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SCSL-03-01-T
(34578-34593)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Teresa Doherty, Presiding Judge Justice Richard Lussick Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Binta Mansaray
Case No.:	SCSL-03-1-T
Date:	11 February 2011

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON LATE FILING OF DEFENCE FINAL TRIAL BRIEF

Office of the Prosecutor:
Brenda J. Hollis

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

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

SEISED of the "Urgent and Public Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief", filed on 8 February 2011 ("Motion"),[1] wherein the Defence seeks leave to appeal the Trial Chamber's "Decision on Late Filing of the Defence Final Trial Brief", dated 7 February 2011 ("Impugned Decision"),[2] on the basis that:

1) "exceptional circumstances" exist in that:

   a. it is not in the interests of justice for the Trial Chamber not to have the benefit of the Defence's reasoned and comprehensive argument when determining the Accused's guilt or innocence on the most serious crimes;[3]

   b. that it would be patently unfair for the Judges to only have before them "the Prosecution's road-map to conviction" without being in a position to critically analyse the sufficiency of the evidence through the assistance of the Defence Final Trial Brief;[4]

   c. that it is a question of fundamental legal importance as to whether the Trial Chamber can reject the final submissions of an accused, even when the submissions are filed out of time;[5]

   d. that the interests of justice may be interfered with if the Defence Final Trial Brief is struck out on a procedural irregularity, as this has very serious implications for the fair trial rights of the Accused, as such a rejection effectively denies his fundamental right to defend himself;[6]

   e. that it is in the interests of justice to have an appellate decision on whether a court can completely obviate a party's reliance on a related Rule of the Court, as the majority has stated that the Defence's regard to Rule 86(B) is inapposite given that the Trial Chamber's scheduling order supersedes the provisions of Rule 86(B);[7]

2) irreparable prejudice exists in that the rejection of the Defence Final Trial Brief cannot be remediable on final appeal, as it would not adequately protect the accused's fair trial

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[1] SCSL-03-01-T-1195.
[2] SCSL-03-01-T-1191.
[3] Motion, paras 14-15
[4] Motion, para. 14-15.
[5] Motion, para. 16.
[6] Motion, para. 17.
[7] Motion, para. 18.

rights, for the Appeals Chamber, who is not supposed to be the primary trier of fact, to review the Final Trial Brief *de novo* in relation to the Trial Chamber's factual findings;[8]

RECALLING the "Order for Expedited Filing", dated 9 February 2011, wherein the Trial Chamber ordered expedited filing schedules for a response and a reply in relation to the Motion;[9]

NOTING the "Public Prosecution Response to Urgent and Public Defence Motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Trial Brief", filed on 10 February 2011 ("Response"),[10] wherein the Prosecution submits that the well reasoned Impugned Decision is correct in fact and law and based on a proper exercise of judicial discretion, but that it takes no position on whether the standard for leave to appeal has been met;

NOTING that the Defence has orally indicated that it is unlikely that it will file a reply;[11]

FINDING that, in any event, there would be no prejudice to the Defence in issuing this Decision without such a reply;

SEISED ALSO of the "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", filed on 9 February 2011 ("Ancillary Request"),[12] wherein the Defence pursuant to Rule 73(B) requests in the interest of justice an order to stay the proceedings pending the outcome of the Motion and/or related decision by the Appeals Chamber in order to preserve the Defence's right to present a closing argument prior to the close of the hearings;[13]

NOTING the Prosecution Response to the Ancillary Request, given orally in court on 11 February 2011, in which the Prosecution submitted that "[. . .] Your Honours may well determine that it is appropriate for the smooth functioning of the proceedings to postpone closing the hearing until the Motion is decided, either by your Honours, or on appeal", but submits that regardless of the outcome of the appeal, the Defence should not be granted to opportunity to make closing oral submissions, as it has waived its right to do so by failing to make such closing arguments on the scheduled days;[14]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rule 73 of the Rules of Procedure and Evidence ("Rules");

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[8] Motion, para. 20.
[9] SCSL-03-01-T-1199.
[10] SCSL-03-01-T-1200.
[11] *Prosecutor v. Taylor*, SCSL-03-01-T, (Draft) Transcript 11 February 2011, p. 14.
[12] SCSL-03-01-T-1197.
[13] Ancillary Request, para. 5-6.
[14] *Prosecutor v. Taylor*, SCSL-03-01-T, (Draft) Transcript 11 February 2011, p. 15.

