786) SCSL-03-01-T (25358-25397) 25358

THE SPECIAL COURT FOR SIERRA LEONE

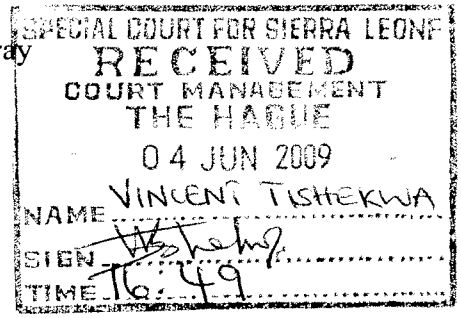
APPEALS CHAMBER

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

Acting Registrar: Ms. Binta Mansaray

Date: 4 June 2009

Case No.: SCSL-03-01-T



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

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

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

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

NOTICE OF APPEAL

I. INTRODUCTION

1. The Defence files this Notice of Appeal and accompanying Submissions, pursuant to Rules[1] 73(B) and 108(C), and the Practice Direction for certain Appeals before the Special Court[2].
2. All documents believed by the Defence to be necessary for a decision in this appeal are enumerated in the index that is within Annex A.[3]
3. The particulars of the decision being appealed and a summary of the proceedings relating to that decision, as well as the grounds in support of the appeal and the remedy or relief now being requested are delineated immediately below in seriatim.[4]

II. TITLE AND DATE OF FILING OF THE APPEALED DECISION AND THE DECISION GRANTING LEAVE TO APPEAL

4. The decision under appeal is an oral Decision rendered by a majority of the Trial Chamber on 4 May 2009, requiring the Defence to commence its case on 29 June 2009. See, *Prosecutor v. Taylor*, SCSL-03-01-T, Transcripts of Proceedings, 4 May 2009, page 24220, lines 14 - 18 ("Appealed Decision"). Justice Julia Sebutinde dissented orally from the Appealed Decision. See, Transcripts of Proceedings, 4 May 2009, pages 24220 (line 22) through 24222 (line 2). The decision granting the Defence leave to appeal was rendered unanimously by the Trial Chamber in *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*, 28 May 2009, ("Decision Granting Leave").

III. SUMMARY OF THE PROCEEDINGS REGARDING THE APPEALED DECISION

5. The trial in this case commenced with the opening statement of the Prosecutor on 4 June 2007. Current Counsel of record were assigned to represent the Accused on 17 July 2007[5]. On 26

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1 *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, as amended on 27 May 2008 ("Rules").
2 Practice Direction for certain Appeals before the Special Court, 30 September 2004 ("Practice Direction"), filed under, inter alia, SCSL-04-16-PT-111.
3 Practice Direction, Section III, para. 16, requiring an index of "documents believed to be necessary for the decision in the appeal."
4 See, Practice Direction, Section II, para. 10.

March 2009, Lead Defence Counsel expressed in a letter to the Registrar, the Prosecutor, the Trial Chamber's Senior Legal Officer, and other principals of the Court, his considered view that the earliest the Defence would be able to commence its case would be 15 July 2009[6]. The Presiding Judge indicated in court on 9 April 2009 that, if appropriate and after hearing from the parties on 4 May 2009, the Trial Chamber would on that date "fix a date for the commencement of the Defence case."[7] The Appealed Decision was accordingly rendered on 4 May 2009 and the Defence attempted to seek reconsideration of the Appealed Decision in court on 7 May 2009, but that request was denied by the Trial Chamber.[8] The Trial Chamber, nonetheless, extended the time-limit within which the Defence could apply for leave to appeal the Appealed Decision to 11 May 2009[9]. The Defence's Application for Leave to Appeal was filed on 11 May 2009[10] and the Decision Granting Leave was rendered on 28 May 2009, following further pleadings between the parties.

IV. GROUNDS OF APPEAL: STATEMENT OF ALLEGED ERRORS

6. First Ground of Appeal

The Majority of the Trial Chamber erred in law 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. The Accused has the right to a fair trial under Article 17 of the Statute. Article 17(4)(b) guarantees the Accused's right to "have adequate time and facilities for the preparation of his or her defence..." The Appealed Decision therefore constitutes an abuse of the Trial Chamber's discretion.

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[5] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T-320, "Principal Defender's Decision Assigning New Counsel to Charles Ghankay Taylor, 17 July 2007.

[6] The 26 March 2009 letter from Lead Defence Counsel is attached hereto as Annex B. The Prosecution's letter in reply to the said letter from Lead Defence Counsel was dated 15 April 2009 and is attached hereto in Annex C.

[7] See, *Prosecutor v. Taylor*, SCSL-03-01-T, Transcripts of Proceedings, 9 April 2009, page 24191, lines 22 - 24.

[8] See, *Prosecutor v. Taylor*, SCSL-03-01-T, Transcripts of Proceedings, 7 May 2009, page 24232, lines 3 – 6.

[9] Ibid., lines 7 – 12.

[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 ("Application").

7. **Second Ground of Appeal**

The Majority of the Trial Chamber erred in fact by failing to consider and/ or give due weight to the unique circumstances of the case, in particular the unique logistical problems faced by the Defence which impact upon, inter alia, the Defence's ability to investigate, gather evidence, and locate appropriate witnesses.

8. **Third Ground of Appeal**

The Majority of the Trial Chamber failed to consider and/or give due weight to the time limits ordered in the other cases before the Special Court. As such the Appealed Decision does not afford the Accused adequate time, therefore infringes Article 17(4)(b), and constitutes an error of law invalidating the Majority's decision;

9. **Fourth Ground of Appeal**

The Majority of the Trial Chamber failed to consider and/or give due weight to the fact that an expeditious trial requires the Defence to prepare its case as thoroughly as possible and in failing to take proper consideration of this fact, the Trial Chamber committed an error in the exercise of its discretion.

10. **Fifth Ground of Appeal**

The Majority of the Trial Chamber failed to consider that the delay sought by the Defence would cause no prejudice to the Prosecution.

V. REQUESTED RELIEF

The relief that is respectfully being sought as a consequence of the alleged errors in the Appealed Decision is,that the Appeals Chamber overturn the Appealed Decision and order that the Defence case be commenced on 15 July 2009.

SUBMISSIONS BASED ON THE GROUNDS OF APPEAL

A. INTRODUCTION

11. Submissions and arguments in support of each ground of appeal are advanced below under the respective ground of appeal, the Defence having elected to file its submissions as a separate part of the same document containing its Notice of Appeal.[11]

B. APPLICABLE STANDARDS OF REVIEW ON APPEAL

12. Article 20(1) and Rule 106(A) provide that the Appeals Chamber shall hear appeals on the following grounds: (a) a procedural error; (b) an error on a question of law invalidating the decision; or (c) an error of fact which has occasioned a miscarriage of justice.

13. In relation to an error on a question of law, the error must invalidate the decision of the Trial Chamber[12] and the appellant must provide details of the alleged error and state with precision how the legal error invalidates the decision.[13] In exceptional circumstances, an Appeals Chamber may consider legal issues which may not lead to the invalidation of the Trial Chamber's decision, where such issues are of general significance to the Tribunal's jurisprudence.[14]

14. In respect of errors of fact, an appellant must demonstrate that the Trial Chamber committed an error of fact and that the error resulted in a miscarriage of justice[15] before a decision will be overturned on appeal. A miscarriage of justice is defined as "[a] grossly unfair outcome

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11 See, Practice Direction, Section II, para. 11.

[12] Prosecutor v. Fofana and Kondewa, Appeals Chamber, Judgment [Fofana Appeal Judgment], 28 May 2008, para. 32.

[13] Prosecutor v. Norman et al, SCSL-04-14-688, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone [Norman Subpoena Decision], 11 September 2006, para. 7.

[14] See e.g., Prosecutor v. Galić, IT-98-29-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment, 30 November 2006, para. 6 [Galić Appeal Judgement]; Prosecutor v. Stakić, IT-97-24-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 22 March 2006, para. 7 [Stakić Appeal Judgement]; Prosecutor v. Kupreškić et al., IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 23 October 2001, para. 22 [Kupreškić Appeal Judgement]; Prosecutor v. Tadić, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 15 July 1999, para. 247 [Tadić Appeal Judgement].

