

339

**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
Freetown – Sierra Leone

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

Registrar: Mr. Robin Vincent

Date filed: 15 February 2005

**THE PROSECUTOR**

**Against**

**SAM HINGA NORMAN  
MOINANA FOFANA  
ALIEU KONDEWA**

Case No. SCSL – 2004 – 14 – T

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**PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES  
AND FOR ORDERS FOR PROTECTIVE MEASURES  
PURSUANT TO RULES 69 and 73bis(E)**

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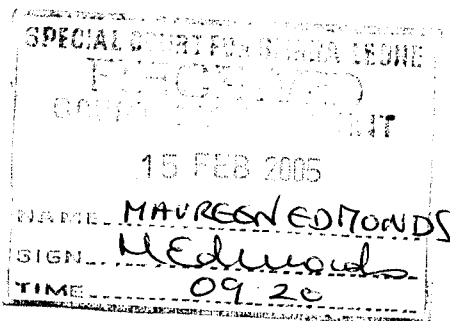
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**I. PROCEDURAL BACKGROUND**

1. On 1 April 2004, the Trial Chamber issued the “Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial” (“the Original Order”). On 26 April 2004, pursuant to the Original Order, the Prosecution filed a “Witness List”, which included a summary of the expected testimony of each witness.
2. On 5 May 2004, the Prosecution filed a “Modified Witness List”, which totalled 154 witnesses. On 3 February 2005, the Prosecution filed a “Revised Prosecution List”, which reduced the Core Witness List by 18 witnesses to a new total of 82 witnesses. Thirty-eight of the witnesses listed in the Revised Prosecution List have already testified in the proceedings.
3. On 29 July 2004, the Trial Chamber issued the “Decision on Prosecution Request For Leave to Call Additional Witnesses” (“the 29 July 2004 Decision”).<sup>1</sup>
4. On 1 October 2004, the Trial Chamber issued the “Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund” (“the 1 October 2004 Decision”). In the “Request for Leave to Call Additional Expert

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<sup>1</sup> Registry Page Numbers 7310 – 7321.

Witness Dr. William Haglund”, the Prosecution stated that “(t)he Prosecution is anticipating to call two additional expert witnesses to testify in the CDF trial. Upon receipt of their expert reports, the Prosecution will follow the procedure ordered by the Trial Chamber in its ‘Order for Compliance of Prosecution with Rule 94b *bis*’”.<sup>2</sup>

5. Pursuant to Rule 73*bis*(E), the Prosecution now respectfully requests that the Trial Chamber allow the addition of these two witnesses to the Revised Prosecution Witness List for the reasons outlined below.
6. The Prosecution further requests an order of protective measures for the child soldier direct/expert witness pursuant to Rule 69. In order to protect the identity of this witness, the Prosecution submits a “Confidential Attachment Outlining Witness Protection Measures Necessary for Child Soldiers Direct/Expert Witness” in support of this request as Annex A.

## II. ARGUMENT

7. In the Original Order of 1 April 2004, the Trial Chamber stated that should the Prosecution seek to add any witnesses or exhibits to the lists submitted on 5 May 2004, “it shall be permitted to do so only upon good cause being shown”.
8. In its Decisions of 29 July 2004 and 1 October, the Trial Chamber recognized that several factors have been taken into account by the international ad hoc tribunals assessing the “interests of justice” and “good cause” for adding witnesses to the witness list.<sup>3</sup> In its “Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements”, the Trial Chamber reiterated that the Prosecution must demonstrate a) that the circumstances being argued to demonstrate good cause are “directly related and material to the facts in issue”; b) that the evidence to be provided by the witnesses are “relevant to determining the issues at stake and would contribute to serving and fostering the overall interest of the law and justice”; c) that “leave to call new

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<sup>2</sup> Paragraph 30.

<sup>3</sup> *Prosecutor v. Nahimana et al*, ICTR-99-52-I, “Decision on the Prosecutor’s Oral Motion for Leave to amend the list of selected witnesses”, 26 June 2001, cited at paragraph 29, Registry Page Number 7318 of the 29 July 2004 Decision; and paragraph 13, Registry Page Number 9632 of the 1 October 2004 Decision.

witnesses would not unfairly prejudice the defence; and d) that the new evidence “could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence”.<sup>4</sup>

9. The Prosecution respectfully submits that the factors outlined below demonstrate how the addition of each proposed witness to the Reduced Witness List meets the standard of good cause and of being in the interests of justice, as articulated by the Trial Chamber in its decisions issued on 29 July 2004, 1 October 2004 and 11 February 2005.