NOTING that Rule 73(B) provides:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

NOTING therefore that (i) as a general rule, interlocutory decisions are not subject to appeal; (ii) Rule 73(B) involves a high threshold that must be met before the Trial Chamber can exercise its discretion to grant leave to appeal; (iii) a party seeking leave to appeal against an interlocutory decision must show "exceptional circumstances" and "irreparable prejudice"; (iv) the two prong test prescribed under Rule 73(B) is conjunctive and not disjunctive;[15] (v) even where the conjunctive test is satisfied, leave to appeal remains in the discretion of the Trial Chamber;[16]

RECALLING the Appeals Chamber rulings that "[a]s a general principle, interlocutory appeals are a rare exception"'[17] and that "[i]n this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by this Chamber on appeal";[18]

RECALLING ALSO that this Court has held that an interlocutory appeal does not lie as of right and that "the overriding legal consideration in respect of an application of this nature is that the applicant's case must reach a level nothing short of "exceptional circumstances" and "irreparable prejudice", having regard to the restrictive nature of Rule 73(B) and the rationale that criminal trials must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals";[19] and that "exceptional circumstances" may arise "where the cause of justice may be interfered with" or "where issues of fundamental legal importance" are raised;[20]

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[15] *Prosecutor v Brima, Kamara, Kanu*, SCSL-4-16-T, Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 of 31 March 2006, 4 May 2006.

[16] Rule73(B) states that "in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal"; also, see for example *Prosecutor v. Popovic et al.*, IT-05-88-T, Decision on Gvero Motion Seeking Certification to Appeal the Decision on the Extension of Time for Filing the Final Trial Brief, 15 July 2009; *Prosecutor v. Stanisic & Zupljanin*, IT-08-91-T. Decision Denying Mico Stanisic's Motion for Certification to Appeal the Oral Decision Accepting Christian Nielsen as an Expert and Requesting for a Stay of Proceedings, 20 October 2009, para 3.

[17] *Prosecutor v. Taylor*, SCSL-03-01-T-1166, Decision on Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 21 January 2011.

[18] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

[19] *Prosecutor v. Taylor*, SCSL-03-01-T-584, Decision on Confidential Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168, 10 September 2008.

[20] *Prosecutor v. Taylor*, SCSL-03-01-T-764, Decision on Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of

NOTING that the Trial Chamber, by a majority, has orally granted the Motion and the Ancillary Request, and indicated that written reasons for the decision would follow by the end of the day;[21]

CONSIDERING that the refusal to admit the Defence Final Brief for failure to conform to the orders of the Trial Chamber raises serious issues of fundamental legal importance involving the interests of justice;

CONSIDERING FURTHER that an erroneous interpretation of Rule 86(B) could result in irreparable prejudice to the Accused;

SATISFIED therefore that the Defence has met the conjunctive conditions of exceptional circumstances and irreparable prejudice as prescribed by Rule 73(B);

FOR THE ABOVE REASONS

GRANTS the motion and the Ancillary Request; and

1. Leave be granted to the Defence to Appeal the Impugned Decision; and
2. These proceedings are stayed until the Appeals Chamber has issued a decision on any appeal the Defence may choose to file on this matter.

Justice Doherty appends a Separate Opinion.

Justice Lussick appends a Dissenting Opinion.

Justice Sebutinde appends a Separate Opinion.

Done at The Hague, The Netherlands, this 11th day of February 2011.

Justice Teresa Doherty
Presiding Judge

[Seal of the Special Court for Sierra Leone]

Justice Julia Sebutinde

JCE, 18 March 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-764, Decision on Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents, 11 December 2008, p. 3; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005.

[21] *Prosecutor v. Taylor*, SCSL-03-01-T, (Draft) Transcript 11 February 2011, pp. 20.

SEPARATE OPINION OF JUSTICE DOHERTY

1. I concur with the above decision to grant leave to appeal the Impugned Decision.

2. However, and for the sake of clarity and objectivity, I consider that it is important to highlight that the Defence has omitted some important facts from its Motion which give a better understanding of the stance of the majority in rejecting the Defence Final Trial Brief.

