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: 21st of June, 2005

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

DECISION ON PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES AND FOR ORDERS FOR PROTECTIVE MEASURES

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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;

SEIZED OF the *Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures Pursuant to Rules 69 and 73bis(E)*, filed on the 15th of February, 2005 ("Motion"), including the *Confidential Attachment Outlining Witness Protection Measures Necessary for Child Soldier Direct/Expert Witness* ("Annex A") and the *Confidential Curriculum Vitae of Child Soldier Direct/Expert Witness* ("Annex B"), requesting the Chamber to grant leave to add two additional witnesses to the Revised Witness List[1] that include a Military Expert Witness, Colonel Richard Iron ("Colonel Iron") and a Direct and Expert Child Soldier Witness[2] ("Child Soldier Witness") and pursuant to Rule 69 of the Rules, further requesting an order for protective measures for the Child Soldier Witness;[3]

NOTING the *Joint Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures*, filed on the 25th of February, 2005 ("Response"), opposing the Motion;

NOTING the *Prosecution Reply to "Joint Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures"*, filed on the 2nd of March, 2005 ("Reply"), including the Confidential Annex A containing two letters from the Prosecution to the Defence, dated the 8th of February, 2005 and the 7th of June 2004 ("Second Annex A");

NOTING the *Curriculum Vitae of Expert Witness Colonel Richard Iron*,[4] filed by the Prosecution on the 28th of February, 2005 ("CV") pursuant to the Chamber's Decision of the 24th of February, 2005;[5]

MINDFUL OF the Chamber's *Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures*, delivered on the 24th of May, 2005, where the Chamber held that "a reasoned written Decision will be published in due course";

NOTING the *Expert Reports*, filed by the Prosecution on the 24th of May, 2005, which included Report on the Civil Defence Force of Sierra Leone by Colonel Iron and Report on the Situation in Sierra Leone in Relation to Children with the Fighting Forces by Child Soldier Witness;

NOTING that Rule 73*bis*(E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules"), which reads as follows:

> After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

MINDFUL OF this Chamber's prior rulings on the issue in this case[6] and in the case of *Sesay, Kallon and Gbao*,[7] where the Chamber outlined the general principles of law applicable to the variation of

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[1] On the 23rd of May, 2005, the Prosecution filed "Revised List of Prosecution Witnesses", thereby reducing the number of witnesses on the "core" list to 77 by moving five witnesses to the "back-up" list.
[2] Motion, paras 5 and 10.
[3] Motion, para. 6.
[4] In their Request the Prosecution lists the name of the expert as Richard Irons [sic!].
[5] *Order to Prosecution to File Military Expert's Curriculum Vitae*, dated the 24th of February, 2005.
[6] *Decision on Prosecution Request for Leave to Call Additional Witnesses*, dated the 29th of July, 2004 and *Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglun*, dated the 1st of October, 2004.

the witness list and held that when interpreting provisions of Rule 73*bis*(E) together with Rule 66(A)(ii),[8] and the circumstances that give rise to a showing of "good cause" and the "interests of justice", certain factors should be taken into consideration;

NOTING that these factors, as elaborated in the ICTR *Nahimana* case, are as follows:

> [...] the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence [...][9]

NOTING further that the Chamber observed that the ICTR *Bagosora* case expanded the factors identified in the *Nahimana* case as follows:

> These considerations [under Rule 73*bis*(E)] require a close analysis of each witness, including the sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witness.[10]

NOTING that when applying the above-mentioned factors, the Chamber adheres to "the principle of law that the Prosecution should not be allowed to take the Defence by surprise with additional witnesses and should fulfil in good faith its disclosure obligations;"[11]

NOTING that Rule 94*bis* of the Rules relates to expert witnesses and provides as follows:

> (A) Notwithstanding the provisions of Rule 66(A), Rule 73*bis*(B)(iv)(b) and Rule 73*ter*(B)(iii)(b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty one days prior to the date on which the expert is expected to testify.[12]
>
> (B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:
> i. It accepts the expert witness statement; or
> ii. It wishes to cross examine the expert witness.

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[7] *Prosecutor Against Sesay, Kallon and Gbao*, SCSL-2004-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, dated the 11th of February, 2005 ("Decision of the 11th of February, 2005").

[8] Rule 66(A)(ii) of the Rules, on the disclosure of witness statements, which provides that the Prosecution shall:
(ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution.

[9] *Prosecutor v. Nahimana*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20.

[10] *Prosecutor v. Bagosora*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis*(E), 26 June 2003, para. 14 reiterated by the Trial Chamber in its Decision of the 11th of February, 2005, para. 26.

[11] Decision of the 11th of February, 2005, para. 27.

[12] Emphasis added.

> (C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

CONSIDERING that as Rule 94*bis* of the Rules does not provide a definition of an expert witness, the Chamber accepts the definition of an "expert" as more fully described in the case law of the ICTY to mean:

> A person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute.[13]

NOTING further with approval the comment of the ICTR Trial Chamber in *Akayesu* case, where the Chamber stated that an expert's testimony is "testimony intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field"[14] and as stated in *May and Wierda*:

> The purpose of expert evidence is to provide a court with information that is outside its ordinary experience and knowledge. Indeed, a Trial Chamber should refrain from acting as its own expert in cases where expert evidence is appropriate.[15]

CONSIDERING that Colonel Iron can be properly characterised as an expert, since his specialised military education and 25 years of professional military experience, including his field experience, as documented in his CV, have provided him with sufficient training and specialised knowledge to qualify him as a military expert;

CONSIDERING that as a military expert, Colonel Iron is likely to assist the Chamber in understanding and determining the issues relating to the structure of the CDF, its military organization, the chain of command and control of the CDF;

CONSIDERING that Colonel Iron will not give testimony on the criminal liability of the Accused[16]and in this respect, the Chamber concurs with the finding of the ICTY Trial Chamber in *Hadzihasanovic* case, where it was held that:

> [..] an expert witness may not be authorised to offer his opinion on the criminal liability of the accused, a matter which falls within the sole jurisdiction of the Chamber at the close of the trial [...]
> [...]
> [...] an expert may provide the judges with any information useful to an evaluation of the facts, particularly, for a military expert, as regards the military structures, chain of command and disciplinary procedures of an army, and the military responsibility deriving from such provisions [...][17]

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[13] *Prosecutor v. Stanislav Galic*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p.2.

