Case Comment

SCSL, 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", *Prosecutor v. Taylor,* Case No. SCSL-03-1-T, A. Ch., 23 June 2009 (9p.) + Dissenting Opinion of Justice George Gelaga King (9p.) + Separate Concurring opinion of Justice Emmanuel Ayoola (4p.)

SCSL, Decision on the Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship Between the United States Government and the Prosecution of Charles Taylor, *Prosecutor v. Taylor,* Case No. SCSL-03-1-T, T. Ch. II, 27 January 2011 (7 p.) + Declaration of Judge Sebutinde

SCSL, Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables, *Prosecutor v. Taylor,* Case No. SCSL-03-1-T, T. Ch. II, 28 January 2011 (8 p.) + Declaration of Judge Sebutinde

SCSL, Decision on late filing of Defence final trial brief, *Prosecutor v. Taylor,* Case No. SCSL-03-1-T, T. Ch. II, 7 February 2011 (11p.) + Dissenting Opinion of Judge Sebutinde

SCSL, Decision on Defence motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Brief, *Prosecutor v. Taylor,* Case No. SCSL-03-1-T, T. Ch. II, 11 February 2011 (16p.) + Separate opinion Judge Doherty, Dissenting Opinion Judge Lussick, Dissenting Opinion of Judge Sebutinde

SCSL, Decision on Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief, *Prosecutor v. Taylor,* Case No. SCSL-03-1-T, A. Ch. II, 3 March 2011 (28p.) + Separate Opinion of Judge George Gelaga King

This selection of decisions from the Taylor case can be divided into three parts. The first part deals with the date of commencement of the Defence case, the second considers the Defence's request for admitting new evidence after it had closed its case, and the final part deals with the Defence's late filing of its Final Brief. All three parts are linked by the central question of the appropriate balance between fair trial rights of the accused and the danger of delaying the trial. At the same time, these decisions show a worrisome tension between the different courtroom actors.

I. Date of Commencement of Defence Case

This decision deals with the Defence appeal against the date of the commencement of the Defence case. In March 2009, the Defence had suggested 15 July as "the bare minimum"[1] (having preferred a later date in mid-August), but the Trial Chamber had instead set the date of 29

[1] Transcript, Monday, 4 May 2009, 9.30 a.m., Trial, Trial Chamber II, Case No. SCSL-2003-01-T, The Prosecutor Of The Special Court v. Charles Ghankay Taylor, available at: http://www.rscsl.org/Documents/Transcripts/Taylor/4May2009.pdf, p. 24212

June 2009. The Appeals Chamber held that the Trial Chamber had not erred in the exercise of its discretion and dismissed the appeal. Three issues are worth considering more detail.

1. Logistic problems

The Defence based its request for more time on the unique circumstances of the case, namely that the trial was held on the premises of the International Criminal Court (ICC) in The Hague, which is 3,171 miles away from Freetown, the seat of the SCSL. This resulted in the Defence team being split between Sierra Leone, the Netherlands and Liberia. The Defence explained that this hindered their ability to conduct their investigations, gather evidence and locate appropriate witnesses. In addition, with most of the Defence Team in West Africa, it was difficult to prepare the accused for his evidence and go with him through the many exhibits. It is therefore of little surprise that the Defence team felt "stretched to its very limits"[2] even though, as the Prosecutor pointed out, the Defence had access to a rather significant range of resources, including three offices, eight lawyers, a trial manger, a case manager, a number of interns, and eight international investigators.

In spite of these resources, the fact that a trial was located on a different continent from the Court put the Defence in an exceptional situation. It is therefore surprising that neither the Trial Chamber nor the Appeals Chamber discussed this unique circumstance in the majority decisions, or addressed the question of available resources, when considering the appropriate preparation time for the Defence case. Instead, there was some debate as to how much time the Defence had already had to prepare its case. Justice Ayoola found 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 the opportunity to prepare his defence."[3]

Thus, the Defence could have started preparing its case from the moment the accused was in custody (March 2006) and continue preparing it during the Prosecution's case. He argued that 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."[4]

The Prosecution reminded the Court that there had already been an extensive delay when the Defence had been granted five additional months after Charles Taylor had fired his first Defence Team in June 2007, after which the trial was postponed until January 2008. However, one has to agree with the Defence that, until the Prosecution had closed its case, the Defence had not heard the full argument. Moreover, the point that the Defence could have started preparing their case in March 2006 assumes that the Defence had not done so already. This ar-

[2] *Ibid*.
[3] SCSL, 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" – Separate Concurring Opinion Justice Emmanuel Ayoola, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, A. Ch., 23 June 2009, par. 6, in this volume PAGINA.
[4] *Ibid*.

gument seems to overlook the fact that the Defence was not asking for time to prepare the whole case, but rather for two additional weeks.

