

TRIAL CHAMBER I (“The Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

NOTING the Prosecution Oral Application for Closed Session for Witness TF2-218, made during Court’s closed session proceedings on the 3rd of June, 2005 (“Motion”);

NOTING the Defence Oral Response to the Motion, made during court proceedings in closed session on the 3rd of June, 2005, opposing the application (“Response”);

MINDFUL of the Chamber’s Oral Ruling on the Motion, delivered on the 6th of June, 2005, granting the Motion;

MINDFUL of Article 17(2) of the Statute which provides that the “accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses”;

CONSIDERING that the Chamber, in granting closed session hearings, is mindful of the Accused to a fair and public hearing, and as such, has granted closed session testimony only in very limited circumstances;

CONSIDERING that witness TF2-218 is a former employee of an international organization, and continues to enjoy privileges and immunities, including immunity from legal process in respect of all words spoken or written and all acts performed by him in the course of the performance of his official functions;

CONSIDERING that the evidence which witness TF2-218 is called to give includes sensitive and confidential information which he allegedly obtained in the course of the performance of his official functions;



CONSIDERING that his former employer has waived witness TF2-218’s immunity from legal process on the condition that he be allowed to testify in closed session in view of the nature of his evidence;

CONSIDERING that testifying on relevant, sensitive and confidential information in a closed session, would, in this case, not prejudice the interests of the Accused or the conduct of the trial as a whole;

MINDFUL of the necessity to protect the interests of justice from prejudicial publicity as stipulated in Rule 79(A)(iii) of the Rules;

THE TRIAL CHAMBER FINDS:

- (1). That based upon the information provided to the Court it would appear that the evidence of this witness would be relevant to some allegations in the Consolidated Indictment; and
- (2). That such evidence was obtained by the witness in the course of his employment with an international organization;
- (2). That it would be in the interests of justice that the evidence be heard in the course of this trial; and finally;

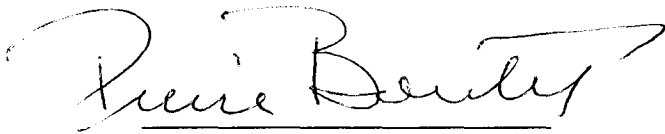



(3). That no unfair prejudice to any of the Accused would result from such evidence being adduced in a closed session.

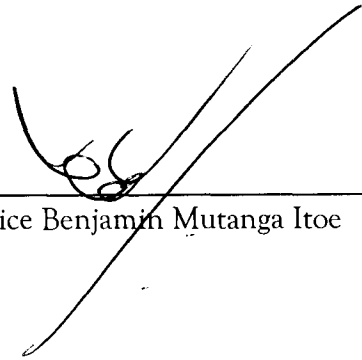
ACCORDINGLY, THE TRIAL CHAMBER GRANTS the Motion.

Hon. Justice Bankole Thompson appends a Dissenting Opinion to this Decision.

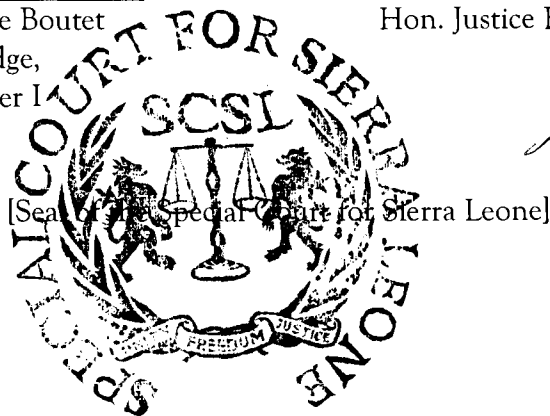
Done in Freetown, Sierra Leone, this 15th day of June, 2005.



Hon. Justice Pierre Boutet
Presiding Judge,
Trial Chamber I



Hon. Justice Benjamin Mutanga Itoe



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

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.

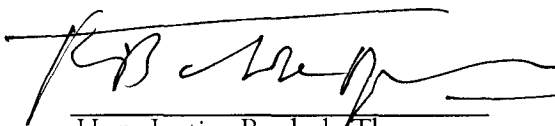
6. Fourthly, I opine that international institutions, whose interest in the transparency of international criminal justice is a matter of public record, cannot themselves be perceived as impeding such transparency by a claim of privilege in a case where, on the Prosecution’s own avowal, some of the information 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]

