

I, JUDGE PIERRE BOUTET of the Trial Chamber of the Special Court for Sierra Leone (“Special Court”);

SEIZED of the Application for Provisional Release filed confidentially on 4 February 2004 (“Motion”) on behalf of Issa Hassan Sesay (“Accused”) pursuant to Rule 65 of the Rules of Procedure and Evidence of the Special Court (“Rules”);

NOTING that the Motion was not served to the Office of the Prosecution (“Prosecution”) until 19 February 2004;

NOTING the Confidential Order under Rule 65 (B) of the Rules on the Submissions from the Government of Sierra Leone, issued on 12 February 2004;

NOTING FURTHER the submissions filed confidentially by the Government of Sierra Leone on 23 February 2004;

NOTING the Order for Expedited Filing issued on 24 February 2004;

NOTING the Response to the Defence Motion for Provisional Release, filed on 27 February 2004 (“Response”) by the Prosecution, to which the Defence filed a Reply on 2 March 2004 (“Reply”);

MINDFUL of the Parties’ oral submissions on the present issue made during the said hearing, which took place on 3 March 2004;

COGNISANT of Rule 65 of the Rules, relative to bail, and Article 17 of the Statute of the Special Court (“Statute”);

HEREBY ISSUE MY DECISION:

I. THE SUBMISSIONS OF THE PARTIES

A. The Motion

1. The Defence seeks the provisional release of the Accused pursuant to Rule 65 of the Rules submitting that, if released, he will fulfil the conditions to satisfy the two-pronged test envisaged in Rule 65(B), namely that he will appear for trial and will not pose danger to any victim, witness or any other person.¹

2. The Defence submitted various arguments in support of the Motion. These can be grouped into five sub-categories, the first two directly addressing the two-pronged test in Rule 65(B), namely, Appearance at Trial and No Danger to Any Victims, Witness or Other Person, and the remaining three setting out the arguments regarding the issue of the Character and Association of the Accused, the issue of Preservation of Public Order and the Guarantees by the Accused.

a. Appearance at Trial

3. Supported by different statements in annex to the Motion, the Defence submits that the Accused was long aware that, due to his position of interim leader of the Revolutionary United Front

¹ Motion, para. 4.

B

("RUF"), he was likely to be the subject of investigations by the Special Court and nevertheless he did not attempt to flee Sierra Leone. In addition, the Defence submits that such conduct testifies to the Accused wilfulness to appear at trial in order to contest the allegations made against him.²

4. The Defence also states that the argument that the Special Court lacks its own means to execute a warrant of arrest, or to re-arrest an accused, is only a general one. The focus has to be on a particular accused and if a Judge or Trial Chamber were to be persuaded that a particular individual could be granted bail, the efficacy of the authorities in re-arresting an accused becomes irrelevant.³

5. The Defence furthermore contends that the Accused has strong family ties in Freetown, in particular with a wife and one young son, and will not willingly abandon his family by fleeing the country.⁴

b. No Danger to Any Victims, Witness or Other Person

6. The Defence submits that "unless it can be demonstrated that the Accused personally possess [sic] a danger to witnesses [...] any potential ongoing danger to witnesses from other sources should not be taken into consideration." The Accused's continued detention is therefore unnecessary and disproportionate.⁵

7. In addition, the Defence submits that all Prosecution witnesses are protected by the relevant orders concerning witness protection issued by this Trial Chamber⁶ and therefore that the Accused is not in the position to know their identifying data.⁷

c. Character and Association

8. Supported by various statements in an annex to the Motion, the Defence asserts that the Accused played a strong role in the enforcement of the rule of law and in the disarmament process in Sierra Leone following the cessation of the hostilities. In particular, the Defence draws the attention to the fact that he was awarded the Sierra Leonean National Peace Award in January 2002 and to some specific activities of the Accused.⁸

d. Preservation of Public Order

9. The Defence submits that the presence of the Accused in Freetown for a period of fourteen months after the war and prior to his arrest did not cause any public disturbance within the local population.⁹

e. Guarantees

10. In support of his application, the Accused submits several guarantees. In particular, the Accused submits that, if released, he will:

² *Id.*, paras 6-13 and Annexes A, B and C.

³ *Id.*, para. 15.

⁴ *Id.*, paras 16-17.

⁵ *Id.*, para. 28.

