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(8904 - 8923)

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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Hon. Judge Benjamin Mutanga Itoe,
Designated Judge

Registrar: Robin Vincent

Date: 5 August 2004

PROSECUTOR Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-T)

FOFANA - DECISION ON APPLICATION FOR BAIL PURSUANT TO RULE 65

Office of the Prosecutor:
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Defence Counsel for Moinina Fofana:
Michiel Pestman

Defence Counsel for Allieu Kondewa
Charles Margai

I, JUDGE BENJAMIN MUTANGA ITOE, designated Judge of the Trial Chamber of the Special Court for Sierra Leone ("Special Court");

SEIZED of the Application for Bail filed on 27 January 2003 on behalf of Moinina Fofana ("Motion") pursuant to Rule 65 of the Rules of Procedure and Evidence of the Special Court ("Rules");

NOTING the Response to the Motion, filed on 9 February 2004[1] ("Response") by the Office of the Prosecution ("Prosecution"), to which the Defence filed a Reply on 16 February 2004[2] ("Reply");

NOTING the unsigned Confidential Defence Declaration filed on the 11th of March, 2004;

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

NOTING the Defence Request for an Oral Hearing which was granted by a Hearing Notice dated the 1st of March, 2004 to that effect;

NOTING the Confidential Declaration of the Chief of Investigations of the Special Court;

MINDFUL of the Parties' submissions made during the said hearing on the 5th of March, 2004;

MINDFUL of the Ruling of the 5th of March 2004, for the Defence to file an affidavit of a Defence witness;

MINDFUL of the Parties' submissions made during the hearing of the 17 of March, 2004;

MINDFUL of the provisions of Rule 65 of the Rules and Article 17 of the Statute of the Special Court ("Statute");

THIS IS MY RULING ON THIS APPLICATION:

1. The Applicant, Mr Moinina Fofana, was arrested on the 23rd of May, 2003. He made his initial appearance before His Lordship Hon. Judge Pierre Boutet, on the 1st of July, 2003, on a seven-count indictment to which he pleaded "Not Guilty". He was thereafter remanded into custody.

2. The charges that led to his arrest concerned crimes listed under Articles 2, 3 and 4 of the Statute, namely, Crimes Against Humanity, Violations of Article 3 common to the Geneva Conventions and Additional Protocol II, and Other Serious Violations of International

[1] The Prosecution Response to Defence "Application for Bail pursuant to Rule 65", 9 February 2004.
[2] Reply to the Prosecution Response to the Application for Bail pursuant to Rule 65, 16 February 2004.

Humanitarian Law.

3. The Application before me as designated Judge, seeks an order for a release on bail of the Applicant pursuant to the provisions of Rule 65 of the Rules

4. Before proceeding to the examination of the merits of the application, I would first detail and examine the submissions of the parties.

SUBMISSIONS OF THE PARTIES

A. FOR THE APPLICANT

5. The Defence seeks provisional release pursuant to Rule 65 of the Rules and submit that the Accused, if released, will appear for trial and will not pose a danger to any person.[3]

6. Relying on the Ruling for Bail in the case of *PROSECUTOR V. BRIMA*[4], the Defence submits that the Prosecution has to demonstrate that there are good reasons for the continuation of the pre-trial detention of the Accused and that the Prosecution has firstly to demonstrate that a reasonable suspicion still exists that the Accused has committed the crimes for which he is charged. It is only after such a demonstration that the burden should shift to the Defence to satisfy the Court that the Accused, if released, will fulfil the two-pronged test envisaged in Rule 65(B).[5]

7. The Defence submits that it is a rule in customary international law that pre-trial detention should remain an exception.[6]

a. Appearance at Trial

8. Regarding the first criterion that has to be fulfilled before granting bail, namely, the appearance of the Accused at trial, the Defence submits that the Accused would have voluntarily surrendered if he was aware of the issuance of a warrant of arrest against him. Moreover, the Accused is conscious of the fact that standing trial is the only way to contest the allegations against him.[7]

9. According to the Defence, there is no factor suggesting a risk of flight, as the Accused has never travelled outside Sierra Leone neither does he have travel documents nor a bank account. That the Applicant has very strong community ties within Sierra Leone, being the sole supporter of his

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[3] Motion, para. 1.
[4] *The Prosecutor v Tamba Alex Brima*, SCSL-03-06-PT, Ruling on a Motion applying for Bail or Provisional Release, 22 July 2003 ("*Brima* Ruling").
[5] *Id.*, paras 5-6.
[6] *Id.*, para. 8.
[7] *Id.*, paras 13-14.

four wives and 18 children. In addition, the Accused is Chiefdom Speaker and Deputy Paramount Chief of his Chiefdom. The Accused is also involved in several projects in his Chiefdom aimed at the reconstruction of the damage caused during the war.[8]

