accept the late filing of the Defence's Final Trial Brief, the entire brief, including the three Annexes, should be accepted. The Scheduling Order modified the usual 200 page limit for final briefs and extended the limit to 600 pages.[86] The Defence's Final Trial Brief as corrected is 548 pages. Attached to the brief are three annexes, totaling 279 pages. These annexes are summaries of evidence on the record, collated in such a way as to assist the Trial Chamber. They do not contain substantial additional submissions in support of the Defence's arguments.[87] Consequently, they

[86] See Practice Direction on dealing with Documents in The Hague – Sub-Office, amended 25 April 2008, Article 6(B) (final trial submissions shall not exceed 200 pages or 60,000 words, whichever is greater).
[87] *Prosecutor v. Taylor*, SCSL-03-01-T-209, Decision on Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses, 21 March 2007, paras. 8-10 (stating that substantial additional submissions in support of a party's arguments properly belongs in the main document rather than in an annex).

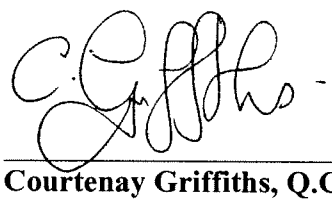
are properly appended to the brief. Article 6(F) of the Practice Direction provides that "appendices and authorities do not count toward the page limit".

68. The Trial Chamber's Scheduling Order did not modify this provision of the Practice Direction; thus the Defence submitted the annexes in reasonable reliance on it. In fact, previous scheduling orders by the Trial Chambers state that other than the explicit changes made to the Practice Direction, "the final trial briefs filed by the parties shall in all other respects, comply with the Practice Direction".[88] Thus, the brief and its annexes should be accepted *in toto*.

VI. CONCLUSION

69. The Defence has identified a number of errors of law and/or fact and/or procedure leading to the abuse of its discretion by the Majority in its Decision which resulted in its refusal to accept the Defence's Final Trial Brief. Thus, the Appeals Chamber should overturn that decision.[89] Furthermore, as the Defence's inability to participate in closing arguments was predicated by this refusal, the Appeals Chamber should direct the Trial Chamber to set a new date to allow the Defence to present closing arguments.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 17th Day of February 2011,
The Hague, The Netherlands

[88] *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-T-581, Order for Filing of Final Trial Briefs and Presentation of Closing Arguments, 30 October 2006, para. 6(C); RUF Scheduling Order, Order 6.
[89] *Contra* Certification, Lussick Dissenting Opinion, para. 22 (wherein Justice Lussick states "...since it is within the discretion of the Trial Chamber to refuse to accept a document filed late in deliberate contravention of a court order, it is unlikely that the Appeals Chamber would intervene").

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