### III. PROSECUTION’S PROPOSED WITNESSES

10. The Prosecution respectfully requests that two witnesses be added to the Reduced Witness List and that the Prosecution be allowed to call these witnesses to testify at trial. These two witnesses are Colonel Richard Irons, a military expert witness; and a direct and expert child soldiers witness.

#### A. Colonel Richard Irons

##### (i) **Procedural background demonstrates good cause**

11. Colonel Richard Irons has been serving in the British Army since 1975.

Following a Prosecution request to the United Kingdom Ministry of Defence, Colonel Irons was initially contacted in relation to testifying as a military expert before the Special Court in March 2004. Having been approved as such, Col. Irons travelled to Sierra Leone for one week in order to commence preparation of expert reports for the CDF, RUF and AFRC trials. Col. Irons later travelled to Sierra Leone for two weeks in September 2004 and again for three weeks in February 2004. A preliminary draft of the military report was reviewed by Prosecution in February 2005, following which a decision was made to call Colonel Irons as a military expert in these proceedings.

##### (ii) **Relevance and materiality of expert testimony**

12. Col. Irons was appointed Assistant Director of Land Warfare (Doctrine) to the British Army in 2002. He possesses a detailed understanding of conventional and unconventional conflict and an expertise in command and control. His expert

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<sup>4</sup> Paragraphs 34 and 35, *Prosecutor Against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-15-T, 11 February 2005.

testimony is highly probative and will add significantly to the Prosecution's case concerning the individual criminal responsibility of all three CDF Accused.

13. The particular issues to which Col. Irons will testify include:

- a) A detailed description of the identifying characteristics of military organisations and the general nature of military command.
- b) Did the CDF have a recognized military hierarchy and structure?
- c) Did the CDF exhibit the characteristics of a traditional military organization?
- d) Did the CDF maintain a coherent link between strategic operational and tactical procedures?

**(iii) No unfair prejudice to the Defence**

14. The Prosecution submits that the addition of Col. Irons as a military expert will cause minimal prejudice to the Defence. The Prosecution has already submitted his name to the Defence, who have had time to investigate and prepare rebuttal evidence. In addition, Col. Irons will not be providing any new evidence rather he will simply present an expert opinion on the evidence that is already before the Court. As a result, the Prosecution notes that this witness is not expected to testify until the late stage of the proceedings, once key evidence is presented before the Court.

**B. Child Soldiers Direct/Expert Witness**

**(i) Procedural background demonstrates good cause**

15. The proposed witness is currently employed by an international organization. This witness was also employed by an international organization whilst in Sierra Leone during 1998 to 2004. A formal release for this witness's expert testimony before the Special Court was required from both employers according to the specific terms of this witness's past and present employment.

16. The Prosecution has diligently engaged in efforts to secure releases for the testimony of this witness from both present and past employers. The Office of the Prosecutor first approached the witness in late March 2004 and again on 19 May 2004. The witness works in remote areas that do not facilitate instantaneous communication. Following informal discussions with the said witness and the

present employer, the Office of the Prosecutor initiated a formal request for the release of the said witness's testimony on 15 June 2004. After additional discussion, formal permission was granted on 17 July 2004.

17. Following further discussion with the witness, the Office of the Prosecutor proceeded to initiate a request to the former employer on 8 September 2004. Correspondence and discussion was undertaken with officials in the months of September, October, November and December. Informal permission releasing the testimony of the said witness was finally confirmed orally over the telephone on 25 January 2005. Written confirmation of the formal release was not received until 7 February 2005, following an additional letter from The Prosecutor that was sent on 4 February 2005.
18. The Prosecution submits that the administrative encumbrances encountered in securing the testimony of this witness appear to be due, in part, to the novel practice of seeking employees of international organizations to testify before an international tribunal. In granting a release of the testimony of an employee, international organizations follow internal protocols, to which the Prosecution must adhere before presenting a potential witness to the Court. In this instance, the former employer would not agree to a preliminary release of the witness's name on a confidential basis to the defence until a full release for the witness's testimony had been made.
19. Throughout, the Prosecution has undertaken countless correspondence and telephone conferences in order to facilitate securing the final release for the testimony of this witness from both international organizations. The Prosecution submits that the Prosecution has exercised diligence and acted in good faith, which was complicated by the need to secure releases of testimony from two separate international organizations, and therefore demonstrates good cause.