⁶ *Prosecution v. Issa Hassan Sesay*, SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003.

⁷ Motion, para. 31.

⁸ *Id.*, paras 18-22 and Annexes B-F and H.

⁹ *Id.*, para. 33.

- a) Surrender all his travel documents;
- b) Live in Freetown or Makeni;
- c) Abide to a 10pm to 7am curfew and consent to unannounced checks;
- d) Report twice daily at the local police station or if appropriate to the UNAMSIL headquarter;
- e) Travel to the Special Court whenever requested, bearing all expenses thereof;
- f) Not contact directly or indirectly any witness or victim;
- g) Not contact any of the other accused persons before the Special Court;
- h) Not discuss his case with anyone, in particular with member of the press.¹⁰

B. The Response

11. In its Response, the Prosecution contends that the grounds contained in the Motion fail, cumulatively or individually, to satisfy the two-pronged test envisaged in Rule 65(B) and therefore submits that the bail application should be denied.¹¹

12. Addressing the issue of the burden of proof in an application for bail, the Prosecution submits that case law from the International Criminal Tribunal for the former Yugoslavia (“ICTY”) has established that “the burden is squarely on the Accused at all times to establish his entitlement to provisional release”.¹²

a. Appearance at Trial

13. Relying on the submissions from the Government of Sierra Leone, the Prosecution contends that the Government has no capacity to guarantee the Accused appearance at trial, if released. In addition, the Prosecution also argues that the gravity of the crimes is a factor that should be taken into account when evaluating the risk of flight for an accused.¹³

14. The Prosecution also contests the Defence assertions that the Accused was aware of investigations being conducted against him because there is no evidence in support thereof, and the investigation were conducted confidentially. Following the indictment and the disclosure of evidence against him, the Accused might now resolve to flee the country if released.¹⁴

15. As far as concerns the Accused’s family ties, the Prosecution contends that such ties are not sufficient to assure his appearance at trial.¹⁵

16. With reference to the Accused’s involvement in the disarmament process, the Prosecution comments that the Accused himself had benefited from the Lomé Agreement. The Prosecution also submits that in the Decision on an application for bail in the case of the co-accused Morris Kallon, the Judge of the Trial Chamber was not convinced by similar arguments.¹⁶

¹⁰ *Id.* para. 36.

¹¹ Response, paras 4 and 7.

¹² *Id.*, para. 4, quoting *Prosecutor v. Brdanin and Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000 (“*Brdanin Decision*”), para. 13.

¹³ Response, para. 8.

¹⁴ *Id.*, para. 18.

¹⁵ *Id.*, para. 19.

¹⁶ *Id.*, para. 20, quoting *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Decision on the Motion by Morris Kallon for Bail, 24 February 2004 (“*Kallon Decision*”), para. 43.

b. **Danger to Victims and Witnesses**

17. The Prosecution submits that the lack of police enforcement and the gravity of the crimes increase the risks that the Accused, if released, will pose a danger to witnesses and victims. This risk is now further heightened by the knowledge of the specific crimes under which the Accused is charged, as well as of the potential evidence disclosed against him. Moreover, the continued detention of the Accused is not disproportionate when consideration is given to the risk of flight and the potential interference with witnesses and evidence.¹⁷

c. **Discretion of the Special Court in Ordering Bail**

18. The Prosecution concludes its submissions stating additional factors which should be taken into consideration besides the two-pronged test of Rule 65(B), namely public order and safety of the Accused, the proximity to trial, the submissions of the Government of Sierra Leone, the seriousness of the alleged crimes against the Accused, the possibility of destruction of evidence and the potential conspiracy with other accused and at large ex-combatants.¹⁸

C. The Submissions of the Government of Sierra Leone¹⁹

19. In its submissions, the Government of Sierra Leone deems that the Defence has not met the burden of satisfying that the Accused, if released on bail, will indeed appear for trial and will not represent a threat to victims, witnesses and other persons. Therefore, the Government of Sierra Leone is urging the Special Court to deny the Motion.

20. The Government of Sierra Leone underlines the practical consequences for the State of Sierra Leone should the provisional release be granted to this Accused. Unless these practical consequences were to be addressed satisfactorily, bail should not be granted. The Government of Sierra Leone insists on the grave consequences for the security situation in Sierra Leone and on the impossibility for its authorities to ensure that the Accused remains under house arrest in their custody. Also, the authorities of the Government of Sierra Leone may not be in a position to prevent the Accused from fleeing or hiding. While reiterating its commitment to assist the Special Court in accordance with its obligations under the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, the Government of Sierra Leone stresses its current lack of police and military capacities in remote areas of the country and generally in the whole of the territory, as well as its lack of financial resources, to be able to respond to the requirements that could be imposed by such a release.

