799)

SCSL-03-01-T
(25681-25704)

25681

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Acting Registrar: Binta Mansaray

Date: 23 June 2009

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-2003-01-T)

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"

Office of the Prosecutor:
Brenda J. Hollis
Nicholas Koumjian
Kathryn Howarth

Defence Counsel for Mr. Taylor:
Courtenay Griffiths Q.C.
Andrew Cayley
Terry Munyard
Morris Anyah
Silas Chekera

THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Renate Winter, Presiding Judge, Justice Jon M. Kamanda, Justice George Gelaga King, Justice Emmanuel Ayoola and Justice Shireen Avis Fisher;

SEIZED of the "Public with Annexes A, B and C Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence its case on 29 June 2009," dated 4 June 2009 ("Appeal");

CONSIDERING the "Prosecution Response to 'Public with Annexes A, B and C Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence its case on 29 June 2009'," dated 8 June 2009 ("Response") and the "Defence Reply to Prosecution Response to 'Public with Annexes A, B and C Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence its case on 29 June 2009'," dated 8 June 2009 ("Reply");

NOTING the oral decision delivered by Trial Chamber II ("Trial Chamber") on 4 May 2009 ("Impugned Decision")[1] requiring the Defence to commence its case on 29 June 2009;

NOTING the "Decision on Defence Application for Leave to Appeal the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 29 June 2009", dated 28 May 2009, in which the Trial Chamber by majority granted the Defence of Charles Ghankay Taylor ("Defence") leave to make the Appeal;

HEREBY DECIDES the Appeal based on the written submissions of the Parties.

I. BACKGROUND

1. On 4 May 2009, the majority of the Trial Chamber, Justice Sebutinde dissenting, ruled orally that the Defence case would commence on 29 June 2009.[2]

2. Prior to the Impugned Decision, the Trial Chamber heard from the Parties on the matter on several occasions. The Prosecution initially raised the issue of the start date for the Defence case on 9 February 2009.[3] In a memorandum dated 26 March 2009, the Defence stated that the earliest the Defence would be able to start its case was 15 July 2009.[4] On 9 April 2009, the Trial Chamber

[1] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 4 May 2009, pp. 24219-24220.
[2] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 4 May 2009, page 24220, lines 14-18.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 9 February 2009, pages 24048-24049. The Trial Chamber held that it was 'premature' to consider the issue prior to the closing of the Prosecution's Case.
[4] Appeal, Annex B.

indicated that on 4 May 2009 it would "fix a date for the commencement of the Defence Case" after hearing from the Parties.[5] On 15 April 2009, Principal Trial Attorney for the Prosecution responded to the Defence's 26 March 2009 memorandum, objecting to the date proposed by the Defence and stating that the Defence's suggested start date had not been shown to be reasonable or necessary.[6]

3. On 4 May 2009, after hearing oral submissions from the Defence and Prosecution, the Trial Chamber orally delivered the Impugned Decision and Justice Sebutinde delivered her dissenting opinion.[7]

4. On 7 May 2009, a Defence request for reconsideration by the Trial Chamber of the Impugned Decision was denied.[8] However, the Trial Chamber by an oral order extended the time within which the Defence could file an application for leave to appeal to 11 May 2009.[9] On 11 May 2009, the Defence filed its application,[10] on 20 May 2009, the Prosecution filed its response, and the Defence filed its reply on 25 May 2009. On 28 May 2009, the Trial Chamber granted the Defence application for leave to appeal, ruling that the "Defence has met the conjunctive conditions of exceptional circumstances and irreparable prejudice as prescribed by Rule 73(B)" of the Rules of Procedure and Evidence ("Rules").[11]

II. SUBMISSIONS OF THE PARTIES

A. The Appeal

5. The Defence raises five grounds on appeal. *First*, the Defence argues that the Trial Chamber erred in law, resulting in an abuse of its discretion, in failing to give due weight to the fair trial rights of the Accused, in particular, the right of the Accused under article 17(4)(b) to have adequate time and facilities to prepare his case.[12] In support of its contention, the Defence submits that the amount of time allocated to it before the commencement of the Defence Case, as well as the facilities available to it, cannot be deemed as "adequate" within the meaning of Article 17(4)(b) of

[5] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 9 April 2009, page 24191, lines 22-24.
[6] Appeal, Annex C.
[7] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 4 May 2009, pp. 24219-24222.
[8] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 7 May 2009, page 24226, lines 18-29 & page 24232, lines 3-12.
[9] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 7 May 2009, Page 24232, lines 7-12. Pursuant to Rule 73(B) of the Rules and Procedures of the Special Court, leave to appeal from an interlocutory decision must be sought within 3 days of the Decision intended to be appealed.
[10] *Prosecutor v Taylor*, SCSL-03-01-T-777, Public with Annexes Defence Application for Leave to Appeal the Oral Decision Requiring the Defence to Commence its Case on 29 June 2009, 11 May 2009 ["Defence Application"].
[11] *Prosecutor v Taylor*, SCSL-03-01-T-783, Decision on Defence Application for Leave to Appeal the 4 May 2009 Oral Decision Requiring the Defence to Commence Its Case on 29 June 2009 ["Decision on Defence Application].
[12] Appeal, para. 6.

the Statute[13] "to the extent that the [Impugned Decision] denies the Defence ample time to prepare the Accused for trial and to prepare the strategy of the defence case and the deployment of exhibits."[14] According to the Defence, an assessment of what constitutes "adequate" should include a consideration of the unique circumstances of the case and a comparison with the amount of time granted for the defence cases in the *Sesay et al.*, *Brima et al.* and *Fofana and Kondewa* trials.[15] The Defence further submits that the Impugned Decision deprives it of adequate time to prepare the Accused for his testimony on his own behalf, especially, as "the bulk of the exhibits produced for the Defence will be introduced through the testimony of the Accused."[16] Additionally, the Defence argues that the Trial Chamber's failure to provide it with the time and facilities that it requires to prepare its case would create unfairness when compared to the amount of time given to the Prosecution's Case, thereby violating the Accused's fair trial right to an "equality of arms."[17]

6. *Second*, the Defence contends that the Trial Chamber erred in fact by failing to consider the unique circumstances of the case, in particular the unique logistical problems that affect the Defence's ability to conduct investigations, gather evidence and locate appropriate witnesses.[18] In support of its contention, the Defence points to the recent death of its international investigator and argues that the unforeseen problems attendant thereto justify the Defence request for an additional two and half weeks.[19] The Defence also argues that the "added obstacle of … running a complicated case that is spread across two continents and different local[ities]" was good cause for the Trial Chamber to conclude that the eight week period granted for the Defence's preparation was inadequate and infringes the Accused's fair trial rights.[20]