[15] Kupreškić Appeal Judgement, para. 29 (citing Prosecutor v Furundzija, IT-95-17/1-A, Judgement, [Furundzija Appeal Judgement] 21 July 2000, para. 37 (citing Serushago v Prosecutor, ICTR-98-39-A, Reasons for Judgement, 6 April 2000, para. 22))).

in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[16] Furthermore, a "reasonableness standard" is applied by the Appeals Chamber when evaluating the viability of alleged factual errors: to wit - "[W]here no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous," the Appeals Chamber will overturn or interfere with the Trial Chamber's finding of fact.[17]

15. Where an appellant alleges an error relating to the Trial Chamber's exercise of discretion, the Appeals Chamber will overturn the challenged decision if it amounted to a "discernible error" in which "the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."[18] A discernible error is one where the Trial Chamber "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."[19] This applies to all errors relating to the exercise of the Trial Chamber's discretion, whether of law or of fact.[20]

16. Where an alleged error does not implicate an exercise of discretion by the Trial Chamber and is instead concerned with the application of mandatory standards, the issue is whether the Trial Chamber used the correct legal criteria in its determination and that those criteria were correctly interpreted and applied.[21]

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[16] Kupreškić Appeal Judgement, para.29 (citing Furundzija Appeal Judgement, para. 37 (quoting Black's Law Dictionary (7th ed. 1999)).

[17] Fofana Appeal Judgment, para. 33 (citing Kupreškić Appeal Judgement, para. 22, and Prosecutor v. Ntakirutimarna, ICTR-96-10-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgment, 13 December 2004, para. 12).

[18] Fofana Appeal Judgment, para. 36 (citing Norman Subpoena Decision, para. 5, citing Milošević Decision on Appeal from Refusal to Order Joinder, [Milošević Decision] para. 4, and citing Prosecutor v. Karemera, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9).

[19] Norman Subpoena Decision, para. 6, referring to Milošević Decision, para. 5.

[20] Norman Subpoena Decision, para. 7.

[21] See, e.g., Prosecutor v. Norman et al., SCSL-2004-14-AR73, Fofana – Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 16 May 2005, para. 28.

C. FIRST GROUND OF APPEAL

The Majority of the Trial Chamber erred in law 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. The Accused has the right to a fair trial under Article 17 of the Statute. Article 17(4)(b) guarantees the Accused's right to "have adequate time and facilities for the preparation of his or her defence..." The Appealed Decision therefore constitutes an abuse of the Trial Chamber's discretion.

17. The principle that an accused is entitled to a fair trial is an accepted norm of international law, and is recognised in numerous international criminal tribunals, and in the SCSL itself.[22]
18. The Defence submits that the amount of time allocated before the commencement of its case, as well as what facilities are available to the Defence, both cannot be deemed to be adequate within the meaning of Article 17 of the Statute, to the extent that the Appealed 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 its exhibits. The failure to provide the Defence with the necessary time and resources amounts to an error in law and has the effect of invalidating the Appealed Decision.
19. The defence submits (as is developed further below in respect of the second and third Grounds of the Appeal) that what should be construed as "adequate" within the meaning of Article 17(4)(b) should not only have reference to the unique circumstances of this case but should also be analysed in comparison to the periods of time given to the Defence in the RUF, AFRC, and CDF cases that the SCSL has also heard.
20. It is the submission of the Defence that the failure to provide the Defence with adequate time will jeopardise the right of the Accused to have his case heard in full and open conditions in order to fully rebut the case of the Prosecution.
21. Denying the extra time requested by the Defence also has the effect of depriving the Defence of adequate time to prepare the Accused for his testimony on his own behalf, a right guaranteed him under Rule 85(C) of the Rules. The preparation of the Accused and the

[22] Article 17 of the Statute.

effective presentation of his Defence will be pivotal to the success of the case. By denying the presentation of an effective Defence the Appealed Decision will have the effect of unfairly inhibiting the Defence's case which would, in turn, have an unavoidably damaging impact upon the development of the case that the Defence will seek to make.

22. Further, the bulk of the exhibits produced for the Defence will be introduced though the testimony of the Accused and the denial of adequate time to prepare the Defence for trial will inhibit the ability of the defence to plan the strategy and the structure regulating the introduction of said exhibits.

23. Depriving the Defence of the extra time requested will have the unavoidable effect of depriving the Accused and Lead Counsel adequate opportunity to assist and give/ receive instructions regarding other defence witnesses and evidence for a period of at least four (4) to six (6) weeks.

24. Further, in the Prosecution response[23] to the Defence Application for Leave to Appeal, the Prosecution failed to understand the nature of how the Defence will, by necessity, seek to develop its case, by suggesting that the period during which the Accused will be giving evidence would afford the Defence extra time to develop its case. In reality, it is anticipated that the Accused and the Defence team will have their resources completely employed both in the giving of testimony each day in court by the Accused. It is vital therefore that the evidence the Defence seeks to adduce during the course of the case be planned and prepared before the commencement of the Defence case, in order that it may be produced and developed in the most efficient and effective way.

25. In addition, failure to provide the Defence with such opportunities would put the Defence case in an unfair position when compared to the amount of time granted to the Prosecution in bringing the case against the Accused. Such a disparity would create an unavoidable inequality of arms and in the preparation of the Defence's case, amounting to an abuse of the Accused's right to a fair trial.

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[23] *Prosecutor v. Taylor*, SCSL-03-01-T-780, "Prosecution Response to Public with Annex A Defence Application for Leave to Appeal the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 29 June 2009", 20 May 2009 ("Response").

26. For all of the foregoing reasons, it is submitted that the Majority of the Trial Chamber erred in law 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.

D. SECOND GROUND OF APPEAL

The Majority of the Trial Chamber erred in fact by failing to consider and/ or give due weight to the unique circumstances of the case, in particular the unique logistical problems faced by the Defence which impact upon, inter alia, the Defence's ability to investigate, gather evidence, and locate appropriate witnesses.

27. As noted in the dissenting opinion of Justice Sebutinde, "the time requested by the defence in order to allow them to prepare their Defence is not unreasonable"[24]. Whilst the Defence acknowledges the authority of the Trial Chamber to make such decisions, the Defence submits that the Trial Chamber erred in fact by failing to consider the unique circumstances of this case and that despite sharing broad similarities with the other cases heard by the Special Court, the unique logistical problems and unavoidable delays suffered by the Defence place this case in a unique position in terms of the time required to adequately prepare and present the Defence' case.
28. Failure to provide such adequate time will result in a miscarriage of justice, present the appearance of bias in favour of the Prosecution, and severely hamper the reputation and perceived legitimacy of the Special Court for Sierra Leone.
29. The Defence submits that the Trial Chamber failed to accord due weight to the problems encountered by the Defence team in the investigation and preparation of its case, and such failure to take such problems into full consideration amounts to an abuse of the Trial Chambers' discretion. The Defence consequently and respectfully requests that the Appeals Chamber overturn the Appealed Decision, on the basis that the "the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion"[25].

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[24] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcripts of Proceedings, 4 May 2009, page 24221.
[25] Fofana Appeal Judgment, para. 36

30. Furthermore, and as Lead Defence Counsel indicated in his 26 March 2009 letter to the Trial Chamber, among others, the unfortunate death of the Defence's International Investigator, Ambassador Joshua Iroha, has presented unforeseeable problems to the Defence Team which can be partially ameliorated by the granting of the requested extension. Ambassador Iroha was the only International Investigator for the Defence team and as the former Nigerian Ambassador to Liberia, he benefited from unique expertise and personal acquaintance with many of the leading figures in the West African sub-region that has proven to be irreplaceable. Since Ambassador Iroha was struck down with an unexpected heart attack, he had not had time to complete his formal report. As a result of this, and coupled with the desire of many of those he contacted to remain anonymous before meeting Counsel, the Defence Team lost the valuable information the Ambassador was collecting. In this regard alone, therefore, the Defence has lost a significant amount of potentially vital and important evidence and testimony. It is submitted that such a loss alone justifies the request for a mere two and one-half weeks' extension to help compensate for the loss of over six months of work from our highest level investigator, in order to allow the Defence to attenuate a situation that it could not have anticipated in advance.
31. In addition to the unforeseen delays caused by the above, the Defence has had the added obstacle of having to run a complicated case that is spread across two continents and several different locales – countries and specific locations. The problems of running numerous separate teams in a variety of locales has led to inevitable delays in communication and problems in organising the Defence case. More specifically, whilst the team has had competent legal assistants working on the ground in Africa, the nature of any team ultimately requires the input of the team leader, in this case Lead Defence Counsel, to ensure optimum running and efficiency, something that can only be best achieved by direct supervision. Lead Defence Counsel, needless to say, cannot often be at different places without having adequate time away from courtroom obligations to travel, as such.
32. In addition, the often high profile nature of the witnesses has required extra effort to enlist their assistance. Another problem this poses is that the witnesses have often stated that they wish to discuss their evidence only with the Lead Counsel directly, which has prohibited the Defence team from making any progress in this regard until Lead Counsel was able to visit the region, resulting in obvious delays to the preparation of the Defence case.