3. In particular, in paragraph 7 of the Motion the Defence fails to mention that the majority of the Trial Chamber had, in fact, expressly granted the Defence the right to apply for the ancillary relief of presenting additional arguments after the decisions on the pending motions in question had been rendered thereby indicating that the majority did consider the impact of the outcome of the pending motions on the fair trial rights of the Accused. The Trial Chamber on 12 January 2011 stated:

> **CONSIDERING** that a review of the status of the case is not necessary at this stage as, once a determination on the pending motions has been made by the Trial Chamber, any outstanding issues on which the Defence may wish to make written submissions can be the subject of an appropriate application in accordance with the Rules;
>
> **CONSIDERING FURTHER** that, for the same reasons, a stay of proceedings or an extension of the time for filing the final briefs is not necessary, and that given that the Defence may seek leave to make additional submissions after the filing of the final trial briefs, there is no prejudice to the Accused's fair trial rights;[1]

4. The Trial Chamber, by a majority, restated this at the Status Conference on 20 January 2011.[2]

5. Again, in its "Decision on 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 Proceeedings Pending Resolution of Outstanding Issues", rendered on 2 February 2011, the Trial Chamber stated:

> [r]eiterating the statement made by the Trial Chamber in the Impugned Decision that "once a determination on the pending motions has been made by the Trial Chamber, any outstanding issues on which the Defence may wish to make written submissions can be the subject of an appropriate application in accordance with the Rules."[3]

6. This possibility was rejected by the Defence.

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[1] *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.
[2] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 20 January 2011, pp. 49133-49134.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T-1182, Decision on 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, 2 February 2011.

Done at The Hague, The Netherlands, this 11th day of February 2011.

Doherty J.

Justice Teresa Doherty
Presiding Judge

[Seal of the Special Court for Sierra Leone]

SEPARATE CONCURRING OPINION OF JUDGE JULIA SEBUTINDE

1. I write this separate opinion firstly to articulate my reasons for the Majority holding that "the Defence has met the conjunctive conditions of "exceptional circumstances" and "irreparable prejudice" as prescribed by Rule 73(B) of the Rules. Quite simply put, the issue of whether the Trial Chamber can reject a Defence Final Trial Brief filed out of time is a question of fundamental legal importance that has serious legal implications for the interests of justice and the fair-trial rights of the Accused. This constitutes "exceptional circumstances" in my view. Furthermore, if the trial was to proceed without reference to the Defence Final Trial Brief, the prejudice caused to the Defence could not be easily remedied on appeal, short of a declaration of a mistrial or alternatively a declaration that the Judgement be reviewed de novo taking into account the Defence Final Trial Brief. This, in my view, constitutes "irreparable prejudice".

Per curiam:

2. Secondly, whilst I am satisfied that the interests of justice have finally been served by this leave to appeal being granted, I am judicially compelled to separately articulate some concerns for the expedition of this trial in the hope that the kind of unnecessary delay occasioned in the recent past will in future be avoided.

3. This Trial Chamber has on occasion, rightly or wrongly, been accused of "undue delay" either in rendering its decisions or generally in protracting proceedings unnecessarily. On its part, the Trial Chamber has consistently maintained that it has conducted its proceedings "fairly and expeditiously" as required under Rule 26*bis* of the Rules of Procedure. However, that Rule also enjoins the Chamber to properly balance judicial economy with "*full respect for the rights of the accused* and due regard for the protection of victims and witnesses." [emphasis added] Failure to properly balance these two competing interests, I submit, may inevitably result in undesirable delays, thereby ultimately defeating the very objective and purpose of Rule 26*bis*.

History:

4. It will be recalled that since the Trial Chamber issued its Scheduling Order of 22 October 2010 setting out the road-map for the final stages of this trial, a number of issues arose *ex improviso*, which issues the Trial Chamber is expected in the spirit of Rule 26bis, to have dealt with "expeditiously and with full respect for the rights of the accused". A quick recap shows that no less than 14 applications were put before the Trial Chamber since its last Scheduling Order on 20 October 2010. They are as follows:

(1) *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 2011; **(Denied)**

(2) *Prosecutor v. Taylor*, SCSL-03-01-T-1117, Public with confidential Annexes A and B Defence Motion for Admission of Documents pursuant to Rule 92bis - Prince Taylor and Stephen Moriba, 11 November 2010; **(Granted)**

(3) *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Public 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, 12 November 2010; **(Denied)**

(4) *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 Prosecution and its Investigators, 15 November 2010; **(Granted) (Appeals Chamber dismissed the appeal)**

(5) *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 Alleged Death of Johnny Paul Koroma, 15 November 2010; **(Granted) (partially granted by Appeals Chamber)**

(6) *Prosecutor v. Taylor*, SCSL-03-01-T-1123, Public Defence Motion for Reconsideration of Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 15 November 2010; **(Denied)**

