

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

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 26 June 2006

THE PROSECUTOR**Against**

Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PUBLIC

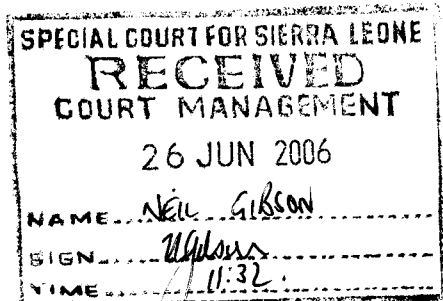
**PROSECUTION RESPONSE TO 'FOFANA SUBMISSIONS REGARDING
PROPOSED EXPERT WITNESS DANIEL J. HOFFMAN PHD'**

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I. INTRODUCTION

1. The Prosecution files this response to the “Fofana Submissions Regarding Proposed Expert Witness Daniel J. Hoffman PHD”¹ (“**Submissions on Proposed Expert Witness**”) filed on 16 June 2006.
2. The Prosecution opposes the Defence request for the Chamber to recognize Dr. Hoffman as an expert witness. The Prosecution submits that the Defence request is procedurally irregular and outside the scope of Rule 94*bis* of the Rule of Procedure and Evidence (the “**Rules**”). It should therefore be dismissed on this basis.
3. Alternatively, should the Trial Chamber find otherwise, the Prosecution’s objections on the merits are threefold. First, the Prosecution submits that based on the Defence submissions and the *Curriculum Vitae* provided, Dr Hoffman does not possess the necessary qualifications to testify to the claimed areas of expertise. Secondly, the Prosecution asserts that the expected testimony relates to *ultimate issues*, the determination of which falls exclusively within the role of the Chamber. Finally, it is submitted that the bulk of the proposed evidence is irrelevant and will not assist the Chamber to resolve the issues in dispute.
4. If the Trial Chamber grants Dr. Hoffman the status of an expert witness at this stage, the Prosecution submits that its right to cross-examine the expert as to his qualifications is nevertheless preserved.

II. ARGUMENTS

A. Procedural Irregularity

5. Rule 94*bis* states:

(A) Notwithstanding the provisions of Rule 66(A), Rule 73 *bis* (B)(iv)(b) and Rule 73 *ter* (B)(iii)9b) 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.

¹ *Prosecutor v Norman et al.*, SCSL-04-14-T-621.

(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.

6. As this rule prescribes, any challenges with respect to an expert witness are to be raised by the opposing party once the full statement of the expert witness has been filed. The practical effect of this procedure is to allow the opposing party the opportunity to adequately examine the proposed evidence and make an informed opinion as to any challenges that it may want to raise. Upon notice by the opposing party rejecting the expert witness statement, Rule 94*bis* (B) (ii) allows for objections challenging the expert's status and testimony to be raised during the cross-examination of the proposed expert witness.

7. This procedure has been adopted by the Trial Chamber in this case. Upon the filing of the Defence intention to cross-examine the Prosecution's proposed expert witness, the Trial Chamber informed the Defence, prior to the examination in chief of the expert witness, that any "arguments that [the Defence] may have about admissibility, probative value and so on"² can be raised in due course during their cross-examination of the witness.³ In the *Brima* case the Trial Chamber II clearly stated that concerns as to the qualifications of an expert witness "can adequately be tested during cross-examination."⁴ The Chamber further opined that "[t]here is no third option under the Rule whereby the Trial Chamber is permitted, at the request of the opposing party, to exclude or lock out an expert witness or her evidence, much less at this early stage when the witness has not yet testified."⁵ This clearly indicates that any final determination with respect to an expert witness's evidence and credentials is therefore to be made

² *Prosecutor v Norman et al.*, Transcript 14 June 2005 p 13.

³ *Id.*

⁴ *Prosecutor v Brima et al.*, SCSL-04-16-T-365, "Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) pursuant to RULE 73*bis* (E) and on Joint Defence Notice to inform the Trial Chamber of its position Vis-à-Vis Expert Witness (Mrs. Bangura) Pursuant to Rule 94*bis*", 5 August 2005, para 30.

⁵ *Id.*

after the witness has testified and the opposing party has had ample opportunity to cross-examine the witness.⁶

8. Based on the above arguments, the Defence application should be denied as premature. This procedure is outside the scope of Rule 94*bis* and it inequitably forces the Prosecution to raise objections it may have without being in possession of the expert report and being denied the benefit of properly analyzing it.
9. Should the Trial Chamber decide otherwise, the Prosecution respectfully submits that it ought nevertheless to be allowed to raise any objections as to the credentials of the proposed Defence expert witness in cross-examination.

