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SCSL-04-14-T
(18705 - 18713)

18705

SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

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

Registrar: Mr Lovemore Munlo, SC

Date: 3 July 2006

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

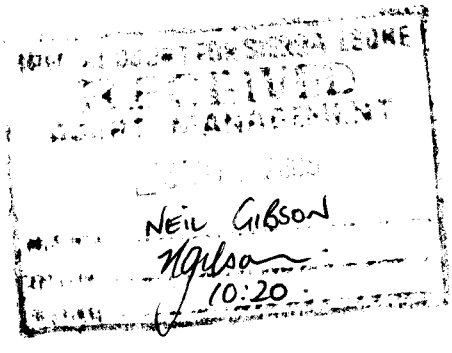
REPLY TO PROSECUTION RESPONSE TO FOFANA SUBMISSIONS REGARDING PROPOSED EXPERT WITNESS DANIEL J. HOFFMAN PHD

For the Office of the Prosecutor:
Mr Christopher Staker
Mr James C. Johnson
Mr Joseph Kamara
Ms Bianca Suciu

For Moinina Fofana:
Mr Victor Koppe
Mr Michiel Pestman
Mr Arrow Bockarie
Mr Andrew Ianuzzi

For Samuel Hinga Norman:
Dr Bu-Buakei Jabbi
Mr Alusine Sani Sesay
Ms Clare DaSilva
Mr Kingsley Belle

For Allieu Kondewa:
Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana
Mr Martin Michael



INTRODUCTION

1. Counsel for the Second Accused, Mr Moinina Fofana, (the "Defence") hereby submits its reply to the 'Prosecution Response to Fofana Submissions Regarding Proposed Expert Witness Daniel J. Hoffman PhD'[1] (the "Response"). Contrary to the submissions of the Office of the Prosecutor (the "Prosecution"), there is nothing procedurally irregular about the Defence request[2]. The Chamber can grant the limited relief requested upon review of Dr Hoffman's *curriculum vitae*, as it has already done with respect to previous expert witnesses. Further, the Defence has not attempted to limit any of the Prosecution's rights and concedes that the question of what weight to be given, if any, to Dr Hoffman's proposed testimony is without question a matter to be decided at a much later point in time. The Request merely seeks, as a preliminary matter and with a view to streamlining the proceedings, the recognition of Dr Hoffman's expertise and the acknowledgement of the *prima facie* relevance of his proposed evidence. Accordingly, the Defence takes up the points raised by the Response and reasserts its very limited request for relief and the following arguments in support thereof.

SUBMISSIONS

There is Nothing Procedurally Irregular About the Relief Requested

2. The Prosecution contends that the Submissions are "procedurally irregular and outside the scope of Rule 94*bis*"[3] and submits that the requests contained therein "should therefore be dismissed on this basis"[4]. However, this position is untenable and demonstrates a misunderstanding of the Request, which was intended to put all parties on notice of Dr Hoffman's qualifications and proposed evidence as early as possible given that his report has not yet been completed[5]; to confirm Dr Hoffman's status before the Chamber; and to avoid any delay to the trial proceedings prior to the witness's *viva voce* testimony[6].

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-632, 26 June 2006.
[2] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-621, 'Fofana Submissions Regarding Proposed Expert Witness Daniel J. Hoffman PhD', 16 June 2006 (the "Request").
[3] Response, ¶ 2.
[4] *Ibid.*
[5] As noted previously, the report itself will be disclosed and filed pursuant to Rule 94*bis*.
[6] For example, Colonel Iron's substantive testimony was preceded by a colloquy between the Chamber and the Prosecution with respect to the scope, domain, and basis of his expertise. *See Prosecutor v. Norman et al.*,

3. As a general matter, Rule 73(A) provides that any "party may move before ... a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused". By way of the Request, the Defence has asked the Chamber to make two preliminary rulings: to recognize Dr Hoffman as an expert in his field and to acknowledge, *prima facie*, the relevance of his proposed testimony[7]—nothing more.

