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### Contesting expertise

Anthropologists at the Special Court for Sierra Leone

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## **Contesting Expertise:**

### **Anthropologists at the Special Court for Sierra Leone**

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#### **Abstract**

This article examines how social anthropologists' expertise was employed in the international war crimes trials heard at the Special Court for Sierra Leone. It tracks how the anthropologists challenged the prosecution experts by raising concerns about their methodology and advancing a fundamental critique of abstract legal categories. The discussion between the experts centred on two contested issues: The character of the armed groups and the phenomenon of forced marriages during the civil war in Sierra Leone. The analysis of the experts' testimonies shows that the anthropologists were engaged in an epistemological contest with the prosecution experts. The article aims at understanding why the anthropologists' arguments had less resonance with the judges than the reports submitted by the prosecution

experts. Beyond the courtroom, it also speaks to the general debate about expertise and ways to study it.

### ***Introduction***

Anthropologists act as experts in a wide range of legal proceedings including indigenous rights claims (Clifford 1988; Paine 1996; Rosen 1977; Thuen 2004) and asylum cases (Good 2004; 2007; 2008). This article presents an analysis of anthropologists as experts in a new legal arena, international war crimes trials, where the debate about the nature of anthropological expertise and its relation with the law and other bodies of knowledge plays out. Specifically, it examines the testimony by two anthropologists who were called by defence counsel to rebut the reports submitted by prosecution experts in the trials heard at the Special Court for Sierra Leone (SCSL).

The Special Court for Sierra Leone is an international criminal tribunal set up as ‘sui generic independent institution’ seated in Freetown that was set up by an agreement between the United Nations and the government of Sierra Leone in 2002 following Security Council Resolution 1315. It has the mandate to try to those ‘bearing the greatest responsibility’ for crimes against humanities and war crimes committed during the civil war in Sierra Leone between November 1996 and 2002. The court is a so-called hybrid court since it applies both international and national law and a minority of the judges is appointed by the government of Sierra Leone. The court has two

trial chambers (with three judges each, two appointed by the UN Secretary General and one by the government of Sierra Leone) and one appeals chamber (with five judges, three appointed by the UN Secretary General and two by the government).

Because of the court's limited mandate only a small number of individuals have been indicted and tried. The indictments focused on the alleged leaders of the various warring factions. In 2003, the prosecutor indicted 13 men of which 11 have stood trial. Two of them have died of natural causes in the court's custody. These were tried in four separate trials with three accused each in three trials<sup>1</sup> and one accused, Charles Taylor, in the fourth trial. At the time of writing in February 2014, all trials had been concluded. The Special Court has a remarkable rate of convictions, all the accused who stood trial were found guilty and sentenced to long prison sentences.

The reports submitted by these experts and the evidence they gave in court is of particular interest for anthropologists. The rapidly expanding field of international criminal justice has resulted in a growing demand for anthropological expertise (Eltringham 2013; Wilson 2011). This is likely to increase further due to the International Criminal Court's focus on sub-Saharan Africa and the prominence of anthropologists in African studies. It is therefore important to discuss the challenges and experiences of anthropologists who testified before international criminal tribunals. Beyond

the courtroom, the present analysis also speaks to the wider debate about expertise and how it can be studied from a social-scientific perspective (Carr 2010; Collins and Evans 2007; Jasanoff 1995; 2003).

This article adds a new perspective to the debate about anthropologists as experts. In the literature, there is a tendency to emphasise fundamental epistemological differences, and as a consequence, incommensurability between the law, on the one hand, and anthropological knowledge production, on the other (Alvarez and Loucky 1992; Campisi 1991; Clifford 1988; Holden 2011; Kandel 1992a; Rigby and Severeid 1992; Rosen 1977; Thuen 2004). Recently, several studies of asylum cases (Good 2004; 2007; 2008) and international war crimes trials (Eltringham 2013; Wilson 2011) have examined more closely the role played by anthropologists and historians in the strategies of the parties calling them as experts. This shift in emphasis to the strategies pursued in court brings the epistemological contest between different types of expertise and their role in legal fact-finding in focus.

In the trials heard at the Special Court, the anthropologists who were called as experts were asked to address the importance of certain aspects of socio-cultural life during the civil war in Sierra Leone. It is significant that both anthropologists were called by the defence to rebut the prosecution experts' reports. The judges, however, refused to adopt the anthropologists' arguments and did not share their concerns about the methodology and

conceptual framework employed by the prosecution experts, a military officer and a civil rights activist. This was, this article will argue, due to universalistic assumptions and categories shared by the prosecution experts and the judges who were reluctant to recognize the challenge posed by Sierra Leone's socio-cultural specificities to the application of international criminal law.

This article will first situate the debate between the experts at the Special Court in relation to the literature on anthropological and historical expertise in court. It is a piece of courtroom ethnography based on direct observation of Hoffman's testimony, a close reading of the transcripts as well as interviews with Hoffman, Thorsen, the prosecutor, the defence lawyers and one of the judges. The first part of the analysis examines the discussion about the methodology employed by prosecution and defence experts. The second part focuses on the anthropologists' attempts to expose the universalistic and simplistic assumptions informing the prosecution experts' reports. The third part discusses the impact of the experts' testimony on the judgements and discusses its implications for anthropologists in international war crimes trials and the current debate on expertise in the social sciences.

### ***Uneasy Fact-finding: Anthropologists as Experts***

The discussion on anthropologists as experts in trials, both criminal and civil, has mainly centred on the question whether anthropological knowledge production can be adapted to legal fact-finding. According to Rosen, ‘there are few roles that confront conscientious anthropologists with more serious scholarly and ethical problems than those posed by their appearance in legal proceedings as expert witnesses’ because ‘the expert witness is brought, usually by one of the adversary parties, into a legal proceeding whose form and goals often appear foreign, if not overtly antithetical, to scholarly capacities and purposes’ (Rosen 1977: 555). Clifford (1988) describes how scholars called as experts are compelled to abide by the law’s strict binary logic employed to establish legal facts and arrive at legal decisions. They were pressed ‘for sharp, unambiguous opinions’ (1988: 318) and provide clear ‘yes or no’ answers (1988: 321). This is said to run counter to anthropological knowledge production, which is more concerned with explaining socio-cultural realities and structures shaping human agency rather than ascribing individual responsibility or liability (cf. Kandel 1992a).