D. The Reply

21. Relying on previous jurisprudence of the Special Court in the case of the *Prosecutor v. Alex Tamba Brima*²⁰, the Defence primarily contests the Prosecution assertion that the Defence solely bears the burden of proof in establishing the Accused entitlement to bail. While the Defence does not

¹⁷ Response, paras 21-22, 25.

¹⁸ *Id.*, para. 27.

¹⁹ Although generally regarded as an important requirement, the submissions of the Government of Sierra Leone filed on 23 February 2004 in the context of this application were not signed. However, in the interest of justice, Rule 89(C) of the Rules, providing that "A Chamber may admit any relevant evidence" was applied in the instant case in order to cure this defect.

²⁰ *Prosecutor v. Alex Tamba Brima*, SCSL-03-06-PT, Ruling on a Motion applying for Bail or Provisional Release, 22 July 2003 ("*Brima* Ruling").

dispute that it has to demonstrate that the Accused has fulfilled the conditions for his release, indeed, the Prosecution has the duty to demonstrate that there are good reasons to continue the detention of the Accused.²¹

22. Accordingly, the Defence submits that the Prosecution has failed in its Response to demonstrate the existence of such good reasons for the continuation of the detention of the Accused.²²

a. On the Submissions of the Government of Sierra Leone

23. The Defence underlines that the submissions of the Government of Sierra Leone bear a strike out of the name of another accused. In addition, relying on a report from the United Nations Mission in Sierra Leone (“UNAMSIL”), the Defence submits that the security situation in the country remains calm and that therefore the statement of the Government of Sierra Leone is not accurate.²³

b. Appearance at Trial

24. The Defence reiterates that the Prosecution has not demonstrated that the Accused will not appear at trial.²⁴

25. In particular, the Defence again relies on five factors concerning the Accused previously spelled out in its Motion in order to reinforce its submissions that, if released, he will appear for trial, namely:

- a) Prior knowledge of the establishment of the Special Court;
- b) Possibility that the Special Court would have employed the death penalty;
- c) The Accused expression that he will not flee Sierra Leone if indicted;
- d) The Accused strong family ties in Sierra Leone; and
- e) The Accused acknowledged position of interim leader of the RUF in consideration of his peaceful intentions and participation in the peace process.²⁵

c. Danger to Victims and Witnesses

26. The Defence takes issue with the Prosecution submissions that the Accused faces a long confinement and is now aware of the specific charges and evidence against him, as well as the lack of police enforcement power as factors establishing that the Accused, if released, will pose danger to victims and witnesses. In particular, the Defence relies on jurisprudence from the ICTY in order to question the extent of the evidence materially before the Accused after disclosure and its relevance for the identification of the witnesses.²⁶

d. Additional Submissions

27. The Defence further submits the following replies to the Prosecution’s arguments:

²¹ Reply, para. 4.

²² *Id.*, para. 6.

²³ *Id.*, paras 7-10 and Annex A: HQ UNAMSIL MILINFOSUM for the Period 101600Z - 111559Z FEB 04.

²⁴ *Id.*, para. 11.

²⁵ *Id.*, para. 12.

²⁶ *Id.*, paras 19-20. See *Brdanin* Decision, *supra* note 12, para 19.

- a) *Public order and safety of the Accused*: The Accused is widely regarded as a man who played a large part in the peace process and was awarded the National Peace Prize;
- b) *Proximity to trial*: The Trial Chamber has not fixed the trial date. In addition, the proximity to trial is not a factor that should be taken into account in such application;
- c) *Seriousness of the alleged crimes*: To allow this factor to deny bail for the Accused would effectively mean that no accused will be granted bail;
- d) *Possibility of destruction of evidence*: The Prosecution has failed to prove any conduct of the Accused that will establish any attempt to destroy evidence;
- e) *Potential conspiracy with other accused and at large ex-combatants*: Similarly as above, no evidence has been provided by the Prosecution in support of this factor.²⁷

E. Oral Submissions of 3 March 2004

28. In the public hearing held on 3 March 2004, the oral submissions of both Parties were largely repetitive of their written submissions. In particular the Defence reiterated that the Prosecution has the burden of proof to rebut the fulfilment by the applicant of the test contained in Rule 65(B) and it stressed specific activities of the Accused since the end of the hostilities.²⁸ The Prosecution stated again that the Motion does not satisfy the requirements of Rule 65(B). Furthermore, the involvement of the Accused in the peace process and the disarmament might be considered as mitigating factor, should the Accused be convicted, but should have no influence on the question whether the Accused will appear for trial.