4. Of course, as the *lex specialis* with respect to expert witnesses, Rule 94*bis* must be given due regard. Yet that Rule addresses only (i) the timeframe for disclosing and filing an expert report[8]; (ii) the right of the opposing party to either accept the report or cross-examine the witness and the associated timeframe for so doing[9]; and (iii) the prerogative of the Chamber to accept the expert report without calling the witness to testify should the opposing party accept the report and waive its right to cross-examine the witness[10]. The Rule, however, is silent as to the particular relief sought by the Request. Further, as previously noted, it has been the practice of this Chamber to recognize a proposed expert witness as such based upon a review of his *curriculum vitae*[11]. Nothing in the language of Rule 94*bis* prohibits such practice[12], and the right of the parties to later challenge any aspect of the acknowledged expertise on cross-examination is in no way limited by a preliminary determination[13].

Dr Hoffman is Qualified to Testify to the Claimed Areas of Expertise

5. The Defence agrees with the Prosecution that no hard and fast rule "provides for a technical determination of when someone possesses enough specialized knowledge in a specific area

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SCSL-2004-14-T, Trial Transcript, 14 June 2005, at 2–13. Indeed when drafting the Request, the Defence took as a guide the stated concerns of the Chamber in this regard. *Ibid.*

[7] *See* Request, ¶ 20.

[8] *See* Rule 94*bis*(A).

[9] *See* Rule 94*bis*(B).

[10] *See* Rule 94*bis*(C).

[11] *See* Request, ¶ 4.

[12] This practice has the practical advantage of avoiding a situation whereby a potential expert witness travels to Freetown at great expenditure of time and money only to be told that the Chamber does not recognise his expertise or the relevance of his proposed testimony.

[13] The Defence fully concedes that all parties will have the right to raise "any challenges with respect to [the] expert witness ... once [his] full statement ... has been filed" (Response, ¶ 6); that no party should be denied the "opportunity to adequately examine the proposed evidence and make an informed opinion as to any challenges that it may want to raise" (Response, ¶ 6); and that all parties shall be free to raise any "objections challenging the expert's status and testimony ... during the cross-examination of the proposed expert witness" (Response, ¶ 6). The Request does not seek to raise issues of "admissibility, probative value and so on" (Response, ¶ 7) with respect to the report, which has not yet been disclosed to the Prosecution, filed with the Court, or tendered in evidence. Nor is the Defence attempting to "exclude or lock out an expert witness or her evidence" (Response, ¶ 7) or asking for any "final determination" to be made (Response, ¶ 7). Such positions are nowhere contained in nor implied by the Request.

to qualify as an expert"[14] and that "a holistic assessment of all relevant factors such as 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"[15]. Yet the Defence finds it difficult to appreciate how, after engaging in such a holistic assessment, the Prosecution could suggest that Dr Hoffman is not what he purports to be[16]—an expert in the field of cultural anthropology with a particular focus on civil militias operating in the Mano River region of West Africa, including the Kamajors.

6. The assertion that Dr Hoffman "just recently completed his PhD"[17] is both factually inaccurate and largely irrelevant. Dr Hoffman finished his doctoral studies nearly two years ago, and contrary to the Prosecution's insinuation, youthfulness and expertise are not mutually exclusive concepts. As outlined in the Request[18], Dr Hoffman has the necessary academic credentials, training, professional experience, publications, and field experience to enable him to comment, as an expert, on the relevant issues to which he intends to testify.

7. Further, by arguing that Dr Hoffman "does not possess the expertise to testify on matters of command and control in the CDF organisation"[19], the Prosecution reveals a misconception of the field of modern cultural anthropology. The drawing of conclusions from facts related to the concepts of command and control is not solely the province of military expertise. The expert opinion of a cultural anthropologist with a specialty in West African militia groups may be equally informative as those of a traditional military expert in assisting the Chamber with its evaluation of effective control within the CDF[20]. The "sphere of competence which is anthropology"[21] encompasses a much greater area than the Prosecution apparently appreciates. Modern cultural anthropology necessarily extends to warfare, especially in West African where it can be said that armed conflict is