B. Merits of the Application

10. Since, in the Prosecution's view, the Defence request is outside the scope of Rule 94*bis* and should therefore be denied, there is no need to proceed with a further analysis of the request. Nevertheless, the Prosecution will canvass its arguments on the merits of the application.
11. The Prosecution concurs with the Defence that expert evidence plays a prominent part in international criminal trials in as much as such evidence serves to assist a court of law in the understanding of specific issues of a technical nature that are outside its ordinary experience and knowledge. It is conceded that expert witnesses have also been called in the *ad hoc* tribunals to familiarize the judges with the historic, cultural and political background of the conflict in order to enable them to better understand the context in which the events took place.
12. For a witness to be recognized as an expert, in a specific area, he or she must possess "specialized knowledge, skill or training".⁷ There is no set rule that provides for a technical determination of when someone possesses enough specialized knowledge in a specific area to qualify as an expert. However, the Prosecution submits that a holistic assessment of all relevant factors such as

⁶ The Prosecution points out however that the Trial Chamber, on applications brought under Rule 73*bis* (E), has decided on questions of the qualification of expert witnesses. This did not, however, preclude the opposing party from raising objections as to the status of the proposed expert during cross-examination.

⁷ *Prosecutor v Blagojevic*, IT-02-60-T, "Decision on Prosecution's Motions For Admission of Expert Statements", Tr. Ch. 7 November 2003. para 19.

academic credentials, training, professional experience, field experience and area of publications must be conducted, keeping in mind the scope of the issues to which the witness is to testify to.⁸

The proposed expert does not possess the necessary qualifications

13. Based on the Defence Submissions on Proposed Expert Witness, the Prosecution submits that Dr. Hoffman does not possess the necessary credentials and expertise to testify to the proposed issues. As his CV details, Dr. Hoffman is an academic in anthropology who has just recently completed his PhD at Duke University. His professional experience as a contract photographer in a number of conflict zones has no relevance to the subject matter on which he is to be qualified as an expert.
14. Dr. Hoffman's credentials do not qualify him as an expert in the proposed areas of testimony, even less so to adopt a stance on military or legal issues. As such he does not possess the expertise to testify on matters of command and control in the CDF organization, including the issue of subordination of the Kamajors to specific commanders⁹ or "the relationship between commanders and fighters"¹⁰; whether the CDF was an organized armed force¹¹; whether the Second accused knew of and approved of the use of children to participate actively in hostilities¹²;

⁸ See *Prosecutor v Norman et al.*, Transcript 14 June 2005 p 2, 4, 5: where the Trial Chamber emphasized that the expert's domain of expertise must be defined in a very specific and precise manner with regards to the issues of the case. See *Prosecutor v Norman et al.*, SCSL-04-14-T-435 "Decision on Prosecution Request For Leave to Call Additional Witnesses And For Orders for Protective Measures", 21 June 2005 at page 5 where the Trial Chamber, considering the witness's extensive years of military experience, his training and field experience, concluded that he had the required expertise to testify to particular issues relating to the command structure of the CDF, its military organization, and the chain of command and control. In the ICTR case of *Ndayambaje*, the Trial Chamber looked at the combination of both the academic qualifications as well as the professional training when determining whether the witness could or could not qualify as an expert on the specific subject matter. See *Prosecutor v. Ndayambaje*, ICTR-96-8-T, "Oral Decision on the Qualifications of Mr. Edmond Babin as Defence Expert Witness", Tr. Ch. II, 13 April 2005.

⁹ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 3-C para 1 and p 5-C para 1, 2.

¹⁰ Submissions on Proposed Expert Witness, para 12.

¹¹ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 2-C.

¹² Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 4-C.

or, to the widespread and systematic nature of the attacks.¹³

15. The Defence has failed to demonstrate how Dr. Hoffman's professional and academic credentials in anthropology and history qualify him to give, for example, an expert opinion on specific issues that fall more naturally within the field of expertise of a military expert.¹⁴ His sphere of competence must be clearly defined and he must confine himself to that sphere of competence which is anthropology. It is unclear how the proposed testimony can assist the Trial Chamber in the determination of the above mentioned matters, when the witness's expertise cannot properly extend to the areas to which he is called to testify.

The evidence of the proposed expert witness relates to ultimate issues of interpretation by the Trial Chamber

16. The Prosecution notes that the Defence correctly pointed out that "an expert can not usurp the role of the Chamber by testifying as to the criminality of the accused".¹⁵ Trial Chamber II stated in the *Brima* case that "[a]n expert witness must not offer an opinion on the 'ultimate issue' in a case, that is for the Trial Chamber to consider and determine".¹⁶ In the *Nahimana* case, the trial Chamber concluded that an expert witness should not be allowed to testify to "law-related issues for interpretation by the Chamber [...] that should appropriately be addressed in Counsel's Closing Brief."¹⁷
17. The Prosecution takes issue with several of the proposed areas of testimony of Dr. Hoffman as they relate to matters that fall exclusively within the knowledge and experience of the Trial Chamber, some of which go to the *ultimate issue* of the

¹³ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 5-C.