7. *Third*, the majority of the Trial Chamber failed to consider the time limits ordered in the other cases before the Special Court.[21] According to the Defence, the Trial Chamber should have considered the time given to other Defence cases as a useful indicium of the time required.[22] The Defence points to the fact that that the Trial Chamber allocated two months and five days to the AFRC Defence, and that Trial Chamber I allocated three months to the defendants in the CDF case and six months and two days to the defendants in the RUF Case, and submits that an eight-week period is the smallest amount of time thus far allocated by the Trial Chamber to any Accused to

[13] Appeal, para. 18.
[14] Appeal, para. 18.
[15] Appeal, para. 19.
[16] Appeal, paras 21-22.
[17] Appeal, para. 25.
[18] Appeal, paras 7, and 27-29.
[19] Appeal, para 30.
[20] Appeal, paras 31-34.
[21] Appeal, paras 31-34.
[22] Appeal, para. 35.

prepare his defence.[23] In light of the difficulties highlighted in its second ground of appeal, the Defence submits that the ten-week period granted by Justice Sebutinde in her Dissenting Opinion should have been the "minimum granted to the Defence by the Trial Chamber in the circumstances of this case."[24]

8. *Fourth*, the Defence argues that the Trial Chamber failed to consider that an expeditious trial requires the Defence to prepare his case as thoroughly as possible.[25] According to the Defence, by ordering the Defence case to start on 29 June 2009, the Defence will "almost inevitably" need to request multiple adjournments to undertake the work that would have otherwise been completed within the additional two weeks period that it had originally requested.[26] The Defence submits such disruptions would infringes the Accused's right to be tried without undue delay under Article 17(4)(C) of the Statute.[27]

9. *Fifth*, the Defence submits that the Trial Chamber failed to consider that the additional time sought by the Defence would not prejudice the Prosecution.[28]

B. Prosecution Response

10. The Prosecution opposes the appeal. In its Response, the Prosecution submits that the grounds of appeal raised by the Defence are without merit and should be dismissed.[29] The Prosecution submits generally, that the Trial Chamber considered all the relevant factors in reaching its decision because the Defence submissions on appeal were addressed to the Trial Chamber in a memorandum dated 26 March 2009,[30] and the Trial Chamber expressly stated it had considered the Parties' memoranda and oral submissions in reaching the Impugned Decision.[31]

11. Regarding the other arguments of the Defence, the Prosecution makes the following submissions. First, that the Defence has had significant time to prepare its case before, during and after the Prosecution case-in-chief.[32] The Prosecution points to the additional five months that were granted to the Defence following the departure of its prior lead counsel, the length of time that the Accused has been held in Court custody, and the two years that the Defence has had to analyse the

[23] Appeal, para 36.
[24] Appeal, para. 38.
[25] Appeal, para. 9.
[26] Appeal, paras 40-42.
[27] Appeal, para. 42.
[28] Appeal, paras 10 and 43-47.
[29] Response, paras 1-2.
[30] Response, para. 8.
[31] Response, para. 8.
[32] Response, para. 11.

Defence exhibits allegedly in the Accused's personal archives.[33] Second, the Prosecution submits that for the majority of the three year period that the Defence has had to investigate its case, it had access to both international and national investigators. Furthermore, Prosecution submits that in the period following the unfortunate death of the Defence international investigator the Defence continued to benefit from the assistance of other investigators as well. Third, the Prosecution submits that the Defence contention that it has been allocated comparatively less time to prepare its case than the other Defence teams in the RUF, AFRC and CDF cases provides no basis for granting the Defence appeal.[34]

C. Defence Reply

12. In essence, the Defence's submissions in Reply repeated its submissions in the Appeal.

III. STANDARD OF REVIEW

13. Trial Chambers have discretion with respect to scheduling trial proceedings.[35] The Appeals Chamber accords deference to such discretionary decisions because of "the Trial Chamber's ... familiarity with the day-to-day conduct of the parties and practical demands of the case."[36] The Trial Chamber's exercise of discretion will only be overturned 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.[37] The scope of appellate review of discretion is, thus, very 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.[38] Where the issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching its decision the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of

---

[33] Response, paras 11-13.
[34] Response, paras 16-17.
[35] *See Ngirabatware v Prosecutor,* ICTR-99-54-A,Decision on Augustine Ngirabatware's Appeal of Decision Denying Motions to vary Trial Date, 12 May 2009, para 8 ["*Ngirabatware Appeal Decision*"]; citing *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.6, Decision on Interlocutory Appeal by the *Amicus Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 ["*Milosevic Decision*"] para. 6; *Prosecutor v Taylor*, Decision on Defence Application for Leave to Appeal 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for Preparation of Mr Taylor's Defence' dated 23 January 2007, 15 February 2007, para 12 ["*Taylor* 23 January 2007 Decision"].
[36] *Prosecutor v Ndayambaje et al.*, Decision on Joseph Kanyabashi's Application against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to vary his Witness List, 21 August 2007, para. 10.
[37] *Norman* Subpoena Decision, para. 6, *citing Milosevic* Decision on Appeal from Refusal to Order Joinder, para. 5.
[38] *Norman* Subpoena Decision, para. 5; *see also Karemera* Decision on Leave to File Amended Indictment, para. 9.

discretion.[39] A Trial Chamber will have made a discernible error if it misdirected itself as to the legal principle or law 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 facts upon which it has exercised its discretion.[40]

IV. DISCUSSION

14. The question on appeal is whether the Trial Chamber erred in the exercise of its discretion when it set the start of Taylor's defence case for 29 June 2009 by erroneously concluding that the Defence would have adequate time for the preparation of the Accused's defence within the meaning of Article 17(4)(b) of the Statute.

15. Article 17(4)(b) of the Statute secures for an accused the right "to have adequate time and facilities for the preparation of his or her defence."[41] Article 17(4)(b) of the Statute provides the same guarantees as provided in Article 21(2) of the ICTY Statute, Article 20(2) of the ICTR Statute, Article 7 of the African Charter on Human and Peoples' Rights, Article 14(3) of the ICCPR, and Article 6(3) of the European Convention on Human Rights.