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[14] Response, ¶ 12.
[15] *Ibid.*
[16] *See* Response, ¶ 3. *N.B.* The Defence submits that it is inconsistent to advance a so-called "holistic" approach to issues of expertise and then to dismiss, for example, Dr Hoffman's "professional experience as a contract photographer in a number of conflict zones". Response, ¶ 13. The Defence submits that almost *any* type of professional experience in modern African conflict zones would have *some* impact on one's future anthropological study of African civil militias.
[17] Response, ¶ 13.
[18] *See* Request, ¶¶ 7–9.
[19] Response, ¶ 14.
[20] If one thing has been brought into stark relief by the war in Sierra Leone, it is that men in military uniforms do not have a monopoly on the modern West African warscape. Rather, the so-called irregular fighter seems more emblematic of the conflicts of the region.
[21] Response, ¶ 15.

unfortunately very much a part of life. In the final analysis of this case, questions of command and control will be answered by this Chamber with reference to factual assessments of the interactions between and among men, a topic which is indisputably embraced by Dr Hoffman's expertise.

8. Despite laying claim to a holistic approach to the evaluation of expertise, the Prosecution appears to be advancing a rather strict and outmoded methodology not in keeping with either the reality of modern West African warfare or the flexible standard of admissibility consistently employed by this Chamber. As the Prosecution enjoyed the benefit of this standard with respect to its own expert evidence[22], it would be improper to corral the Defence case into the conceptual models endorsed by the Prosecution[23]. If the Defence chooses to attempt to explain the CDF through the broader prism of cultural anthropology, that is its prerogative.

Dr Hoffman Will Not Encroach on the Chamber's Domain

9. The Prosecution claims "the expected testimony relates to ultimate issues, the determination of which falls exclusively within the role of the Chamber"[24]. However, as explicitly noted in the Request[25], Dr Hoffman will not offer any opinions on the ultimate issue in the case nor will he testify to "law-related issues"[26]. Rather, he will make factual conclusions based on his expertise in order to assist the Chamber in arriving at the legal decisions with which it is tasked[27]. The Prosecution either misunderstands the ultimate issue rule[28] or is improperly invoking it here in an attempt to preclude relevant testimony

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[22] *See, e.g., Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Transcript, 16 June 2005 (testimony of TF2-EW2).
[23] With respect to the Prosecution's view that the particular issues "fall more naturally within the field of expertise of a military expert" (Response, ¶ 15), the Defence notes that it did not accept the report of Colonel Iron and fully intends to address the Chamber on the validity of his expert testimony at the appropriate time.
[24] Response, ¶ 3.
[25] *See* Request, ¶ 11.
[26] Response, ¶ 16. Further, the Defence has already made it very clear that Dr Hoffman will not make any of the determinations listed by the Prosecution at ¶ 17 of the Response.
[27] Expert witnesses draw conclusions and state opinions based on their assessment of facts for the benefit of the trier of fact. Such conclusions and opinions should be relevant to matters in dispute, matters for determination by the Chamber. *See Prosecutor v. Blagojevic*, IT-02-60-T, Trial Chamber I, 'Decision on Prosecution's Motions for Admission of Expert Statements', 7 November 2003, ¶ 19 ("The Trial Chamber notes that one of the distinctions between an expert witness and a fact witness is that due to the qualifications of an expert, he or she can give opinions and draw conclusions and present them to the Trial Chamber").
[28] All testimony should be relevant to an ultimate issue in the case. However, simply giving such testimony is not equivalent to deciding the issue to which the evidence relates.

it finds unpalatable[29]. The Prosecution's claim is further belied by the fact that the one of its own expert witnesses testified with respect to many of the same proposed areas[30].

The Proposed Evidence is Relevant

10. Contrary to the Prosecution's assertions[31], the proposed evidence is relevant to the charges against Mr Fofana. The role of an expert witness before an international criminal tribunal is to "provide opinion or inferences to assist the finders of fact in understanding the facts at issue before the Chamber"[32]. Such opinions "need not be essential or strictly necessary, ... [r]ather the said evidence needs to be useful to the finders of fact"[33].

11. As noted in the Request and more specifically in the résumé of his proposed evidence, Dr Hoffman will provide information useful to the Chamber in determining a number of contested issues[34]. The proposed evidence challenged in the Response[35] is highly relevant to issues of command and control, in so far as it places alleged CDF activity within a broader context, a context which may, for example, explain why certain fighters behaved as they did. This type of evidence is designed to assist the Chamber in understanding, for example, Mr Fofana's alleged command responsibility[36].