33. As was made clear in Lead Counsel's 26 March 2009 letter, Defence witnesses are spread-out across numerous locations in West Africa and meeting with or interviewing them requires travel which in certain parts of Africa can often be quite difficult and this has, in turn, created further problems for the Defence Team.
34. Proper consideration of the above factors should have led the Majority to conclude that the eight-week period granted by the Trial Chamber was inadequate and that it infringes upon Article 17(4) (b) of the Statute. Failure to adequately consider the above constitutes an error of law which invalidates the Appealed Decision.

E. THIRD GROUND OF APPEAL

The Majority of the Trial Chamber failed to consider and/ or give due weight to the time-limits ordered in the other cases before the Special Court. As such the Appealed Decision does not afford the Accused adequate time, therefore infringes Article 17(4)(b), and constitutes an error of law invalidating the Majority's decision;

35. It is submitted that one useful indicium by which the Appeals Chamber should assess the time required by the Defence would be to consider the previous Defence cases that have been heard by the variously Trial Chambers of the SCSL.
36. It is pertinent to note that in the CDF case, the Trial Chamber allocated three (3) months between the Rule 98 decision and the start of the defence case. In the AFRC case, that period was two (2) months and five (5) days. In the RUF case, that period was six (6) months and two (2) days. A review of the above deadlines confirm that an eight-week period is by far the smallest amount of time thus far allocated to any accused before the Trial Chambers of the Special Court for the preparation of the Defence case.
37. Proper consideration of the above deadlines should have led the majority to conclude that an eight-week preparation period was an insufficient period of time in the present case and to concur with Justice Sebutinde that "a period that compares either with the period granted in the AFRC or even in the RUF case, which were held in Freetown, is not a realistic

comparison,"[26] and that a greater (not lesser) period of time should have been granted in the present case and the failure to do so is a violation of the Accused's fair trial rights under Article 17 of the Statute, thereby invalidating the Appealed Decision.

38. As the factors highlighted in the second ground of this appeal confirm, the present case has proven far more difficult to organise in terms of logistics as "this trial is different in that the parties are not sitting in the jurisdiction where the witnesses are located and...the Defence have additional logistical problems that are posed as a result of the trial not being held at the seat of the Court, or where the witnesses are located"[27]. Accordingly, the Defence submits, consistent with the dissenting opinion of Justice Sebutinde, that a period of ten (10) weeks from the Rule 98 decision should have been the bare minimum granted the Defence by the Trial Chamber in the circumstances of this case.

39. Further, it is submitted that the periods of time granted in previous SCSL cases created a legitimate expectation that the Defence would be treated with the same level of consideration and consistency. It was indeed anticipated that the Trial Chamber would take into consideration the added complexities of the present Defence case in comparison when determining the appropriate the amount of time that should be granted for the preparation of the Defence's case. The failure by the Majority of the Trial Chamber to take these factors into account constituted an error of law invalidating the Appealed Decision.

F. FOURTH GROUND OF APPEAL

The Majority of the Trial Chamber failed to consider and/ or give due weight to the fact that an expeditious trial requires the Defence to prepare its case as thoroughly as possible. In failing to take proper consideration of this fact, the Trial Chamber committed an error in the exercise of its discretion.

40. It is submitted that the Trial Chamber in seeking to expedite proceedings by rendering the Appealed Decision has ultimately and only exacerbated the problem. As noted by Lead

[26] Transcript, 24221:20-22.
[27] Ibid.

Counsel in his 26 March 2009 letter,[28] a premature start may well lead to multiple adjournments and prove to be a false-economy and therefore lead to a far longer trial period than would otherwise have occurred. As such, the Majority of the Trial Chamber has erred in the exercise of its discretion.

41. The inevitable delay that stands to arise should the current trial start date of 29 June 2009 prevail would also amount to an unacceptable infringement of the Accused's right under Article 17 (4)(c) "to be tried without undue delay" as the Defence would almost inevitably need to request further adjournments to undertake the work that would have been completed, had its original request for the two additional weeks been granted. And while some might suggest that two additional weeks is such a small amount of time that little, if much, could possibly be accomplished by the Defence, the Defence takes the contrary view unabashedly by stating bluntly that any additional amount of time is better than the prevailing timeframe and the progress that it could make if granted the additional two weeks would be significant.
42. The Defence noted that time and resource constraints exist in all judicial 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 a reasonable time. Indeed, and as has been stressed by an Appeals Chamber, such considerations should never impinge on the rights of the parties to a fair trial"[29]. Such considerations should, consequently, never affect the Accused's right to a fair trial under Article 17. And by failing to consider and/ or give due weight to the fact that an expeditious trial requires the Defence to prepare its case as thoroughly as possible, the Majority of the Trial Chamber committed an error in the exercise of its discretion.

G. FIFTH GROUND OF APPEAL

The Majority of the Trial Chamber failed to consider that the delay sought by the Defence would cause no prejudice to the Prosecution.

[28] 26 March 2009 Letter by Lead Defence Counsel.
[29] Ngirabatware v Prosecutor ICTR-99-54-A Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009

43. The start date of 15 July 2009, as was requested by the Defence, would cause no prejudice to the Prosecution. An additional two (2) weeks causes no significant delay and should assist in producing an expeditious trial, given that the Defence would have completed the most vital part of its pre-Defence investigation and legal tasks, and would be primarily preoccupied with the effective presentation of its case in court.
44. Furthermore, declining the Defence's request for additional time on grounds of potential prejudice to the Prosecution would amount to a gross injustice to the Accused. The Defence reiterates that the Prosecution was allowed more than double the amount of time it originally predicted for the presentation of its case. At no point during the Prosecution's evidence did the Defence attempt to hinder the Prosecution from developing their case to its full extent and it seems now to be grossly unfair that the Defence's request for a mere two weeks has been resisted by the Prosecution and rejected by the Majority of the Trial Chamber.
45. In relation to the submission of the Prosecution on 4 May 2009 that the "the fair trial rights of the prosecution could be affected by an inordinate delay" should the Defence be granted a two (2) week extension, the Defence submits that within the context of a two (2) year- long trial, the protestations of the Prosecution whither under an analysis of the timeframes already involved in the case. Furthermore, and as previously stated, "the tribunal in this case is composed of professional Judges with the testimony of witnesses already recorded in the transcript".[30] Therefore, there is clearly no risk of prejudice to the Prosecution through Prosecution evidence being lost or forgotten, especially by an experienced and professional judiciary.
46. The current resistance of the Prosecution in the circumstances amounts to little more than a tacit attempt to claim to have suffered a prejudicial effect when not even a semblance of legitimate prejudice has been foreshadowed. While accommodating the Defence's request for two additional weeks could potentially be viewed as amounting to a form of prejudice to the prosecution's case, it must be balanced against the fundamental right of the Accused to a fair trial, and the Prosecution's claim on this ground does necessarily fail against that of the Accused.