16. Jurisprudence of the *ad hoc* tribunals and international human rights bodies indicates that the right to adequate time and facilities form part of the principle of equality of arms,[42] and that the principle of equality of arms is a core element of the right to a fair trial.[43]

17. This position has been endorsed by the ICTY and ICTR.[44] The ICTY Appeals Chamber has defined the principle of equality of arms to mean that each party must have reasonable opportunity

---

[39] *Ibid.*
[40] *Ibid.*
[41] Article 17(4)(B) SCSL Statute.
[42] *Prosecutor v Tadić* Appeal Judgment, IT-94-5, 15 July 1999, para. 47 ["*Tadić* Appeal Judgment"] .
[43] *Ibid*, paras 43-44; see also, *Prosecutor v Kordic and Cerkez,* IT-95-14/2-A, Appeal Judgment, paras 175-177 ["*Kordić and Čerkez* Appeal Judgment"]; For instance, the European Court of Human Rights has stated in relation to Article 6 which guarantees the right to a fair trial that, "it is a fundamental aspect of the right to a fair trial that ... there should be equality of arms between the prosecution and the defence." *Rowe and Davis v. United Kingdom*, ECHR, App. 28901/95, Judgement, 16 February 2000, para. 60, cited in Jacobs & White, *European Convention on Human Rights*, Oxford, 2002 at. 157; Similarly, the Human Rights Committee has ruled that a fair trial under Article 14(1) of the International Convention on Civil and Political Rights must at a minimum include "equality of arms." *Robinson v. Jamaic*a, HCR, Communication n. 289/1988, 26 March 1992, U.N. Doc CCPR/11/Add.1 at 399, cited in, *Tadic*, Appeal Chamber, para. 44, see also *Morael v France* UN Doc. CCPR/8/Add/1 28 July 1989, para. 416; *Wolf v Panama,* UN Doc. CCPR/8/Add1, 30 March 1989, para. 426, cited in *Tadic* Appeal Judgment, para. 44..
[44] In *Tadic,* the Appeals Chamber confirmed that the principle of equality of arms forms part of the fair trial guarantee. *Tadic* Appeal Judgement, para. 44; *see also Prosecutor v Perisic*, IT-04-81-PT, Decision on Motion to Appoint *Amicus Curiae* to Investigate Equality of Arms, 18 June 2007, para. 5 ["*Perisic* Decision on Equality of arms"], para. 5 (holding that "[t]he right of an accused to a fair trial implies the principle of equality of arms between the Prosecution and the Defence.") In the *Kordic and Cerkez* Appeal Judgment, the Appeal Chamber stated that the principle of equality of arms "is described as being only one feature of the wider concept of a fair trial." para. 5, In *Delalic*, the Trial Chamber stated that "One of the minimum guarantees for the accused in Article 21 paragraph 4(e) of the Statute is equality of

to present its case under conditions that do not place him at substantial disadvantage vis-à-vis his opponent.[45] This definition essentially mirrors that of the European Court of Human Rights in *Beheer B.V v The Netherlands*;[46] and has been subsequently endorsed by both Trial Chambers at the Special Court.[47]

18. Although the right to adequate time and facilities for the preparation of the defence case forms part of the principle of equality of arms,[48] the rights of the accused and equality between the parties should however not be confused with a requirement for precise parity of means, resources and time.[49] The principle of equality of arms was designed to provide the parties rights and guarantees that are *procedural* in nature.[50]

19. The question of what constitutes "adequate time and facilities" cannot be assessed in the abstract, but will depend on the circumstances of the case.[51] An accused's right to adequate time for the preparation of his case is interpreted in light of the Chamber's obligation to ensure that a trial is fair and expeditious, codified in Rule 26*bis* of the Rules,[52] which in turn implicates the right of the accused to be tried without undue delay.[53] When considering an appellant's submission regarding

---

arms, which is the most important criteria of a fair trial." *Prosecutor v. Delalic et al.,* IT-96-21, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 February 1998, para. 45. ["*Delalic* Decision on Disclosure of witness by the Defence."]; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Appeal Judgment ("the principle of equality of arms falls within the fair trial guarantees under the Statute"), [*"Kayishema et al.* Appeal Judgement"]; *Prosecutor v. Nahimana, Ngeze, Barayawiza*, ICTR-99-52-T, Trial Chamber, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003, para. 5, whereby "[T]he Chamber accepts that the principle of equality of arms falls within the fair trial guarantee under the Statute." [*"Nahimana* Decision on Stay of the Proceedings"]

[45] *Ibid,* paras 43-44, & para. 48, citing *Delcourt v Belgium,* 1970.

[46] *Beheer B.V v The Netherlands*, 27 October 93.

[47] See *Prosecutor v Sesay et al.*, SCSL-04-15-T, Consequential Orders Concerning the Preparation and Commencement of the Defence Case, 28 March 2007; see also, *Prosecutor v Norman et al.,* SCSL-04-15-T, Order to the first Accused to Re-file Summaries of Witness Testimonies, 2 March 2006.

[48] *Tadic Appeal Judgment,* para. 47.

[49] *Prosecutor v Sesay et al.,* SCSL-04-15-T, Consequential Orders Concerning the Preparation and Commencement of the Defence Case, 28 March 2007, at 4 ("[T]he principle of equality does not entitle the accused to precisely the same amount of time ... as the Prosecution."); *Prosecutor v Norman et al.,* SCSL-04-15-T, Order to the first Accused to re-file Summaries of Witness Testimonies, 2 March 2006, at 4; *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Judgement, 21 May 1999, para. 20; *Prosecutor v. Milutinovic el al.,* Case No. IT-99-37-AR73.2, Decision on interlocutory appeal on motion for additional funds, paras 23 and 24, ("The principle of equality of arms would be violated only if either party is put at a disadvantage when presenting its case. In the circumstances of this case, the Appeals Chamber finds that the Appellant cannot rely on the alleged inadequacy of funds during the pre-trial stage to establish such a disadvantage.")

[50] *Tadić Appeal Judgement*, para. 50, *citing B. d. B et al. v. The Netherlands*, Communication No. 273/1989, 30 March 1989, U.N. Doc. A/44/40, 442 and *Nqalula Mpandanjila et al. v. Zaire*, Communication No 138/1983, 26 March 1986, U.N. Doc. A/41/40, 121.

[51] *Prosecutor v. Krajišnik*, ICTY-00-39-A, Appeal Judgment, 17 March 2009 [*Krajisnik* Appeal Judgment], para. 80.

[52] Rule 26*bis* of the SCSL Rules obliges both the Trial Chamber and Appeals Chamber to ensure that a trial is fair and expeditious.

[53] In an earlier decision, the Trial Chamber held, and we concur, that the "duty under Rule 26*bis* to ensure a fair and expeditious trial ... has to be carefully balanced with the fundamental rights of the accused to a fair trial under Article 17

this right, the Appeals Chamber must assess whether the Defence as a whole was deprived of adequate time and facilities.[54] An assessment of what constitutes "adequate time" for the preparation of a defence typically involves an assessment of the complexity of the case, including the issues to be litigated.[55] Chambers are required to ensure that a degree of proportionality will govern the relationship between the amount of time allocated to all sides.[56]

20. The Defence has not shown that the Impugned Decision infringed the fair trial rights of the Accused by denying him adequate time for preparation. When the Trial Chamber examined what would be a "*reasonable* and *appropriate* date for the start of the Defence case," it expressly assessed the time that the Accused has had to conduct investigations and to prepare his case in response to the Prosecution case.[57] The Defence has also failed to show that time afforded to it for the preparation of its case lacked a degree of proportionality that would be restored by starting the Defence case two weeks later. The Appeals Chamber therefore considers this submission to lack merit and dismisses it.