(7) *Prosecutor v. Taylor*, SCSL-03-01-T-1142, Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS regarding Relocation Of Prosecution Witnesses, 17 December 2010; **(Denied)**

(8) *Prosecutor v. Taylor*, SCSL-03-01-T-1143, Public 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; **(Denied)**

(9) *Prosecutor v. Taylor*, SCSL-03-01-T-1144, Public Urgent and Public Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 10 January 2011; **(Denied)**

(10) *Prosecutor v. Taylor*, SCSL-03-01-T-1145, Public Urgent and Public Defence request for a Status Conference pursuant to Rule 65*bis*, 10 January 2011; **(Denied)**

(11) *Prosecutor v. Taylor*, SCSL-03-01-T-1146, Public 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 2010; **(Granted)**

(12) *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 65*bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding issues, 14 January 2011; **(Denied)**

(13) *Prosecutor v. Taylor*, SCSL-03-01-T-1160, Urgent and Public with Annexes A and B Defence request for a Status Conference pursuant to Rule 65*bis*, 18 January 2011; **(Granted)**

(14) *Prosecutor v. Taylor*, SCSL-03-01-T-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; **(Denied)**

(15) *Prosecutor v. Taylor*, SCSL-03-01-T-1178, Public Defence Motion Seeking Leave to Appeal the Decision on Urgent and Public with Annex 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. **(Denied)**

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". The Defence was entitled to ensure that all these outstanding issues were resolved before they could file their Final Trial Brief. 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*.

Done at The Hague, The Netherlands, this 11th day of February 2011.

Justice Julia Sebutinde
Presiding Judge

[Seal of the Special Court for Sierra Leone]

DISSENTING OPINION OF JUSTICE R. B. LUSSICK

1. I respectfully disagree with the opinion of my learned colleagues that the Defence has established the existence of the conjunctive requirements of "exceptional circumstances" and "irreparable prejudice" required under Rule 73(B). My reasons for saying so are as follows:

There are no "exceptional circumstances":

2. The Trial Chamber's decision not to accept the late filing of the Defence Final Trial Brief was a foreseeable consequence of the Defence's refusal to comply with a case management decision of the Trial Chamber and, as such, did not give rise to any "exceptional circumstances". That this is so is demonstrated by the following brief history of the matter.

3. The date ordered for the filing of final trial briefs, i.e. 14 January 2011, was the date suggested by the Defence and accepted by the Trial Chamber. The views of the parties on the subject were canvassed at a status conference held on 22 October 2010. At that status conference, Counsel for the Defence submitted:

> All I can say is that we have carefully, and I hope judiciously, attempted to come up with a realistic timetable for the submission of a proper closing brief in this case[1] [...] We would invite you to say that Friday 14 January would be an appropriate date for the filing of the final trial brief.[2]

4. The Trial Chamber accepted this estimate by the Defence and, in its "Order Setting a Date for the Closure of the Defence Case and Dates for Filing Trial Briefs and the Presentation of Closing Arguments", dated 22 October 2010, set the following schedule ("Scheduling Order"):[3]

> 1. The Defence shall close its case soon after the testimony of the last witness and in any event no later than 12 November 2010;
> 2. The Parties shall file their respective final trial briefs by 16:30 on 14 January 2011;
> [...]
> 6. A party may file a written response to the final trial brief of the opposing party by 16:30 on 31 January 2011;
> [...]
> 8. The Prosecution shall present its oral closing arguments on Tuesday, 8 February 2011, between 9:00 and 16:30;
> 9. The Defence may present its oral closing arguments on Wednesday, 9 February 2011, between 9:00 and 16:30;
> 10. The Prosecution may present oral arguments in rebuttal on Friday, 11 February 2011, from 9:00 to 11:00 and the Defence from 11:30 to 13:30.

5. The Defence made no attempt to file a final trial brief. Instead, it inundated the Trial Chamber with a series of motions and other filings[4] and then used the fact that decisions on these

[1] Transcript, 22 October 2010, p. 48346, l. 9-12.
[2] Transcript, 22 October 2010, p. 48437, l. 12-15.
[3] SCSL-03-1-T-1105

filings were outstanding as an excuse to not file its final trial brief on the date ordered by the Trial Chamber.