The Defence also drew attention to the preparation times of the other cases before the Court, which were all held in Freetown. The Defence team in the AFRC case were given 2 months and 5 days to prepare their case, in the CDF case 3 months, and in the RUF case 6 months and 2 days. The Defence in the trial of Charles Taylor, which was the only case held abroad, was granted only 8 weeks. This argument seems to be based on the assumption that there is a general principle of equality of defendants before the Court, where the discretion of the Chamber concerns questions of trial management. The Defence, however, did not provide any source for this principle.[5] There is a good reason for the Statute not to prescribe equality between defendants in such matters. It would be much too difficult to compare the specific circumstances of the very different cases. Thus, the Prosecution is right when they argue that the comparison with other cases is irrelevant, and that each case needs to be decided on its own merit.[6]

2. Fair trial rights

While the majority of the Trial Chamber scrutinised the relevant dates and the reasonableness of the requested two week extension, Justice Sebutinde, in her dissenting opinion, turned her attention away from logistics and to the fair trial rights of the accused. Her line of argument was taken up by the Defence in the appeal, where they claimed that the Trial Chamber had abused its discretion to manage the trial, as they failed to give due weight to Art. 17. This shift from practical considerations to the rights of the accused is to be welcomed as, in the end, each managerial decision should be taken in light of the consequences for the rights of the parties.

While the exercise of a defendant's rights often causes more delays, Rule 26*bis*[7] compels the Court to ensure that the trial is both fair and expeditious. This requires striking a balance between providing adequate time and facilities for the preparation of the defence (Art. 17(4)(b) SCSL Statute) and the right to be tried without due delay (Art. 17(4)(c)). As Justice King pointed out, the International Criminal Tribunal for former Yugoslavia (ICTY) has repeatedly declared that the endeavour to save time must not come at the cost of the fair trial rights of the defendant.[8] However, this balance is quite difficult to find. As the relationship between these two values is the central question of this decision, it is regrettable that neither of the Chambers took the opportunity to give some guidelines on how to achieve such balance.

[5] Nor did Justice Sebutinde, who agreed with this argument.
[6] SCSL, Prosecution Response to "Public with Annex 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, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, A. Ch,.8 June 2009, par. 14.
[7] SCSL Rules of Procedure and Evidence.
[8] SCSL, 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" – Dissenting Opinion of Justice George Gelaga King, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, A. Ch., 23 June 2009, par. 22 and footnote 42, in this volume PAGINA.

The Defence did not only argue that the Trial Chamber had unduly favoured judicial economy over the accused's right to prepare their case fully, they also argued that the early date would cause further delay later on and thus, in itself, would infringe on the accused's right to be tried without undue delay. On 4 May, the Defence Counsel declared:

> Nonetheless, it seems to us that to order a start date prematurely will in due course prove to be a false economy – and I say that quite bluntly - because it will result undoubtedly in future requests for more time because of our inability to in effect sort out these difficulties at the front end. It seems to me that time allowed at this stage will guarantee savings down the line.[9]

Again this argument is supported by the ICTY, which declared that "by allowing sufficient time for the preparation of the Defence case, its conduct will be all the more efficient".[10]

Before the Trial Chamber, the Prosecution had pointed out that they, too, had fair trial rights and that further delay would mean that the Court was more likely to forget the Prosecution's submissions.[11] This argument was, however, not discussed at the appeal, and it is likely that the judges agreed with the Defence's argument that, being professional judges and being able to consult the transcripts at any time, a delayed Defence case would not impair their ability to recall the Prosecution's case. Moreover, the requested delay of two weeks does not seem to make any difference considering the Prosecution had commenced their case one and a half years earlier (on 7 January 2008).

In light of the total length of the Charles Taylor trial, it seems disproportionate to deny the Defence two more weeks to ensure their case is fully prepared. In the end, the start of the Defence case was delayed nevertheless. After the Appeals Chamber had dismissed the appeal, the start of the Defence case had to be postponed until 13 July due to a virus in the detention centre.

3. The weighing of arguments

At the appeal, the Court had to decide whether the Trial Chamber had failed to consider any relevant factors or had failed to give them sufficient weight. The Appeals Chamber deemed that this was not the case, as the Trial Chamber had listed all arguments presented to them. This conclusion is unsatisfactory. As mentioned before, the Trial Chamber's discussion had mainly turned on the logistical question of dates rather than considering what effect their decision would have on the accused's fair trial rights. While the Trial Chamber had admittedly taken notice of all the relevant factors, they did not explain what weight, if any, they had given each argument, other than simply rejecting the request because a lack of "reasonableness".

