SPECIAL COURT FOR SIERRA LEONE
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PUBLIC DEFENCE MOTION SEEKING TERMINATION OF THE DISCIPLINARY HEARING FOR FAILURE TO PROPERLY CONSTITUTE THE TRIAL CHAMBER AND/OR LEAVE TO APPEAL THE REMAINING JUDGES'DECISION TO ADJOUN THE DISCIPLINARY HEARING

Document Dated: **28 FEBRUARY 2011**

☐ The Defence submits that this filing is not deficient by exceeding any page limit. Article 6(D)(i) of the Practice Direction states that the motion of a party seeking leave to pursue an interlocutory appeal shall not exceed 15 pages or 4500 words, whichever is greater. The Defence's filing is 12 pages, less the table of authorities, which does not count toward the page limits. The fact that the Defence is seeking leave to appeal as an additional and alternate form of relief does not negate the fact that it is indeed a motion seeking leave to appeal. Thus, the Defence properly filed a pleading in excess of the usual 10 page limit.

Signed:
Rachel Irura

Dated: 28 February 2011

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SCSL-03-01-T
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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before: Justice Teresa Doherty, Presiding
Justice Richard Lussick
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate

Registrar: Ms. Binta Mansaray

Date: 28 February 2011

Case No.: SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR
–v–
CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE MOTION SEEKING TERMINATION OF THE DISCIPLINARY HEARING FOR FAILURE TO PROPERLY CONSTITUTE THE TRIAL CHAMBER AND/OR LEAVE TO APPEAL THE REMAINING JUDGES' DECISION TO ADJOURN THE DISCIPLINARY HEARING

Office of the Prosecutor:
Ms. Brenda J. Hollis

Counsel for Courtenay Griffiths, QC:
Mr. Peter Robinson

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

I. INTRODUCTION

1. The Defence[1] seeks the termination of the Rule 46 disciplinary hearing against Courtenay Griffiths, QC on the basis that the Trial Chamber has failed to properly constitute itself in order to conduct the hearing and that the matter has been indefinitely adjourned, to the detriment of the defendant, Courtenay Griffiths, QC.

2. Additionally and/or alternatively, pursuant to Rule 73(B) and/or Rule 46(H), the Defence seeks leave to appeal the Presiding Judge's decision on 25 February 2011 to adjourn the disciplinary hearing.[2] The Defence submits that both exceptional circumstances and irreparable prejudice exist, making this request ripe for an interlocutory decision.

3. Specifically, the Defence submits that on 25 February 2011, the Presiding Judge, in consultation with Justice Lussick ("the remaining Judges"), committed several procedural errors and/or errors of law and/or fact including a failure to properly consider and/or give due weight to several factors, in that:

    i. Given that Justice Sebutinde had chosen not to attend the disciplinary hearing and thus was consequently unable to continue sitting, the remaining Judges determined "this is not a situation where Rule 16 applies"; and

    ii. Despite the fact that an alternate judge was present in Court and was willing to participate, and despite the fact that the Defence had invited the Trial Chamber to invite the alternate judge to participate so that the bench could be regularly constituted of three judges and the hearing could continue, the remaining Judges determined that "this Trial Chamber is not properly constituted and we consider we have no alternative but to adjourn this hearing today".

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[1] For purposes of this pleading, "the Defence" refers collectively to Counsel for Courtenay Griffiths, QC (Peter Robinson) and Counsel for Charles Ghankay Taylor (as led by Courtenay Griffiths, QC).
[2] *Prosecutor v. Taylor,* SCSL-03-01-T, Disciplinary Hearing Transcript, 25 February 2011, p. 49318 ("**Decision**").

4. The Defence further requests the Trial Chamber to order that this motion seeking to terminate the disciplinary hearing ("Parallel Proceedings") and/or seeking leave to appeal the indefinite adjournment of the Parallel Proceedings shall operate as a stay of the Parallel Proceedings until the issues raised herein are resolved.

5. The Defence appreciates that while the Prosecution was not a party to the Parallel Proceedings on 25 February 2011 wherein the impugned decision was issued, the Prosecution may nonetheless have an interest in the issue, the resolution of which may set precedent relevant to the primary case at bar – the case against Charles Ghankay Taylor ("Primary Case"). As such, the Defence does not object should the Trial Chamber decide that it is useful and appropriate for the Prosecution to file submissions in response to this Motion.