AND AFTER HAVING DELIBERATED:

II. THE APPLICABLE LAW

29. I have duly taken into consideration each of the written submissions and oral arguments of the parties, as well as those made on behalf of the Government of Sierra Leone, and I would like to state that I am very much aware of the sensitivity and the seriousness of this pending matter, both for the Government and the Accused.

30. The current applicable provisions of Rule 65 of the Rules, on application for bail, and in particular Rule 65(A) and (B), read as follows:

(A) Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber.

(B) Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the accused seeks to be released and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

31. Article 17 ("Rights of the accused") of the Statute reads in relevant part:

(3) The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

²⁷ Reply, para. 25.

²⁸ In particular, see Annexes B and H to the Motion.

(4) In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

[...]

(c) To be tried without undue delay;

[...]

A. On the Public Nature of this Decision

32. All written submissions filed by both parties and the Government of Sierra Leone in connection with the Motion were then marked as confidential and, accordingly, have not been disclosed to the public. As stated already in a previous decision,²⁹ all documents filed before the Special Court should be public, as a matter of general principle, unless a cogent reason is offered to the contrary.³⁰

33. In reviewing this matter and in rendering this Decision on the Motion, I have come to the conclusion that there is no reason why this decision should not be made public. The justified confidentiality of particular submissions or evidence will not be endangered, herein being only limited to a general reference, the public nature of this Decision will better serve the fundamental rights of the Accused, and in particular his right to a fair and public hearing, as well as the right for the public to be properly informed of the nature of such Motion and of the Decision thereto, and of all matters forming part of the trial of an accused.

34. I will dispose of the confidential submissions pertaining to the Motion in accordance with Rule 54 and Rule 81(B) of the Rules.³¹

B. The Burden of Proof

35. Although the question of the burden of proof was not dealt with in the submissions of the parties in this case as extensively as in other applications for provisional release before this Trial Chamber, I deem it necessary to add comments to further clarify some issues that have been raised by this Motion.³²

36. In a recent decision of the Appeals Chamber of the ICTY on a motion for provisional release in the case of *Prosecutor v. Limaj et al.*, rendered on October 2003, it was held that:

It is the Bench's view, contrary to the argument of the Defence that the Trial Chamber did not err in not imposing the burden on the Prosecution to demonstrate that provisional release was inappropriate. First, Rule 65(B) does not place the burden of proof on the Prosecution. Pursuant to

²⁹ *Kallon* Decision, supra note 16, paras 19-21.

³⁰ Rule 78 of the Rules, in particular, provides for the following: "All proceedings before a Trial Chamber, other than the deliberations of the Chamber, shall be held in public, unless otherwise provided."

³¹ Rule 54 of the Rule provides for the following:

"At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

Rule 81(B) of the Rules, on the records of proceedings, provides that:

"The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist."

³² For an extensive discussion of this question and the relevant jurisprudence from the ICTY, see *Kallon* Decision, supra note 16, paras 22-35.

that Rule, the Trial Chamber was required to determine whether it was “satisfied” that [the Accused], if released would appear for trial. After taking into account the information submitted to it by the parties and weighing all the relevant factors, it held that it was not satisfied. There is no basis for holding that, by not placing the burden of proof on the Prosecution, the Trial Chamber erred in its application of Rule 65(B).³³

37. Although not generally bound by jurisprudence of the other International Tribunals,³⁴ I do however concur with this position – as stated also in the *Kallon* decision – and find based upon the preceding review and analysis that it is for the Defence to show that further detention of the Accused is neither justified nor justifiable in the circumstances at hand.