21. The Defence also submits that the Trial Chamber failed to consider relevant factors or failed to give them sufficient weight. The Defence raised the following factors on appeal: (i) various logistical problems related to the locations of the trial and witnesses, (ii) the amount of time granted for the defence cases in the *Sesay et al.*, *Brima et al.* and *Fofana and Kondewa* trials, (iii) the time required to prepare the Accused and the defence case, (iv) the recent death of the Defence's international investigator, (v) that expediency at the start of the defence case will results in delays later, and (vi) that the additional time sought by the Defence would not prejudice the Prosecution.

22. In the Impugned Decision, the Trial Chamber held that the time sought by the Defence for the preparation of its case was "not justified."[58] The Trial Chamber ruled that a reasonable and appropriate date for the commencement of the Defence case is 29 June 2009.[59] In arriving at its

---

of the Statute, which includes the right to adequate time to prepare [the defence case]." *Prosecutor v Taylor*, SCSL-03-1-PT, Status Conference, 20 August 2007, Transcripts, Page 34, lines 16-21.

[54] *Ntabakuze v. Prosecutor*, Case No. ICTR-98-41-AR72(C), Decision on Appeal of the Trial Chamber I "Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses" of 9 September 2003, 28 October 2004, p. 4.

[55] *Prosecutor v Taylor,* SCSL-03-1-PT, Joint Decision on Defence Motion on Adequate Time for the Preparation of Mr Taylor's Defence, 15 December 2006, para.13; see also *Prosecutor v Prilic et al.,* IT-04-74-AR73.4, Decision on Prosecution's Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 16.

[56] *Prosecutor v. Prlić et al.*, ICTY-04-74-AR73.4, Decision on Prosecution Appeal Following Trial Chamber's Decision on Remand and Further Certification, 11 May 2007, para. 38.

[57] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 4 May 2009, pp. 24220, ll. 16-17 (emphasis added). The Trial Chamber expressly considered the date the Accused was taken into custody and the date the Prosecution completed its case.

[58] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 4 May 2009, page 24220, lines 14-16.

[59] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, page 24220, lines 14-18.

Decision, the Trial Chamber considered the following:[60] (i) the oral arguments of the Parties, including their written submissions in their respective memorandums; (ii) the length of time the Accused has been in custody: since March 2006; and the possibility that that investigations and preparations may have been ongoing since that time; (iii) that the last Prosecution witness was heard over three months ago on 29 January 2009; (iv) the Defence's intention to call the Accused to give evidence in his defence; and (v) that the Defence had initially suggested that the earliest it was prepared to present its Defence was 15 July 2009.[61]

23. Reviewing the list of factors submitted on appeal, it is apparent that all of them were considered by the Trial Chamber. They formed part of the Defence's oral submissions to the Trial Chamber and were also provided in the 26 March 2009 memorandum,[62] both of which were expressly considered by the Trial Chamber. Consequently, the Appeals Chamber does not find the Trial Chamber failed to consider a relevant factor in reaching its discretionary decision. The Appeals Chamber therefore dismisses this part of the Appeal.

V. DISPOSITION

BASED ON THE FOREGOING REASONS, THE APPEALS CHAMBER by a majority

DISMISSES the Appeal in its entirety.

Justices King and Kamanda append a Dissenting Opinion.

Justice Ayoola appends a Separate Concurring Opinion.

[60] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, page 24220, lines 1-13.
[61] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, page 24220, lines 1-13.
[62] The 26 March 2009 memorandum discusses: (i) logistical problems related to locations of trial and witnesses, (ii) the time allotted in other cases at the Special Court, (iii) the death of the Defence's international investigator, and (iv) the false economy of starting the defence case early. The Defence's oral submissions to the Trial Chamber included the above factors and that the Prosecution would not be prejudiced by the additional time requested. *See Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, page 24219.

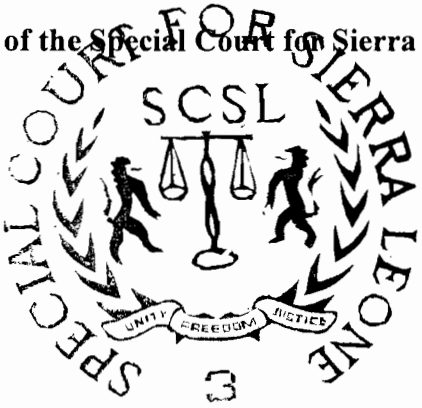
Done this 23rd day of June 2009 at Freetown, Sierra Leone.

Justice Renate Winter, Presiding

Justice Emmanuel Ayoola

Justice Shireen Avis Fisher

[Seal of the Special Court for Sierra Leone]



DISSENTING OPINION OF JUSTICE GEORGE GELAGA KING ON TAYLOR APPEAL REGARDING THE 4 MAY 2009 ORAL DECISION REQUIRING THE DEFENCE TO COMMENCE ITS CASE ON 29 JUNE 2009

I. INTRODUCTION

1. I have read the Decision of the majority of my colleagues in the Appeals Chamber, but with respect, I have to dissent, as I cannot agree with them that "the Defence has not shown that the Impugned Decision infringed the fair trial rights of the Accused by denying him adequate time and facilities for preparation."[1] In the result I dissent from their Decision to dismiss the appeal in its entirety.

II. SUBMISSIONS OF THE PARTIES

2. The Taylor Defence filed five grounds of appeal against the 4 May 2009 Impugned Decision of the Majority of the Trial Chamber ("the Majority") requiring Taylor Defence to commence its case on 29 June 2009.