This unease with the logic of the trial and the law are by no means unique to anthropologists. Historians who testify in criminal and civil cases have expressed similar concerns arising from epistemological and methodological differences (Evans 2002). At international criminal tribunals, Wilson shows how experts often have grappled with the challenges of presenting multifaceted histories in the setting of a trial where they are exposed to cross-examination and pressed for unequivocal statements (Wilson 2011: 202-206).

Confronted with fundamental epistemological and methodological differences historians such as Rousso (2002), a French historian who refused to testify as expert in the trial against Maurice Papon, deem historiography to be utterly unsuitable to legal fact-finding and, consequently, refuse to act as expert witnesses (Rousso 2002: 86).

However, Rousso's position is not widely shared by social scientists and historians. Evans (2002), for instance, takes issue with Rousso and makes a case for the use of historical expertise in criminal and civil trials. Evans, who acted as expert in the libel case of David Irving, points out that historians can help the courts by providing expertise the lawyers cannot be expected to possess. In contrast to Rousso, Evans highlights ways in which historians can benefit from the courts' directions that might push their research in new, promising areas (Evans 2002: 343-344).

This view is shared by the anthropologists writing on the subject such as Rosen (1977) and Good (2004; 2007) who argue that anthropologists' expertise can assist in the courts' fact-finding exercise and – eventually – in achieving justice. Awareness of the risks and challenges associated with inserting their knowledge into the adversarial dynamic of legal proceedings are seen as crucial for the efficacy of the anthropologist as expert. Without a clear idea of what is expected and what is possible in the setting of the courtroom the expert is likely to have a frustrating experience and waste an

opportunity to help the court. This position is supported by Wilson's (2011) recent study of historians' expert testimony in international war crimes trials. He shows how historians who were called as experts at the International Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) were employed in the strategies of the prosecution and the defence. He tracks how 'historical evidence has become an integral part of prosecution and defence cases' (Wilson 2011: 218) and, consequently, relativizes the importance of the epistemological divide between social science and historiography, on the one hand, and legal reasoning in court, on the other. A similar argument is made by Eltringham (2013), who points out that those who acted as experts at the ICTR did not consider the epistemological and methodological differences between law and anthropology to constitute an insurmountable obstacle. The debate between the anthropologists and the prosecution experts at the Special Court paints a different picture. Here, the anthropologists hoped to educate the judges by raising fundamental epistemological and methodological concerns but failed to make an impact on the judges who found the expertise offered by other experts more conveniently corresponding to their legal epistemology.

In the four trials heard at the Special Court between 2004 and 2013, 13 experts submitted reports. 10 of them were called to testify in court although two did do so in closed session.<sup>ii</sup> The experts included one forensic expert, four military officers, one member of a UN-Panel of Experts, two

representatives of non-governmental organisations, one historian and three anthropologists. The prosecution called the forensic expert, two of the military officers, the member of the UN panel of Experts, the historian and the two NGO representatives whereas the defence called the other two military officers and the anthropologists. My analysis focuses on the testimony of the two anthropologists who submitted reports and testified in court (one anthropologist submitted a report for the defence but he was not called to testify) as well as the prosecution experts whose testimony they sought to rebut. The following questions will guide my analysis: How did they seek to establish their authority as experts? What were the arguments they advanced? Did they assist the judges in their task? The underlying question is whether anthropological arguments were deemed useful by the court.

### *Expert witnesses at the Special Court for Sierra Leone*

The two anthropologists who testified were both called by the defence to rebut the testimony of two experts called by the prosecution. Dr. Danny Hoffman, an American anthropologist, acted as expert witness in the trial against three leaders of the Civil Defence Force (CDF), a pro-government ethnic militia also known as *kamajors* that fought against the rebels of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC), a group of renegade soldiers that had toppled the democratically elected government in 1997 and formed an alliance with the

RUF. He wrote a report on the structure of the CDF and testified on 9 and 10 October 2006. He was called to rebut the testimony of Colonel Richard Iron, an expert on military doctrine called by the prosecution, who had concluded that the various armed groups during the civil war in Sierra Leone constituted military or paramilitary organizations.

Dr. Dorte Thorsen, an anthropologist from the Nordic Africa Institute in Uppsala, was called by the defence in the trial against three leaders of the AFRC who were accused of committing countless atrocities against the civilian population. Her report was filed by the defence on 26 July 2006. She testified in open session on 24 and 25 October 2006. Thorsen was called to challenge the testimony of prosecution expert Zainab Bangura, a Sierra Leonean civil rights activist, who had submitted a report on the ‘bush wife’ phenomenon. Bangura’s report was disclosed on 6 July 2005 and she testified in open session between 3 and 5 October 2005.

### *Contested expertise*

The first hurdle a prospective expert witness has to take is whether he or she is recognized by the court as expert. In general, an expert witness is defined in terms of a specific knowledge acquired through experience, training or education to assist the court in assessing the evidence or determine the facts (Good 2007; Jasanoff 1995; Kandel 1992b: 56). The Special Court’s judges

defined an expert witness as 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’ (SCSL 2005a: 4). In the trials heard at the Special Court for Sierra Leone expert witnesses were called by the parties to support their theory of what the case is about or the assessment of the relevant facts. This is due to the adversarial system used in international criminal trials and Common Law jurisdictions where the parties are the masters of the trial and the judges adopt a fairly passive role.