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[30] Prosecutor v Taylor, "Public with Annex A Defence Application For Leave to Appeal the 4 May 2009 Oral Decision Requiring the Defence to Commence its case on 29 June 2009", filed on 11 May 2009

47. In addition, when the negligible impact that a start date of 15 July 2009 would have upon the Prosecution is weighed against the arguable harm that the 29 June 2009 start date will cause the Defence, the needs of the Defence should be paramount, bearing in mind the grave consequences that denying such a request would have for the Defence case. Failure to provide such an extension would not therefore amount to "adequate time" within the meaning of Article 17 of the Statute. As such, the Appealed Decision constitutes an abuse of the Trial Chamber's discretion and gives rise to exceptional circumstances; indeed, and as was acknowledged by the Trial Chamber in the Decision Granting Leave[31], the potential detriment that would be suffered by the Defence constitutes "irreparable prejudice" within the meaning of Rule 73(B).

H. CONCLUSION

48. The Defence submits that the above submissions taken individually and/ or collectively are sufficient to demonstrate that the Trial Chamber erred in fact and/ or in law when it rendered the Appealed Decision and consequently, the Defence respectfully requests that Appeals Chamber overturn the Appealed Decision and grant it until 15 July 2009 for the commencement of the Defence case.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 4th Day of June 2009,
The Hague, The Netherlands

[31] *Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Defence Application for Leave to Appeal, 4 May 2009, page 25250.

List of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcripts, 27 February 2009

Prosecutor v. Taylor, SCSL-03-01-T, Transcripts of Proceedings, 9 April 2009

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 4 May 2009

Prosecutor v. Taylor, SCSL-03-01-T, Transcripts of Proceedings, 7 May 2009

Prosecutor v. Taylor, SCSL-03-01-PT-164, "Joint Decision on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defences," 23 January 2007

Prosecutor v. Taylor, SCSL-03-01-T-320, "Principal Defender's Decision Assigning New Counsel to Charles Ghankay Taylor", 17 July 2007

Prosecutor v. Taylor, SCSL-03-01-T-775, "Decision on Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", 1 May 2009

Prosecutor v Taylor, SCSL-03-01-T-777, "Public with Annex A Defence Application for Leave to Appeal the 4 May 2009 Oral Decision Requiring the Defence to Commence its case on 29 June 2009", 11 May 2009

Prosecutor v. Taylor, SCSL-03-01-T-780, "Prosecution Response To 'Public With Annex A Defence Application For Leave To Appeal The 4 May 2009 Oral Decision Requiring The Defence To Commence Its Case On 29 June 2009'", 20 May 2009

Prosecutor v. Taylor, SCSL-03-01-T, "Decision on Defence Application for Leave to Appeal, 4 May 2009 Oral Decision Requiring the Defence to Commence Its Case in 29 June 2009", 28 May 2009

CDF

Prosecutor v. Norman et al., SCSL-04-14-T-231, "Decision on Joint Request for Leave to Appeal against Decision on Prosecution's Motion for Judicial Notice," dated 19 October 2004, filed 20 October 2004

Prosecutor v. Norman et al., SCSL-04-12-T-669, "Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal", 17 January 2005

Prosecutor v. Norman et al., SCSL-2004-14-AR73, "Decision on Amendment of the Consolidated Indictment", 16 May 2005

Prosecutor v. Norman et al, SCSL-04-14-688, "Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone", 11 September 2006

Prosecutor v. Norman et al., SCSL-2004-14-AR73, Fofana – Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 16 May 2005

Prosecutor v. Norman et al., SCSL-2004-14, Appeals Chamber, Judgment, 28 May 2008

RUF

Prosecutor v. Sesay et al., SCSL-2004-15-PT-14, "Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder," 13 February 2004

Prosecutor v. Sesay et al., SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141," 28 April 2005

Prosecutor v. Sesay, SCSL-01-03-T-1001, "Decision on Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution Witnesses," 25 February 2006

ICTR

Prosecutor v *Ngirabatware,* ICTR-99-54-A Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009 **(no Internet link, found hardcopy provided to the CMS)**

Prosecutor v. Karemera, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment,19 December 2003,
http://www.ictr.org/ENGLISH/cases/Karemera/decisions/191203.htm

Prosecutor v. Ntakirutimarna, ICTR-96-10-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgment, 13 December 2004
http://www.ictr.org/ENGLISH/cases/NtakirutimanaE/judgement/Arret/Index.htm

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ANNEX A

Index of Documents Believed Necessary for the Decision on Appeal, Pursuant to *Practice Direction for Certain Appeals Before the Special Court*, 30 September 2004, Section III, Para. 16.

(a) Memorandum by Lead Defence Counsel "*Defence Case Start Date*", dated 26 March 2009;

(b) Letter by Brenda Hollis Regarding Defence Case Start Date, dated 15 April 2009;

(c) *Prosecutor v. Taylor*, SCSL-03-01-T, Transcripts of Proceedings, 09 April 2009;

(d) *Prosecutor v. Taylor*, SCSL-03-01-T, Transcripts of Proceedings, 04 May 2009;

(e) *Prosecutor v. Taylor*, SCSL-03-01-T, Transcripts of Proceedings, 07 May 2009;

(f) *Prosecutor v. Taylor*, SCSL-03-01-T-777, *Public With Annex A Defence Application For Leave To Appeal The 4 May 2009 Oral Decision Requiring The Defence To Commence Its Case On 29 June 2009*, 11 May 2009;

(g) *Prosecutor v. Taylor*, SCSL-03-01-T-780, *Prosecution Response To 'Public With Annex A Defence Application For Leave To Appeal The 4 May 2009 Oral Decision Requiring The Defence To Commence Its Case On 29 June 2009'*, 20 May 2009;

(h) *Prosecutor v. Taylor*, SCSL-03-01-T-781, *Defence Reply To Prosecution Response To 'Public With Annex A Defence Application For Leave To Appeal The 4 May 2009 Oral Decision Requiring The Defence To Commence Its Case On 29 June 2009'*, 25 May 2009;

(i) *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,* 28 May 2009;

ANNEX B
Memorandum by Lead Defence Counsel "*Defence Case Start Date*", dated 26 March 2009

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SPECIAL COURT FOR SIERRA LEONE
OFFICE FOR THE DEFENCE OF CHARLES TAYLOR
Telephone +31705159743 Facsimile: +31703222711

MEMORANDUM

To: Herman von Hebel, Binta Mansaray, Gregory Townsend, Claire Carlton-Hanciles, Will Romans, Simon Meisenberg, Stephen Rapp, Brenda Hollis, Saleem Vahidy, Elaine Bola-Clarkson

From: Courtenay Griffiths, QC

Cc: Terry Munyard, Andrew Cayley, Morris Anyah, Silas Chekera

Date: 26 March 2009

Subject: Defence Case Start Date

Dear All -

I am rounding up a 2 week trip to West Africa during which I met with a number of important witnesses and various team members and SCSL personnel (including WVS). Thus I am now in a better position to indicate how much time our team is likely to need to ensure that we have adequate time for the preparation of the defence case. I am writing to all parties informally, because I know that the time we need for preparation has important administrative and budgetary implications for the court. We are particularly conscious that given the current state of the global economy, many of the countries which have historically supported the SCSL may now adjust their priorities.

Nonetheless, for reasons which I develop below, my considered view is that the earliest we will be able to start our defence case is 15 July. To start any earlier would be a false economy. It is fairer to all parties concerned, and a more efficient use of time and resources, to be fully prepared upfront, rather than to request multiple adjournments throughout the defence case, which would be the inevitable result of a forced premature start. Silas had indicated to the Management Committee in November of last year that our team would need approximately six months from the end of the Prosecution case to the beginning of the defence case. This estimate is proving to be accurate.

My team in The Hague as well as the teams in Freetown and Monrovia are fully committed and working diligently. Since the last Prosecution witness testified, myself and co-counsel have been involved in a comprehensive review of the evidence, not only for Rule 98 purposes, but with a view to establishing how to streamline the defence

SPECIAL COURT FOR SIERRA LEONE
OFFICE FOR THE DEFENCE OF CHARLES TAYLOR
Telephone +31705159743 Facsimile: +31703222711

case. That review has an impact on the course of the ongoing investigations – some witnesses are no longer necessary while other have to be found.

Of course, linkage witnesses like ours are more time-intensive than crime-based witnesses, because they are often high-profile and enlisting their assistance takes extra effort. Often they demand discussion with Lead Counsel directly, and this has been difficult to accommodate while the Prosecution case was in full swing and counsel were in court every day. Additionally, our linkage witnesses are not conveniently located in a crime base area, and thus require travel throughout Africa. The recent death of our International Investigator Ambassador Iroha has further complicated the investigations aspect of our case preparation.