This author argues that, in order to "consider and give weight" to the relevant factors, the Trial Chamber should instead have evaluated each point and explained how each of the arguments was or was not relevant for reaching the final decision. It is for reasons of transparency

[9] Supra note 1, p. 24213.
[10] Scheduling Order, *Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, Pusic*, Case No. IT-04-74-T, Trial Chamber, 27 September 2007, par. 7.
[11] Supra note 1 p. 24216.

and accountability that Courts are required to provide a full judgement rather than simply issuing their decision. Therefore, judges have to explain what factors they considered, what weight they gave them, and how they reached their conclusion.

II. Admission of US Cables

Three weeks after the Defence had closed its case, a number of diplomatic cables by the US government were leaked to WikiLeaks and published in the media. According to the Defence, the leaked cables raised doubts about the independence of the Court, and thus confirmed part of the Defence case, namely that the accused had been indicted for political reasons. The fear that political considerations influence the criminal proceedings is understandable. Since Nuremberg and Tokyo, international criminal trials have been notorious for being influenced by *realpolitik*, especially in the selection of the defendants. It is to be expected that, in high profile cases such as the trial of Charles Taylor, national governments have a strong concern about what impact the judgement has for the political situation in a country or even a whole region. However, the question of the political consequences of an acquittal or early release, even if the outcome is feared to be disastrous, is not something the Court can or should concern itself with. *Realpolitik* should have no room in the question of individual criminal culpability.

The Defence asked to re-open the case and admit the new documents. In addition, claiming that the US cables showed a close relationship between the US government and the Trial Chamber, Prosecution and Registry of the Court, it requested:

a) the source be identified within the Trial Chamber, Prosecution and Registry who had provided the US government with information;
b) an investigation into the relationship between these sources and the US government;
c) information be provided regarding the Prosecution receiving the instructions; and
d) information regarding any money provided by the US government to the Prosecution.

Unsurprisingly, the Trial Chamber was not eager to open new investigations, especially into the organs of the Court itself. Two arguments were made against the request. The first was with regard to the call for information about the funding of the SCSL. The Trial Chamber correctly pointed out that this argument had already been brought up by the Defence during their opening statement, as well as during the examination-in-chief of the accused. Thus, there was no reason for it to be dealt with again at this late stage after the passing of the deadline for filing motions, which was on the 24 September of 2010. Moreover, there was nothing linked to the question of funding within the US cables.

Secondly, for a request for further information about persons or parties of the case, there needed to be at least a *prima facie* case of bias. The Chamber concluded that there was no such bias to be found in the cables as there was no indication that the US government had tried to translate their concern into interference with the court. Indeed, the US had considered other legal avenues such as “building a case in the US against Taylor for financial crime such

as fraud".[12] The fact that the US considered other legal avenues to keep Taylor detained showed that the US government did not believe they had control over the SCSL. If there had been attempts of influence, they were not shown in the three documents presented by the Defence.

One of the US cables claimed that Justice Sebutinde was trying to take advantage of the fact that the Presidency of the Chamber was rotating and tried to delay the proceedings in such a way that, at the time of the judgement, she would be the presiding judge.[13] Because of this accusation, Justice Sebutinde withdrew herself from any decision related to these cables. This decision has to be welcomed, as it showed the Court's strong endeavour to demonstrate independence and impartiality.

III. Final Brief Submission

The third part of the decisions deals with the Defence's Final Brief, which was filed 20 days after the deadline.

It might be helpful to summarise the timeline of events and decisions. On 22 October 2010, the Trial Chamber ordered both parties to submit their Final Briefs on 14 January 2011. Four days before this deadline, on 10 January, the Defence requested a stay of proceedings, or at least to be given a one month extension, in order to allow them to wait for all outstanding decisions to be issued before filing their Final Brief. At this point there were 14 decisions still outstanding. On 12 January, the Trial Chamber refused this request. The outstanding decisions were issued mostly in the two weeks after the submission deadline, the final one on 3 February. On the same day (albeit at 16:59), the Defence filed its Final Brief and asked the Trial Chamber to condone the late submission. On 4 February the Prosecutor responded and requested that the Trial Chamber should only accept the Defence's late brief if the Prosecution could also file a "revised and refined version" of its own brief, or to disregard the part of the Defence brief that went over the page limit, or to reject the Defence brief and allow the Defence to file a 600 page brief by 7 February. The Trial Chamber rejected to accept the Defence's late Final Brief, but granted leave to appeal this decision; an apparently difficult decision, with each of the three judges submitting their own opinion.