In the trials heard at the Special Court it was common to challenge the credentials of expert witness called by the opposing side. The defence doubted the qualifications of the prosecution experts. The prosecutors, in turn, expressed doubts with regard to the qualifications of Hoffman and Thorsen. This is not unusual, in particular with regard to an adversary trial where experts are brought in by the parties rather than the court. International criminal law, as a fairly young field, does not yet have the consolidated body of precedents and regulations or clearly established professional associations (Wilson 2011: 221-222) found in national legal systems (cf. Good 2007: 140; Jasanoff 1995: 57- 61). Following the other international tribunals the judges at the Special Court adopted a quite extensive interpretation of the term ‘expert’ and rejected only one expert, Corinne Dufka in the trial against Taylor, because of lack of expertise although they admitted her testimony as witness of fact (SCSL 2008a).

Danny Hoffman, then assistant professor at the University of Washington in Seattle, is specialised in the anthropology of violence and warfare, African affairs and visual anthropology. He received his PhD in 2004 from Duke University for a thesis on the *Kamajor* movement in Sierra Leone, where he had carried out extensive fieldwork between 2000 and 2003. Hoffman was called by defence counsel of the second accused, Moinina Fofana, to rebut Colonel Iron's report. Iron, a Colonel in the British Army, had concluded that the *kamajors*, an ethnic militia that fought in the civil war in Sierra Leone, did constitute a military organisation. This finding was a necessary prerequisite for the prosecution's charge that the accused, who were leaders of this militia, had exercised command responsibility as senior commanders and were therefore directly responsible for war crimes committed by members of the *kamajors*, also known as Civil Defence Forces (CDF).

The *Kamajors*, hunters in Mende, were a response to the threat posed by the RUF in the Mende-areas in the country's southeast. In 1991, the RUF had started a guerrilla war against the government in Freetown. The *kamajors* and other self-defence groups replaced the army, which proved unable to provide the necessary protection and, in fact, terrorized the population they were supposed to protect. In the mid-1990s, an alliance of Mende politicians, traditional leaders and the government of Sierra Leone coordinated the *Kamajors* and self-defence groups from other ethnic groups to establish the

CDF under the leadership of Sam Hinga Norman, a Mende chief (Hoffman 2007).

During the civil war, the fighters of the CDF were accused of committing war crimes and human rights violations. These allegations were the foundation for the indictment against three leaders of the CDF and the trial against Sam Hinga Norman, National Coordinator of the CDF, Moinina Fofana, the 'Director of War', and Allieu Kondewa, the *Kamajor* 'High Priest'. The trial lasted from March 2004 till August 2007 and ended with the conviction of the second and third accused for war crimes. This judgement was confirmed by the appeals chamber. The first accused, Norman, had died before the judgement was handed down in custody while undergoing medical treatment in Dakar in February 2006. The most contentious issue in the trial was whether the accused could be held responsible for acts committed by members of the CDF.

The Office of the Prosecutor (OTP) had charged the three accused for war crimes because they allegedly held positions of superior responsibility and exercised command and control over their subordinates (Art. 6(3) Statute of the Special Court for Sierra Leone). The exercise of effective command responsibility presupposes the existence of a military or civilian organisation including chain of command and internal coherence. The CDF was, according to the OTP, an irregular military force which exhibited most of the

characteristics of an army albeit in rudimentary form. The defence attorneys disputed this and argued instead that the accused never exercised effective command and control because the CDF did not constitute a military organisation.

OTP called Colonel Richard Iron as expert witness. At the time Iron was the British liaison officer in NATO's Allied Command Transformation unit. Prior to that he had served as the head of the British Army's Doctrine Branch in the Directorate General of Development and Doctrine. In addition to extensive experience in evaluating the conduct of conventional forces he was an expert on non-conventional warfare (SCSL 2005b: 14-17). His report addressed four questions: The first one was whether the CDF had a military hierarchy and structure; the second one whether the CDF exhibited the characteristics of a military organisation; the third one whether it was a coherent organisation and the fourth whether command was effective. Colonel Iron answered all these questions in the affirmative in his report and testimony given before the court on 14 June 2005. In order to refute Colonel Iron's report the defence attorneys brought Dr. Hoffman who, in turn, wrote a report examining the structure of the CDF. In this report he concluded that the CDF was not a military organisation.

The contents of Hoffman's report will be discussed at length in the second part of this piece. Here I want focus on the doubts raised by the prosecutor

regarding Hoffman's expertise and methodology. When Hoffman took the witness stand on 9 October 2006 the prosecutor Kamara raised an objection against his report on the grounds that Hoffman was not qualified to give his opinion since he was not a 'military expert' but merely an anthropologist.

MR KAMARA (the prosecutor): My Lord, he's not qualified to proffer that opinion, because he's here before the court as an expert in anthropology.

PRESIDING JUDGE: Cultural anthropology.

MR KAMARA: Yes, My Lord. Cultural anthropology.

PRESIDING JUDGE: Don't narrow it down.

MR KAMARA: Yes, My Lord, cultural anthropology, and there is evidence before this court, that has been adduced by a military expert. It is not for this witness to come to this court as a cultural anthropologist to comment and evaluate the evidence of that military expert.

PRESIDING JUDGE: Yes. The question I put now is: For me to be enlightened, why is the subject that he's purporting to proffer an opinion on not a proper subject for cultural anthropology?

MR KAMARA: My Lord, it could be a proper subject for cultural anthropology, but where evidence has been adduced before this Court by a military expert, it cannot come in the disguise of a cultural anthropologist to evaluate and assess the value of that evidence.

PRESIDING JUDGE: That is the difficulty of your position. You cannot, as a lawyer, merely from that podium, make a pronouncement that his particular area of study is an area which does not fall within the disciplinary scope of cultural anthropology, but within the scope of military science, unless you can produce evidence to counter that. It seems as if you're asking us to take your own *ipse dixit* on this, which is a very controversial issue.

...