I envisage that my team will spend the time between now and 15 July as follows:

- Now to 6 April – Finalize Rule 98 preparation and arguments
- Mid-April to end of May – Terry Munyard, Morris Anyah and one Legal Assistant will be based in Freetown and Monrovia; I will travel between the two and elsewhere as necessary. We will undertake extensive witness interviews, make final selections, compile the required documentations, and prepare all witnesses for trial (witnesses not to exceed 50).
- End of May to mid-July – I meet with Mr. Taylor to prepare him for testimony. This requires an extensive analysis of exhibits and personal knowledge. This will take 4 to 6 weeks, as I anticipate his testimony will take the same. You will appreciate that it was not possible to prepare Mr. Taylor to give testimony during the Prosecution case because he was in Court every day.
- June and July will be used to compile results of the field work and put all logistics in place for the travel of the witnesses.
- Andrew and Silas will stay in The Hague to oversee filings, prepare the pre-defence case materials, and coordinate disclosure obligations, etc.

We are aware of the resource-implications of the matters set out above, but would observe that it would be wise and fair to consider them in light of:

- The Article 17 rights of the accused and the statutory guarantee of adequate time for the preparation of the defence case.

SPECIAL COURT FOR SIERRA LEONE
OFFICE FOR THE DEFENCE OF CHARLES TAYLOR
Telephone +31705159743 Facsimile: +31703222711

- The disparity of resources between the defence and the prosecution, even **now** that the prosecution has closed its case.
- The fact that the change representation which occurred in June 2007 has meant that the accused's current team of lawyers have had out of necessity to prepare to deal with the prosecution case whilst in tandem preparing the defence case, in a situation where all potential witnesses are a continent away. In this regard the prosecution had the luxury of five years in which to prepare their case whilst we have had in effect 18 months.
- Further the time requested is less than that granted in all other cases heard before this court.
- Finally, it should be borne in mind that the prosecution were allowed to present their case without any pressure being placed on them as to the duration and content of their case, even though, in the event, their case lasted twice as long as indicated, thus creating the pressures currently acting upon the proceedings.

I am sure this time-line will be discussed at length at the appropriate time; however, I thought it helpful to make all parties aware of the work we have already undergone and the work that lies ahead.

Yours,

Courtenay Griffiths Q.C.
Lead counsel

ANNEX C
Letter by Brenda Hollis Regarding Defence Case Start Date, dated 15 April 2009

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 297000
FAX: Extension: 178 7366 or +39 0831 257366 or +232 22 297366

By email

April 15, 2009

Mr. Courtenay Griffiths, QC, Herman von Hebel, Binta Mansaray, Gregory Townsend, Claire Carlton-Hanciles, Will Romans, Simon Meisenberg, Stephen Rapp, Saleem Vahidy, Elaine Bola-Clarkson.

Re: *Prosecutor v. Taylor* - SCSL-03-01-T
Defence Case Start Date

Dear All,

I refer to the Defence letter of 26 March 2009 regarding the above matter.

The Prosecution wishes to thank the Defence for indicating when it wishes to start the Defence case. It may be of assistance to give advance notice of the Prosecution position as well. In that regard, I would like to first point out that the requested date is a Wednesday, and that the following Friday is the last official work day before the ICC recess, which begins at 5:00 pm on that date and continues until 10 August. So, unless the trial continues through the ICC recess, we would have only three days of witness testimony before the recess. The Prosecution understands that it has been informally agreed between the Registry and the ICC that the courtroom and sufficient support staff could be available to continue the trial through the ICC recess. The Prosecution requests that formal commitments be obtained with the ICC to ensure the availability of the courtroom throughout the summer regardless of the date the Trial Chamber orders the Defence case to begin.

The Prosecution notes that the Accused's right to a fair trial does not translate into giving the Accused as much time as Defence Counsel requests. Rather, that right translates into giving him the time that is required if the Defence exercises due diligence. This duty requires there be no undue delay, that is, no more delay than is reasonable or necessary.[1] One can assume this standard was applied to all requests for delay in the cases before the Special Court; therefore, what happened in the other trials before the SCSL, with multiple accused, may not be dispositive here. If any comparison would be helpful, it should be noted that this requested trial date would give this Accused—who is represented by four experienced counsel backed by a team

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-182, 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. 13.

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OFFICE OF THE PROSECUTOR

JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 297000

FAX: Extension: 178 7366 or +39 0831 257366 or +232 22 297366

of investigators and legal officers—almost as much delay as was given Slobodan Milosevic, who was ill and defended himself against some 60 counts related to three separate conflicts, with over 350,000 pages of disclosure and some 350 witnesses testifying against him in the case in chief, and whose case was heard before the ICTY Rule 98*bis* was amended to require oral submissions to expedite the proceedings. Regarding delay involved in cases using the oral Rule 98*bis* procedure, in the *Krajisnik* case (8 counts), which involved a very high level accused, the Accused was given a delay of some three months from the end of the Prosecution case until the commencement of the Defence case. In the *Milutinovic* case (5 counts), involving the former President of Serbia and five other accused, there was less than a two month delay from the close of the Prosecution case until the commencement of the Defence cases.

The Prosecution would make several additional points regarding the Defence letter. First, contrary to the Defence assertion at page 3 of the letter, the Prosecution case did not last twice as long as indicated. The Prosecution's estimate was that its case would last eight months, excluding recesses. Indeed, as the evidence was adduced the Prosecution carefully reviewed its case and determined it could reduce the number of witnesses required, which it did. The Prosecution efficiently presented its case, using some 461 total hours for direct and re-direct examination of its viva voce witnesses, approximately 43 hours or 13% less than the 504 hours estimated for the direct examination alone. This total is compared to approximately 448 hours for cross examination of viva voce witnesses. In total, the Prosecution case was presented in 205 court days, equaling 41 weeks or 9 ½ months, excluding breaks. This was to be expected given that our eight-month estimate for the case-in-chief was always based on the expectation that most of the Prosecution's crime base witnesses' evidence would be tendered through Rule 92*bis*. The additional time required for the presentation of the Prosecution case was largely attributable to the Defence successfully demanding the right to cross examine all but two of the Prosecution Rule 92*bis* witnesses.

Second, to state that the Prosecution had five years to prepare its case is misleading. During the three years time when the Accused was a fugitive, the Prosecution used its limited resources to carry out its mandate to investigate all potential cases, prepare and provide extensive pre-trial disclosure in all cases in which the Accused were in custody, and to prosecute those cases. Thus, only minimal and sporadic additional investigation was conducted related to the Taylor case. Further, this Defence team did not start from ground zero as implied. It had the benefit of the work done by the previous members of the team, including one co-counsel and two other lawyers who worked with the previous team. It must also be noted that the Accused was aware of the indictment against him and was represented by counsel before this court very early

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OFFICE OF THE PROSECUTOR
JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 297000
FAX: Extension: 178 7366 or +39 0831 257366 or +232 22 297366

on. Thus he has had several years to consider the case against him and how to meet it, given his intimate knowledge of his conduct and that of his subordinates and associates.

Third, it is also misleading to speak of the disparity between Prosecution and Defence resources, without any accurate reflection of the resources available to the Defence. And, without considering, as stated above, the Prosecution's mandate to investigate and prosecute all potential cases. It must also be remembered that the Prosecution bears the burden of proof beyond a reasonable doubt, not the Defence. Regarding Defence resources, it is the understanding of the Prosecution that the Defence has had the services of a member of the Defence office for the greater part of this trial and that a member of the Defence office with knowledge of this case has now been provided to the Defence team as a full time member of that team, to use in any way it deems necessary. The Defence has also had the use of a significant number of interns, some who have been admitted to practice. Finally, it must be remembered that any delay has the effect of exhausting Special Court resources because of the need to maintain full-time judicial, registry and prosecution staff in place while these personnel await the start of the Defence case. This consideration makes it essential that no part of the delay be caused by members of the Defence working on cases other than that of the Accused.