6. Amongst three Defence filings on 10 January 2011 were: (i) a motion for a stay of proceedings[5] requesting a stay of proceedings, including vacating the deadline for filing final trial briefs pending the resolution of outstanding filings, or alternatively, a one month extension for filing the briefs and (ii) a request for a status conference[6] "given that there are a number of outstanding

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[4] See the following documents:
(1) *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 2011;
(2) *Prosecutor v. Taylor*, SCSL-03-01-T-1117, Public with confidential Annexes A and B Defence Motion for Admission of Documents pursuant to Rule 92bis - Prince Taylor and Stephen Moriba, 11 November 2010;
(3) *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Public 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, 12 November 2010;
(4) *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 Prosecution and its Investigators, 15 November 2010;
(5) *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 alleged death of Johnny Paul Koroma, 15 November 2010;
(6) *Prosecutor v. Taylor*, SCSL-03-01-T-1123, Public Defence Motion for Reconsideration of Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 15 November 2010;
(7) *Prosecutor v. Taylor*, SCSL-03-01-T-1142, Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS regarding Relocation Of Prosecution Witnesses, 17 December 2010;
(8) *Prosecutor v. Taylor*, SCSL-03-01-T-1143, Public 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;
(9) *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;
(10) *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;
(11) *Prosecutor v. Taylor*, SCSL-03-01-T-1146, Public 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 2010;
(12) *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 65*bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding issues, 14 January 2011;
(13) *Prosecutor v. Taylor*, SCSL-03-01-T-1160, Urgent and Public with Annexes A and B Defence Request for a status conference pursuant to Rule 65*bis*, 18 January 2011;
(14) *Prosecutor v. Taylor*, SCSL-03-01-T-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;
(15) *Prosecutor v. Taylor*, SCSL-03-01-T-1178, Public Defence Motion Seeking Leave to Appeal the Decision on Urgent and Public with Annex 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.
[5] *Prosecutor v. Taylor*, SCSL-03-1-T-1144, Urgent and Public Defence Motion for a Stay of Proceedings Pending Resolution of Outstanding Issues, 10 January 2010.
[6] *Prosecutor v Taylor*, SCSL-03-1-T-1145, Urgent and Public Defence Request for a Status Conference Pursuant to Rule 65*bis*, 10 January 2010.

filings before the Trial Chamber and yet the parties are scheduled to file their final trial briefs on 14 January 2011".

7. In its decision dated 12 January 2011[7] the Trial Chamber refused the Defence motions, but stated that

> [o]nce a determination on the pending motions has been made by the Trial Chamber, any outstanding issues on which the Defence may wish to make written submissions can be the subject of an appropriate application in accordance with the Rules.

In other words, the Trial Chamber had taken into account the outstanding decisions and had laid down a procedure to deal with any issues arising from them. Obviously, the effect of this decision would have been - had the Defence obeyed it - to allow the trial to progress whilst protecting the rights of the parties to be heard on any issues that might arise from the pending decisions.

8. The Defence did not accept the Trial Chamber's decision and on 14 January 2011 filed a motion seeking leave to appeal it, and also requesting a status conference and a stay of proceedings. The Defence also refused to accept service of the Prosecution Final Trial Brief (which had been filed in compliance with the Scheduling Order) thus deliberately rendering itself unable to comply with the other orders in the Scheduling Order.

9. The Trial Chamber accordingly scheduled a status conference for 20 January 2011 to give the Defence an opportunity to explain its conduct. At that status conference, Lead Counsel for the Defence advised the Trial Chamber that:

> Mr. Taylor has provided us with written instructions that we are not to file a final brief until such time as decisions are reached on all outstanding motions and appeals.[8]

10. At that status conference, the Trial Chamber (by majority) held that no submissions were put forward that would cause it to depart from its original order. However, and most importantly, the Trial Chamber again stressed that any orders necessary to accommodate issues arising from the outstanding decisions could be made when appropriate. The majority decision stated:

> The decisions on outstanding motions and appeals may call for further orders to be made in relation to the presentation of the Defence case and in the interests of a fair trial. But the Trial Chamber emphasises that any such orders will be made by the Trial Chamber and not by Mr. Taylor. Mr. Taylor does not have the option of obeying or disobeying court orders as he sees fit.[9] [...] [T]he Trial Chamber has indicated that it will afford the Defence the opportunity to apply for

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[7] *Prosecutor v. Taylor*, SCSL-03-1-T-1154, Decision on Defence Request for a Status Conference Pursuant to Rule 65 and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 12 January 2011.
[8] Trial Transcript 20 January 2011, p. 49121, l. 28 - p. 49122, l. 2.
[9] Transcript, 20 January 2011, p. 49133, l. 21-24.

ancillary relief, if necessary, after the decisions on the very recently filed motions and appeals are rendered.[10]

11. Notwithstanding what had been stated by the Trial Chamber, the Defence continued to adhere to the filing time decided by Mr. Taylor in violation of the court order and did not file its final trial brief until 3 February 2011, 20 days out of time, when all outstanding decisions had been received.