3. First, the Defence submits that the Majority erred in law and abused its discretion by failing to give due weight to the fair trial rights of the Accused when setting the date on which the Defence case is to commence. Referring to the right to "have adequate time and facilities for the preparation of his [...] defence," enshrined in Article 17(4)(b) of the Statute, the Defence contends that the amount of time allotted to it for the commencement of its case and the facilities available to it cannot be deemed "adequate" within the meaning of Article 17.[2] It submits that "adequate" under this provision should be construed in reference to the unique circumstances of the case and in comparison with the time given to the Defence in other cases before the Special Court,[3] and contends that the Impugned Decision results in depriving the Defence of adequate time to prepare the Accused for his testimony.[4] The Defence also alleges that the Impugned Decision puts the Defence in an unfair position compared with the amount of time granted to the Prosecution.[5]

4. Second, it submits that the Majority erred in fact by failing to consider and/or give due weight to the unique circumstance of the case, in particular the unique logistical problems faced by

[1] Majority Decision, para. 20.
[2] Appeal, para. 18.
[3] Appeal, para. 19.
[4] Appeal, para. 21.
[5] Appeal, para. 25.

the Defence. It argues that failure to provide adequate time will result in a miscarriage of justice, present the appearance of bias in favour of the prosecution and, further, that the failure to accord due weight to the problems faced by the Defence in the preparation of its case amounts to an abuse of the Majority's discretion.[6]

5. Third, it submits that the Majority failed to consider and / or give due weight to the time limits ordered in the other cases before the Special Court. It contends that the eight weeks period allotted to it by the Majority is the shortest amount of time allowed in this respect even though the Taylor case would have required more time than the other cases, given the logistical difficulties arsing from the fact that it is being heard outside the seat of the Court.[7]

6. Fourth, it submits that the Majority erred in the exercise of its discretion in that it failed to consider that an expeditious trial requires the Defence to prepare its case thoroughly.[8] It argues that a premature start of the Trial may lead to multiple adjournments and, consequently, further delay the trial.[9]

7. Fifth, it submits that the delay it sought would cause no prejudice to the Prosecution.[10]

8. The Defence submits that its submissions contained in this appeal, taken individually and/or collectively, are sufficient to demonstrate that the Majority erred in fact and or in law and requests the Appeals Chamber to overturn the Impugned Decision and grant it until 15 July for the commencement of the Defence case.

9. In Response, the Prosecution contends that in setting the date of commencement of the Defence case, the Majority exercised its discretion in a manner which was undoubtedly "reasonably open" for it to do so.[11] It objects to the Defence's submission that the Majority failed to give due weight to the various matters raised in the grounds of appeal and contends that those matters were addressed in the Defence's Memorandum of 26 March 2009 and in the oral submissions made before the Trial Chamber on 4 May 2009.[12] The Prosecution further contends that to start the Defence case two weeks prior to the date requested by the defence does not deprive the Accused of any rights under Article 17. It avers that the current Defence Team has had almost two years to prepare, notwithstanding the one year during which the Accused benefited from the Defence efforts

[6] Appeal, para. 29.
[7] Appeal, para. 37.
[8] Appeal, para. 40.
[9] Appeal, para. 40
[10] Appeal, para. 43.
[11] Response, para. 7.
[12] Response, para. 8.

of the previous lead Counsel.[13] The Prosecution also points to the fact that the Accused having been in custody since March 2006, has had a significant period of time to prepare his testimony[14] and that the Accused has significantly more resources than any other Accused at the Special Court.[15] Further, it argues that, for the greater part of the last three years, the Defence has had the benefit of international and national investigators.[16] The Prosecution disputes the Defence's claim that the time allotted to the Defence to prepare is less than that granted to the other Accused and that such claim provides no basis for granting the appeal.[17]

III. DELIBERATIONS

10. The Defence alleges that, in setting the date for the commencement of the Defence case, the Majority of the Trial Chamber abused its discretion in that it failed to consider and / or give due weight to various considerations submitted by the Defence, namely: 1) the fair trial rights of the accused, in particular, the right to have "adequate time and facilities" for the preparation of his defence;[18] 2) the unique logistical problems faced by the Defence;[19] 3) the time limits ordered in the other cases before the Special Court;[20] 4) the fact that an expeditious trial requires the Defence to prepare its case thoroughly[21] and; 5) the fact that the delay sought by the Defence would cause no prejudice to the Prosecution.[22]

11. At the oral hearing before the Trial Chamber of 4 May 2009, the Parties made submissions on the Defence's application that it be granted until 15 July 2009 for it to commence its case. The Prosecution objected to the request. Counsel for Mr. Taylor stressed the logistical difficulties faced by the Defence team in the preparation for the trial; in particular, problems arising from the fact that some members of the Defence team were located in West Africa until end of May 2009 while the Accused is being tried in The Hague. He further pointed to delays in consequence of the Appeals Chamber's decision on Joint Criminal Enterprise and the Trial Chamber's Decision on Rule 98 of the Rules of Procedure and Evidence (the "Rules"). He submitted further that a premature date of the trial would prove to be a false economy as it would most probably lead to further requests for additional time. In addition to the oral submissions of the Parties, the Trial Chamber had before it

[13] Response, para. 11.
[14] Response, para. 12.
[15] Response, para. 15.
[16] Response, para. 16.
[17] Response, para. 17.
[18] First Ground of Appeal.
[19] Second Ground of Appeal.
[20] Third Ground of Appeal.
[21] Fourth Ground of Appeal.
[22] Fifth Ground of Appeal.

the Defence's arguments in support of the July 15 date contained in its Memorandum to the Prosecution dated 26 March 2009 and the Prosecution's Reply dated 15 April 2009.[23]

12. In the fulfilment of its mandatory duty to ensure that "a trial is fair and expeditious" pursuant to Rule 26*bis* of the Rules, the Trial Chamber is obliged to strike a balance between the right of the Accused to have "adequate time and facilities" for the preparation of his defence enshrined under Article 17(4)(b) of the Statute and his right to "be tried without undue delay," pursuant to Article 17(4)(c) of the Statute. The right to have adequate time (and facilities) for the preparation of the Accused Defence is regarded as a "minimum guarantee" of the right to a fair trial.[24] As emphasised by human rights bodies and international criminal tribunals, "adequate time" for the preparation of the defence case cannot be assessed in the abstract and depends on the circumstances of the case,[25] which can be affected by a number of factors, including the complexity of the case and the competing forces and claims at play.[26]

13. In that regard, let me emphasise that the question on appeal is not whether the Majority erred in setting the date for the commencement of the defence case 15 days earlier than that sought by the Defence. As has been acknowledged by both parties, the scheduling of trial dates is in the Trial Chamber's discretion. Likewise, while the Chamber ought to consider the views of the parties, it is not bound by them.[27] However, a discernable error arising from the Trial Chamber's failure to consider relevant factors or failing to give them weight would amount to an abuse in the exercise its discretion.[28]

14. In my opinion, the principal question for determination in this appeal is whether the Majority of the Trial Chamber ("the Majority") abused its discretion in failing to address the factors which are relevant considerations when adumbrating on its legal obligation to give a full informed

