

THE TRIAL CHAMBER (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

SEIZED of the “Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund”, filed on the 28th of July, 2004 (“Motion”);

MINDFUL of the “Joint Response of Second and Third Accused to Prosecution’s Request for Leave to Call Additional Expert Witness”, filed on the 30th of August, 2004 (“Response”), and the “Prosecution Reply to Joint Response of Second and Third Accused to Prosecution’s Request for Leave to Call Additional Expert Witness“, filed on the 6th September, 2004 (“Reply”);

NOTING that no Response was filed by the First Accused;

MINDFUL of the Prosecution’s submission of the Expert Report of Dr. William Haglund on the 14th of July, 2004, and the consequent Trial Chamber Order for Compliance by Prosecution with Rule 94bis of 16th of July, 2003;

NOTING the Trial Chamber’s Order dated 1st April, 2004 for the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, in which the Trial Chamber in addition ordered the Prosecution to file by 26th of April, 2004, a witness list for all the witnesses that the Prosecution intended to call at trial with the name or the pseudonym of each witness, and further that, should the Prosecution seek to add any witnesses to this list after the 26th of April, 2004, it should be permitted to do so only upon good cause being shown;

NOTING that the Prosecution filed a Witness List on 26th of April, 2004, as part of its filing of “Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1st of April, 2004” (“Witness List”);

NOTING that the Prosecution filed a Modified Witness List on the 5th of May, 2004, as part of its filing of “Supplemental Materials Filed Pursuant to Order from the Bench During Pre-Trial Conference Held 28 April 2004 and Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004” (“Modified Witness List”);

MINDFUL of the “Order for Prosecution to Supplement Request” of 30th of July, 2004, in which the Trial Chamber ordered the Prosecution to submit the curriculum vitae of the said Expert Witness and the submission of the said curriculum vitae by the Prosecution on the 3rd of August, 2004;

HEREBY ISSUES THE FOLLOWING RULING:

I. SUBMISSIONS OF THE PARTIES

A. Prosecution Motion

1. The Prosecution seeks to vary the Modified Witness List by adding an expert witness, Dr. William Haglund to it. It submits that the Trial Chamber should allow the addition of this witness since the standard of "good cause" is met.¹

2. The Prosecution submits that the Expert Report by Dr. William Haglund describes forensic assessment and investigations of two grave sites relevant to this case at Mohiboima in the District of Bo, conducted between the 28th of October and the 8th of December, 2003. Due to security concerns the report was personally delivered to Freetown by Alan W. White, Chief of Investigations of the Special Court, on the 22nd of April, 2004.² The report was then filed with the Evidence Unit of the Office of the Prosecutor, but which due to a backlog in work in this Unit was not processed until June 2004.³

3. The Prosecution submits that the International Criminal Tribunal for the Former Yugoslavia and Rwanda ("ICTY", "ICTR" respectively) expressed on several occasions that a flexible approach should be adopted when considering the management of witnesses in order to facilitate the truth finding process. Since the Prosecution team was provided with a copy of the report in the second week of June 2003 only, the evidence was disclosed in a timely manner "as early as possible".⁴

4. The Prosecution asserts that the evidence is material, since it is independent and real proof of the death of four civilian victims. The alleged perpetrators of the killings are identified as being Kamajors and the date of the event was determined to have been February 1998. This evidence is in addition to the testimony of witnesses TF2-030 and TF2-156. The Prosecution further asserts that it will adduce evidence to the effect that the three Accused were closely involved in the planning of the February 1998 attack on Bo during which these crimes were perpetrated by their subordinates, the Kamajors. Therefore, the Prosecution submits that the report is of high significance to meet the

¹ Motion, para. 6.

² *Id.*, Annex A.

³ *Id.*, paras 11-12.

