**SPECIAL COURT FOR SIERRA LEONE**

**TRIAL CHAMBER**

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

Registrar: Robin Vincent

Date: 25 February 2005

**THE PROSECUTOR**

**-against-**

**SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA**

SCSL-2004-14-T

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JOINT DEFENCE RESPONSE TO PROSECUTION REQUEST
FOR LEAVE TO CALL ADDITIONAL WITNESSES AND
FOR ORDERS FOR PROTECTIVE MEASURES

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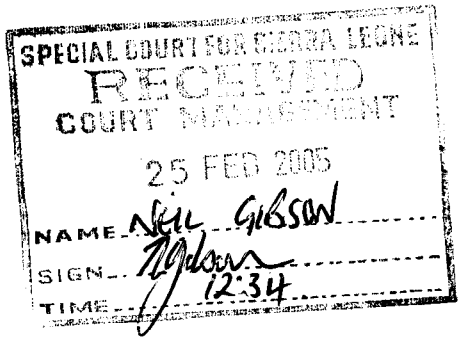


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## INTRODUCTION

1. The defence teams for the three Accused (the "Defence") hereby submit their joint response to the 'Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures Pursuant to Rules 69 and 73*bis*(E)' (the "Request")[1].

2. The Prosecution seeks to add two witnesses to its witness list, namely a proposed military expert and a proposed child soldiers expert.

3. Contrary to the Prosecution's submissions, the Defence submits that the Prosecution has not made the requisite showing of good cause under the relevant jurisprudence. Furthermore, it is submitted that—given the rather late stage of the proceedings—the Defence would suffer undue prejudice by the admission of such evidence. Finally, the Defence submits that, should the Chamber decide to allow the testimony of the proposed child soldier expert, no protective measures are necessary. Accordingly, and for the reasons set forth below, the Request should be denied.

## BACKGROUND

4. On 1 April 2004, the Trial Chamber issued an order directing the Prosecution to file its witness list and stating that the Prosecution would be permitted to call additional witnesses or present additional exhibits only upon a showing of good cause[2].

5. The Prosecution Filed its original witness list on 26 April 2004[3], which it has subsequently altered, most recently on 3 February 2005[4].

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[1] Document No. SCSL-04-14-T-339.

[2] 'Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial', 1 April 2004, Document No. SCSL-04-14-PT-047.

[3] 'Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial', 26 April 2004, Document No. SCSL-04-14-PT-065.

[4] 'Revised Prosecution Witness List', 3 February 2005, Document No. SCSL-04-14-T-329.

6. On 1 November 2004, the Chamber admonished the Prosecution to make its decision with respect to any further expert witnesses as soon as possible so as not to unduly prejudice the Defence[5].

7. To date more than half of the Prosecution's witnesses have testified, and its case appears poised to finish by the end of the next trial session.

8. On 15 February 2004, the Prosecution filed the instant Request.

## SUBMISSIONS

### The Applicable Law

#### *Variation of Witnesses*

9. Pursuant to the Special Court for Sierra Leone Rules of Procedure & Evidence (the "Rules)[6] and the jurisprudence of this Chamber, the Prosecution may vary its list of witness only upon satisfactory showing of good cause in the interests of justice.

10. The Chamber has adopted certain criteria set forth by the ICTR to be used in assessing what constitutes "good cause" and the "interests of justice"[7]. These include such considerations as:

> 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. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay[8].

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[5] *See* Transcript of Status Conference, 1 November 2004, at page 30, lines 15-22.

[6] "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". Rule 73*bis*(E).

[7] 'Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund' (the "Haglund Decision"), 1 October 2004, SCSL-2004-14-T-213. *See also* 'Decision on Prosecution Request for Leave to Call Additional Witnesses', 29 July 2004, SCSL-2004-14-T-167.

[8] *Id.* at ¶ 13 (*citing Nahimana*).

11. Additional factors to be taken into account include the timing of the disclosure of the witness information and the probative value of the proposed testimony[9]. Particular emphasis has been placed on the Defence's right not to be ambushed[10].

***Expert Testimony***

12. According to the relevant jurisprudence, an expert is one "whose testimony is intended to enlighten the [Chamber] on specific issues of a technical nature, requiring special knowledge in a specific field"[11].