38. The Prosecution submitted that the burden is squarely on the Accused at all times to establish his entitlement to provisional release. However, the Prosecution still has some obligations in connection with such an application for bail. After hearing from the State and were the Defence to satisfy the two-prong test of Rule 65(B), i.e. the certainty that the Accused will appear to stand trial and that he will not pose any danger to victims and witnesses or other person, the Prosecution would then be compelled to submit information or evidence to rebut or challenge as appropriate what has been submitted by the Defence and demonstrate that, indeed in the circumstances, the public interest requirement for pre-trial detention does outweigh the right of the Accused to be released.³⁵

39. When dealing with a request for bail, the focus must be on the particular circumstances of each individual case without considering that the eventual outcome is either the rule or the exception.³⁶ More explicitly, as stated in a decision in the case of *Prosecutor v. Darko Mrdja*, the Trial Chamber “must interpret Rule 65 of the Rules not *in abstracto* but with regard to the factual basis of the single case and with respect to the concrete situation of the individual applicant”.³⁷ As a general rule, a decision to release an accused should then be based on an assessment of whether public interest requirements, demonstrated by the Prosecution, outweigh the need to ensure respect for an accused’s right to liberty,³⁸ as formulated in the two-pronged test found in Rule 65(B).

40. Applications for bail require a close review and careful consideration of the requirements of Rule 65 given that they entail the risk of affecting the proceedings before the Special Court, as well as the risk of infringement upon the rights of the Accused. However, in so doing one should bear in mind that, in the specific nature of international tribunals, the crimes over which such tribunals have jurisdiction can be categorised as the most serious crimes under international law. Therefore, it can be said that the approach to bail that prevails in national courts of law may be different than that for

³³ *Prosecutor v. Limaj et al.*, IT-03-66-AR65, Decision on Fatmir Limaj’s Request for Provisional Release, App. Ch., 31 October 2003, para 41. The Appeal was brought against the Trial Chamber decision denying the provisional release. See *id.*, IT-03-66-PT, Decision on Provisional Release of Fatmir Limaj, 12 September 2003.

³⁴ *Prosecutor v. Issa Hassan Sesay*, SCSL-03-05-FT, *Prosecutor v. Alex Tamba Brima*, SCSL-03-06-PT, *Prosecutor v. Morris Kallon*, SCSL-03-07-PT, *Prosecutor v. Augustine Gbao*, SCSL-03-09PT, *Prosecutor v. Brima Bazzy Kamara*, SCSL-03-10-PT, *Prosecutor v. Santigie Borbor Kanu*, SCSL-03-13-PT, Decision on Prosecution Motions for Joinder, 27 January 2004, para 26. See also *Prosecutor v. Augustine Gbao*, SCSL-03-09PT, Decision on the Prosecutor Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, paras 31-32.

³⁵ *Kallon* Decision, *supra* note 16, paras 32 and 33. See also the *Brima* Ruling, *supra* note 20, p. 9-10.

³⁶ *Prosecutor v. Miodrag Jokić* and *Prosecutor v. Rahim Ademi*, IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, Trial Chamber, 20 February 2002.

³⁷ *Prosecutor v. Darko Mrdja*, Decision on Darko Mrdja’s Request for Provisional Release, 15 April 2002, para. 29.

³⁸ Accordingly, in *Ilijkov v. Bulgaria*, ECHR, Appl. 33977/96, 26 July 2001, at para. 84, the European Court of Human Rights reiterated that “continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption on innocence, outweighs the rule of respect for individual liberty”.

an international tribunal, such as the Special Court.³⁹

C. The Opinion of the Government of Sierra Leone on Granting or Denying Bail

41. One additional issue that needs to be addressed preliminarily in the present decision is that of the weight that should be afforded to the opinion of the Government of Sierra Leone on bail when it files, as in the present case, written submissions on the matter pursuant to Rule 65(B) of the Rules.

42. Again, as already stated in the *Kallon* Decision,⁴⁰ I deem that the opinion of the Government of Sierra Leone is important although not decisive of the issue, and is a matter that must be properly assessed within the parameters of Rule 65(B). However, considering that the Special Court, an independent institution, has been established by means of a bilateral agreement between the United Nations and the Government of Sierra Leone, not only would it not be appropriate but it cannot be bound by the opinion as expressed by the Government of Sierra Leone on the question of whether the Accused should be provisionally released or not. This is a matter to be determined by the Special Court and the Special Court only. Nonetheless, it is important to stress the fact that the present submissions have been given due consideration in so far as they provide information on the current internal and security situation in Sierra Leone and are, in this respect, an important factor in determining the public interest aspect.