JUDGE BOUTET: And why is it an anthropologist cannot speak about war, the consequences of war and implications of war, as such? Why is it you seem to imply in your objection that only military people can speak about that? Why is it? Is it an exclusive domain of the military? (SCSL 2006a: 43-44)

This exchange nicely illustrates that the epistemological contest in court did not play out between anthropologists and the law but rather between different types of expertise, here juxtaposed by the prosecutor. The exchange between the prosecutor and the judges highlights the role of the parties in employing expert knowledge against their opponent and the judges' role as judicial gatekeepers who decide over admissibility and weight, i.e. relevance, of the expert testimony. It also hints probably at the judges' limited knowledge over anthropology or rather cultural anthropology. It is quite common for lawyers to have not a very clear idea of social and cultural anthropology, as Sapignoli shows in her analysis of an anthropologist who acted as expert witness in

Botswana (Sapignoli 2008). She and Good (2007) show that lawyers tend to imagine social and cultural anthropology as empiricist, value-free and objective, a perception often promoted by experts themselves, as Good (2007: 130) notes.

In cross-examination the prosecutor tried to discredit Hoffman's report because of the intimate relationships he developed with *kamajors* with whom he had lived together at the Brookfields Hotel in Freetown, a *kamajor* 'barracks'.

MR KAMARA: So, for the most part, Dr. Hoffman, during that period, your observations of the Kamajors was from the balcony of room 312?

WITNESS: I am not sure I'd characterise it that way, no. I would also point out this was a room shared by six combatants, so it's not as though I were there alone.

...

JUDGE ITOE: Dr. Hoffman, are you saying you shared the room at Brookfields Hotel with six Kamajors?

WITNESS: Right. There were – the room – when I stayed, when I spent the nights at Brookfields, I stayed in this room 312 A, room 312, which was block A. It was a room that was occupied – the numbers tended to vary. There were probably four people that were prime

residents there. A number of people floated in and out. So, I usually approximated it as being six people. The distinction here is that this is participant-observation research. This is anthropological work where my fieldwork involves living with people on a day-to-day basis. And, as I was researching the Kamajors obviously, this was the place to do it (SCSL 2006a: 127).

It is clear from this exchange that the prosecutor intended to demonstrate that participant observation creates a bias on part of the researcher in favour of his research subjects. Hoffman, in turn, played out the anthropological trump card, the long period of close contact with the research subjects. He had done extensive research in Sierra Leone since 2000, conducted interviews with approximately 200 individuals and had lived in close social interaction with *kamajors*. In April 2006, he came back to collect more material for the report he was asked to write (Hoffman 2006: 5).

Dr. Dorte Thorsen from the Nordic Africa Institute testified in the trial against three leaders of the AFRC. She received her PhD in African Studies from the University of Sussex in 2005. Her research has focused on women in Burkina Faso where she has carried out anthropological fieldwork since 1997. She was called by the defence to rebut an expert witness report written by Zainab Bangura, a Sierra Leonean women's rights activist. The defence lawyers had raised objections against Mrs. Bangura's report arguing it failed

to meet the standards of an expert report because it was unscientific and exclusively based on Bangura's personal experience. Their objection was overruled by the judges who admitted Bangura's report into evidence. To challenge Bangura's report the defence attorneys asked Thorsen to write an expert report on 'forced marriages' in West Africa.

The indictment against three leaders of the AFRC, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, listed several counts of sexual violence and other inhumane acts (counts 6-9) including 'forced marriages'. OTP defined 'forced marriage' as an inhumane act by which girls and women were abducted and forced into marriages as so-called bush wives. According to the indictment, 'the "wives" were forced to perform a number of conjugal duties under coercion by their "husbands"'. Bangura's report dealt with what she referred to 'the bush-wife phenomenon' perpetrated by combatants of the AFRC and RUF. According to Bangura, the AFRC and the RUF abducted many girls and women and declared them their wives against the will of the girls and women who faced gang rape, deprivation and death if they refused to 'marry' the combatants. Many of these unions had offspring and often the women would stay with their 'husbands' for years and after the end of the war. In her report Bangura pointed out that being a 'bush wife' carried a social stigma since these women were not properly married according to custom (Bangura 2005).

Both anthropologists explicitly criticised the reports of the expert witnesses called by the prosecution. They took issue with the other experts' methodology and theoretical framework.

WITNESS [Dr. Hoffman]: I have read Colonel Iron's report, obviously. I would generally categorise my concerns along three lines. And those would be first, methodological; second, empirical and third, theoretical or conceptual, and there are particulars within each of those. But, very briefly, methodologically, I am concerned with the very limited number of people spoken to and their location and position within the CDF, and concerned about the very limited amount of time that was spent in preparation for that report. As, hopefully, it has become clear from the report and testimony I have been giving, there are a lot of social nuances that are incredibly important for understanding the dynamics of the CDF which you just – nobody could possibly pick up talking to seven people over I believe it's 14 days (SCSL 2006a: 110-111).

Colonel Iron was a trained civil engineer and a Sandhurst-trained career soldier in the British army who saw active duty in Bosnia and served in a number of staff functions in the British Ministry of Defence and NATO. During his oral testimony on 14 June 2005 he said he could not rely only on secondary sources and had 'to go out on the ground' to verify information

from his interlocutors or ‘sources’ and the written documents he had consulted. In fact, Iron had visited a couple of sites in Sierra Leone and interviewed nine men (not seven as Hoffman claimed) during a 14-day period. From the perspective of a military man this might be a perfectly sound method but it did not meet the standards applied to anthropological fieldwork, as Hoffman pointed out.

Thorsen had similar criticisms with regard to Bangura’s report. She pointed out that Bangura had merely collected statements of women who allegedly were ‘bush wives’ without giving background information or providing the socio-cultural background against which these statements should be placed.

PROSECUTOR: ...did you consult the report of Mrs Bangura?

WITNESS: I read the report. I found it very flawed on the methodological issues and I found that the quotes she gives in her report, it talks a lot about the circumstances of these – well not even circumstances – it tells a lot about – that women were abducted and that they were being coerced into being bush wives and that they left or stayed with the husband after the war. But inasmuch as she didn’t analyse her data, inasmuch as she didn’t discuss it but left it to speak on its own, it is actually very difficult to know what she wanted to say with this material. And also, she does not contextualise the whole situation of these women and she collected the data from a large

amount of regions. How can we know that everything is the same in those regions? There is a lack of contextualisation.