⁴ *Id.* paras 17-20.

threshold for proving beyond reasonable doubt that the above mentioned civilian killings in the Bo crime base were committed.⁵

5. Finally, the Prosecution submits that no prejudice to the Defence would be caused since this request is brought at a very early stage of the proceedings after only four witnesses⁶ have testified and given the fact that Dr. Haglund will only be called by the Prosecution at a much later stage in trial. Moreover, the Prosecution stresses that the Defence was already put on notice about killings of civilian victims at the said site in November 2002 and November 2003, following the disclosure of the statements of witnesses with pseudonyms TF2-030 and TF2-156.⁷

B Response of the 2nd and 3rd Accused

6. The Defence submits that the Prosecution failed to disclose the evidence in a timely manner in accordance with Rule 94bis since the report had already been finalised on the 27th of February, 2004 and was brought to Sierra Leone on the 22nd of April, 2004. The Defence asserts that there have been contacts between the Office of the Prosecutor and the Expert, as the project was “undertaken at the request of the Officer of the Prosecutor of the Special Court for Sierra Leone.” Nevertheless, the Prosecution informed the Trial Chamber on the 28th of April, 2004 and on the 1st of June, 2004 that “the Prosecution was not at that point in possession of any expert statements.”⁸

7. The Defence asserts that the addition of witnesses causes prejudice to the right of the Accused to a fair and expeditious trial since the testimony of an expert witness of Dr. Haglund’s qualifications and experience unduly hinders the expeditiousness of the proceedings. As the report is of a complex and specialised nature the Accused would be unable to subject the Expert’s evidence to the necessary scrutiny.⁹

C. Prosecution Reply

8. The Prosecution reiterates its submission that good cause exists by virtue of the materiality of the evidence of the Expert Witness and because the report was disclosed in a timely manner. Moreover, the Prosecution submits that the Defence did not identify any substantial prejudice or

⁵ *Id.*, paras 22-25.

⁶ At time of filing.

⁷ *Id.*, paras 26-28.

⁸ Response, para. 4.

⁹ *Id.*, paras 10-11.

unfairness arising from the presentation of the report, but solely asserted the existence of a prejudice.¹⁰

9. The Prosecution submits that the contents of the report will assist the Court in its final determination and are not a source of unfairness.¹¹

10. The Prosecution further submits that, contrary to the Defence assertions in its Response, the Prosecution did not represent to the Court in the Status Conference on the 1st of June, 2004 that it was not in the possession of the Expert Report.¹²

11. Finally, the Prosecution submits that the addition of the Expert Witness to the witness list would not cause any delay in the proceedings, since the Defence will have ample time to study the report and contest its findings as they have already indicated.¹³

II. THE APPLICABLE LAW

12. The law governing the request of the Prosecution to vary the witness list and add additional witnesses is Rule 73bis(E) of the Rules, which reads as follows:

(E) 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.

13. The Chamber notes that Rule 73bis(E) is similar in formulation to the corresponding Rule of the ICTR, which provides as follows:

(E) After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may 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.

The Chamber further notes that when interpreting Rule 73bis(E) as to the applicable criteria of showing “good cause” and the “interest of justice”, Trial Chambers of the ICTR have articulated

¹⁰ Reply, para. 4.

¹¹ *Id.*, para. 5.

¹² *Id.*, para 6.

¹³ *Id.*, para 7.

certain factors in their exposition of law.¹⁴ In the *Nahimana* case, for instance,¹⁵ the Trial Chamber observed as follows:

“In assessing the “interests of justice” and “good cause” Chambers have taken into account 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.”

14. The Trial Chamber further notes that additional factors, taken into account by Trial Chambers of the ICTR when considering the circumstances giving rise to “good cause” and the “interests of justice”, include the time of disclosure of the witness information to the Defence and the probative value of the proposed testimony.

15. While acknowledging the importance of its role to ensure a fair and expeditious trial when considering the abovementioned factors as provided for in Rule 26bis of the Rules and the rights of accused persons to adequate time and facilities for the preparation of their defence, as stipulated in Article 17(4)(b) of the Statute, we 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.


16. In deciding on similar issues, The Trial Chamber of the ICTY in the *Delalic* case,¹⁶ stated that it will “[u]tilise all its powers to facilitate the truth finding process in the impartial adjudication of the matter between the parties”. This Chamber will, in the determination of this issue, have due regard for the doctrine of “equality of arms”.

¹⁴ *Prosecutor v. Nahimana*, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20; *Prosecutor v. Nahimana*, Decision on the Prosecutor’s Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 5; *Prosecutor v. Bagosora*, Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E), para. 8.