II. PROCEDURAL HISTORY

6. During proceedings in the Primary Case on 8 February 2011, Lead Counsel for Charles Ghankay Taylor (Courtenay Griffiths, QC) notified the Trial Chamber that he would not participate in closing arguments because the Defence Final Trial Brief had been rejected.[3] The Presiding Judge directed that "the accused and counsel will remain and hear the evidence and the submissions of the Prosecution as scheduled".[4] This directive was a majority decision, Justice Julia Sebutinde dissented. The Presiding Judge further ordered Mr. Griffiths to sit down and remain as directed by the Court, stating that if he continued to remain on his feet and prevent Counsel for the Prosecution from speaking by doing so, then she would be obliged to consider that his conduct was verging on contempt. Mr. Griffiths then left the Court and did not prevent Counsel for the Prosecution from speaking;[5] the Prosecution delivered its closing arguments on 8 and 9 February 2011.

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[3] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript of Prosecution Closing Arguments, 8 February 2011, p. 49137-8 ("**Prosecution Closing**"). See also *Prosecutor v. Taylor*, SCSL-03-01-T-1191, Decision on Late Filing of Defence Final Trial Brief, 7 February 2011, Justice Julia Sebutinde dissenting.
[4] Prosecution Closing, p. 49144-5.
[5] Prosecution Closing, p. 49145.

7. On 9 February 2011, the Presiding Judge issued a "Direction to Lead Counsel to Appear Before the Trial Chamber"; Justice Julia Sebutinde dissented.[6] The Direction to Appear directed Lead Counsel to attend court on Friday 11 February 2011 and warned that unless he apologized for his behavior on 8 February 2011, then the Trial Chamber may impose sanctions pursuant to Rule 46.[7]

8. On 8 February 2011, Lead Counsel appeared in Court and, through co-counsel Terry Munyard, requested an adjournment of the hearing until Mr. Griffiths could find representation, given the seriousness of the matter.[8] The matter was adjourned for two weeks so that Mr. Griffiths could find representation.[9] On 18 February 2011, the Defence informed the Trial Chamber that Mr. Peter Robinson had agreed to represent Mr. Griffiths in the Parallel Proceedings scheduled for 25 February 2011.[10]

9. Mr. Griffiths and Mr. Robinson duly appeared on 25 February 2011. For the Trial Chamber, only the Presiding Judge (Justice Doherty), Justice Lussick, and the Alternate Judge (Justice Sow) appeared.[11] The Presiding Judge opened by noting that Justice Sebutinde was not present and read the following notification on her behalf:

> "This is to notify you that in view of the recent developments in the Trial Chamber, and consistent with my earlier 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."[12]

10. The Presiding Judge then invited comments "on the question of the constitution of the Court, in light of the matter I have just read, and in light of Justice Sebutinde's absence". Mr. Robinson conferred with the Defence and thereafter invited the Trial Chamber to invite the alternate judge, Justice Sow, to participate so that the Bench could be constituted of three

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[6] *Prosecutor v. Taylor,* SCSL-03-01-T-1196, Direction to Lead Counsel to Appear Before the Trial Chamber, 9 February 2011 (**"Direction to Appear"**), Justice Julia Sebutinde dissenting; she explained her reasons for doing so at a subsequent hearing. See *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript of Hearing, 11 February 2011, p. 49302-3.
[7] Direction to Appear, p. 2.
[8] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript of Hearing, 11 February 2011, p. 49296-9.
[9] Transcript of Hearing, 11 February 2011, p. 49304-5.
[10] Email from the Defence to the Trial Chamber, dated 18 February 2011.
[11] Justices Doherty and Lussick will be referred to herein as the "remaining Judges", given that Justice Sebutinde had absented herself and Justice Sow was barred by them from participating.
[12] Transcript of Hearing, 25 February 2011, p. 49316.

judges.[13] Thereafter, Justice Sow expressed his willingness to participate. He stated, "This bench is regularly composed with three judges sitting, as it shows ... I am a judge. This Bench is regularly composed, as everybody can see".