13. It is generally accepted that proposed expert testimony should be excluded where: (1) the proposed testimony is irrelevant in the sense that it will not assist the Chamber in determining a matter in dispute[12]; (2) the subject matter on which the proposed expert seeks to testify is within the knowledge and experience of the court[13]; (3) the proposed expert does not possess the necessary qualifications or has not exhibited the use of accepted methods; or (4) the proposed expert is not independent[14].

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9 *Id.* at ¶ 14.

10 *Id.* at ¶ 15 ("[W]e reassert the principle that the Prosecution should not be allowed to surprise the Defence with additional witnesses and should fulfil in good faith its disclosure obligations".)

11 *Prosecutor v. Nahimana, et al.*, ICTR-99-52-T, 'Decision on the Expert Witnesses for the Defence', 24 January 2003, at ¶ 2 (*citing 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).

12 As with any witness, the primary concern of the Chamber is the relevance of the proposed testimony. *See Prosecutor v. Aloys Simba*, ICTR-01-76-I, 'Decision on Prosecutor's Motion for Admission of Testimony of an Expert Witness', 14 July 2004, at ¶ 6 (The chamber denied the motion to admit the testimony of an expert, finding that such "broad historical evidence" as was proposed would not have "any value in the proving of the charges against the Accused" and accordingly did not satisfy the criteria of Rule 89(C)).

13 For example, testimony relating to legal issues is not the province of expert witnesses. It is axiomatic that Judges decide what the law is based on their own expertise and the submissions of counsel. In *Nahimana*, the Chamber denied expert status to two witnesses whose proposed testimony related to legal issues, rather than issues of a technical nature, noting that such issues should be properly addressed by counsel in oral or written arguments. *Nahimana* at ¶¶ 16, 22. The Chamber also noted that it is necessary to provide curricula vitae and full summaries of anticipated evidence, *Id.* at ¶ 17, and declined to recognize the expertise of a proposed witness due to the "paucity of detail provided as to [his] anticipated evidence" and his professional qualifications. *Id.* at ¶ 20.

14 *See generally* Richard May and Marieke Wierda, INTERNATIONAL CRIMINAL EVIDENCE (Transnational 2002) ("ICE"), at § 5.1. *See also* Rodney Dixon, Karim A.A. Khan, and Richard May, ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE & EVIDENCE, (Sweet & Maxwell 2003), at § 20-124.

14. Accordingly, where a proposed witness fails on any of these criteria, his testimony shall be excluded.

**The Proposed Military Expert**

***The Chamber is Capable of Determining the Alleged Command Responsibility of the Accused Without the Aid of a Military Expert***

15. The Prosecution seeks to elicit testimony from a proposed military expert as to the command structure of the CDF. However, although some of the topics advanced by the Prosecution[15] may be relevant to the assessment of command responsibility, none of these areas requires the elucidation of an expert witness.

16. The legal elements of the concept of command responsibility have been developed by the relevant jurisprudence[16]. Despite the somewhat controversial nature of command responsibility as a theory of liability, it is, of course, fundamentally a *legal* conception—the very thing judges are trained to handle as *legal* experts. Furthermore, the Chamber has heard varying factual accounts of the alleged command structure of the CDF through the testimony of several insider witnesses[17]. Accordingly, the Chamber is sufficiently seized of both the requisite legal and factual bases on which to make a determination as to the alleged command responsibility of the Accused. No expert testimony is required[18].

17. The ICTY has specifically rejected the testimony of a proposed military expert who sought to comment on the command responsibility of an accused in a situation remarkably similar to the instant case. In *Kordic*, the proposed expert—a political and military analyst—drew certain conclusions about the accused's responsibility as a military superior. The Chamber excluded the

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[15] Request at ¶ 13.

[16] *See, e.g.*, Arthur Thomas O'Reilly, "Command Responsibility: A Call to Realign Doctrine with Principles", 20 Am. U. Int'l L. Rev. 71 (2004), at 73-87.

[17] Namely, Witnesses TF2-082, TF2-223, TF2-201, TF2-008, TF2-068, TF2-017, TF2-190, TF2-005, TF2-222, and TF2-013. By all indications, there are more to come.

[18] Expert evidence must not usurp the role of the trial chamber. It is for the court to make factual findings on the evidence, whereas it is for the expert to express and opinion on them. *See* ICE at ¶ 6.88.

evidence on the basis that the witness was drawing conclusions as to the very matters upon which the Chamber was required to decide. The Chamber also found that the witness's evidence would not assist in its task[19].