¹⁵ *Prosecutor v. Nahimana*, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20.

¹⁶ *Prosecutor v. Delalic*, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, 4 September 1997, para. 7.





III. THE MERITS OF THE APPLICATION

17. The Prosecution indicated during the Pre-Trial Conference of the 28th of April, 2004 that it was waiting to evaluate the Expert Report to determine its utility first, even though it would have to seek leave and show good cause for the addition of a witness.¹⁷ It appears that the evaluation and the consequent disclosure of the report were, to a minor extent, delayed by internal communication difficulties in the Office of the Prosecutor. It is the considered opinion of the Trial Chamber however, that this delay, which is understandable, is not critical in determining whether or not to grant the application, provided that the Defence is given or disposes, as it does in this case, of sufficient time to prepare for the cross-examination of the witness to be called.

18. More importantly, the Trial Chamber finds preliminarily, that the proposed evidence of the Expert Witness, Dr. William Haglund, appears relevant and may have probative value for the Prosecution's case with respect to the crimes and events alleged in the Joint Indictment¹⁸ for the Bo crime base. Dr. Haglund is Director of the International Forensic Program, Boston, Massachusetts, and an Instructor at the Washington State Criminal Justice Commission and the Washington State Death Investigation Council and has testified in cases before the ICTY and ICTR, our sister international criminal tribunals.

19. The evidence sought to be added by the Prosecution appears not to be a duplication of the evidence of other witnesses on the Modified Witness List. Since it is statement of facts, Dr Haglund's testimony is additional and supplemental to oral witness testimonies and, therefore, appears to be relevant in relation to existing witnesses, and their testimony.

20. Given that the trial of the accused persons commenced on the 3rd of June, 2004 and that so far, only 17 Prosecution witnesses have testified coupled with the assurance by the Prosecution that it would not be calling the Expert Witness until at a much later stage in the trial, the Trial Chamber does not consider that the Defence would suffer any prejudice to its case.

21. In particular, the Chamber finds that there is no element of surprise resulting in detriment to the Defence, since the events covered by the expert testimony are already mentioned in the statements of witnesses TF2-030 and TF2-156, disclosed to the Defence by the Prosecution in

¹⁷ Transcript, Pre-Trial Conference, 28 April 2004, page 15.

¹⁸ Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14-1, Indictment, 5 February 2004.

November 2002 and November 2003. On the contrary, it is our opinion that the Defence will have adequate time to investigate and prepare for the cross-examination of this Expert Witness.

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

23. It is in this light that the Chamber is of the opinion that upholding the Defence submission at this stage to exclude the evidence of this Expert on the grounds, as they submit, that it would unduly hinder the expeditiousness of the proceedings which, we observe, are still very far from being concluded, would contravene the principle of equality of arms and defeat the course of justice that this Expert's evidence is intended to serve.


24. We, therefore, hold that good cause has been shown and that it is in the interests of justice to add Dr. William Haglund as an Expert Witness to the Modified Witness List.

FOR THE ABOVE REASONS, THE CHAMBER

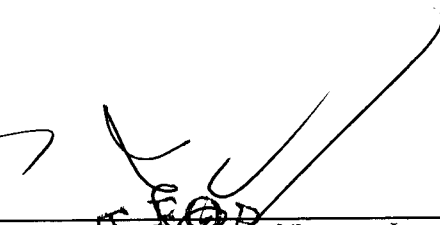
GRANTS the Motion to add Dr. William Haglund as an Expert Witness to the Modified Witness List and

ORDERS the Prosecution to file a revised witness list by the 8th of October, 2004.

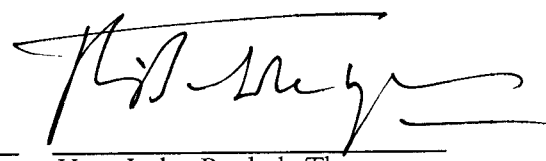
Done in Freetown, Sierra Leone, this 1st day of October, 2004



Hon. Judge Pierre Boutet



Hon. Judge Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber

Hon. Judge Bankole Thompson