**(ii) Relevance and materiality of child soldier testimony**

20. The Prosecution submits that it is in the interests of justice to allow this witness to provide testimony before this Court. The use of child soldiers has only recently been considered a crime under international law. The witness will give evidence that can be categorised as both direct evidence and expert opinion evidence, which is partially based on direct observations, in relation to the use of child soldiers. The Prosecution submits that this evidence, outlined below, is both relevant and material in relation to the indictment.
21. The specific issues to which the child soldier witness is expected to testify hold significant probative value for the Prosecution's case. As a result of this witness's experience in Sierra Leone and professional expertise, the child soldier witness has been requested and it is anticipated that she will be able to give direct evidence and express the opinions on the following:
- a) A description of direct negotiations undertaken with commanders and leaders of the CDF for the release of child soldiers prior to and during disarmament;
  - b) A description of the enlistment of children into the CDF;
  - c) An explanation and evaluative opinion of the official age determination process undertaken during disarmament on child combatants;
  - d) A description and opinion of the patterns of use of children in the CDF fighting forces;
  - e) An opinion on the motivations for use of child soldiers by the CDF;
  - f) An explanation and evaluative opinion of the official figures of child soldier participants provided by official sources; and
  - g) An opinion of the uses of girls as fighting forces by the CDF.
22. In assisting the Trial Chamber to deliberate on this application, the Prosecution has also **confidentially** attached the curriculum vitae of the child soldier witness. The curriculum vitae outlines how the witness's professional background and direct experience in Sierra Leone are uniquely relevant to the subject matter of the direct and expert testimony, and as such, the testimony will not be a duplication of the evidence of other witnesses.

**(iii) No unfair prejudice to the Defence**

23. The Prosecution submits that the addition of this direct/expert witness will cause minimal prejudice to the Defence. The Prosecution has already submitted the name of the child soldier witness to the defence on a confidential basis. Moreover, the Prosecution has arranged for an expedited preparation of the expert report, which will be disclosed immediately upon final receipt pursuant to Rule 94 *bis*.

**IV. PROTECTIVE MEASURES SOUGHT FOR CHILD SOLDIER EXPERT**

24. The Prosecution seeks an order for protective measures for the child soldier witness that is identical to those which were granted in the “Decision on Prosecution Motion for Protective Measures”, dated 8 June 2004, namely those accorded under sub-paragraphs 2.) b) to k). The Prosecution relies upon the submissions outlined in the “Confidential Attachment Outlining Witness Protection Necessary for Child Soldier Direct/Expert Witness”.

**CONCLUSIONS**

25. In the 1 October Decision, it was noted that:

(t)he Chamber must draw a balance between the Statutory right of the accused persons, as the Defence contends, to a fair and expeditious trial and the equally important and very challenging right of the Prosecution for access to evidence and all material that would contribute not only to discharging the onerous legal burden that it bears to prove the guilt of the accused beyond a reasonable doubt, but also to furnish the Court with evidence that would contribute to fulfilling its mission of ensuring that justice is done to all parties.<sup>5</sup>

26. The Prosecution respectfully submits that the strong materiality and relevance of the unique testimonies of a military expert and child soldier direct/expert witness to the presentation of the Prosecution’s case demonstrates good cause and their addition to the Modified Witness List is in the interests of justice – particularly in light of the due diligence which the Prosecution has undertaken in to secure their testimony.

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<sup>5</sup> Paragraph 22, Registry Page Number 9634, 1 October 2004 Decision.

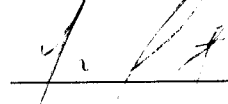


27. The Prosecution requests that the Defence respect the confidentiality attached to the child soldier witness in preparing their submissions in response to this request.

Filed in Freetown,

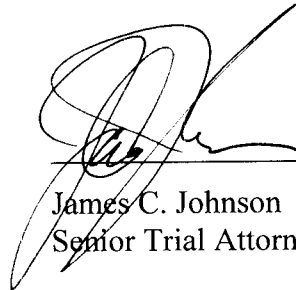
15 February 2005

For the Prosecution,



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Luc Côté  
Chief of Prosecutions



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James C. Johnson  
Senior Trial Attorney



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Court Management Section – Court Records

**CONFIDENTIAL DOCUMENT CERTIFICATE**

Pursuant to article \_\_\_\_ of the Directive for the Registry, Court Management Section, this certificate replaces the following confidential document which has been filed in the *Confidential Case File*.