[14] *Prosecutor v Akayesu*, ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998; *see also* Richard May and Marieke Wierda, *International Criminal Evidence*: Transnational 2002, ("*May and Wierda*"), p. 202, para. 6.88 (footnotes omitted).

[15] *May and Wierda*, p. 199, para 6.83.

[16] *See* Response, para 17.

[17] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision on Report of Prosecution Expert Klaus Reinhardt, 11 February 2004, paras 11and 13 (footnotes omitted).

CONSIDERING that Colonel Iron's expert testimony appears to be both material and relevant to the case and therefore it is in the interests of justice to add him as an expert witness on the Revised Witness List;

CONSIDERING the Child Soldier Witness' professional experience in general and in Sierra Leone particularly, which is detailed in her CV,[18] properly characterize this witness as an expert on children within fighting forces;

CONSIDERING that by virtue of her experience and expertise, the Child Soldier Witness will be able to enlighten the Chamber on enlistment process of children into the CDF and give an explanation and evaluative opinion of the official age determination process undertaken during the disarmament process of child combatants;

CONSIDERING that the Child Soldier Witness' proposed expertise and her direct testimony appears to be material to the case and therefore it is in the interests of justice that this evidence be heard;

NOTING that the Defence were aware, at least since the 1st of November, 2004, of the Prosecution' intention to call additional experts[19] and therefore, the element of surprise or prejudice in this instance cannot be entertained;

CONSIDERING that due diligence was exercised by the Prosecution in complying with their disclosure obligations, as the name of the military expert and a summary of his professional background, have been disclosed to the Defence since the 7th of June, 2004,[20] and Colonel Iron's expert report was filed on the 24th of May, 2005;

CONSIDERING that, although the Prosecution did not disclose to the Defence the name of the Child Soldier Witness until the 8th of February, 2005, for which they provided satisfactory explanation,[21] the Prosecution exercised due diligence in fulfilling their disclosure obligations and filed her expert report on the 24th of May, 2005;

NOTING that various Trial Chambers of the ICTR have adopted "a liberal approach" to the admission of expert testimony[22] and concluded that "[t]here is no exact deadline for disclosure" of an expert report;[23]

NOTING that the applicable rules for an application for protective measures for the witnesses include Rule 69, Protection of Victims and Witnesses, of the Rules and Rule 75, Measures for the Protection of Victims and Witnesses, of the Rules;

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[18] Confidential Annex B, Motion.

[19] At the Status Conference held on the 1st of November, 2004, the Chamber urged the Prosecution to disclose the identity of additional expert witnesses as soon as possible to avoid any prejudice to the Defence case; Transcript of the Status Conference of the 1st of November, 2004, pages 28-31.

[20] Second Annex A, Reply.

[21] As elaborated in the Second Annex A, Reply.

[22] *The Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 8.

[23] *The Prosecutor v. Semanza*, ICTR-97-20-T, Decision on Defence Extremely Urgent Motion for Extension of Time and for an Order of Cooperation of the Government of Rwanda, 13 December 2001, para. 4.

MINDFUL OF the Chamber's previous ruling in this case that "the process of granting protection to witnesses entails in each specific circumstance a balance between the "full respect" for the rights of the Accused and "due regard" for the protection of victims and witnesses";[24]

CONSIDERING that the nature of Child Soldier Witness' current employment and the fact that both the witness herself and her current employer expressed strong concerns that if she and her testimony were exposed to the public, it would give rise to a significant threat to her personal safety;[25]

CONSIDERING further that both Child Soldier Witness' previous and current employers have made her anonymity a condition to the release of her testimony and that her previous employer stipulated that another condition for the release of her testimony would be to hold a closed session for this witness;[26]

CONSIDERING that exceptional circumstances do exist in this case for granting protective measures for the Child Soldier Witness and that "a measure of hearing the testimony in closed session is only granted to a certain category of the witnesses and is based on the principle of protection of victims and witnesses where the interests of justice so dictate"[27] and that it is "an extraordinary protective measure that will only be granted where it is shown that there is a real risk to the witness and / or his or her family and that their privacy or security will be threatened";[28]

PURSUANT TO Rules 54, 66(A)(ii), 69(A) and (C), 73*bis*(E), 75(A) and (B) and 94*bis* of the Rules;

THE CHAMBER GRANTS THE MOTION.

Done in Freetown, Sierra Leone, this 21st day of June, 2005.

Hon. Justice Benjamin Mutanga Itoe | Hon. Justice Pierre Boutet, Presiding Judge, Trial Chamber I | Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

[24] Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, dated the 8th of June, 2004, para. 27.
[25] Annex A.
[26] Annex A, para. 6.
[27] Ruling on Motion for Modification of Protective Measures for Witnesses, dated the 18th of November, 2004, para. 49.
[28] *See, inter alia, Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Order on an Application by the Prosecution to Hold a Closed Session Hearing of Witness TF2-223, 27 October 2004.