The Final Brief is an essential part of the parties' cases because it contains the entire closing argument. The subsequent oral presentation is reserved only for highlighting details from that brief. Once again, the Trial Chamber had to use its discretion in questions of trial management and find the appropriate balance between safeguarding the accused's right to a fair trial whilst avoiding undue delays of an already extremely long procedure. Initially, the Trial Chamber showed understanding for the special circumstances of this case and granted the Defence each of their three requests: first, the submission date which the Defence had suggested, secondly, to triple the page limit from 200 to 600 pages, and thirdly, to postpone the date of the oral presentations so that both parties would have time to digest the extended doc-

[12] "WikiLeaks cabs reveal US concerns over timing of Charles Taylor trial", The Guardian, 17 December 2010.
[13] *Ibid*.

uments. Thus the Trial Chamber delayed closing arguments so as to allow three weeks after filing to prepare the oral presentations, even though Rule 86(b) prescribes a minimum of only five days.

1. Trial Chamber's rejection

Considering the importance of the Final Brief, the brevity of the Trial Chamber's rejection (a little over 1 page) is surprising. The Defence's reasons for the late submission are certainly not without merit. The Defence was instructed by the accused not to file the Final Brief before all outstanding court decisions had been issued. Understandably, the accused wanted to avoid "filing a half-baked Brief, which is the most significant stage of this three and a half year old trial". On 22 October, when the Trial Chamber had agreed to the Defence's suggested date of submission, none of the outstanding decisions had been foreseeable. For example, the US cables were leaked only in December. The Chamber nevertheless simply declared that the explanation by the Defence did not give any new grounds for rescinding from the original order to submit the Final Brief on 14 January. The main argument of the Defence, that it could not complete its brief without knowing the outcome of the outstanding issues, was not discussed.

In her separate opinion, Justice Doherty explained that the Trial Chamber had considered the fact that decisions were outstanding and that, at the status conference on 20 January, 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".[14] The question is, however, whether these procedures were sufficient to secure the fair trial rights of the accused. Presenting additional arguments in a piecemeal fashion is not the same as including them in the narrative of one coherent argument. Additions submitted to the brief subsequently would also cause further delays, as the Prosecution would need to be given the opportunity to respond to the additional arguments. In short, the procedure envisioned by the Trial Chamber meant that the Final Brief would not be final.

Another argument the Defence submitted for accepting their late brief was that the outstanding applications were all filed after the Court's scheduling order on 22 October. Thus, the "superseding events", namely the outstanding decisions, rendered the court order obsolete and Rule 86(B) became applicable instead. Rule 86(B) requires the Final Brief to be filed no later than five days prior the date for oral presentations, which would mean the submission on 3 February was still in time.

There are, however, two flaws in this argument. First of all, one cannot argue that the scheduling order has been rendered obsolete by superseding events where the Court explicitly considered these events and clearly decided that the date should not be changed. As Rule 86 only gives a minimum of time between written submissions and oral presentations, the Trial

[14] SCSL, Decision on Defence motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Brief – Separate Opinion of Justice Doherty, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, T. Ch. II, 11 February 2011, par. 3, in this volume PAGINA.

Chamber has the discretion to extend this time, which they decided to do here. While it is true that the applications could not have been foreseen on 22 October when the order was issued, the Trial Chamber had confirmed their decision in January when they rejected the Defence's request for an extension.

Secondly, this argument does not take into consideration that the Trial Chamber scheduled the oral arguments three weeks after the date for submission on the request of the Defence and in light of the length of the briefs (which had been extended at the request of the Defence). It is not acceptable to ask for an extension of the page limit and a delay of the oral arguments beyond the minimum of Rule 86(B), only to then submit the brief shortly before the oral arguments, relying on the very same Rule.[15]

2. Consequences of the rejection

It is interesting to observe the discussion revolving around the classification of the Trial Chamber's rejection of the Final Brief. The Defence, as well as Justice Sebutinde, saw in the rejection "a drastic and disproportionate penalty"[16] for the violation of the court order. The Prosecution, on the other hand, viewed it as a foreseeable consequence of the accused's voluntary action, and thus claimed the late submission was "a knowing and wilful waiver".[17] The accused "was not denied the opportunity to file a Final Brief, but rather, was denied the authority to substitute his decisions on timing for that of the Judges"[18].

The Appeals Chamber embraced the classification of a waiver, concluding that there is "no 'lesser sanction' that could or should have been considered, because enforcement of an order is not a sanction."[19] This is convincing in that the accused voluntarily failed to submit the Final Brief on the scheduled date. There are, however, also two flaws with this argument. First, the Appeals Chamber pointed out that the Trial Chamber "never stated with any degree of clarity what, if any, consequences would flow from that violation".[20] Thus, the accused could not have voluntarily waived his right to have the Final Brief considered if this consequence had not been stated. Moreover, the accused explicitly did not intend to give up his right to file the brief, but rather insisted on filing a complete brief at a later stage.