11. Following Justice Sow's remarks, the Presiding Judge then issued the impugned decision(s):

> "The Articles governing the composition of this Court and the Trial Chamber mandate that it is to be composed of three judges. This is not a situation where Rule 16 applies. Accordingly, in our view, this Trial Chamber is not properly constituted and we consider we have no alternative but to adjourn this hearing today. The matter is adjourned for a date to be fixed".[14]

Appointment of Justice Sow as Alternate Judge

12. A brief history of the appointment of Justice Sow as an alternate judge for Trial Chamber II may be instructive to understanding the underlying purpose of having and utilizing an alternate judge. In December 2006, jurist Antonio Cassese, as part of his independent expert review of the functioning of the Special Court for Sierra Leone,[15] recommended that an alternate judge be appointed for the Taylor Trial. He opined that because it was important for the Taylor Trial to "run smoothly and not falter", he believed that "an alternate Judge should be appointed who could sit through each stage of the trial and step in to replace a Judge if, for any reason, the Judge cannot continue sitting"; Cassese noted that it would be "undesirable to gamble on the continuity of such an important case".[16]

13. Justice Sow was sworn in as an alternate judge for Trial Chamber II on 9 May 2007.[17] According to the Court's official press release of this event, Justice Sow's role was that he should be present at each stage of the trial and that he would replace a Judge if that Judge is unable to continue sitting, in accordance with Article 12(4).[18]

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[13] Transcript of Hearing, 25 February 2011, p. 49317.
[14] Transcript of Hearing, 25 February 2011, p. 49318.
[15] "Report on the Special Court for Sierra Leone", submitted by the Independent Expert Antonio Cassese, 12 December 2006 ("**Cassese Report**"), *available at*: http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176.
[16] Cassese Report, paras. 228 and 229.
[17] "Justice El Hadji Malick Sow of Senegal Sworn in as Alternate Judge," Special Court for Sierra Leone, Press and Public Affairs, Press Release, Freetown, Sierra Leone, 9 May 2007, *available at*: http://www.sc-sl.org/LinkClick.aspx?fileticket=SIQl4Ssen%2Bc%3D&tabid=110
[18] The Defence notes that Rule 16*bis*, which provides for alternate judges was not in effect on the date Justice Sow was sworn in. Rule 16*bis* was adopted shortly thereafter on 14 May 2007.

14. Justice Sow has thereafter been present at all stages of the trial of the Primary Case, including at all of the Parallel Proceedings leading up to the disciplinary hearing on 25 February 2011. He has occasionally asked questions of a witness[19] and the parties[20].

III. APPLICABLE LAW

Leave to Appeal

15. Rule 46(A), under which the Parallel Proceedings were brought, states that "a Chamber may, after a warning, impose sanctions against or refuse audience to a counsel whose conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice". Rule 46(H) provides in part that decisions made under sub-Rule 46(A) may be appealed with leave from that Chamber.

16. Rule 73(B) sets out the usual legal standard for leave to appeal. It provides that:

> "Decisions rendered on such motions [brought by either party for appropriate ruling or relief after the initial appearance of the accused] are without interlocutory appeal. However in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders."

17. Rule 73(B) is a restrictive provision[21] and an interlocutory appeal does not lie as of right. The rationale behind this rule is that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.[22] The party seeking leave to appeal must meet the conjunctive conditions of "exceptional circumstances" and "irreparable prejudice" before the Trial Chamber can exercise its discretion; this is a "high threshold".[23]

18. There is no comprehensive or exhaustive definition of "exceptional circumstances" as the "notion is one that does not lend itself to a fixed meaning [and it cannot be] plausibly

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[19] *Prosecutor v. Taylor,* SCSL-03-01-T, Testimony of Sam Kolleh, DCT-102, 3 Nov 10, p. 48533; 4 Nov 10, p. 48693, 48751-2; 5 Nov 10, p. 48846-7; 9 Nov 10, p. 49080-1. On each of these occasions, one of the other justices was unable to sit, pursuant to Rule 16.
[20] Prosecution Closing, p. 49182, 49209, 49280-2.
[21] *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, 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, para. 11.
[22] Id.
[23] Id., para. 10.

maintained that the categories of 'exceptional circumstances' are closed or fixed".[24] Exceptional circumstances will depend on the circumstances of each case. Instances may include where for instance the question is one of general principle to be decided for the first time; where the interests of justice *might* be interfered with (there is no requirement to prove that such interference *will* definitely arise); where further decision is conducive to the interests of justice; or where the question is of fundamental legal importance.[25]

19. Irreparable prejudice arises where the Trial Chamber's decision is not remediable on final appeal. The Appeals Chamber has noted that although most decisions will be capable of disposal at final appeal "the underlying rationale for allowing such appeals is that certain matters cannot be cured or resolved by final appeal against judgment".[26]

Role of the Alternate Judge

20. Article 12 of the Statute sets out the composition of the Chambers. Article 12(1)(a) states that three judges shall serve in the Trial Chamber. Article 12(4) provides for an alternate judge, and states in relevant part that:

> "If, at the request of the President of the Special Court, an alternate judge or judges has been appointed ... the presiding judge of a Trial Chamber ... shall designate an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting".