¹⁴ *Prosecutor v Hadzihasanovic*, IT-01-47-T, "Decision on Report of Prosecution Expert Klaus Reinhardt", Tr. Ch. II, 11 February 2004, para 14, 16.

¹⁵ Submissions on Proposed Expert Witness, para 10.

¹⁶ *Prosecutor v Brima et al.*, SCSL-04-16-T-420, "Separate and Concurring Opinion of justice Doherty on Prosecution Request for Leave to Call an Additional Witness pursuant to RULE 73bis (E) and Joint Defence Application to Exclude the Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross-Examine Her pursuant to Rule 94bis", 21 October 2005 para 55. See also *Prosecutor v Norman et al.*, Transcript 14 June 2005 p 10.

¹⁷ *Prosecutor v Nahimana et al.*, ICTR-99-52-T, "Decision To Reconsider the trial Chamber's Decision of 24 January 2003 on the Defence Expert Witnesses", Tr. Ch. I, 25 February 2003, p 4.

trial. The identified areas of concern are: 1) the determination whether the accused had actual knowledge that any Kamajor fighters were below the age of fifteen and whether the accused approved or not of the use of such combatants¹⁸; 2) whether the CDF had a criminal common plan, purpose or design;¹⁹ 3) the loyalty of the Kamajors towards the village elders²⁰ and 4) factual conclusions on whether the Kamajor attacks were widespread and systematic so as to elevate the crimes to the level of crimes against humanity.²¹

18. The Prosecution submits that the Trial Chamber has been presented with ample evidence on the above mentioned issues. It is for the Trial Chamber to draw its own factual and legal conclusions in relation to these matters based on the evidence admitted. It is not for an expert witness to make such determinations. The Defence has attempted to broad-brush the proposed witness with expertise that he clearly does not possess and which encroaches upon the competence of the Trial Chamber.

The proposed testimony is irrelevant

19. The Prosecution submits that even when a witness is recognized as an expert, he or she must adduce evidence that is relevant and can assist the court to determine the matter in dispute. A *matter in dispute* means “an issue or an allegation upon which the trial chamber must make a determination or finding”.²²
20. The Prosecution finds that several areas of the proposed evidence of Dr. Hoffman go to matters that are entirely irrelevant to the charges of the Indictment. The Prosecution fails to see how the Trial Chamber will be in any way assisted by the presentation of such evidence. For example, evidence that goes to show “kamajors fighters as violent labourers in a global economy and consumers of a

¹⁸ Submissions on Proposed Expert Witness , Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 4-C.

¹⁹ *Id.*

²⁰ Submissions on Proposed Expert Witness , Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 2-C.

²¹ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 5-C.

²² *Prosecutor v Blagojevic*, IT-02-60-T, “Decision on Prosecution’s Motions For Admission of Expert Statements”, Tr. Ch. 7 November 2003. para 19.

global popular culture; the potentiality of youth for violence and the possibility of understanding such violence as political discourse, that is, as part of a struggle for visibility and speech; and the shifting thinking that accompanied the movement of fighters across international borders”²³ has “nothing of direct relevance to the alleged criminal responsibility of the accused.”²⁴

21. As the Defence notes, the proposed expert evidence will also attempt to discredit the Prosecution’s theory of the common criminal plan, purpose or design of the accused persons. As stated in the Defence Submissions on Proposed Expert Witness, Dr. Hoffman intends to do so by providing explanations on a Kamajors rule, “the implication of which was that a kamajor initiate should show no fear or run from combat, but more importantly that he should not turn on his companions or members of the civilian population”.²⁵ The Prosecution fails to see the helpfulness or need whatsoever for such evidence that relates nothing more than a basic conduct requirement to which combatants are called to adhere and to which many witnesses have already testified to.²⁶
22. Moreover, this evidence brings no enlightenment as to the existence or non-existence of a common criminal purpose in which *the accused participated*, which is the necessary element to determine the criminal responsibility of the accused. Opinions on whether or not different subordinates in the CDF organization were in fact aware or not of the criminal goal that the accused intended to achieve, are irrelevant as they do not constitute allegations with respect to which the Trial Chamber must make a finding.
23. Other examples of proposed evidence that bears no relevance to the determination

²³ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 1-C.

²⁴ *Prosecutor v Milosevic*, IT-02-54-T, “Decision on Admissibility of Expert Report of Vasilije Krestic”, Tr. Ch., 7 December 2005, para 6: where the Trial Chamber refused to admit the expert report of a scholar in historical science on that basis.

²⁵ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 4-C.