What is, however, more important than the appropriate classification, is the issue of the extent to which the consequences of the late filing, whether voluntarily and foreseeable or not, had a disproportionate effect on the fair trial rights of the accused. Justice Sebutinde argued that, in light of the seriousness of the charges, the interests of justice dictated that the Court should allow the late filing. She reminded the Court that the ICTY had even accepted a brief that had been filed without any explanations, simply because "the interests of justice warrant

[15] This meant the Prosecution had only two working days to digest 842 pages.
[16] SCSL, Decision on Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, A. Ch. II, 3 March 2011, par. 30, in this volume PAGINA.
[17] *Ibid.*, par. 35.
[18] *Ibid.*, par. 41.
[19] *Ibid.*, par. 56.
[20] *Ibid.*, par. 60.

it receiving the Brief as validly filed despite Counsel's breach of its order."[21] However, in the ICTY case, the delay was just one rather than 20 days.[22] On the other hand, the ICTY decision was part of a contempt proceedings rather than the Final Brief of a Defence case for war crimes and crimes against humanity.

Justice Sebutinde argued that the accused should be permitted to present his defence, notwithstanding the "procedural irregularity"[23]. Disobeying the Court, however, cannot be described as a mere procedural irregularity. While it is understandable that the Defence did not want to submit their final argument when a number of decisions were still outstanding, one must not forget that the late submission was a clear violation of a direct court order. The Defence had presented their concerns on 10 January, but the Trial Chamber did not agree that the situation required an extension. Thus, the accused had no right to set his judgement of the situation over that of the Chamber.

Further, Justice Sebutinde did not explain which irregularity would be serious enough to reject the Final Brief. If justice dictates overlooking irregularities, does this give the Defence a *carte blanche* to disobey orders? The final decision of trial management must lie with the Court. Even if one disagrees with the outcome, a trial cannot be conducted if the parties substitute their own schedules. As the Trial Chamber explicitly told the Defence not to wait for outstanding decisions, there was no plausible excuse for the Defence to disobey the explicit order.

Admittedly, the rejection has such a crucial implication because this is the accused's last chance to comprehensively and thoroughly present his arguments. However, not having the Final Brief accepted does not mean that there is no defence at all, as the judges have access to the Defence case. Moreover, the SCSL Statute did not make it compulsory for the Defence to file a Final Brief. This means that the Statute allows the Trial Chamber to make their final judgement without having a Final Brief at all. Thus, one cannot agree with Justice Sebutinde's conclusion that to strike out the Final Brief on procedural basis was to deny the "fundamental right to defend himself".

3. Duty to Protect the Accused

The Appeals Chamber based its decision to reverse the Trial Chamber's decision on a completely different argument. It held that, due to the serious implications of not submitting the Final Brief, the Trial Chamber was under the duty to assure itself that the accused fully understood his actions and the possible consequences, stating:

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[21] ICTY, Decision on Prosecution Application to Strike out Appellant's Brief in the Appeal of the decision on Contempt of the Tribunal Kosta Bularovic, *Prosecutor v. Milosevic*, Case No. IT-02-54-A-R 77.4, A. Ch., 23 June 2005, par. 5-8.

[22] Another example comes from the SCSL itself in Decision on Urgent Defence Request under Rule 54 with Respect to Filing of Motion for Acquittal, *Prosecutor v. Brima et al*, Case No. SCSL-4-16-T-456, T. Ch., 19 January 2006.

[23] SCSL, Decision on Defence motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Brief – Separate Concurring Opinion of Justice Julia Sebutinde, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, T. Ch. II, 11 February 2011, par. 10, in this volume PAGINA.

Had the fundamental rights of the Accused not been at issue, given the broad discretion that the Trial Chamber has in overseeing its own scheduling, the Trial Chamber would have committed no error in concluding that the Defence had forfeited its opportunity to file the final brief as ordered, and had no right to file at a later date of its own choosing. However, when as in this case, the forfeiture signifies a waiver of fundamental rights of the Accused, there is an obligation on the Court to assure itself that the Accused understand that the consequences of the actions ad representations of Counsel could be construed to be a waiver of the Accused's right to be heard and to defend at the conclusion of the trial.[24]

The core of the Appeals Chamber's reasoning was that, despite the accused's education and position as Head of State, he was nevertheless "entirely reliant on Counsel to file the Brief on time and could not himself have done so".[25] Even though the accused was present at the status conference, the Trial Chamber could not have assumed that he understood that he was waiving his defence rights. Interestingly, this was in line with the Defence, who argued that the accused explicitly did not want waive his right to submit the brief altogether, but rather to file it once all outstanding decisions had been issued.