21. The Rules provide some further guidance on instances wherein an alternate judge may be called upon to replace a judge. Rule 16(B) states that "if a judge is, for any reason unable to continue sitting in a proceeding, trial or appeal which has been partly heard for a period which is or is likely to be longer than five days, the President may designate an alternate Judge as provided in Article 12(4) of the Statute". Rule 16*bis*(A) specifies that an alternate Judge designated in accordance with Article 12(4) of the Statute shall be present at each stage of the trial to which he has been designated. Rule 16*bis*(D) states that the alternate Judge "may perform such other functions" within the Trial Chamber as the "Presiding Judge in consultation with the other judges of the Chamber may deem necessary".

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[24] *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, para. 21.
[25] Id., para. 26.
[26] *Prosecutor v. Norman et al.*, SCSL-04-14-T-669, Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para 29.

IV. SUBMISSIONS

Termination of Proceedings

22. Given the Trial Chamber's inability to properly constitute itself with three Judges such that the disciplinary hearing scheduled for 25 February 2011 could take place, the proceedings against Lead Counsel should be terminated. The indefinite adjournment of the hearing, given Justice Sebutinde's unlikely return to the bench in the Parallel Proceedings and the remaining Judges' refusal to accept Justice Sow as a replacement for her in the Parallel Proceedings, makes it impossible for the Court to adjudicate the Rule 46 issue. Thus, the Directive to Appear should be vacated and the disciplinary proceedings against Lead Counsel should be terminated.

Leave to Appeal Under Rule 46(H) and/or Rule 73(B)

23. The Defence submits that it can seek leave to appeal the decision taken by the remaining Judges to exclude the alternate Judge and adjourn the Parallel Proceedings under both Rule 46(H) and/or Rule 73(B). The Directive to Appear summoned Lead Counsel under Rule 46. Therefore, Rule 46(H) which specifies relief available to the Defence in disciplinary hearings, is applicable. The Defence submits that Rule 46(H) does not apply only to leave to appeal a final determination under the Rule but to all decisions taken as part of the Rule 46 proceedings. Had Rule 46(H) been intended to only apply to appeals from final judgement, the rule would have explicitly stated so.[27]

24. The Defence submits that seeking leave to appeal under Rule 46(H) would still require the same showing of exceptional circumstances and irreparable prejudice, and thus the arguments with respect to that criterion are set out below. If the Trial Chamber deems Rule 46(H) in applicable, the Defence seeks relief under Rule 73(B), the standard interlocutory appeal provision.

[27] See for example Rule 77(J) which was amended to state that "any conviction under this rule [contempt of court] shall be subject to appeal".

Exceptional Circumstances

25. Since May 2007, Justice Sow has been appointed by the President of the Special Court to serve as an alternate Judge in accordance with Article 12(4) of the Statute. Consequently, the Defence submits that the remaining Judges failed as a matter of law to consider Justice Sow as the third member of a properly constituted Trial Chamber on 25 February 2011 when Justice Sebutinde indicated that she was unable to sit for reasons of principle and due to recent and unspecified developments in the Trial Chamber. The terms of Article 12(4) and Rule 16(B) have therefore been fulfilled in the sense that the President of the Court has already designated an alternate Judge, in case a Judge is unable, for any reason, to sit for longer than five days. Consequently, the Defence submits that Justice Sow should have automatically replaced Justice Sebutinde for purposes of the disciplinary hearing on 25 February, given that she had notified the Court that she was unable to attend.

26. Alternatively, the Defence submits that the provisions of Rule 16*bis*(D) were automatically triggered on 25 February 2011 when Justice Sebutinde stated that for reasons of principle she was unable to attend the disciplinary hearing. The Defence further submits that it is unlikely that Justice Sebutinde will change her principled position, and therefore it is unlikely that she will attend any future-scheduled disciplinary hearing. In these circumstances, the Defence submits that the Presiding Judge (in consultation with her colleagues) had the option of asking Justice Sow to perform the functions of Justice Sebutinde for purposes of the disciplinary hearing.

27. Indeed, at the disciplinary hearing, the Defence suggested such a course of action, and Justice Sow concurred and indicated his readiness to step in. The Presiding Judge, however, stated the Rule 16 had no applicability to the situation and that therefore she had no alternative but to adjourn the proceedings. The Defence submits that this is an error of law and/or procedure and/or fact and/or abuse of discretion, which have resulted in the indefinite adjournment of the proceedings.

