SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 15th of June, 2005

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

DISSENTING REASONED WRITTEN RULING OF HON. JUSTICE BANKOLE THOMPSON FROM MAJORITY RULING ON PROSECUTION'S APPLICATION FOR CLOSED SESSION HEARING OF TESTIMONY OF WITNESS TF2-218

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I. Introduction

1. I respectfully dissent from the Majority Ruling of my learned brothers, Hon. Justice Pierre Boutet, Presiding Judge and Hon. Justice Benjamin Mutanga Itoe to grant the Prosecution's application for the entire testimony of Witness TF2-218 to be heard in closed rather than public session. I do so for the reasons articulated in the succeeding paragraphs.

II. Reasons for Dissenting

2. Firstly, I am not persuaded that the criteria governing applications of this nature as prescribed by Rule 79(A) of our Rules of Procedure and Evidence have been fulfilled by the Prosecution in so far as the present application is concerned. It is my considered view that the instant application does not reach the required statutory level of any of the justifications upon which such applications are to be predicated: (i) national security, (ii) protecting the privacy of persons, and (iii) protecting the interest of justice from prejudicial publicity.

3. Understandably, the Prosecution has not relied upon paragraph (i) of the sub-rule. It does not appear either that the application is predicated upon paragraph (ii) of the sub-rule. As regards paragraph (iii) of the sub-rule, by no stretch of the judicial imagination can I fathom how permitting the aforesaid witness to testify in closed rather than public session as to the information which will form the subject matter of his testimony will protect the interests of justice from prejudicial publicity. It is difficult to process this intellectually. Furthermore, the issue of the confidentiality or sensitive nature of the subject matter upon which the testimony is predicated is certainly one for judicial determination, a unilateral claim in respect of which by the Prosecution cannot be conclusive and binding upon the tribunal.

4. Secondly, in its purposive or teleological context, gathered from its plain and ordinary meaning, Rule 79(A) is restrictive in character and scope.[1] To give it a broad and non-restrictive

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[1] It is instructive to note that the *Vienna Convention on the Law of Treaties, 1969* enjoins tribunals when faced with the interpretation of treaties and other international instruments or subordinate legislation made thereunder to give them a purposive or teleological interpretation to be gathered from their *plain and ordinary meaning*. The Convention has not, contrary to some judicial viewpoints, rendered obsolete the golden rule of statutory interpretation. Article 31(1) promulgates thus:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."

interpretation is to derogate from the significance and pre-eminence of the norm that criminal trials must generally be conducted in public.

5. Thirdly, I respectfully part company with the learned Majority Justices on the more philosophical ground that "Justice is not a cloistered virtue", and ought not, save in exceptional circumstances, to be sheltered from public view. To this end, I am not persuaded that the matters in respect of which this witness will be testifying, or his position, or the paraphernalia attaching to his office, singly or cumulatively, constitute exceptional circumstances justifying a departure from the ordinary procedure for hearing a witness' testimony in a criminal trial as mandated by Rule 78.

6. Fourthly, I opine that international institutions, whose interest in the transparency of international criminal justice is a matter of public record, cannot themselves be perceived as impeding such transparency by a claim of privilege in a case where, on the Prosecution's own avowal, some of the information is already in the public domain. Such a policy ought not to receive uncritical judicial endorsement. To insinuate that if the tribunal does not grant the privilege, the witness will not be permitted to testify, in my view, savours of administrative high-handedness of which courts of justice usually take a dim view.

7. Finally, I am judicially convinced that both the Sierra Leonean community, in particular, and the international community, in general, do have an interest in having the testimony of the kind proffered being given in public both for their enlightenment on the importance of international criminal justice as an effective response to the culture of impunity, and for enhancing the visibility of the Court as a UN-supported international justice forum.

III. Conclusion

8. I, accordingly, deny the application, recognising fully that the Majority Ruling unquestionably prevails.

Done in Freetown, Sierra Leone, this 15th day of June, 2005.

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]