---

[23] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcripts, 4 May 2009, p. 24220.
[24] *Prosecutor v. Tadić, IT-94-1-A,* Appeals Chamber, Judgment, 15 July 1999, paras 46-47.
[25] *Nahimana* Appeals Judgment, para. 220, *quoting Paul Kelly v. Jamaica*, Communication No. 253/1987, 10 April 1991, UN Doc. CCPR/C/41/D253/1987, para. 5.9; *Aston Little v. Jamaica*, Communication No. 283/1988, 19 November 1991, UN Doc. CCPR/C/43/D/283/1988 (1991), para. 8.3.
[26] *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Motion for Joinder, 20 July 2007, para. 37; *Prosecutor v. Delalic, Mucic, Delic, and Landzo*, IT-96-21-T, Decision on the Applications for Adjournment of the Trial Date, 3 February 1997, para. 19; *Prosecutor v. Seselj*, IT-03-67-PT, Decision on Provision of Previous Testimony in Audio Format, 22 November 2006, para. 17.
[27] *Prosecutor v. Taylor*, SCSL-03-1-PT, Decision on Defence Application for Leave to Appeal "Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence" Dated 23 January 2007, 15 February 2007, para. 12.

[28] *Prosecutor v. Krajišnik, IT-00-39-A,* ICTY, Appeals Chamber, Judgement, 17 March 2009, para. 81; *Prosecutor v. Milosevic*, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence, IT-02-54-AR73.6, 20 January 2004, para. 7

and reasoned decision as to whether its refusal to grant the 15 July 2009 date requested by the Defence, violated the Accused's right to a fair trial.

15. The Majority stated: ". . . we are not convinced that the time sought by the Defence is justified and we, the majority, are of the view that a reasonable and appropriate date for the start of the Defence case will be Monday, 29 June 2009 and we so order."[29] Apart from stating that it was not convinced that the time asked for by the Defence to prepare its case was not justified, it failed to advert its mind to the inherent right of the Defence to be given adequate time to prepare its defence, thereby in my opinion, contravening Article 17(4)(b) of the Statute. The Majority had an overriding legal duty to examine, evaluate and adjudicate on "the factors relevant to its making a fully informed and reasoned decision"[30] as to whether setting 29 June 2009 for commencement of the Defence case infringed Mr. Taylor's right to a fair trial and in particular, his right to have adequate time to prepare his Defence as provided in the said Article.

16. The Majority did not give any reason for finding that the Defence's request was "not justified." On the contrary, it cursorily stated:

> We have considered the arguments of the parties, including the memorandum of Mr Griffiths of 26 March 2009 and that of Ms Hollis for the prosecution of 15 April 2009, both of which were referred to in the Defence submissions. We bear in mind in fixing the appropriate start dated that Mr. Taylor has been in custody since March 2006 and presumably investigations and preparations have been ongoing since that time. We also note that the Defence intends to call Mr. Taylor to give evidence and no doubt that will be a substantial amount of time which could be used for the preparation of other defence witnesses.[31]

17. Although the Impugned Oral Decision was not rendered upon a Motion filed by the Defence, it is nonetheless to be regarded as such.[32] The assessment by a Trial Chamber in relation to Motion for extension of time and / or alleging breach of the right to equality of arms is based on whether the requesting party has shown "good cause."[33]

---

[29] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcripts, 4 May 2009, p. 24220, lines 14-18.
[30] *Ngiravatware v. Prosecutor*, ICTR-99-54-A, Appeals Chamber, Decision on Augustine Ngirabatware's Appeal of Decision Denying Motions to vary Trial Date, 12 May 2009, para. 27.
[31] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcripts, 4 May 2009, p. 24220, lines 1-13.
[32] The parties presented submissions before the Trial Chamber as regards the commencement of the Defence case (by way of Memorandum and oral submissions); the Impugned Oral Decision was thereafter subject to a Motion for Leave to Appeal pursuant to Rule 73(B) which provides for interlocutory appeal against "decision rendered on such motions," in exceptional circumstances and to avoid irreparable prejudice.
[33] *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Chamber, Decision on Defence Motion to Further Delay the Commencement of the Defence Case, 28 September 2005; *Prosecutor v. Taylor*, SCSL-03-1-PT, Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence, 23 January 2007, *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 176; *Prosecutor v. Kordic & Cerkec*, IT-95-14/2-A, Decision on Application by Mario Cerkez for Extension of Time to File his Respondent's Brief, 11 September 2001, para. 9.

18. In the instant case, for reasons appearing hereinafter, I consider that the Taylor Defence had shown good cause before the Trial Chamber to merit an order that the date for the commencement of its case be 15 of July 2009, taking into consideration the logistical constraints faced by the Defence. Consequently, the failure of the Majority to give sufficient weight to these considerations constitutes, in my view, a discernable error in the Majority's exercise of its discretion.

19. The material difficulties faced by the Defence in view of the unique and peculiar circumstances of the case ought to be duly weighed against the right of the Accused to have adequate time to prepare his defence. I must stress the fact that the trial is being heard in The Hague and that members of the Defence Team are located in numerous locations outside The Hague. Further, high profile witnesses located in West Africa may wish to disclose their evidence to the lead Counsel directly, while the latter has to prepare the Accused for his testimony in The Hague.[34] These are all objective and significant factors specific to the Taylor case – and not found in the other cases before the Special Court – that are likely to affect the length of time necessary for the preparation of the Defence case. While I do not accept the Defence's submissions regarding an alleged "inequality of arms" between it and the Prosecution arising from a disparity of amount of time granted to them,[35] I consider that the governing principle as regards allotting time to a party, particularly the defence, is to ensure that the length of time granted is adequate to enable the party to fairly prepare and present its case. In summarily dismissing the Defence's arguments in relation to the unique circumstances of this case, I find that the Majority failed to give sufficient weight to the relevant factors for ensuring that the Defence is allotted sufficient time to properly prepare its case. This failure to my mind amounts to an abuse of the Majority's discretion in that regard.

20. I endorse Justice Sebutinde's Dissenting Opinion that "the time requested by the Defence in order to permit them to adequately prepare their Defence is not unreasonable,"[36] based in particular on the fact that the "the Defence is in the best position to assess the time that they require at this

---

[34] Appeal, para. 22.