Fourth, it must also be noted that ICC courtroom facilities may not be fully committed to this case after 24 September 2009, when another case is set to begin there. The ICC Press Release indicates that no postponement will be allowed except for compelling reasons (*http://www.icc-cpi.int/NR/exeres/44337E63-2415-4A1F-BB4A-3622EFD903E9.htm*). This could mean that we will not have a courtroom available at the ICC on a regular basis after 24 September, requiring part of the Defence case to be presented during intermittent sessions or in other facilities, and over a more extended period. This of course cannot be the reason for setting a date to start the Defence case which would violate the Accused's right to a fair trial but does mitigate against any delay for one day more than that for which good cause has been shown.

Finally, the Prosecution also notes that:

- Detailed cross examination indicates the Defence has identified the potential themes of any case it might present;
- The objections to Rule 92*bis* evidence indicate the Defence has closely reviewed and understood that evidence;
- Lead Defence Counsel's statements to the media that, as of about 26 January 2009, he had a list of potential witnesses and the Defence team was in the position of **finalizing** its Rule 98 submissions;

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OFFICE OF THE PROSECUTOR
JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 297000
FAX: Extension: 178 7366 or +39 0831 257366 or +232 22 297366

- As was evidenced by the active role that the Accused played in court during the Prosecution case, it appears that the Accused has closely followed the presentation of the case against him and should be ready to tell his side of the story. Additionally, one or more of the Defence counsel have had ready access to him since August 2007. It is thus difficult to understand how it can be reasonable to assert it will take 6 weeks to "prepare" him to testify.

For the reasons given above, the requested trial date and ensuing delay in the start of the Defence case have not been shown to be reasonable or necessary.

Yours sincerely,

for Brenda J. Hollis
Principal Trial Attorney

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AUTHORITIES PROVIDED

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Andrésia Vaz, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Decision of: **12 May 2009**

Augustin NGIRABATWARE

v.

THE PROSECUTOR

Case No. ICTR-99-54-A

DECISION ON AUGUSTIN NGIRABATWARE'S APPEAL OF DECISIONS DENYING MOTIONS TO VARY TRIAL DATE

Counsel for the Defense:
Mr. David C. Thomas

Office of the Prosecutor:
Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of "Dr. Ngirabatware's Appeal of Trial Chamber's Decision Denying Defence Motion to Vary Trial Date of May 18, 2009" filed on 21 April 2009 ("Appeal") by Augustin Ngirabatware ("Ngirabatware").

A. Background

2. Ngirabatware was arrested in Germany on 17 September 2007 and transferred to the Tribunal in Arusha on 8 October 2008. He made his initial appearance on 10 October 2008, during which he pleaded not guilty to all the counts in the indictment against him.[1]

3. On 29 January 2009, the President of the Tribunal issued an Interoffice Memorandum stating that Ngirabatware's trial was scheduled to start on 4 May 2009. On the same day, the Bench of Trial Chamber II of the Tribunal seized of Ngirabatware's case ("Trial Chamber") granted in part the Prosecution's motion to amend the initial indictment.[2] On 4 February 2009, Ngirabatware filed a motion requesting the Trial Chamber to vacate the scheduled trial date.[3]

4. During the further appearance held on 9 February 2009, Ngirabatware pleaded not guilty to all charges contained in the amended indictment filed by the Prosecution on 5 February 2009.[4]

5. On 25 February 2009, the Trial Chamber found that there was no justification to vacate the scheduled trial date and denied Ngirabatware's motion to vacate the 4 May 2009 trial date accordingly.[5] However, "due to scheduling issues", the Trial Chamber ordered that the trial should

[1] Initial Appearance, T. 10 October 2008 pp. 17-24.
[2] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution Motion for Leave to Amend the Indictment, 29 January 2009 ("Decision Granting Leave to Amend the Indictment").
[3] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Vacate Trial Date of May 4, 2009, 4 February 2009.
[4] Further Appearance, T. 9 February 2009 pp. 26-28; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Amended Indictment, 5 February 2009.
[5] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Vacate Trial Date of 4 May 2009, 25 February 2009 ("Decision Setting the Trial Date"), para. 12 and disposition.

commence on 18 May 2009.[6] Arguing that his Defence would not be ready for trial on 18 May 2009, Ngirabatware moved the Trial Chamber to strike the scheduled trial date.[7]

6. On 25 March 2009, the Trial Chamber denied in its entirety what it considered to be a request for reconsideration of its Decision Setting the Trial Date and reiterated that Ngirabatware's trial shall commence on 18 May 2009.[8] Thereafter, the Trial Chamber granted Ngirabatware certification to appeal the Decision Denying Reconsideration and ordered a stay of the commencement of the trial should a determination of the appeal be filed later than the set trial date of 18 May 2009.[9] In the meantime, the Prosecution filed another amended indictment pursuant to the Trial Chamber's decision of 8 April 2009.[10]

7. Ngirabatware filed his Appeal on 21 April 2009. The Prosecution responded on 1 May 2009, opposing the Appeal.[11] Ngirabatware filed a reply on 5 May 2009.[12]

B. Standard of Review

8. A Trial Chamber has discretion with respect to the scheduling of a trial.[13] As such, the decision of the Trial Chamber to set the 18 May 2009 trial date is a discretionary decision to which the Appeals Chamber accords deference. The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a "discernible error". The Appeals Chamber will only overturn the Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[14]

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[6] *Idem.*
[7] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Continue 18 May 2009 Trial Date, 11 March 2009.
[8] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Vary Trial Date, 25 March 2009 ("Decision Denying Reconsideration"), para. 23 and disposition.
[9] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date, 15 April 2009 ("Certification Decision"), para. 21 and disposition.
[10] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Amended Indictment, 14 April 2009 ("Amended Indictment"). *See also The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment, 8 April 2009, para. 4 and disposition.
[11] Prosecutor's Response to Augustin Ngirabatware's Appeal of the Trial Chamber's Decision Denying the Defence Motion to Vary Trial Date of 18th May 2009, 1 May 2009 ("Response").
[12] Dr. Ngirabatware's Reply to the Prosecutor's Response to Dr. Ngirabatware's Appeal of the Trial Chamber's Decision Denying the Defence Motion to Vary Trial Date of 18 May 2009, 5 May 2009 ("Reply").
[13] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 ("*Milošević* Decision"), para. 16.
[14] *See, e.g., Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's

C. Submissions

9. In his Appeal, Ngirabatware submits that the Trial Chamber abused its discretion in denying him minimal adequate time to prepare for trial. He requests the Appeals Chamber to reverse the Decision Denying Reconsideration and remand the matter to the Trial Chamber with instructions to set a trial date in January 2010.[15] Before setting out the arguments in support of his contention that the Trial Chamber abused its discretion, Ngirabatware recalls that his Lead Counsel, legal assistant and investigator were assigned to his Defence team only on 3 December 2008, 15 January 2009 and 6 February 2009, respectively.[16]

10. In support of his Appeal, Ngirabatware first argues that the Trial Chamber failed to address his needs to prepare for trial, and instead deferred to the date set by the Office of the President, which was not in a position to know of those needs.[17] Although the Trial Chamber stated that the scheduling of trials depends on a number of factors, Ngirabatware submits, it never analyzed the trial date in light of those factors.[18]

11. Second, Ngirabatware submits that the Trial Chamber's decision constitutes an abuse of its discretion in light of the fact that it allowed the Prosecution to file an amended indictment containing 54 new charges less than four months before the trial date. He stresses that in the *Casimir Bizimungu et al.* case, leave to amend the indictment to expand the charges was denied on the ground that less than three months was not enough time to prepare a defence.[19]

12. Third, Ngirabatware claims that he is being given far less time to prepare for trial than any other person to ever appear before the Tribunal and that the Trial Chamber has never set forth any

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Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 8; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release, 7 April 2009, para. 4; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Matthieu Ngirumpatse's Appeal From the Trial Chamber Decision of 17 September 2008, 30 January 2009 ("*Karemera et al.* Decision of 30 January 2009"), para. 18; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.7, Decision on Jérôme-Clément Bicamumpaka's Interlocutory Appeal Concerning a Request for a Subpoena, 22 May 2008, para. 8.

[15] Appeal, paras. 27, 28, and Conclusion at pp. 16, 17.

[16] *Ibid.*, paras. 4, 7, 12.