For Hoffman and Thorsen the methodology used by Iron and Bangura did not meet the norms for scholarly research. Both of them criticized the lack of ‘social nuances’ (Hoffman) and ‘contextualisation’ (Thorsen) in the prosecution experts’ testimony. The next part will examine in more detail how the anthropologists rebutted the testimony of the prosecution experts.

### *The anthropological perspective*

Anthropologists writing about international criminal justice (Eltringham 2013; Wilson 2011) emphasise the salience of the trial strategies of the prosecution and defence with regard to the analysis of expert testimony in international war crimes trials. Eltringham takes issue with the idea of an ‘epistemological confrontation’ (Thuen 2004: 266) and argues that the historians and anthropologists who testified at the ICTR did not consider themselves to be ‘engaged in an epistemological contest with the law’ (Eltringham 2013: 338). To some degree this finding is backed up by my evidence from the Special Court for Sierra Leone where the anthropologists did indeed submit nuanced and detailed reports. Both, however, did consider themselves to be engaged in an epistemological and methodological confrontation – albeit with the prosecution experts rather than the Law.

Both, Hoffman and Thorsen heavily criticized the ethnocentric and normative assumptions underlining the prosecution theories of the military structure of the *kamajors* and ‘forced marriage’. They insisted on contextualised and nuanced representations and eschewed sweeping general conclusions, drawing attention to complexity and contingency. That was the very reason why they were called by defence counsel who was at pains to show that the realities in during the civil war in Sierra Leone were more complex and dynamic than the prosecution theory of clear-cut criminal responsibility suggested.

In the CDF-trial Hoffman took issue with the idea of the CDF as a hierarchical and coherent military organization over which the accused exercised effective command and control. From his perspective, the CDF constituted ‘a loosely organized militarized social network without a centralized military command structure’ (Hoffman 2006: 4). Hoffman contradicted Colonel Iron’s report on a number of factual issues. For example, Iron describes a base, which was known as Base Zero, in terms of a military headquarter where combatants would receive military training, obviously an important aspect of the prosecution’s theory of the case against the leaders of the CDF. Hoffman criticized this representation of Base Zero during his examination in court.

WITNESS: I think training is one of the things that's going on there. It is sporadic. There is a mention in Colonel Iron's report about this intensive two-week training course, as though you were going to Fort Benning in Georgia, and receiving your officer training. It's just not the way I would characterise what was going on there. It is more sporadic than that and it's only one of the many, many functions that is taking place. The concerns at Base Zero were a bit more mundane than that; providing food, for example, that kind of things (SCSL 2006a: 74).

Another central element in the prosecution's case was the existence of a hierarchy and a chain of command in the CDF. Colonel Iron confirmed this view in his report and during his testimony. By contrast, Hoffman denied the existence of a centralised command structure and sketched a more polycentric, highly dynamic structure with little internal coherence and no real chain of command. Hoffman based his interpretation of the CDF as militarized web of social relations on the scholarly debate on the prevalence of patron/client relationships in African societies, a point which was missed both in the prosecution's case and Iron's expert witness report. The defence lawyers sought to emphasize this interpretation when they questioned Hoffman in court as the next quote illustrates.

MR POWLES (defence lawyer): How relevant is that concept of patronage to the Kamajor/CDF structures?

WITNESS: My Lords, I think it's as central to the Kamajors and CDF as it is to everyday life in the Mende communities, which is to say that it is foundational (SCSL 2006a: 102).

From Hoffman's perspective, the importance of patronage in understanding the CDF lend support to his argument that the CDF was a 'militarized social network' without clear hierarchies. In line with recent studies on the role of youth in African armed conflicts (Peters and Richards 1998; Utas 2003; West 2000) Hoffman argued that the war offered many disenfranchised young people an avenue for social advancement. This was facilitated because the patronage system had become more volatile and hence more permeable due to the civil war. In this context it was frequently not a leader who appointed individuals to positions of authority but rather enterprising individuals who tried to assume positions of authority by acquiring clients and declaring themselves 'commanders' as Hoffman pointed out.

MR POWLES: You talk of titles in your report, and you mention of course the meaning of the term "commander"; what is the meaning of the term "commander"?

WITNESS: My Lords, I think one of the dynamics that happened within this, the conflict, is that the term "commander" essentially

became a synonym, if you will, of the term “patron”. That was – the implication in the term “commander” was that this was the kind of relationship that was being pointed to.

MR POWLES: How would one get such a title?

WITNESS: Well, for one thing, through the accumulation of clients, but there were also a number of people, and again, this goes back to this idea of experimentation, there is a fair amount of, if you will, bravado in this. Individuals staking a claim to certain positions of authority and, if you will, seeing if making that claim is enough in itself to attract people... (SCSL 2006a: 104).

Hoffman emphasised that titles like ‘commander’, although they mimicked military ranks, had a different meaning in the context of the civil war in Sierra Leone.

MR POWLES: If a title was in the English language, to what extent would the majority of Kamajors be able to understand the meaning of that title?

WITNESS: What most people would understand by titles that are in English is that they are titles of importance. They would not, necessarily, and, in fact, most cases would not be able to say “Okay, this title corresponds to this, it entails this responsibility.” What it

evokes, what titles in English evoke... is a sense of authority (SCSL 2006a: 106).

While listening to the anthropologist's nuanced and contextualised description of the CDF's organisation it occurred to me that his account in many ways resembled those by anthropologists in native title claims in the US. Under US law an indigenous group first had to prove its continued existence as 'tribe' before it could lay claim to a specific territory. In legal terms a 'tribe' was contingent upon several features that bore only little resemblance to actual social organisation of Native American groups and rather reflected European ideas about these 'savage' and 'state-less' societies. Anthropologists on the plaintiffs' side often criticised concepts such as 'tribe' or 'land ownership' as too simplistic and static. They pointed out that indigenous identity did not necessarily depend on the existence of 'tribal' institutions or customs. Clifford's (1988) ethnography is a good example of these debates on indigenous identity in the courtroom. Just as the Jack Campisi, the anthropologist who acted as expert witness for the Mashpee Wampanoag Tribal Council, Inc., tried to show that the history of Native Americans was not a simple story of either survival or assimilation Danny Hoffman tried to show that the Kamajors were in fact a much more complex and contradictory phenomenon than the prosecution assumed, a fluid militarized social movement that provided opportunities for gain and advancement rather than a centralized military organization described by the prosecution and Colonel Iron.