The Appeals Chamber concluded that the Trial Chamber:

…had an obligation to ascertain on the record that the Accused fully understood and agreed with his lawyer's actions and representations and that he was aware that the consequences of that agreement included the possibility that his right to be heard at the conclusion of the case could be considered waived.[26]

The Appeals Chamber assumed here a very extensive obligation, which not only puts a strenuous burden on the Trial Chamber, but also raises far-reaching questions about the relationship between the Trial Chamber and Defence Counsel. At what point can the Trial Chamber not rely on the Defence Team's declaration that they have been instructed? More importantly, when are the consequences serious enough to create a duty for the Trial Chamber to question the accused as to whether he has understood and agrees with his Counsel? Regrettably, the Appeals Chamber did not give any legal source or principle for this obligation except for a brief reference in a footnote to the ICTY.[27]

The Appeals Chamber's reasoning has the appearance of a rabbit being pulled out of a magic hat. It seems the Appeals Chamber was reluctant to allow the harsh outcome of depriving the accused the right to file his Final Brief but, at the same time, did not want to undermine the discretion of the Trial Chamber in questions of trial management. If this line is followed by other Courts, however, this could easily open the floodgates for appeal applications against any number of situations where the Trial Chamber has exercised its discretion.

4. Conclusions

[24] Decision of 3 March 2011, *supra* note 17, par. 56, 57.
[25] *Ibid.*, par. 59.
[26] *Ibid.*, par. 61.
[27] Footnote 120 "See e.g., ICTY, "Decision on Momcilo Krajisnik's Motion to Present Additional Evidence", *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, A. Ch., 4 November 2008, par.12.

The Final Brief is the last chance where the parties can articulate their arguments in detail. Interestingly, in this question we cannot observe the usual antagonism[28] between Defence and Prosecution. The Prosecution did not request that the Final Brief be rejected altogether, and mainly tried to be allowed to resubmit its own brief. As Justice Sebutinde pointed out, it seems that the Prosecution had difficulties providing a complete brief itself as it had tried to amend its Final Brief twice. The Defence did not oppose the Prosecution's request to resubmit its Brief, resulting in both parties accepting each other's late filings. The Prosecution agreed with the Defence that "well-written final arguments only assist the trial Chamber in its deliberations and Judgement writing".

Thus, as both the Defence and Prosecution respected each other's wish to submit a completed and polished brief, the outcome in this case was justified. It has to be welcomed that the Trial Chamber had access to the Final Brief of the Defence before it issued the judgement in what was arguably the most important case before the SCSL. That the Defence's Final Brief was accepted is therefore certainly welcome. However, neither the Trial Chamber nor the Appeals Chamber sufficiently resolved the underlying issue, namely the balance between the right to sufficient time to prepare the defence case versus judicial economy.

IV. Tensions between the Courtroom Actors

In a criminal trial, especially an international criminal trial, it is expected that the professionals show a certain detachment from the case at hand. It is therefore astonishing that, in the present decisions, so much discussion revolved around attacking the other parties. Furthermore, one can observe a clear division between the majorities of the Trial Chamber, the Appeals Chamber, and the Prosecution on the one hand, and the Defence and Justices Sebutinde and King on the other.

Rather than focussing on how to avoid undue delays in an already very lengthy trial while preserving the accused's fair trial rights, a lot of debate turned around the question of whose fault the different delays were. Regarding the late submission of the Final Brief, the Defence clearly pointed the finger at the Court, since the Defence had to wait for a large number of outstanding Court decisions. The Prosecutor, on the other hand, highlighted that it was the Defence who had submitted all these motions in the first place.

Justice Sebutinde conversely contended that the fact that a number of the motions were resolved in favour of the accused shows that they were justified. She further argued that the blame for the delays lay with the Court because "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".[29] Moreover, Justice Sebutinde argues that the rejection of justified Defence motions in itself caused further delays, as it caused a number of justified interlocutory appeals. Thus, she reproached her Chamber for overlooking the fact that failure to properly bal-

[28] See below, Part IV.
[29] Separate Concurring Opinion of Justice Julia Sebutinde, *supra* note 24, par. 5.

ance judicial economy with the rights of the accused would result in a number of interlocutory proceedings, and thus would cause even more delays in the long run, concluding:

> 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.*[30]

In the author's opinion, this is also true for the Prosecution, who seemed to oppose most of the Defence's motions apparently for the sake of it, rather than on the merits of the application. For example, the Prosecution objected to the Defence request to postpone the opening of their case without suggesting a different date.[31]