[17] *Ibid.*, paras. 27(a), 27(c), 29, 30.

[18] *Ibid.*, para. 24.

[19] *Ibid.*, paras. 31, 32, referring to *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 ("*Bizimungu et al.* Trial Decision"), para. 34 and *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber's Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 19. Ngirabatware points out that two Judges of the present Trial Chamber were part of the bench that issued the *Bizimungu et al.* Trial Decision.

reason to justify this prejudicial treatment.[20] He adds that given that the Prosecution had years to prepare its case, the principle of equality of arms will be violated if the case proceeds as scheduled.[21]

13. Fourth, Ngirabatware asserts that the setting of the trial was motivated by the completion strategy of the Tribunal, rather than consideration of his rights and the need to prepare for trial.[22] In Ngirabatware's view, although neither the Office of the President nor the Trial Chamber referred to the completion strategy in connection with setting the trial date, "it is disingenuous to state and naive to believe that the setting has not been dictated by that fact".[23] He emphasizes that the Trial Chamber never identified any alternative reason for pushing the case to trial so quickly.[24] He submits that while the completion strategy is a worthy goal, the political considerations and administrative concerns reflected in it cannot prevail over his right to a fair trial.[25]

14. Finally, Ngirabatware argues that he will be irremediably prejudiced if the trial were to start on 18 May 2009 since it is not possible for his Defence team to complete the pre-trial investigation by this date.[26] Specifically, he points out that:

(i) the pre-trial investigation only began in February 2009 due to the filing of the first amended indictment and the time it took to staff the Defence team;[27]

(ii) the pre-trial investigation involves many witnesses from all over the world, as well as numerous documents, some of which are only in the Kinyarwanda language;[28]

(iii) his Defence team has received a very large amount of documents of disclosure from the Prosecution which need to be analyzed;[29]

(iv) the second amended indictment names additional witnesses and makes other changes to the allegations in Count 6;[30]

(v) he is charged with diversion of funds, a charge which involves a lot of documentary evidence, not all of which has been disclosed by the Prosecution;[31]

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[20] Appeal, paras. 27(b), 33, 34. Ngirabatware submits that the average period of time at the Tribunal between the initial appearance and judgement has been approximately four years and five months (*see also* Appeal, para. 16).
[21] Appeal, paras. 35, 37, 38.
[22] Appeal, paras. 39-42.
[23] Appeal, para. 40.
[24] Appeal, para. 25.
[25] Appeal, para. 41.
[26] Appeal, paras. 42-49.
[27] Appeal, para. 44.
[28] Appeal, heading (E) at p. 14, para. 46.
[29] Appeal, paras. 4, 13, 44, 45.
[30] Appeal, para. 44.
[31] Appeal, para. 45.

(vi) the lack of specificity of the second amended indictment regarding dates necessitates more time to conduct investigations.[32]

He avers that, taking into account the scope of the case, the time similar cases have taken and all the other factors involved, his Defence team will in all likelihood be ready for trial by the end of 2009.[33]

15. The Prosecution responds that the Appeal should be dismissed on the grounds that Ngirabatware fails to demonstrate that the Trial Chamber has made a discernible error and that the Trial Chamber's refusal to vary the trial date of 18 May 2009 is reasonable in the circumstances.[34]

16. The Prosecution submits that the Trial Chamber fully addressed the needs of Ngirabatware during the initial appearance and the further appearance and clearly revisited the issue in arriving at its decisions denying variation of the trial date.[35] In its opinion, the Trial Chamber duly took account of all relevant factors, such as the right of the accused to have adequate time and facilites to prepare his defence but also the right to have a trial without undue delay and the administrative and logistical matters that are necessary for the holding of a trial.[36] The Prosecution further contends that the Amended Indictment is considerably more concise, specific and up to date with the practice and jurisprudence of the Tribunal and that "the 'new allegations' have the overall effect of simplifying the proceedings by streamlining the indictment".[37]

17. As regards Ngirabatware's other arguments, the Prosecution submits that: (i) the matters between the Trial Chamber and the Office of the President are irrelevant considerations in the instant case;[38] (ii) the argument that Ngirabatware should be given as much time as previous accused persons is without merit since "each case is unique and all cases before the Tribunal are not subject to the same circumstances";[39] (iii) there is no evidence to suggest that the Tribunal's completion strategy has played any role in the setting of the trial date.[40] After emphasizing that Ngirabatware evaded capture and resisted transfer to the seat of the Tribunal, the Prosecution adds

[32] Appeal, para. 45.
[33] Appeal, para. 48. *See also* Reply, para. 18.
[34] Response, paras. 2, 9, 10, 29.
[35] Response, para. 11.
[36] Response, paras. 12-14, 16.
[37] Response, paras. 19-21. *See* Decision Granting Leave to Amend the Indictment, para. 30.
[38] Response, para. 16.
[39] Response, para. 22.
[40] Response, para. 25.

that it is clear that Ngirabatware's strategy is "to seek to avoid trial by delaying the proceedings beyond the temporal mandate of the Tribunal".[41]

18. The Prosecution concludes by noting that a focused Defence exercising due diligence will be able to complete its pre-trial preparation in time to commence trial on 18 May 2009.[42]

19. In reply, Ngirabatware reiterates that he has received far less time to prepare for trial than any other person ever to appear before the Tribunal.[43] In his opinion, it is "hypocritical" for the Prosecution to argue that the May trial date is necessary to protect his right to a speedy trial when he is not complaining of a violation of that right but of the denial of his right to have adequate time to prepare,[44] and "ludicrous" to suggest that filing 54 new charges less than four months before trial does nothing more than simplify the proceedings and is not prejudicial in terms of trial preparation.[45] Ngirabatware adds that he has no incentive to delay the trial unecessarily or seek to avoid trial, but that he is only seeking a fair trial.[46] The more time the Defence has to prepare for trial, he also argues, the more focused the case will be and the less time the trial will take.[47] Listing a number of pending pre-trial matters, Ngirabatware further argues that the Prosecution is not ready for trial either and contends that he is still "in the dark" about many aspects of the Prosecution's case.[48] He also emphasizes that his Defence team has not been assigned an office yet and that he is still without a Co-Counsel.[49] In conclusion, Ngirabatware reiterates that his Defence team cannot be ready for trial on 18 May 2009 and that the Trial Chamber abused its discretion in refusing to set a reasonable trial date.[50]

D. Discussion

20. As a preliminary matter, the Appeals Chamber notes that Ngirabatware does not take issue with the Trial Chamber's refusal to reconsider its previous decision on the date of the trial, but with the trial date itself and the manner in which it was set. When granting Ngirabatware's motion for certification to appeal the Decision Denying Reconsideration, the Trial Chamber defined the issue that should be put to the Appeals Chamber for resolution as whether Ngirabatware and his Defence

[41] Response, para. 27.
[42] Response, paras. 23, 28.
[43] Reply, para. 5(e). *See also ibid.*, para. 3.
[44] Reply, paras. 7-9.
[45] Reply, heading (C) at p. 7. *See also ibid.* paras. 10-12.
[46] Reply, heading (D) at p. 8, paras. 13-16.
[47] Reply, para. 17.
[48] Reply, para. 1(i).
[49] Reply, para. 2.
[50] Reply, para. 18.

would have sufficient time to prepare the Defence case if the trial proceeds on 18 May 2009 as scheduled.[51] Since the 18 May 2009 trial date was set in the Decision Setting the Trial Date, the consideration of the Appeal will necessarily require the Appeals Chamber to examine this decision. Therefore, although certification was formally granted to appeal the Decision Denying Reconsideration, the Appeals Chamber considers itself seized of a challenge against both the Decision Denying Reconsideration and the Decision Setting the Trial Date (together "Impugned Decisions").

21. Turning to the merit of the Appeal, the Appeals Chamber first notes that the 18 May 2009 trial date was not set by the Office of the President but by the Trial Chamber.[52] The question as to whether the Trial Chamber erroneously deferred to the Office of the President is therefore irrelevant to the resolution of the present Appeal.

22. The Appeals Chamber recalls that Trial Chambers enjoy considerable discretion in the conduct of the proceedings before them,[53] including in the scheduling of trials.[54] However, this discretion finds its limitation in the obligation imposed on Trial Chambers by Articles 19 and 20 of the Tribunal's Statute ("Statute") to ensure that a trial is fair and expeditious.