The question whether the CDF constituted a military organization can be read as an inversion of the central question in the Mashpee-case described by Clifford (1988). In that case, the plaintiff, the Wampanoag Tribal Council, Inc. was at pains to prove that the Mashpee community had been governed as an Indian tribe since only recognized tribes could file claims for land restitution under US law. In both cases the main issue was whether an organized group existed but whilst the Mashpee had to qualify as a tribe to have legal standing in a civil law suit over compensation for the loss of ancestral land the three accused leaders of the CDF could be held criminally responsible.

At the epistemological level, Hoffman took issue with Colonel Iron's representation of the civil war in Sierra Leone:

WITNESS: The theoretical point that's made in the report is that, what I would think of, is a kind of universalism. This claim that understanding any particular violent conflict, any war, allows you to understand any other war. There's a claim made that warfare is so distinct from every other social aspect of life, that any war – any one war has more in common with another war than it does with anything else, any other dynamic. And that troubles me greatly because it simply – what it ends up doing is it completely erases history. It

completely erases culture, politics. It sort of – the implicit claim there, it is not that implicit, it's fairly explicit, is that these factors don't matter. That if you understand, for example, the Polish resistance to World War II, you know everything you need to know about the conflict in Rwanda or Sierra Leone. That, to me, I would take issue with that (SCSL 2006a: 111-112).

Hoffman's insistence on the specificities of the civil war in Sierra Leone reflects cultural anthropology's relativist and historical perspective. From his perspective, Colonel Iron's report 'exemplifies the conventional wisdom about post-Cold War violence and the discourses by which it is understood' (Hoffman 2007: 641). Through this statement shines Hoffman's concerns about the popularity of humanitarian and military interventions in Africa, which are based on a flawed understanding of violent conflicts in Africa and their underlying causes.

In the trial against three leaders of the AFRC, Thorsen expressed similar concerns in her report and the evidence she gave in court on 24 and 25 October 2006. She criticized Bangura's report because, from her perspective, it simplified multi-faceted social practises and represented women as victims without agency. By drawing on feminist and anthropological scholarship Thorsen argued that women employed a range of strategies to create 'room for manoeuvre' in the context of 'arranged marriages'. She then applied this

argument to strategies of girls and women in African violent conflicts. Drawing on the sociological concept of agency and the anthropological literature she argued that even in war women were active agents, not merely passive victims (Thorsen 2006).

Whilst advancing a similar critique of the prosecution experts' reports Hoffman and Thorsen adopted different approaches. Hoffman conducted a short study on the *kamajors* in April 2006 but, unlike Iron who only spent about two weeks in the country, he was able to draw on his considerable research experience and long-standing relationships with former *kamajors*. He elaborated on his motives when I met him after he testified. Initially, Hoffman had hesitated to act as expert witness because of a strong sense of obligation towards his informants, all former members of the *kamajors*, as he told me after he had testified. In particular, he was concerned about his informants' anonymity which he had promised to protect. He was worried about future access to the field if his informants felt he had betrayed their trust. Eventually, he decided to write the report because he felt that Iron's report grossly misrepresented the nature of the *kamajor* movement (cf. Hoffman 2007: 639-641). And at least some of the people he was talking about felt he achieved this goal. I observed his testimony from the public gallery in the courtroom in Freetown and talked to some of the members of the audience, many of them former *kamajors*. After he had given evidence in court they said that finally someone 'had told the truth about the *kamajors*'.

Whilst Hoffman drew on his extensive fieldwork in Sierra Leone Thorsen's role was 'to raise some abstract questions', as she stated under cross-examination on 25 October 2006 (p. 5). She had been asked by one of the defence lawyers in the AFRC-trial to conduct 'a short research on the concept of forced marriage in the West African region, of which the purpose was to outline the history and practice of forced marriage in the region and possibly also the way in which this practice is embedded in local culture and practice' (Thorsen 2006: 1). Thorsen declined to carry out the requested research because of the problematic assumptions underlying the research questions:

My response is founded on a deep concern with the longer-term consequences of making straightforward links between complex social practises of arranging marriages between kin groups, international conceptualisations of "forced marriages", and the coercion of women into being "bush wives" during the civil war in Sierra Leone. Not only does such a simplification deny women – and young women in particular – agency in decisions related to their own or their daughters' marriage, it also describes social practises as static and unresponsive to processes of economic, social and political change.

Most importantly, I am worried that the requested research with its focus on 'forced marriage' in West Africa endorses a general view on rural populations as backwards and on their diverse social

practises as the primary source of malevolence, sexual abuse, and war atrocities (Thorsen 2006: 1).

Instead, she wrote a critical analysis of the problematic concepts of forced marriage and female agency in West Africa drawing on the anthropological literature and her own fieldwork on gender relations in rural Burkina Faso. When I interviewed Thorsen in June 2011 she told me that, from her perspective, her main task had been to educate the court by problematizing the concept of ‘forced marriage’ as it was employed by the prosecution. rather than providing facts or a different interpretation of facts since she fieldwork experience in Sierra Leone. She was at pains to point out that the category of forced marriage is too simplistic to account for girls’ and women’s agency even during armed conflict. Although the defence had initially expected her to visit Sierra Leone for a short research in preparation of writing the report they had no objections against her report and submitted it as evidence hoping it would undermine Bangura’s report.