The underlying question is as old as the idea of fair rights trials itself. How can the defendant be granted a fair trial with the necessary due process rights without causing the procedures to become unduly long? Modern international criminal courts and tribunals have an extensive catalogue of defendants' rights and, not surprisingly, suffer from very lengthy proceedings. While the post-World War II tribunals were conducted in an extremely short time, their defendants' rights would not be acceptable under to modern human rights standards. The fact that the SCSL Statute and Rules grant so many rights to the accused seems to indicate that the Court has learnt from the experience of the Nuremberg and Tokyo trials, and now favours fair trial rights over expediency. The length of trial proceedings, which has been a problem of all modern international and internationalised criminal courts and tribunals, is worrisome, but undercutting Defence rights for judiciary economy has been rejected so far.

When giving the defendant such extensive rights, the international community took the decision that a long trial was better than an unjust one. As long as the Defence is not abusing its rights with the intention of obstructing the course of justice, taking advantage of each and every fair trial right it has in order to fight its case cannot be objectionable.

In the author's view, a substantial part of the problem of the delays in this case is rooted in the antagonistic attitude of the courtroom actors. Throughout the arguments, we can see attacks on the professionalism, integrity and even credibility of the other party.

"Unreasonable request"

The first attack came from the Prosecutor, who argued that the Defence's request for more time to prepare its case was unreasonable. This claim supposed that the Prosecution was in a position to judge what a sensible time for preparation of the Defence case was. The Defence, refuting the assumption that it had not made the best of the available time, reminded the Court that it should be given credit for the fact that its request was genuine and reasonable. Regrettably, it is only the minority opinions in both the Trial Chamber and Appeals Chamber who painted the Defence in a better light. Justice Sebutinde recalled the Defence team's good

[30] *Ibid.*

[31] The only example where the Prosecution did not object the Defence request was where it tried to apply for a resubmission of its own Final Brief.

track record of commitments to efficient proceedings. Justice King endorsed Justice Sebutinde's judgement, and was "relying on the good faith that Counsel for Taylor have demonstrated so far for respecting the commitments."[32]

"Frivolous motions"

One of the most vehement attacks came from the Defence in relation to the leaked US cables. The allegations that the work of the Trial Chamber and the Prosecution had been interfered with by the US Government is one of the most serious accusations against the legitimacy of the Court. The Prosecution, on the other hand, called the Defence motion for investigation into organs of the Court "untimely and frivolous". This terminology seems to reveal not only anger at the Defence motion, but possibly even outrage at the renewed accusations against the Court and the Office of the Prosecution. One can observe here an exchange of allegations of unprofessionalism, rather than an argument about the issues at hand. It seems the Prosecution's argument that the cables demonstrate the independence of the Court rather than political interference would have been sufficiently strong to rebuke the request, without the additional slander against the Defence's intentions.

"Delaying tactics"

With regard to the late filing of the Final Brief, there were strong accusations of intentional delaying tactics by the Defence, even though the Defence rejected them outright.[33] Nevertheless, Justice Lussick declared:

> Instead, it *inundated* the Trial Chamber with a series of motions and other filings and then used the fact that decision on these filings were outstanding *as an excuse* to not file its final trial brief on the date ordered by the Trial Chamber.[34] [emphasis added]

This formulation suggests the Defence abused its procedural rights to play for more time. Justice Lussick did not explain, however, why the Defence should have followed this tactic. The assumption that filing a number of applications, in order to gain more time for writing the Final Brief, is not convincing. Justice Sebutinde correctly points out that a number of the motions were decided in favour of the accused, which shows that there were indeed reasonable applications. Moreover, the issuing of all these requests diverted time that the Defence could otherwise have used for the preparation of the brief. Since the Defence explicitly rejected the accusation that the late filing was a disregard of a Court order, Justice Lussick's accusation seems again to show the inherent mistrust of the intentions of the Defence.

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[32] Dissenting Opinion of Justice George Gelaga King, *supra* note 8, par. 20.
[33] At the status conference on 20 January 2011, Defence Counsel emphasised "This is not meant to be a delaying tactic."
[34] SCSL, Decision on Defence motion Seeking Leave to Appeal the Decision on Late Filing of Defence Final Brief – Dissenting Opinion of Justice R. B. Lussick, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, T. Ch. II, 11 February 2011, par. 5, in this volume PAGINA.