28. The Defence notes that there is no clearly defined role of the alternate Judge at the Special Court, and indeed little useful jurisprudence by way of comparison from the ICTR and ICTY.[28] The question of when and how an alternate Judge should replace a Judge who is unable to sit for any reason is one of general principle to be decided for the first time and this constitutes exceptional circumstances. Such a question is thus appropriate for interlocutory appellate adjudication; it is appropriate for an Appeals Chamber to consider an issue of general importance where its resolution is deemed important for the development of the Tribunal's case-law and it involves an important point of law that merits examination. This is because the Appeals Chamber must give the Trial Chambers guidance in their interpretation of the law.[29] As such, further decision would be conducive to the interests of justice.

29. Additionally, the Defence submits that given the acknowledged seriousness of the Parallel Proceedings, including the fact that they could ultimately result in the denial of rights of appearance and/or audience to Lead Counsel, the Trial Chamber was under an imperative to deal with the matter quickly.[30] The decision by the remaining Judges not to continue in the absence of Justice Sebutinde, when an alternate Judge was present and willing to replace her, has delayed the Parallel Proceedings indefinitely. This constitutes an exceptional circumstance, in that the interests of justice (ie, Lead Counsel's right to a fair and expeditious proceeding) might be interfered with.

30. Furthermore, the Defence notes with concern the remaining Judges' outright and abrupt dismissal of the Justice Sow's offer of assistance, which would have allowed the Parallel Proceedings to continue uninterrupted. Surely this is one of the scenarios that Cassese had in mind when he recommended that an alternate Judge be assigned to Trial Chamber II. Likewise, this is the type of disruption the President of the Court presumably sought to prevent when he designated Justice Sow as an alternate Judge in accordance with Article 12(4). Despite this history and especially in light of Justice Sebutinde's notification of

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[28] The ICTR/Y have somewhat similar provisions to the SCSL Rule 16*bis* in their Rules 15*bis* and *ter* by way of substitute judges which are brought in on a case by case basis when another judge is unable to sit. However, as far as the Defence is aware, no Trial Chamber at the ICTR/Y has convened with an alternate judge present for the entire proceedings and trial.
[29] *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 7.
[30] Transcript of Hearing, 11 February 2011, p. 49304.

unspecified developments in the Trial Chamber which preclude her as a matter of principle from attending the hearing, the remaining Judges' rejection of the assistance of the alternate judge raises questions about the proper exercise of their discretion. Therefore, this is an issue of fundamental legal importance that elevates this situation to one of exceptional circumstances meriting appellate intervention.

Irreparable Prejudice

31. The Parallel Proceedings have been adjourned indefinitely. This is to the detriment of the professional reputation of Lead Counsel who has been directed by a Majority of the Trial Chamber to appear and apologize for his alleged misconduct or face sanctions under Rule 46. The remaining Judges' failure to consider all of the options available to it to compose a full bench in order to hear the Parallel Proceedings on 25 February 2011 has irreparably prejudiced Lead Counsel's ability to clear his name while the public and the press are still following this issue. An eventual finding in Lead Counsel's favor on a final appeal pursuant to Rule 46(H) would not adequately address the prejudice already caused. The sooner the Trial Chamber is able to properly convene, and Lead Counsel is able to make representations on his behalf, the less prejudice will accrue to his professional reputation and standing in the international criminal law community.

32. Significantly, the question of whether the alternate Judge should sit as one of the requisite three members of the Trial Chamber for the Parallel Proceeding is preventing this matter from even reaching the stage wherein a final verdict is reached and Lead Counsel could appeal it. Therefore, this issue is not remediable on final appeal, and irreparable prejudice arises.

V. CONCLUSION AND RELIEF REQUESTED

33. From the foregoing, it is clear that Trial Chamber's failure to properly constitute itself and conduct the disciplinary hearing on 25 February 2011 should result in the termination of the proceedings against Courtenay Griffiths, QC. Additionally and/or alternatively, and the decision of Justice Doherty and Justice Lussick to indefinitely adjourn the disciplinary

hearing against Lead Counsel has given rise to exceptional circumstances and irreparable prejudice. As such, the Defence has met the conjunctive requirements for leave to appeal under both Rule 46(H) and/or Rule 73(B).

Respectfully Submitted,

Peter Robinson
Counsel for Courtenay Griffiths, Q.C.
Dated this 28th Day of February 2011,
The Hague, The Netherlands

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 28th Day of February 2011,
The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1196, Direction to Lead Counsel to Appear Before the Trial Chamber, 9 February 2011

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