It is instructive to compare Hoffman’s and Thorsen’s approach. Hoffman grappled with the trust placed in him by his informants and was concerned about the possible long-term consequences for his access to the field. Thorsen did not face these ethical problems as she limited her role to a general critique of Bangura’s report. But unlike Hoffman her testimony was exclusively concerned with a critique of the abstract concept of bush wives

used by Bangura due to a lack of first-hand research experience in Sierra Leone, which adversely affected the relevance of her testimony in the eyes of judges of the trial chamber as the next part shows.<sup>iii</sup>

### ***The judges' take on the experts' testimony***

The main task of the expert is to assist the judges with his or her expertise. The expert reports and testimony constitute merely a fraction of all the evidence assessed by the judges. After weighing all the evidence submitted to them by the parties they decide on the guilt of the accused. Sometimes it is not clear to what extent the judges draw on experts' reports and testimony or if they heed them at all. In some instances, judges draw explicitly on experts' reports to support their findings (Rosen 1977: 561).

In the judgement against the leaders of the CDF, the judges of trial chamber mentioned neither Iron's nor Hoffman's reports. With regard to the structure, origins and history of the CDF and the *kamajor* militia, the subject of Iron's and Hoffman's expert reports, the court relied exclusively on witnesses of fact called by the prosecution who confirmed the prosecution theory of centralized military organization led by the three accused. By doing so, the judges displayed a clear preference for witnesses of fact observed as well at the ICTR (Eltringham 2013). The appeals chamber also did not make explicit reference to the experts' testimony.

It is noteworthy though that the legal categories employed by the judges mirrored those employed by Colonel Iron's report. It appears that the judgement was shaped by the same categories as Iron's report and the prosecution's indictment. The notions about command responsibility, which had been developed in the war crimes trials after World War II had spread with considerable speed in the military field since the advent of peacekeeping in the 1990s and had influenced military doctrine as I was told by justice Boutet of trial chamber I, a former Canadian Judge Advocate General. Thus Iron's expert report applied exactly the same categories as the judges whereas the anthropologist's findings differed too much from the categories circulating with ease between legal and military doctrine.

The expert testimony on forced marriage generated more discussion among the judges of trial chamber II as can be gleaned from the two separate opinions, one concurring by judge Sebutinde and one dissenting by judge Doherty. A judgement at the Special Court requires a majority of the judges but judges have the right to issue separate opinions if they want to present own reasoning. They also might issue a dissenting opinion if they disagree with the majority of the bench. Dissenting opinions are of much value to courtroom ethnography as they reveal at least parts of the discussion between the judges that is usually not made public. The question whether forced marriage constituted a separate crime under international criminal law was important because scholars and activists promoted it as a culturally sensitive

category explicitly recognizing the multifaceted nature of violence against women in war (Gong-Gershowitz 2009; Slater 2012).

The judgement discussed the question whether forced marriage constitutes a separate crime combining elements of sexual and non-sexual violence, the view held by the prosecution, in some detail (SCSL 2007a: §§701-714, pp. 216-221). By majority decision, the judges rejected the prosecution's submission and ruled that forced marriage was not a separate crime but, in fact, constituted a form of sexual slavery. As a consequence, they dismissed the charge as redundant (SCSL 2007a: §713, pp. 220). In their motivation, the judges did not explicitly draw on the expert witnesses. They merely concluded that 'having now examined the whole of the evidence in the case, the Trial Chamber by a majority, is not satisfied that the evidence adduced by the Prosecution is capable of establishing the elements of a non-sexual crime of "forced marriage" independent of the crime of sexual slavery under article 2(g) of the Statute' (SCSL 2007a: §704, p. 217).

The two separate opinions, one concurring and one dissenting, provide much more valuable information on the role played by the experts in the judges' reasoning. Justice Sebutinde's separate concurring opinion found 'Dr. Thorsen's report and evidence of little relevance to the issue at hand given the fact that she declined to write on the topic requested of her by the Defence' (Sebutinde 2007: §1, p. 574).

Justice Sebutinde only referred to Thorsen's testimony when she distinguished 'arranged or inheritance marriages' from the abduction and abuse of women as bush-wives during the civil war in Sierra Leone. During cross-examination, Thorsen had indeed made that distinction but immediately questioned the underlying assumption that all women who became bush-wives during the civil war were abducted. Instead, she raised the possibility 'that some might have gone into it on their own free will but young women also had stakes in getting married' (SCSL 2006b: 4). Thorsen insisted on raising fundamental methodological and epistemological questions about the Eurocentric and universalistic categories in international law, which formed the prosecution expert's framework. In her view, these were not categories of social-scientific study but constituted rather normative and simplistic categories employed from a 'rights-based perspective' (Thorsen 2006: 4).

In her dissenting opinion, Justice Doherty argued against the other two judges that forced marriage is not synonymous with sexual slavery and held that it indeed constituted a separate crime as 'other inhumane act' combining sexual and non-sexual elements stemming from the woman being 'forced into a relationship of a conjugal nature with the perpetrator thereby subsuming the victim's will and undermining the victim's exercise of the right to self-determination' (Doherty 2007: §69, p. 595).

Both, justice Sebutinde and justice Doherty, relied heavily on Bangura's report and testimony, although they drew different legal conclusions. Unlike Thorsen's report they found Bangura's testimony 'relevant and very instructive on the subject of forced "marriage" within the Sierra Leone Conflict' (Sebutinde 2007: §11, pp. 577-578). They explicitly approved of Bangura's methodology. Justice Sebutinde, for instance, approvingly referred to 'in-depth interviews of over 100 former victims of "forced marriage"' conducted by Bangura (Sebutinde 2007: §11, fn. 11, p. 578). In the final judgement, the judges of the Appeals Chamber overturned the trial chambers decision and explicitly recognized forced marriage as a separate crime against humanity. They quoted Bangura's report at length to support their view of forced marriage involving 'a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim' (2008c: §195, p. 64).