The late filing of the Defence brief was an unambiguous violation of the explicit schedule order of the Trial Chamber. The Defence was therefore quite anxious to make it clear that it did not intend to undermine the Court's authority, and emphasised that the late filing was not a deliberate disdain of the Court's order and was done on the instructions of the accused. The Defence reiterated that the Trial Chamber was wrong, holding that the late submission "amounted to a flagrant breach of the Court's order".[35] Instead, the late filing was only "a direct result of its pursuit of other legitimate and important legal issues before the Court".[36]

While the Defence argued that the late submission was necessary to preserve the accused's fair trial rights, the Prosecution called it a "deliberate disregard of court orders",[37] and an "attempt to highjack these proceedings."[38] The Trial Chamber, too, was convinced that Charles Taylor disrespected the Court's authority:

[T]he Trial Chamber emphasises that any such order 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.[39]

In his dissenting opinion, Justice Lussick expresses his accusation as well as his anger in strong terms:

> There can be no doubt that the Accused made a conscious and *calculated decision* to *defy* an order of the 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 described by 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*. [40] [Emphasis added]

It is astonishing how vehemently the Judge denounces the Defence's actions rather than discussing the legal question of the appropriate consequences of the late brief. Indeed, it must be agreed with the Defence that it looks as if:

the Majority decision was primarily spurred by the Majority's desire to show that the Court and not Mr. Taylor was in charge of the running of the trial.[41]

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[35] Decision of 3 March 2011, *supra* note 17, par. 28.
[36] *Ibid.*, par. 28.
[37] *Ibid.*, par. 62.
[38] SCSL, Decision on Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief – Separate Opinion of Justice George Gelaga King, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, A. Ch. II, 3 March 2011, par. 6.
[39] Case No. SCSL-2003-01-T, Status Conference, Trial Chamber II, The Prosecutor of the Special Court v Charles Ghankay Taylor, available at: http://www.rscsl.org/Documents/Transcripts/Taylor/20January2011.pdf, p. 49133

[40] Dissenting Opinion of Justice R. B. Lussick, *supra* note 35, par.13.
[41]

SCSL, Defence Notice of Appeal and Submissions Regarding the Decision on Law Filing of Defence Final Trial Brief, The Prosecutor of the Special Court v Charles Ghankay Taylor, Case No. SCSL-2003-01-T, Appeals Chamber 17 February 2011.

"So-called 'Instructions'"

The Appeals Chamber gave this mistrust of the Defence a new nuance. When examining the Defence's action, the Appeals Chamber spoke of "*so-called*" instructions by the accused, and even puts the word *instructions* in inverted commas. The clear assumption is that the Defence could not be believed when it explained that the late filing had been ordered by the accused. Without any indication to the contrary, this assumption is highly disrespectful of Defence counsel's professionalism, integrity and his ethical standards. Although, in the end, this mistrust helped the Defence to win the appeal, it is quite shocking that there is an underlying assumption that it is at least possible that the accused had not instructed Counsel to submit the Final Brief late as the Defence has repeatedly stated.

Conclusions

The core question of these decisions was the balance between judicial economy and the fair trial rights of the accused. At the same time the elephant in the room seems to be the strained relationship between the Court majority, Prosecution, Defence and the minority on the other side. The tension between the parties reached its climax on 8 February 2011 during the closing arguments of the Prosecution. When Defence counsel Courtenay Griffiths heard that the late submissions were not condoned by the Trial Chamber, he declared that there was no further role in the trial for himself or the accused. He walked out of the courtroom even though the presiding Judge, Justice Doherty, told him twice to sit down. For this, the Trial Chamber decided to subject Counsel to a disciplinary hearing. Surprisingly, Justice Sebutinde absented herself from this hearing[42] and, even more surprisingly, the presiding judge did not let the alternate judge, Justice Sow, sit instead. Thus the hearing was adjourned indefinitely.[43]

It is regrettable that the argument so frequently drifted into attacks on individual professionalism. While all parties should fight their case as well as they can, they must not forget that international criminal justice has aims that go beyond the individual trial. All participants owe it to the victims, as well as the international community, to treat all other participants with respect and integrity. It is especially regrettable that both the Trial Chamber and Appeals Chamber engaged in these antagonistic accusations, which were not relevant for the legal deliberations.

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[42] Justice Sebutinde declared in writing that "in view of the recent developments in the trial chamber, and consistent with my earlier views and opinion on this matter, both in chamber and on the bench wherein I dissented from the directive to lead counsel, I will on principle not attend Friday's hearing. Transcript, Friday, 25 February, 2011, 9.30 am, Hearing, Trial Chamber II, The Prosecutor of the Special Court v. Charles Ghankay Taylor, available at: http://www.rscsl.org/Documents/Transcripts/Taylor/25February2011.pdf, at p. 49316.

[43] Surprisingly, the alternate judge, Justice El Hadjj Malick Sow, was not used to replace Justice Sebutinde, as Justice Doherty explained that Rule 16, which deals with alternate judges, did not apply.

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