18. Because the subject matter on which the proposed military expert seeks to testify is within the knowledge and experience of the Court, the admission of the proposed evidence will usurp the Chamber's role and serve no purpose other than to artificially bolster evidence that has already been presented. Accordingly, the proposed military expert should not be permitted to testify.

***The Proposed Military Expert Does Not Possess the Necessary Qualifications***

19. It is self-evident that, in order for a witness to qualify as an expert, the Prosecution must establish—by some objective indicia—that the proposed expert possesses the necessary qualifications and utilizes generally accepted methods, such that his alleged expertise will actually assist the Chamber. The Defence submits that the proposed military expert is not qualified to act as an expert in this case for the following reasons.

20. The proposed expert's personal exposure to the circumstances of the conflict in Sierra Leone is far too limited to be of any value to the Chamber. He has spent a mere six weeks in this country[20], and the Prosecution has not provided the Defence with any indication as to the nature, quality, or extent of his activities thus far. Additionally, it is unclear whether the proposed expert (i) has any experience with the type of rebel warfare that characterized the conflict in Sierra Leone, (ii) is conversant in any of the local languages, or (iii) has actual, independent knowledge of the conflict and its various fighting forces.

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[19] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Transcript, 8 January 2000, at 13268-13306. The Chamber agreed with the Defence submissions that the witness was "neither neutral nor an expert", that he was drawing inferences from the circumstantial evidence which were in fact the duty of the Trial Chamber to draw, and that, in effect, he was being called as a substitute for the prosecution's closing submissions, essentially fulfilling the role of a "fourth judge". *Id.* at 13289.

[20] Request at ¶ 11.

21. Furthermore, apart from a few glancing references to his service in the British Army[21], the Prosecution has failed to provided a detailed résumé of its proposed military expert in the form of a curriculum vitae or otherwise. It cannot be assumed that one purporting to be an expert possesses the relevant training, knowledge, and experience. Such qualifications must be objectively demonstrated by the Prosecution.

**The Proposed Child Soldier Expert**

22. The Prosecution seeks to elicit various categories of testimony from a proposed child soldiers expert. However, although some of these topics appear to be arguably relevant subjects for factual testimony[22], none requires the explication of an expert witness. Indeed, the majority of the topics are wholly irrelevant and should be disregarded for that reason alone.

***The Chamber is Capable of Determining the Alleged Use of Child Soldiers Without the Aid of an Expert***

23. That the use of child soldiers "has only recently been considered a crime under international law"[23], does not detract form the relatively straightforward nature of the alleged offence[24]. Furthermore, the Chamber has heard various factual accounts, from both insiders and combatants, as to the alleged use of child soldiers[25].

24. Accordingly, as in the case of command responsibility, the Chamber is sufficiently seized of both the requisite legal and factual bases on which to

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[21] *Id.* at ¶¶ 11, 12.

[22] *Id.* at ¶ 21 (a), (b) and (d).

[23] *Id.* at ¶ 20.

[24] Although Count Eight (Use of Child Soldiers) of the Consolidated Indictment is specifically based on Article 4(c) of the SCSL Statute, the Defence submits that the constituent elements of that offence are analogous, if not identical, to the elements of the International Criminal Court (the "ICC") offence of "using, conscripting or enlisting children", namely: (1) The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities. (2) Such person or persons were under the age of 15 years. (3) The perpetrator knew or should have known that such person or persons were under the age of 15 years. (4) The conduct took place in the context of and was associated with an armed conflict not of an international character. (5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict. Rome Statute, Article 8 (2)(e)(iv).

[25] Namely, Witnesses TF2-140, TF2-021, TF2-004, and those Witnesses listed at n.17, *supra.*

make a determination as to the alleged use of child soldiers by the Accused. No expert testimony is required[26].

***The Majority of the Proposed Testimony is Irrelevant***

25. Given the constituent elements of the offence charged in Count Eight, the Defence submits that four of the seven proposed categories of expert testimony are wholly irrelevant to the determination of the guilt or innocence of the Accused[27].