Case Name: The Prosecutor – v- Norman Fofana & Kondewa  
Case Number: SCSL-2004-14-T  
Document Index Number: 339

Document Date: 15-02-2005  
Filing Date: 15-02-2005  
Number of Pages: 6  
Page Numbers: 11961-11966

Document Type: -Two Confidential Annexes to Document 339

- Affidavit
- Decision
- Order
- Indictment
- Motion
- Correspondence
- Other

Document Title: Prosecution request for leave to call additional witnesses & for orders for protective measures pursuant to rules 69 & 73bis(E)

Name of Officer:  
Maureen Edmonds  
Signed:

*M Edmonds*

**PROSECUTION LIST OF AUTHORITIES**

1. *Prosecutor v. Slobodan Milosevic*, ICTY-02-54, “Confidential – Decision on Prosecution’s Application for a Witness Pursuant to Rule 70(B)”, 30 October 2003.

11968

**IN THE TRIAL CHAMBER**

**Before: Judge Richard May, Presiding**

**Judge Patrick Robinson**

**Judge O-Gon Kwon**

**Registrar: Mr. Hans Holthuis**

**Decision of: 30 October 2003**

**PROSECUTOR**

**v.**

**SLOBODAN MILOSEVIC**

**CONFIDENTIAL**

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**DECISION ON PROSECUTION'S APPLICATION FOR A WITNESS PURSUANT TO RULE  
70 (B)**

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**The Office of the Prosecutor**  
**Ms. Carla Del Ponte**  
**Mr. Geoffrey Nice**  
**Mr. Dermot Groome**

**The Accused**  
**Slobodan Milošević**

**Amici Curiae**  
**Mr. Steven Kay, QC**

11969

**Mr. Branislav Tapušković**  
**Mr. Timothy L.H. McCormack**

**THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal"),

**BEING SEISED** of a confidential and partly *ex parte* "Prosecution Application for a Witness Pursuant to Rule 70 (B)", filed on 10 October 2003 ("Application"), seeking the following:

- a. leave to call General Wesley Clark ("the witness"), adding him to the witness list on the basis that "good cause" has been shown;
- b. that, in accordance with the Appeals Chamber's Rule 70 Decision, the witness and his entire testimony be treated as information protected by Rule 70 (C) and (D);
- c. that paragraphs 61, 62, 63, 65, 66, 67 and 85 of the summary attached to the Motion as *ex parte* Annex A be led in closed session, on the basis that, in the opinion of the information provider, the Government of the United States of America ("US Government"), it constitutes sensitive information going to that Government's legitimate national interests;
- d. that the witness or the US Government representatives can require the testimony to be moved into closed session when necessary to protect sensitive information;
- e. to give effect to the protective measures sought, the broadcast of the testimony be delayed 48 hours (instead of the customary 30 minutes), to enable the US Government to review the transcript, and the testimony to be entirely in temporary closed session, the public gallery being closed so as to protect any information initially given in open session but subsequently required to be given closed session protection;
- f. the Prosecution's testimony should be limited in scope to the content of the summary attached to the Motion as *ex parte* Annex A;
- g. the scope of cross-examination should be restricted to the scope of examination-in-chief, except to the extent the Accused or *Amici Curiae* seek to have the scope of examination expanded by prior agreement of the US Government; and
- h. the US Government should be entitled to have 2 representatives present in court during the testimony of the witness,

**NOTING** the "Amici Curiae Reply to Prosecution Application for a Witness Pursuant to Rule 70 (B) Dated 10 October 2003" filed on 16 October 2003 ("Response"), in which the following is submitted:

- a. the Prosecution has not shown "good cause" to add the witness;
- b. whilst not having seen the summary of the witness (which was annexed by the Prosecution to its Motion on an *ex parte* basis), it is suggested that closed session testimony should be used to protect only that which is truly confidential and the impact of the Accused's questioning would be unfairly restricted by it being in closed session; and
- c. the procedures proposed by the Prosecution to protect the confidential information may constitute undue interference with the proceedings and the interests of the US Government could be adequately dealt with in the courtroom as they arise if the Government made available at the time of the testimony the necessary personnel able to take decisions on this;

**CONSIDERING** the Trial Chamber's ruling subsequent to the filing of the Prosecution's pre-trial material for the Croatia and Bosnia part of these proceedings that it would only allow the admission of additional material by the Prosecution on good cause being shown <sup>1</sup>,

**CONSIDERING** the Trial Chamber accepts that the explanation offered in the Motion satisfies the Trial Chamber that its requirement that good cause be shown is satisfied, in that the basis upon which the witness is allowed to give evidence by the information provider was only agreed on the date of the Application and that the witness can give important evidence,