43. As the Accused would be released in the country where he is alleged to have committed the crimes for which he has been indicted, should the application for bail be granted, such submissions of the authorities of the host state have therefore to be regarded as an evaluation of the substantial situation within the Country, with particular reference to the law enforcement capacity of the Government and its ability to effectively control the territory of Sierra Leone.

III. THE MERITS OF THE APPLICATION

44. As discussed above at length, before granting this Motion for bail I must first be satisfied, considering the whole of the circumstances of this case, which includes also hearing the State to which the Accused seeks to be released, that (a) the Accused will appear for trial and (b) if released, the Accused will not pose a danger to any victim, witness or other person.

45. Basing my findings on the submissions of the Accused, the Prosecution and the Government of Sierra Leone, the fulfilment of this two-pronged test, and consequently the right of the Accused to be released on bail, has to be ultimately based on an assessment of whether the public interest requirements related to the appearance of the Accused at trial and the safety of victims and witnesses outweigh the need to ensure the Accused's right to liberty in the particular circumstances of this case.⁴¹

³⁹ This interpretation of the provisions of Rule 65 is consistent with that of Judge Robertson, who, in a ruling relative to an application seeking modification of the conditions of detention of an Accused into a regime arguably close to that of bail, has stated that "[t]here is no presumption in favour of bail, which is understandable given the very serious nature of the crimes charged". See *Prosecutor v. Sam Hinga Norman*, SCSL-03-08-PT, Decision on Motion for Modification of Conditions of Detention, 26 November 2003, at para. 8.

⁴⁰ *Kallon* Decision, supra note 16, paras 36-39.

⁴¹ See supra para. 39.

A. Will the Accused, Issa Hassan Sesay, Appear for Trial if Granted Bail?

46. In this respect, the Accused has indeed provided numerous personal guarantees as well as submitted various pieces of evidence, mainly in the form of witness declarations, with the intent to demonstrate his general character, trustworthiness and willingness to face his trial before this Court. I note that different witnesses have stated that the Accused is a trustworthy man who actively engaged himself in numerous activities pertaining to the development of the peace process following the end of the conflict in Sierra Leone. It is observed that the Prosecution has not presented evidence in rebuttal of these assertions.

47. To further support his assertion that he intends to appear for his trial, the Accused also submitted that he had previous knowledge of the establishment of the Special Court and, because of the position he occupied as interim leader of the RUF, he knew that he would be the subject of investigations by the Prosecution. However, it has to be noted that the investigative activity against the Accused has been largely conducted confidentially and the indictment and related warrant of arrest were kept confidential until their execution in early March 2003⁴², as remarked by the Prosecution.

48. Upon my review of the evidence, I am not satisfied that the Accused was aware of the existence of any indictment against him or that he would have then surrendered to the Special Court. In addition, and more importantly, the Accused has not satisfied me that prior to his arrest he was informed and aware of the extreme seriousness of the crimes falling within the jurisdiction of the Special Court.

49. In evaluating such factors to determine whether the Accused, if released, will appear at trial I must also take into account the inability of the Special Court to directly perform any arrest on the territory of Sierra Leone and the current diminished capability of the national authorities to promptly and efficiently provide any police supervision or intervention in case of flight of the Accused, as presented by the Government of Sierra Leone in its submission in relation to this Motion. Despite the Defence contention that the internal security situation “remains calm”, it has to be carefully noted that the same excerpt of the report quoted by the Defence in its submissions continues as follows: “However the potential continues to exist for an extremist reaction to the Special Court”.⁴³ Further guidance in making such a determination could also be drawn from the Report of the Secretary General of the United Nations on the UNAMSIL mission which refers to the forthcoming trials of the Special Court as “a potential source of instability” for Sierra Leone.⁴⁴

50. Furthermore, the seriousness of the crimes brought against the Accused, which I believe he is sensibly aware of at this point in time, is in fact a factor which influences both the objective evaluation of the risk of flight for the Accused and therefore the use of the Court’s judicial discretion in determining whether bail should be granted or not.

⁴² The original indictment, now consolidated in pursuance to the joinder of the trials, and the warrant of arrest against the Accused were approved confidentially on 7 March 2003. See *Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-1, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003; and *id.*, Warrant of Arrest and Order for Transfer and Detention, 7 March 2003. Subsequently, their confidentiality has been lifted on 14 March 2003. See *id.*, Order for the Disclosure of the Indictment and the Warrant of Arrest and Order for Transfer and Detention, 14 March 2003.