The victims' agency was not an issue for the judges. According to justice Doherty, forced marriage prevented the women to exercise their 'right of self-determination' (Doherty 2007: §69, p. 595). None of them allowed for the possibility that some women might actually choose to become 'bush wives', as Thorsen had suggested in her testimony. Even testimony of factual witnesses supporting Thorsen's arguments was discounted by the judges. One of the witnesses, TF1-023,<sup>iv</sup> testified that she was not forced to do any work

and that she was respected as the wife of a rebel commander but, according to Doherty, ‘this in no way diminishes the seriousness of the acts committed against the witness’ (Doherty 2007: §41, p. 589). The explicit rejection of Thorsen’s testimony illustrates the judges’ refusal to consider ‘abstract questions’ (SCSL 2006b: 5). They also did not share her concerns about the ‘lack of contextualisation’ (SCSL 2006b: 6) and methodological shortcomings in Bangura’s report.

### *Conclusions*

The anthropologists’ critique of Western military and activist concepts did not have a tangible influence on the judges who found the prosecution experts’ testimony more useful. Hoffman’s and Thorsen’s experience resonates with the experience of anthropologists testifying in indigenous rights claims where the judges and jurors rejected the anthropologists’ call for the recognition of cultural difference (Campisi 1991; Clifford 1988; Paine 1996).

In the light of the strategies employed by the prosecution and the defence it is important to remember that both anthropologists testified for the defence. They were employed to cast doubt on the reports of the prosecution experts but in doing so they also sought to raise fundamental questions about the applicability of universalistic military and legal categories to the messy

realities of everyday practices in West Africa. It seems the arguments advanced by the anthropologists suited much better the defence case. This observation should by no means imply that anthropologists invariably act as experts for the defence. In fact, anthropologists have testified as prosecution experts in international criminal trials (Eltringham 2013) and Rosen (1977: 564) reminds us that anthropologists can appear on both sides in a trial. This article rather shows how Hoffman's and Thorsen's critique of abstract, universalistic legal categories and their call for nuanced thick descriptions of ambivalent everyday experiences served the defence argument much better. Of course, these arguments are not the exclusive domain of anthropologists even though anthropologists are more likely and better equipped to raise them. The defence had insisted on contextualising the criminal acts throughout, attempting to undermine the prosecution case of clear-cut criminal responsibility because of command responsibility or joint criminal enterprise. In the end, they failed to convince the judges of their cases. Both trial chambers and the Appeal Chamber found the accused guilty and sentenced them to long prison sentences.<sup>v</sup>

Testifying for the defence of men charged with the most heinous crimes who are subsequently found guilty highlights the professional, ethical and political dilemmas faced by Hoffman and Thorsen. Hoffman was acutely aware of this and felt he had to correct what from his perspective were misrepresentations of the *kamajors*. Thorsen did not want to downplay the prevalence of sexual violence against women during the civil war in Sierra Leone when she

attempted to 'educate the court' about the problematic category of forced marriage. In line with the definition of expert witness, Thorsen saw her task primarily as assisting the judges. Many anthropologists, however, might have serious ethical and political concerns if they would be asked to testify for the defence of those accused of the most heinous crimes. They might also be concerned to jeopardize their career or reputation.

It should be noted that Hoffman and Thorsen submitted their reports after the prosecution had concluded its case, more than two years after the beginning of the trials in 2004. Their anthropological expertise might have better employed at a much earlier stage, during the investigation and pre-trial phases when prosecutors and judges as well as defence lawyers could have benefited from an anthropological perspective on modes of social organisation and marriage practices in Sierra Leone.

Bearing also in mind Rosen's (1977), Good's (2004) and Wilson's (2011) call to understand better the role played by experts in court Hoffman's and Thorsen's experience are instructive for anthropologists who are asked to act as experts in international criminal trials. The judges' refusal to address the arguments raised by the anthropologists highlights their reluctance to question the universalistic assumptions undergirding abstract legal categories. It also bears testimony to the judges' faith in the experts' ability to get the facts right and feed them into legal fact-finding. This reluctance is

understandable as the anthropologists voiced doubts about the very foundations the project of international criminal justice is built on, universality of legal rules and the possibility of establishing facts in a cross-cultural context. The judges' preference for the testimony of Bangura also illustrates the odds faced by anthropologists who aim to expose conceptual and methodological flaws of experts who seem 'to know what they are talking about' (Collins and Evans 2007: 113). The analysis presented in this article shows that demarcation of contested expertise is always contingent and that a reflective approach exploring the boundaries between expertise and law as well as the multifarious ways in which they influence each other continues to be highly relevant to social anthropology and beyond (cf. Jasanoff 2003).

As a consequence, anthropologists in international criminal trials might want to avoid advancing a fundamental epistemological and methodological critique of other bodies of expert knowledge and instead emphasise their role as country specialists and suppliers of factual information. They also will have to weigh the pros and cons of entering an adversarial trial in which they will testify for one of the parties.

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## *Notes*

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<sup>i</sup> These were the trial against the leaders of the Civil Defence Force (CDF) (March 2004 – August 2007), the trial against three leaders of the Revolutionary United Front (RUF) (June 2004 – February 2009), and the trial against three leaders of the Armed Forces Revolutionary Council (AFRC) (March 2005 - June 2007).

<sup>ii</sup> I.e. not open to the public with transcripts and identity of the witness is kept confidential.

<sup>iii</sup> Thorsen's lack of ethnographic data from Sierra Leone does not imply that she was wrong. A recent article by Ferme (2013) presenting ethnographic evidence on the problematic nature of the categories of 'bush wive' and forced marriage in Sierra Leone lends support to Thorsen's arguments.

<sup>iv</sup> Most witnesses of fact testified under witness protection measures behind a screen, not visible to the public, and only identified by the numbers assigned by the court.

<sup>v</sup> The trial against three leaders of the Armed Forces Revolutionary Council (AFRC) was concluded in June 2007 when the three accused were found guilty and sentenced to prison sentences of respectively 45, 55 and 55 years. The judgement was confirmed by the Appeal Chamber in late 2007. The trial against the leaders of the Civil Defence Force (CDF) was concluded in August 2007. The two remaining accused were found guilty and sentenced to respectively seven and eight years. The trial chamber's judgement was overturned in June 2008 by the appeals chamber which raised the sentences to fifteen years and twenty years respectively.