[35] It is well established that the principle of equality of arms does not entail an equality of time between the Prosecution and the Defence, be it for the preparation or the presentation of the case. Rather, this principle should be considered in light of the respective roles of the parties, bearing the duty of the Prosecution to prove the accused's guilt beyond a reasonable doubt in contrast to the Defence's strategy to focus on poking specifically targeted holes in the Prosecution's case. In this context the applicable principle is that of proportionality rather than a literal interpretation of "equality of arms." *See Prosecutor v. Perisic*, IT-04-81-PT, Trial Chamber, Decision on Motion to Appoint *Amicus Curiae* to Investigate Equality of Arms, 18 June 2007 para. 7; *Prosecutor v. Oric*, IT-03-68-AR73.2, Appeal Chamber, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR15bis.3, Appeals Chamber, Decision on Appeals Pursuant to Rule 15bis (D), 20 April 2007, para. 28; *Ngiravatware v. Prosecutor*, ICTR-99-54-A, Appeals Chamber, Decision on Augustine Ngirabatware's Appeal of Decision Denying Motions to vary Trial Date, 12 May 2009, para. 28.

[36] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcripts, 4 May 2009, p. 24220.

stage to prepare,"[37] and relying on the good faith that Counsel for Taylor have demonstrated so far for respecting their commitments.[38] The fact that the time *requested* by the Taylor Defence (compared with that *allocated* to it) is less[39] or little higher,[40] than the time granted to the Accused in the other cases before the Special Court, having regard to the undoubted logistical constraints in the *Taylor* case is demonstrative of the reasonableness and good faith on the part of the Taylor Defence.

21. Accordingly, since I have held that the Defence's application for adequate time to prepare and present its case is not unreasonable, I consider it fair, just, right and in the interests of justice to grant the Defence's plea that the Defence case be commenced on 15 July 2009, instead of 29 June 2009, an extension of a mere two weeks. To hold otherwise would be tantamount to ensnaring oneself in the adage, "penny wise and pound foolish"! And I think that that is what Justice Sebutinde has in mind when she predicts "that a premature start of the Defence case is likely to result in an interrupted hearing with multiple of unforeseen and probably undesirable delays once the hearing begins."[41]

22. I note and endorse the dictum of the ICTY that:

> Pursuant to [...] the Statute, the Chamber must ensure that a trial is both fair and expeditious, and that the Defence has adequate time to prepare its defence. In case of conflict, the Chamber deems that considerations linked to the fairness of the trial must take precedence over those linked to its expeditiousness.[42]

Indeed, this dictum is in line with and in furtherance of "minimum guarantee" provisions enshrined in international and regional human rights conventions and international criminal courts. Let me refer to a few:

> (i) European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)[43]:

---

[37] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcripts, 4 May 2009, p. 24220.
[38] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcripts, 4 May 2009, p. 24221.
[39] In the *CDF* and *RUF* cases, Trial Chamber I allocated respectively three months and six months between the issuance of the Rule 98 Decision and the start of the Defence case.
[40] In the *AFRC* case, Trial Chamber II allocated two months and five days between the issuance of the Rule 98 Decision and the start of the Defence case.
[41] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcripts, 4 May 2009, p. 24221, lines 23-26.
[42] *Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, Pusic*, IT-04-74-T, Trial Chamber, Scheduling Order, 27 September 2007, para. 7. *See also*, *Ngiravatware v. Prosecutor*, ICTR-99-54-A, Appeals Chamber, Decision on Augustine Ngirabatware's Appeal of Decision Denying Motions to vary Trial Date, 12 May 2009, para. 31 (*stating* "Time and resource constraints exists in all institutions and it is legitimate for a Trial Chamber to ensure that the proceedings do not suffer undue delays and that the trial is completed within reasonable time. However, the Appeals Chamber stresses that these considerations should never impinge on the rights of the parties to a fair trial."
[43] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5.

Article 6 – Right to a Fair Trial

3. Everyone charged with a criminal offence has the following minimum rights [. . .]

2. To have adequate time and facilities for the preparation of his defence.

(ii) International Covenant on Civil and Political Rights (ICCPR) (1966)[44]

Article 14

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality.

(b) To have adequate time and facilities for the preparation of his defence.

(iii) The American Convention on Human Rights (1969)[45]

Article 8: Right to a Fair Trial

(2) Every person accused of a criminal offence has the right to be presumed innocent . . . During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: . . .

(C) Adequate time and means for the preparation of his defence.

23. The ICTY Trial Chamber considered that "[i]n making its scheduling decision, the Chamber also bears in mind the fact that by allowing sufficient time for the preparation of the Defence case, its conduct will be all the more efficient."[46] I accept and approve this statement as being both sensible and prudent. Indeed, while the interests of the proper administration of justice would not be served by excessive postponements of the proceedings,[47] it cannot be denied that consideration of grounds of efficiency of trial should catalyse the Trial Chamber into providing the Defence with adequate time for the preparation of its case and thereby prevent frequent requests for adjournments of the trial. The Defence's request was, in my opinion, wholly reasonable and justified. Consequently, the overriding principle of fairness should have prevailed over considerations of expeditiousness – justice must be seen to be done.

24. In view of the above factual and legal considerations, I have come to the conclusion that the Majority of the Trial Chamber, in finding that the Defence's application to commence its case on 15

[44] International Covenant on Civil and Political Rights, 16 December 1966, U.N.T.S, Vol. 999, p. 171.
[45] American Convention on Human Rights, 22 November 1969, entered into force July 18, 1978, 1144 U.N.T.S.17955
[46] *Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, Pusic*, IT-04-74-T, Trial Chamber, Scheduling Order, 27 September 2007, para. 7.
[47] *Prosecutor v. Krajisnik*, IT-00-39-T, Trial Chamber, Reasons for Decision Denying Defence Motion for Time to Call Additional Witnesses Decision, 16 august 2006, para. 35.

July 2009 was unreasonable and not justified, failed to give any or sufficient weight to relevant factors and as a result abused its discretion.

IV. DISPOSITION

25. I would, therefore, grant the Appeal in its entirety.

Done this 23rd day of June 2009 in Freetown, Sierra Leone.

Justice George Gelaga King

I agree:

Justice Jon M. Kamanda

SEPARATE CONCURRING OPINION OF JUSTICE EMMANUEL AYOOLA ON THE 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"

1. I agree that this appeal should be dismissed. However, I state, albeit very briefly, the reasons for my so agreeing.

2. The facts have been stated in the main decision of the Appeals Chamber. The Defence has appealed from the order of the Trial Chamber that the Defence should commence its case on 29 June, 2009 as against 15 July, 2009 requested for by the Defence.

3. Although the Defence has raised five grounds of appeal, it is manifest that the pith and substance of the case of the Defence on this appeal is that the majority of the Trial Chamber in fixing the commencement date of the defence as 29 June, 2009 have infringed the right of the Accused to have adequate time and facilities for the preparation of his defence.

4. The appeal has rightly been argued on both sides in terms of standards of appellate review of discretion, but the main question that is decisive of the appeal is whether the Accused has been deprived of his right to adequate time for the preparation of his defence by the order made by the Trial Chamber. If the Appeals Chamber answers the question in the affirmative the conclusion must follow, inexorably, that the Trial Chamber may have wrongly exercised its discretion.