²⁶ TF2-012, 21 June 2004, p 62, 63; TF2-082, 16 Sept 2004, p 39; TF2-190, 10 February 2005, p 73; TF2-222, 18 February 2005, p 20. TF2-013, 24 February 2005, p 31; Mustapha Lumeh, 5 May 2006, p 94; Albert Joe Demby, 10 February 2006, p 15 and 15 February 2006, p 15.

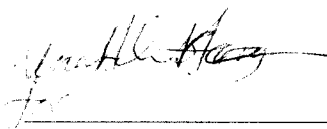
of the issues in the case are: “the mercenary nature of the parties to the conflict [...] and the presence of ULIMO combatants fighting alongside the kamajors in Sierra Leone”²⁷; the significance “of much of the terminology used by the Kamajors, with particular reference to their adoption of many tropes and jargon of Western military and pop culture”²⁸; and finally the traditional role of children in the Mende society²⁹. The Prosecution submits that this evidence will have no impact in determining the issues at trial and ultimately the guilt or innocence of the accused. They are matters that go beyond the scope of the Indictment and are therefore irrelevant.

III. CONCLUSION

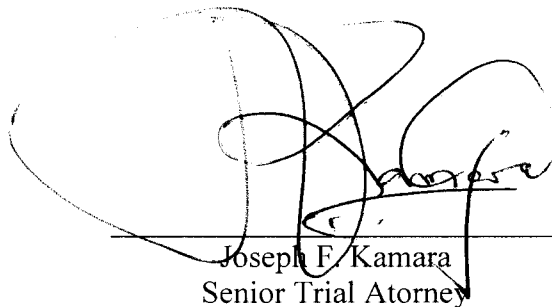
17. For the reasons stated above the Prosecution prays the Trial Chamber to deny the Defence request to recognize Daniel J. Hoffman PHD as an expert witness at this stage. Should the Defence application be granted, the Prosecution reserves its right to cross-examine the proposed expert witness as to his credentials and qualifications.

Filed in Freetown,
26 June 2006

For the Prosecution,



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²⁷ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 5-C.

²⁸ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 3-C.

²⁹ Submissions on Proposed Expert Witness, Appendix C-Resume of Proposed Evidence of Daniel J.Hoffman PHD, p 4-C.

INDEX OF AUTHORITIES

A. MOTIONS, ORDERS, DECISIONS AND JUDGMENTS

SCSL Cases

1. See *Prosecutor v Norman et al.*, SCSL-04-14-T-435 “Decision on Prosecution Request For Leave to Call Additional Witnesses And For Orders for Protective Measures”, 21 June 2005 at page 5.
2. *Prosecutor v Brima et al.*, SCSL-04-16-T-420, “Separate and Concurring Opinion of justice Doherty on Prosecution Request for Leave to Call an Additional Witness pursuant to RULE 73bis (E) and Joint Defence Application to Exclude the Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross-Examine Her Pursuant to Rule 94bis”, 21 October 2005 para 55. See also *Prosecutor v Norman et al.*, Transcript 14 June 2005 p 10.
3. *Prosecutor v Brima et al.*, SCSL-04-16-T-365, “ Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) pursuant to RULE 73bis (E) and on Joint Defence Notice to inform the Trial Chamber of its position Vis-à-Vis Expert Witness (Mrs. Bangura) Pursuant to Rule 94bis”, 5 August 2005, para 30.

ICTY and ICTR Cases

4. *Prosecutor v Blagojevic*, IT-02-60-T, “Decision on Prosecution’s Motions For Admission of Expert Statements”, Tr. Ch. 7 November 2003. para 19.
<http://www.un.org/icty/blagojevic/trialc/decision-e/031107.htm>
5. See *Prosecutor v Ndayambaje*, ICTR-96-8-T, “Oral Decision on the Qualifications of Mr. Edmond Babin as Defence Expert Witness”, Tr. Ch. II, 13 April 2005.
<http://69.94.11.53/ENGLISH/cases/Nyira/decisions/130405.htm>
6. *Prosecutor v Hadzihasanovic*, IT-01-47-T, “Decision on Report of Prosecution Expert Klaus Reinhardt”, Tr. Ch. II, 11 February 2004, para 14, 16.
<http://www.un.org/icty/milosevic/trialc/decision-e/051207.htm>
7. *Prosecutor v Nahimana et al.*, ICTR-99-52-T, “Decision to Reconsider the trial Chamber’s Decision of 24 January 2003 on the Defence Expert Witnesses”, Tr. Ch. I, 25 February 2003, p 4.
<http://69.94.11.53/ENGLISH/cases/Nahimana/decisions/250203.htm>
8. *Prosecutor v Milosevic*, IT-02-54-T, “Decision on Admissibility of Expert Report of Vasilije Krestic”, Tr. Ch., 7 December 2005, para 6.
<http://www.un.org/icty/milosevic/trialc/decision-e/051207.htm>