12. Further, the concept of *ba woteh* to which the Prosecution objects as irrelevant, is more than simply "a basic combat requirement to which combatants are called to adhere"[37], and the fact that "many witnesses have already testified to"[38] this is immaterial to the determination as to whether or not Dr Hoffman should be permitted to give his opinion on the matter. Indeed, it is the function of the expert witness to explain facts already in evidence from the vantage point of his expertise[39]. The proposed ethnographic assessment of the evidence will assist the Chamber in its determination "as to the

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[29] The Defence wonders how the Prosecution can claim that the "Trial Chamber has been presented with ample evidence on the above mentioned issues", (Response, ¶ 18) when the Defence has not yet presented its case.
[30] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Transcript, 14 June 2005.
[31] *See* Response, ¶¶ 3, 20–23.
[32] *Prosecutor v. Ndayambaje*, ICTR-96-8-T, Trial Chamber II, 'Oral Decision on the Qualifications of Mr Edmond Babin as Defence Expert Witness', 13 April 2005, ¶ 5.
[33] *Ibid.*
[34] *See generally* Request, Appendix C.
[35] In particular, that challenged by the Prosecution at ¶ 20 of the Response.
[36] *See* Request, Appendix C at 2-C–3-C
[37] Response, ¶ 21; *cf.* Request, Appendix C at 4-C.
[38] Response, ¶ 21.
[39] *See* n 27 *supra*.

existence or non-existence of a common criminal purpose in which the accused participated"[40] by explaining more fully Kamajor customs and motivations[41].

13. Explanations as to "the mercenary nature of the parties to the conflict"[42] as well as the Kamajor's adoption of "the tropes and jargon of Western military and pop culture"[43] are relevant to the issues of effective control and the widespread and systematic nature of the conflict[44]. And an expert opinion on "the traditional role of children in the Mende society"[45] goes to Mr Fofana's alleged liability under count eight, more specifically to a mistake-of-law defence to those charges.

14. Finally, the Defence takes up the Prosecution's claim that because matters "go beyond the scope of the Indictment"[46] they "are therefore irrelevant"[47]. This view disregards the fact that expert evidence can be particularly appropriate in an international criminal trial for the simple reason that it provides the Chamber with background and contextual information otherwise lacking from the record[48]. Merely because some of the proposed evidence does not neatly align with a particular paragraph in the Indictment does not mean that such evidence cannot be "useful to the finders of fact"[49]. The Prosecution's position in this regard fails to take account of both the applicable standard of admissibility and the larger goals of international criminal tribunals[50].

CONCLUSION

15. For the reasons outlined above and for those contained in the Request, the Defence urges the Chamber to recognize the expertise of Dr Hoffman and the *prima facie* relevance of his proposed testimony.

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[40] Response, ¶ 22.
[41] *See* Request, Appendix C at 4-C.
[42] Response, ¶ 16.
[43] *Ibid.*
[44] *See* Request, Appendix C at 5-C.
[45] Response, ¶ 16.
[46] *Ibid.*
[47] *Ibid.*
[48] *See* Request, ¶ 6.
[49] *See* n 32 *supra.*
[50] One of which is surely to ascertain, as much a possible, the context of the alleged crimes.

COUNSEL FOR MOININA FOFANA

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Victor Koppe

APPENDIX A

Defence List of Authorities

Constitutive Documents of the Special Court

1. Rules of Procedure and Evidence: Rules 73(A) and 94*bis*

Proceedings of the Special Court

2. *Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Transcript, 16 June 2005

3. *Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Transcript, 14 June 2005

Jurisprudence of the *Ad Hoc* Tribunals

4. *Prosecutor v. Ndayambaje*, ICTR-96-8-T, Trial Chamber II, 'Oral Decision on the Qualifications of Mr Edmond Babin as Defence Expert Witness', 13 April 2005

5. *Prosecutor v. Blagojevic*, IT-02-60-T, Trial Chamber I, 'Decision on Prosecution's Motions for Admission of Expert Statements', 7 November 2003