23. In the Decision Setting the Trial Date, the Trial Chamber duly recalled the right of an accused to a fair trial within a reasonable time and pointed out its obligation to balance the need for the accused to have adequate time for the preparation of his case and the need for an expeditious trial.[55] It also correctly pointed out that "[i]n arriving at a decision regarding the scheduling of the trial, the Chamber considers all the relevant factors and appropriate concerns".[56] However, the Appeals Chamber observes that nothing in the Impugned Decisions indicates that the Trial Chamber indeed did so.

24. The Trial Chamber reached its conclusion that there was no justification to vacate the original trial date and set the 18 May 2009 trial date[57] without expressly addressing Ngirabatware's concerns as to the fairness of his trial or any of the relevant factors. While the Trial Chamber mentioned issues related to the staffing of the Defence team, it omitted to discuss the impact of the staffing situation of the Defence team on the Defence's ability to prepare for trial within the

[51] Certification Decision, para. 19.
[52] Decision Setting the Trial Date, para. 12 and disposition.
[53] *See, e.g., Karemera et al.* Decision of 30 January 2009, para. 17 and references cited therein.
[54] *Milošević* Decision, para. 16.
[55] Decision Setting the Trial Date, para. 10.
[56] Decision Setting the Trial Date, para. 10, referring to *Milošević* Decision, paras. 16, 17.
[57] Decision Setting the Trial Date, para. 12.

available time."[58] Instead, the Trial Chamber merely stated that it "expected that the staffing position of the Defence team will be addressed and completed in a timely manner".[59] Nowhere in the Impugned Decisions did the Trial Chamber consider the decisive question as to whether the time for preparation available to the Defence was objectively adequate to permit Ngirabatware to prepare his case in a manner consistent with his rights.

25. The Appeals Chamber further observes that, contrary to the Prosecution's assertion, the issues regarding Ngirabatware's needs were not addressed during the initial appearance or the further appearance. Ngirabatware raised the issue of the trial date at the status conference held on 9 February 2009 but the Trial Chamber declined to discuss it on the ground that a status conference was not the right place to do so.[60] The Trial Chamber merely indicated that it would consider Ngirabatware's request to vary the trial date in a timely and expeditious manner, bearing in mind the rights of the accused.[61] The information on the staffing of the Defence team given at the status conference was not commented upon by the Trial Chamber, which only requested the Registry to provide the necessary assistance to the parties.[62]

26. Ngirabatware's right to have adequate time to prepare for trial was explicitely addressed in the Trial Chamber's Decision Granting Leave to Amend the Indictment.[63] However, the Trial Chamber's consideration therein was limited to the question as to whether the requested amendments would affect the accused's right to a fair trial, without regard to any other factors.

27. The Appeals Chamber finds that the Trial Chamber erred in failing to address the factors relevant to its making a fully informed and reasoned decision as to whether the setting of the 18 May 2009 trial date infringed Ngirabatware's right to a fair trial, in particular his right to have adequate time for the preparation of his defence provided for in Article 20(4)(b) of the Statute.

28. The Appeals Chamber considers that it is not possible to set a standard of what constitutes adequate time to prepare a defence. The length of the preparation period depends on a number of factors specific to each case, such as, for example, the complexity of the case, the number of counts and charges, the gravity of the crimes charged, the individual circumstances of the accused, the status and scale of the Prosecution's disclosure, and the staffing of the Defence team.[64]

[58] Decision Setting the Trial Date, para. 11.
[59] Decision Denying Reconsideration para. 24. *See also* Decision Setting the Trial Date, para. 11.
[60] Status Conference, T. 9 February 2009 pp. 4-7.
[61] Status Conference, T. 9 February 2009 pp. 5, 7.
[62] Status Conference, T. 9 February 2009 pp. 6-8.
[63] Decision Granting Leave to Amend the Indictment, paras. 25, 30, 35.
[64] *Cf. Milošević* Decision, paras. 8-19.

Ngirabatware's comparison with other cases therefore provides very limited, if any, assistance. Likewise, the Appeals Chamber considers that Ngirabatware's argument premised on the principle of equality of arms is ill-founded; the issue is not whether the parties had the same amount of time to prepare their respective cases, but rather if either party, and in particular the accused, is put at a disadvantage when presenting its case.[65] The principle of equality of arms invoked by Ngirabatware should not be interpreted to mean that the Defence is entitled to the exact same means as the Prosecution.

29. In the present case, the Appeals Chamber notes that Ngirabatware's Lead Counsel was assigned on 2 December 2008. A legal assistant and an investigator were assigned to his Defence team only in January and February 2009, respectively. At the time of the Reply, no Co-Counsel had been assigned yet. The Appeals Chamber further notes that the indictment was significantly amended on 5 February 2009, and further amended on 14 April 2009. Although the Prosecution withdrew counts, removed certain allegations and restructured the indictment so as to render it clearer and more specific, it also added a considerable number of new allegations. Ngirabatware is now charged with six different counts related to different offences[66] and for many different incidents. His responsibility is charged under both Article 6(1), including participation in a joint criminal enterprise, and Article 6(3) of the Statute. In addition, the Appeals Chamber observes that pre-trial matters are still pending.[67]

30. Taken in isolation, none of these factors would have justified the Appeals Chamber's intrusion in the Trial Chamber's exercise of its discretion. Considered together, however, they lead the Appeals Chamber to conclude that, in light of the particular circumstances of this case, the Defence was not allowed enough time to prepare for trial. Accordingly, the Appeals Chamber finds that, in this specific situation, the date of 18 May 2009 for the commencement of the trial is so

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[65] *Karemera et al.* Decision of 30 January 2009, para. 29; *The Prosecutor v. Elie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal 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. 18; *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("*Orić* Decision"), para. 7, citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 48. *See also Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision on the Accused Naletilić's Motion to Continue Trial Date, 31 August 2001, para. 7.

[66] Ngirabatware is charged for conspiracy to commit genocide; genocide or, alternatively, complicity in genocide; direct and public incitement to commit genocide; and extermination and rape as crimes against humanity.

[67] The Appeals Chamber notes for instance that no decision has been rendered yet on Ngirabatware's motion objecting to the Prosecution Pre-Trial Brief filed on 19 March 2009: *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence's Objections, Pursuant to Rule 73 *bis*, to the Prosecutor's Pre-Trial Brief, 16 April 2009. In addition, upon reading "Ngirabatware's Reply to the Prosecutor's Response to the Defence Objections, Pursuant to Rule 73 *bis*, to the Prosecution's Pre-Trial Brief" filed on 27 April 2009, the Appeals Chamber observes that disclosure issues still remain.

unreasonable as to permit the Appeals Chamber to draw an inference of abuse of discretion on the part of the Trial Chamber.

31. Time and resource constraints exist in all judicial 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 a reasonable time.[68] However, the Appeals Chamber stresses that these considerations should never impinge on the rights of the parties to a fair trial.[69]

32. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber abused its discretion in failing to address the factors relevant to its taking a fully informed and reasoned decision as to whether the setting of the trial in May 2009 infringed Ngirabatware's right to a fair trial and in setting an unreasonable date for the start of the trial. Because the Trial Chamber is in the best position to determine what would be an appropriate date for the start of the trial, the Appeals Chamber remands the matter to the Trial Chamber.

E. Disposition

33. Accordingly, the Appeals Chamber **GRANTS** the Appeal, **REVERSES** the Impugned Decisions and **REMANDS** the determination of a trial date consistent with this decision to the Trial Chamber.

Done this twelfth day of May 2009,
at The Hague, The Netherlands.

Judge Andrésia Vaz
Presiding

[Seal of the Tribunal]

[68] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendant's Appeal Against "*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*", 1 July 2008 ("*Prlić et al.* Decision of 1 July 2008"), para. 16; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 23, citing *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić et al.* Decision of 4 July 2006"), p. 4.

[69] *Cf. Prlić et al.* Decision of 1 July 2008, para. 16; *Orić* Decision, para 8; *Prlić et al.* Decision of 6 February 2007, para. 23; *Prlić et al.* Decision of 4 July 2006, p. 4.