⁴³ See supra note 23.

⁴⁴ Twenty-First Report of the Secretary General on the United Nations Mission in Sierra Leone, S/2004/228, 19 March 2004 (“Secretary General Report”). See in particular section B.I on the strengthening of the capacity of the Sierra Leone’s security sector. Attention is drawn also to paras 50-52 for comments on the Special Court.

51. Although the evidence indicates that the Accused participated in the peace process that followed the end of the hostilities, I do consider that this issue in these circumstances could be rather regarded as a possible mitigating factor, should he be convicted, than as evidence that he will appear for trial.

52. Finally, looking at the factor concerning the family ties of the Accused based upon the evidence brought in support of this factor, and the submissions made, my position regarding its relevance in this respect is not different from that stated in the *Kallon* Decision.⁴⁵ In the present case I also find that these allegations as submitted by the Accused do not suffice, by themselves or in combination with other factors, to meet the prescribed requirements for bail.

B. Will the Accused, Issa Hassan Sesay, Pose a Danger to Any Victim, Witness or Other Person if Granted Bail?

53. Having determined that the Accused does not satisfy me that, if released, will hence appear for trial, I do not need to go into detail to address the second part of the test prescribed in Rule 65(B), namely the possible danger to victims, witnesses or other persons following a release on bail of the Accused.

54. However, there is one particular issue raised by the Prosecution in its Response that I would like to comment upon. The Prosecution in fact submits that the possible threat to victims and witnesses, as well as to other persons, deriving from a release of the Accused might now be further heightened. The fact that the Accused knows the potential evidence against him following the progress of the disclosure process might put him in a position to identify witnesses in support of the Prosecution case, despite the applicable orders for protective measures. As rightfully quoted by the Defence, the mere ability of the Accused to exert pressure upon any witness following disclosure of evidence by the Prosecution cannot alone affect his release on bail, as stated in the *Brdanin* Decision.⁴⁶ I concur with such findings. Indeed, the issuance and enforcement of the protective measures as ordered by this Trial Chamber stands explicitly as safeguard of the relevant categories of witnesses and a certain measure of disclosure of any witness statement does not per se operate as a further burden on the detention of the Accused. Having so found, it is however, necessary to stress that the need to protect victims and witnesses is also part of the overall additional circumstances that this Chamber must consider to arrive at a proper decision.

C. Particular Circumstances

55. Contrary to the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court has its seat in Freetown, Sierra Leone, which makes the issue of bail somewhat different, not with respect to the applicable principles but when assessing the particular circumstances of an application for provisional release. Granting bail to an Accused before the Special Court entails that he will be released in the very country where he is alleged to have committed the crimes for which he has been indicted. In this respect, reference can be more properly made to the ICTR, the judicial history of which, it has to be noted, shows that it has never granted an application for provisional release. I would suggest that it could be argued that the particular situation of the Special Court and its direct presence in the territory of Sierra Leone and more specifically in Freetown, the capital of this Country, makes it an even more important, difficult, critical and sensitive situation than that of the ICTR which sits in Tanzania, a neighbouring country to Rwanda.

⁴⁵ *Kallon* Decision, supra note 16, para. 43.
⁴⁶ *Brdanin* Decision, supra note 12, para. 19.

56. In my opinion, such a specific context should not be overlooked, and, in this respect, I duly take into consideration the information provided by the Government of Sierra Leone in its written submissions, as well as the situation further described in the Secretary General Report, as to the ability, I would say more accurately the inability, of the Sierra Leonean authorities to assist the Special Court should an application for bail being granted to this Accused.

57. In the present circumstances and, in particular, in consideration of the proximity of the trials, the lack of police enforcement capability by the Government of Sierra Leone and the potential threat to stability with the associated risk of affecting the public order would lead me to conclude that the public interest requirement in this case outweigh the Accused's right to be released on bail.

**FOR ALL THE ABOVE-STATED REASONS,
I DISMISS THE MOTION,
AND HEREBY DENY THIS APPLICATION FOR BAIL**

The Accused will accordingly continue to remain in the custody of the Special Court.

Done at Freetown this 31st day of March 2004



Judge Pierre Boutet