12. In my view, no "plausible excuse" has ever been put forward by the Defence for their failure to obey the Trial Chamber's order. Any claim to a plausible excuse disappeared upon delivery of the Trial Chamber's decision of 12 January 2011 referred to earlier, where the Trial Chamber provided a procedure for dealing with any issues that might arise from the outstanding decisions. The Trial Chamber made it clear to the Defence that it was not to wait for outstanding decisions, that allowance had been made for the filing of further submissions, if necessary, and that it was to file its final trial brief as ordered. From that date onward, the Defence reason for not filing a final trial brief until outstanding decisions had been delivered ceased to be a "plausible excuse", if it ever was.

13. There can be no doubt that the Accused made a conscious and calculated decision to defy an order of this Court. It is nonsense for the Defence to claim, in effect, that the Accused preferred to follow his own procedure to deal with the outstanding decisions rather than the procedure prescribed by the Trial Chamber, and that therefore he has a plausible excuse for ignoring the orders of the Trial Chamber. In my view, the conduct of the Defence amounts to not only an attempt to delay the trial but a deliberate interference with the administration of justice.

14. The decision of the Trial Chamber which was intentionally flouted by the Defence was clearly an exercise by the Trial Chamber of its discretion to make orders for the expeditious management of the trial. The Accused, in making a conscious decision to defy the court order, must have been aware that there was a likelihood that a late filing of his Final Trial Brief would not be accepted. Such was the case. Hence the Impugned Decision does not give rise to any issue of fundamental legal importance, nor any other exceptional circumstance.

There is no "irreparable prejudice"

15. The Defence claims that it will suffer irreparable prejudice if its Final Trial Brief is refused. I disagree.

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[10] Transcript, 20 January 2011, p. 49134, l. 2-4.

16. Under the Rules, the Defence is not even obliged to file a final trial brief. Rule 86(A) provides: "After the presentation of all the evidence, the Prosecutor **shall** and the defence **may** present a closing argument." (emphasis added)

17. It is only when the Defence elects to present a closing argument that it is obliged to file a final trial brief.

18. Rule 86(B) provides: "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."

19. Surely if failure to file a final trial brief would cause irreparable prejudice to the defence, then the Rule would have made it mandatory to file such a brief. In fact, the wording of Rule 86 recognises the principle of law that the burden of proving the guilt of the accused beyond reasonable doubt rests upon the Prosecution and remains upon the Prosecution throughout the entire trial.

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. Moreover, any error by the judges in discharging this responsibility can be corrected on appeal.

21. Therefore, it is my opinion that the Defence has not demonstrated that the Impugned Decision will cause it irreparable prejudice.

22. Moreover, 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.

23. For those reasons, I would dismiss the Motion.

Inaccurate Submission of Defence Counsel

24. Before I conclude, there is one matter I wish to refer to in order to correct a quite unjustified accusation against the majority (in the Impugned Decision) in general and myself in particular. I refer to the following Defence submission which, to say the least, is inaccurate:

> [T]he Defence also notes that the majority, through Justice Lussick, misrepresented the Defence's previously stated position, when he stated that Mr. Taylor had instructed his counsel not to file a final brief.[11]

[11] Motion, para. 7(v).

25. I say this is unjustified because the Defence is well aware that I was speaking in the context of a final trial brief not having been filed by 14 January 2011, and was referring to Mr. Taylor's instructions to his counsel, as told to the Trial Chamber by Lead Counsel Mr. Griffiths, that

> Mr. Taylor has provided us with written instructions that we are not to file a final brief until such time as decisions are reached on all outstanding motions and appeals.[12]

26. My remarks cited in paragraph 3 of the Motion make it quite clear that I was referring to the filing of a brief by 14 January 2011. Given the context, it is inconceivable that the Defence would seriously believe that I was stating that Mr. Taylor had instructed his counsel not to file a final trial brief at all.

Done at The Hague, The Netherlands, this 11th day of February 2011.

Justice Richard Lussick

[Seal of the Special Court for Sierra Leone]

[12] Transcript, 20 January 2011, p. 49121, l. 28 - p. 49122, l. 2.