26. The general "age determination process undertaken during disarmament"[28] is beyond the scope of the indictment. To the extent the Prosecution seeks to prove that the CDF enlisted children under the age of fifteen, it must do so with some degree of specificity. "Motivation"[29] is not an element of the offence and is therefore irrelevant. With respect to "official figures of child soldier participants provided by official sources"[30], the Defence submits that, to the extent they are otherwise relevant, such sources can speak for themselves. Finally, the Defence fails to comprehend how the proposed witness's general opinions regarding the "use of girls as fighting forces" would aid the Chamber. Gender is not a component of the offence.

***The Proposed Protective Measures Are Unnecessary***

27. Assuming, *arguendo*, the Chamber permits the child soldiers expert to testify in this case, the Defence submits it is not in a position to adequately respond to the Prosecution's request for protective measures. To date, no expert report has been produced. Accordingly, the Defence reserves its right to object to the proposed protective measures upon receipt and review of the proposed expert report.

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[26] Again, expert evidence must not usurp the role of the trial chamber. It is for the court to make factual findings on the evidence, whereas it is for the expert to express and opinion on them. ICE ¶ 6.88.

[27] Namely, those set forth in the Request at ¶ 21 (c), (e) – (g).

[28] Request at ¶ 21(c).

[29] *Id.* at ¶ 21(e).

[30] *Id.* at ¶ 21(f).

**Admission of the Evidence Will Unduly Prejudice the Defence**

28. As noted above, one of the paramount considerations when evaluating whether good cause has been shown to present additional witnesses is "the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay"[31]. It is submitted that the addition of the proposed experts at this late stage of the proceedings will unduly prejudice the preparation of the Defence case.

29. Neither the original witness list nor the subsequent lists specified the names and nature of the Prosecution's proposed expert witnesses. Although the Prosecution mentioned the possibility of calling two additional expert witnesses in its request to call Dr. Haglund, it was not until the filing of the instant Request that the Prosecution disclosed the names and limited particulars of the proposed experts, notwithstanding the Chamber's admonishment of 1 November 2004. By the time this Response has been submitted, the Prosecution will have led in excess of fifty witnesses—admittedly well more than half its case.

30. Furthermore, no expert reports have been produced. Review of such reports well in advance of any proposed expert testimony is essential for preparing an effective cross-examination. The Defence submits that its cross-examination, particularly of insider witnesses, has been hampered by untimely disclosure of the proposed expert reports.

31. The Defence further contends that there must be finality to the investigations being conducted by the Prosecution. Unlike the Defence teams, the Prosecution has ample resources to quickly and effectively conduct its investigations and bring them to a point of closure. Accordingly, the Defence

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[31] Haglund Decision, *surpa* at n. 7, at ¶ 13 (*citing Nahimana*). This concept of fairness to the Defence is enshrined in Rule 94*bis* which provides, *inter alia*, that the "full statement of any expert witness...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". Rule 94*bis*(A).

submits that the proposed additions are unfair and likely to cause undue prejudice.

**CONCLUSION**

32. For the reasons stated above, the Defence submits that the Request must be denied in its entirety.

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# DEFENCE LIST OF AUTHORITIES

1. Statute of the Special Court for Sierra Leone, Article 4(c)

2. SCSL Rules of Procedure & Evidence, Rules 73*bis*(E) and 94*bis*(A)

3. 'Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund', 1 October 2004, SCSL-2004-14-T-213

4. 'Decision on Prosecution Request for Leave to Call Additional Witnesses', 29 July 2004, SCSL-2004-14-T-167

5. *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Transcript, 8 January 2000

6. *Prosecutor v. Aloys Simba*, ICTR-01-76-I, 'Decision on Prosecutor's Motion for Admission of Testimony of an Expert Witness', 14 July 2004

7. *Prosecutor v. Nahimana, et al.*, ICTR-99-52-T, 'Decision on the Expert Witnesses for the Defence', 24 January 2003

8. *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

9. Rodney Dixon, Karim A.A. Khan, and Richard May, ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE & EVIDENCE, (Sweet & Maxwell 2003)

10. Richard May and Marieke Wierda, INTERNATIONAL CRIMINAL EVIDENCE (Transnational 2002)

11. Arthur Thomas O'Reilly, "Command Responsibility: A Call to Realign Doctrine with Principles", 20 Am. U. Int'l L. Rev. 71 (2004)

12. Rome Statute of the International Criminal Court, Article 8 (2)(e)(iv)