5. In coming to a decision in the matter, the Appeals Chamber reviews the factors taken into consideration by the Trial Chamber with a view to assessing, among other things whether due weight has been given to relevant factors in fixing the commencement date of the defence.

6. In my opinion, "adequate time for preparation of defence" and opportunity to prepare for the defence may, in practical terms, be one and the same thing. An Accused who has been given an ample opportunity to prepare for his defence cannot complain of inadequate time so to do if, somehow, along the line, he has failed to take advantage of the opportunity. It is thus that when adequacy of time for the preparation of the defence is to be determined, the Tribunal cannot ignore the earliest time the Accused had such opportunity, nor can it ignore the earliest time facilities have been provided and the nature of such facilities.

7. In my opinion, the time an Accused has an opportunity to commence the preparation of his defence would be when he is charged and is informed in detail of the nature and cause of the accusation against him[1] pursuant to Article 17 (4)(a) of the Statute of the Special Court for Sierra Leone[2] and from the time the Prosecution complies with the disclosure obligations prescribed by Rule 66 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone[3] and the disclosure obligations prescribed by Rules 68 and 69(c).

8. Those Rules envisage that even before the Prosecution presents its evidence the Defence would have had materials with which it can commence preparation of the defence. It can reasonably be assumed that an Accused would have utilized those materials to commence the preparation of his defence. The Rules also ensure that the Accused starts with the advantage of access to materials that the Prosecution would have gathered in course of its investigation.[4] Thus, any argument that implies that the Prosecution has had a head-start advantage as to create an inequality is misconceived.

9. It cannot now be doubted that the complexity of the case is a factor to be considered in determining what would be adequate time.[5] Such complexity would be determined, among other things, by the nature of the facts that are to be established, the number of witnesses and international elements. The opportunity to assess the extent of the complexity of a case and the international elements in the case would have manifested as soon as the disclosure obligations prescribed in the Rules are complied with. An Accused cannot, therefore, be heard to contend that he has to wait till the end of the Prosecution case to assess the complexity of a case or to know that the case has international elements.

10. Furthermore, an Accused who has participated fully in the trial during the presentation of the Prosecution case can hardly be heard to argue that time for preparation of the defence does not commence until after the presentation of the case for the Prosecution or until after a Rule 98 decision.

---

[1] *See* Amnesty International U.S.A.: Fair Trials Manual, 1998, Chapter 8, para. 8.4: "One essential part of the information necessary for the realisation of the right to adequate time and facilities to prepare a defence is the right of the Accused to receive prompt notice of the charges against him or her." http://www.amnestyusa.org/international_justice/fair_trials/manual/8.html.

[2] Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone, 16 January 2002, 2178 U.N.T.S. 138 [Special Court Statute].

[3] Rules of Procedure and Evidence, Special Court for Sierra Leone, 12 April 2002 (as amended 27 May 2008), [Rules].

[4] Rules 66, 68.

[5] *Supra* note 1, para. 8.2: "The time adequate to prepare a defence depends on the nature of the proceedings (for example whether they are preliminary proceedings, trial or appeal) and the factual circumstances of each case. Factors include the complexity of a case, an Accused access to evidence..."

11. From all showing the Lead Counsel, a lawyer of considerable experience in criminal defence work, did not claim that commencement of preparation for the defence had not pre-dated the Rule 98 decision.

12. It is thus valid for the Trial Chamber to have taken into consideration, as it did in fixing an appropriate date, the fact that Mr. Taylor has been in custody since March, 2006 and also to have presumed that investigation and preparation have been ongoing since that time.

13. However, the Defence has argued[6] that until January of 2009 when the Prosecution closed its case, the Defence team had not heard the full Prosecution case and were unable therefore to complete preparation of the Defence case and that any Defence case must revolve, in large measure around the factual testimony of Prosecution witnesses and their cross-examination. Such argument appears to me to be misconceived. It assumes, wrongly, that factual testimony presented by the Prosecution, could possibly be permitted to depart, substantially, to the detriment of the Accused, from the case of which the Prosecution had given notice, through the Indictment and the materials disclosed, that it would present. Such argument also ignores the fact that cross-examination of Prosecution witnesses is expected to and would have been designed by the cross-examiner to serve the purpose of weakening the case of the Prosecution and/or of putting the case of the Defence to the Prosecution thus building the Defence's case in the process.

14. There is need to make three pertinent observations before I part with this matter. *First*, it would appear that the appeal has been argued by the Defence as if this were a second application to the Appeals Chamber in which fresh exercise of discretion to fix a date for the start of the defence is being sought, rather than a review of the discretion exercised by the Trial Chamber. Matters of fact were supplied in fresh and greater details than were put before the Trial Chamber. In such an appeal as this, the Appeals Chamber would only confine itself to a review of the exercise of discretion by the Trial Chamber on the basis of the facts presented to that Chamber. *Second*, there seems to have been a confusion of the circumstances that would make a denial of a grant of an application for an adjournment unjustifiable with those that would justify a conclusion that a breach of the right of an Accused to adequate time for the preparation of his defence has occurred. In the latter case, the tribunal is concerned with the overall circumstances of the case, objectively assessed, in regard to a fundamental right of the Accused, while in the former it is the peculiar and

[6] *Prosecutor v Taylor*, SCSL-03-01-T, Defence Reply to Prosecution Response to "Public with Annexes A, B and C Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral decision Requiring the Defence to Commence its case on 29 June 2009", 11 June 2009 ["Reply"], para. 11.

particular reasons presented by the applicant as ground for an application for an adjournment, as and when made, that are due for consideration, notwithstanding that in both cases the overall interests of justice and the fairness of the trial are paramount considerations. *Third*, an Accused who has been granted "adequate time" for the preparation of his defence as requested by him, cannot turn round to claim that by that fact his right to fair and expeditious trial has been infringed. It goes without saying, however, that a trial may be expeditious without being fair, while a trial that is unduly delayed may become unfair by reason of such delay.

15. I am in agreement with the conclusion arrived at in the main decision of the Appeals Chamber. I would only add, for whatever it is worth, that the Trial Chamber continues to be seized of the discretion to shift the commencement date of a case or grant an adjournment as often as fresh facts show that the exigencies of the case demand and as long as none of the parties suffers any prejudice by reason thereof. However, until a factual situation has arisen that calls for the exercise of its discretion a tribunal cannot be expected, speculatively, to exercise a discretion in advance of an eventuality that has not yet arisen.

16. For these reasons, I too will dismiss the appeal.

Done in Freetown, Sierra Leone this 23rd day of June 2009.

Justice Emmanuel Ayoola