**CONSIDERING** the Appeals Chamber has held that

- a. where it can be established that information is provided to the Prosecution on a confidential basis under Rule 70, then it is protected by paragraphs (C) and (D) of that Rule <sup>2</sup>;
- b. when a person possessing important knowledge is made available to the Prosecutor on a confidential basis, not only the informant's identity and the general subject of his knowledge constitute the "information" shielded by Rule 70, but also the substance of the information shared by the person (which is often, as in this case, presented in summary form in a witness statement) <sup>3</sup>;
- c. the Trial Chamber has the authority to assess whether information has been provided in accordance with Rule 70 (B), although "such enquiry must be of a very limited nature" <sup>4</sup>.
- d. the Trial Chamber retains the safeguard of a discretion to "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial" pursuant to Rule 70 (G) <sup>5</sup>; and
- e. the Trial Chamber has discretion to allow the presence of representatives of an information provider in court whilst the evidence is given <sup>6</sup>,

**CONSIDERING** that the Trial Chamber accepts, on the basis of the Prosecution submissions, that the witness and the testimony he will give, was provided on a "confidential basis" pursuant to Rule 70,

**CONSIDERING** that it is appropriate, consistent with the Trial Chamber's prior practice, for two representatives of the US Government to be present in court when the testimony of the witness is given,

**NOTING** the provisions of Rules 75 and 79 of the Rules,

**CONSIDERING** that the US Government has imposed conditions on the provision of the "information" as set out in the Prosecution Application and repeated above,

**NOTING** Rule 70 (G) which states that nothing in Rule 70 (C) or (D) shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial,

**PURSUANT TO** Rules 70, 75, 79 and 54 of the Rules of Procedure and Evidence

**HEREBY GRANTS THE MOTION and ORDERS** as follows:

1. General Wesley Clark ("the witness") may be added to the Prosecution witness list;
2. the witness's testimony shall be treated as information provided pursuant to and protected by Rule 70 (C) and (D);
3. two representatives of the US Government may be present in court during the testimony of the witness;
4. the evidence of the witness shall be given in open session subject to the protective measures set out below;
5. the evidence contained in paragraphs 61, 62, 63, 65, 66, 67 and 85 of the summary attached to the

Motion as *ex parte* Annex A may be given in private session in order to protect the national interests of the US and request may be made for additional evidence to be so given on the same ground;

6. the public gallery be closed during the course of the witness's testimony;
7. the broadcast of the testimony be delayed for a period of 48 hours to enable the US Government to review the transcript and make representations as to whether evidence given in open session should be redacted in order to protect the national interests of the US, and shall be delayed for a period thereafter to enable the Trial Chamber to consider and determine any redactions requested, and, if ordered, for the redactions to be made to the tape of the testimony prior to its release;
8. the scope of examination-in-chief and cross-examination of the witness be limited to the content of the summary attached to the Motion as *ex parte* Annex A;
9. The Accused or *Amici Curiae* may seek to have the scope of examination expanded by prior agreement of the US Government (obtained directly from that Government or through the representation of the Office of the Prosecutor), once the summary of the evidence-in-chief to be given is disclosed to them; and
10. The Prosecution shall disclose the summary contained in *ex parte* Annex A forthwith.

Done in English and French, the English text being authoritative.

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Richard May Presiding

Dated this thirtieth day of October 2003

At The Hague

The Netherlands

**[Seal of the Tribunal]**

- 1 . "Decision on Prosecution Request for Agreement of Trial Chamber to Amend Schedule of Filings", 18 April 2002, p.3.
- 2 . Prosecutor v. Milošević, "Decision on the Interpretation and Application of Rule 70", IT-02-54-AR108bis & AR73.3, 23 October 2002 ("Milosevic Appeals Decision"), para. 20.
- 3 . Ibid, para. 23.
- 4 . Ibid, para. 29. The Appeals Chamber states that this is an objective test, and continues: "The Chambers may be satisfied of this simply by a consideration of the information itself, or by the mere assertion of the Prosecutor, or they may require confirmation from the information provider or, where the information is in the form of a document, for example, there may be something on the face of the document which indicates that it was indeed provided on a confidential basis." Trial Chambers must give the information provider an opportunity to be heard, allowance to file written submissions satisfying this requirement (para. 31).
- 5 . Ibid, para. 26.
- 6 . Ibid, para. 33.