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

10. Regarding the second criterion of the two-pronged test, that the Accused would not cause danger to any victim, witness or other person, the Defence submits that if released, the Accused will return and stay in his original Chiefdom. The Indictment against the Accused refers to a variety of charges allegedly committed in areas outside this Chiefdom. Accordingly, the Defence states that it is unlikely that any victim or witness will be residing therein. In addition, following the decision on witness protection, the Accused and the Defence have no insight on the witnesses' identity.[9]

c. Conditions

11. In support of his application, the Accused submits that he is willing to abide by the following conditions if released,:

a) Not apply for a passport;
b) Live within the confines of Gbap village;
c) Abide to a 10 p.m. to 7 a.m. curfew and consent to unannounced checks;
d) Report twice daily at the local police station and once a day to the Paramount Chief of the Nongoba Bullom Chiefdom;
e) Not have contact with the other Accused or persons testifying;
f) Not engage in political activity or contact the press and media and refuse any interview;
g) Attend trial and respond promptly to all orders, summonses, subpoenas, warrants or requests issued by the Special Court.[10]

B. THE PROSECUTION'S RESPONSE

12. In its Response, the Prosecution states that none of the various grounds submitted by the Accused in his application are sufficient to meet the preconditions for the granting of bail.[11]

13. Relying on the jurisprudence from the International Criminal Tribunal for Yugoslavia ("ICTY"), the Prosecution submits that the Accused has the onus to satisfy his entitlement to

[8] *Id.*, paras 15-20.
[9] *Id.*, paras 22-23.
[10] *Id.* para. 24.
[11] Response, para. 2.

provisional release, and that he should fulfil the two-pronged test contained in Rule 65(B). The Prosecution also submits that bail is a matter which cannot be characterized in a general fashion as either an exception or the rule but that each case must be determined on its own merits.[12]

a. On the Risk of Flight

14. The Prosecution stresses that the Special Court lacks the necessary means for the execution of its warrant of arrest and must therefore rely on the resources of the Government of Sierra Leone for its execution. The Prosecution submits that the Police Forces do not possess sufficient resources or capabilities to re-arrest the Accused in case of flight. The Prosecution further submits that the assurances of the Accused should be weighed against the realities of a possible lengthy sentence.[13]

15. On the Defence assertion that the Accused has never travelled outside Sierra Leone, the Prosecution has filed a Confidential Declaration of the Chief of Investigations[14] from the 5th February 2004 stating that the Accused has travelled to Liberia and Guinea and has previous associations with individuals situated across such borders. The Prosecution argues that the reference made to strong family ties by the Accused is not an assurance that the Accused will appear for trial.[15]

b. Danger to Any Person

16. Relying on the Confidential Declaration of the Chief of Investigations, the Prosecution asserts that the Accused was present at meetings where members of the CDF were threatened not to provide information to the Special Court. To rebut the Defence submission of impossibility to access witnesses, the Prosecution claims that the Defence has at this stage, possession of sufficient information in order to identify possible witnesses.[16]

c. Discretion for Ordering Bail

17. The Prosecution states that notwithstanding the possible proof of the two-pronged test by the Accused, the Chamber shall nevertheless exercise its discretion and deny bail, as the two-pronged test is not intended to exhaustively list the reasons for the refusal of an application for bail. The release of an accused should be based on an assessment of whether the public interest outweighs the right to liberty and the Prosecution submits that public security will be

[12] *Id.*, para. 4.
[13] *Id.*, paras 11-13.
[14] *Id.*, attachment II.
[15] *Id.*, paras 14-16.
[16] *Id.*, paras 17-18.

endangered by the release of the Accused.[17]

C. THE REPLY BY THE APPLICANT

18. The Defence reiterated in its Reply, its submission that the standing provisions in customary international law state that detention should be treated as the exception rather than the general rule.[18]

19. Regarding the burden of proof, it again stated that firstly, the Prosecution has to demonstrate "good reasons" for the continuation of the detention of the Accused, particularly "that a reasonable suspicion still exists that the Accused committed the crime or crimes charged".[19] However, it argued that "reasonable suspicion" alone does not suffice to justify pre-trial detention after a short initial period, following the jurisprudence of the European Court of Human Rights.[20]

20. The Defence submitted in its Reply that it had not been served with the Confidential Declaration of the Chief of Investigations.[21]

D. THE SUBMISSIONS OF THE GOVERNMENT OF SIERRA LEONE

21. 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. The Government of Sierra Leone is therefore urging this Chamber to deny the Motion.

22. In support of its submissions, the Government of Sierra Leone relies mainly on the practical consequences on the State of Sierra Leone that would result from the granting of bail and that unless these practical consequences are addressed satisfactorily, bail should not be granted.

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[17] *Id.*, paras 19-20.
[18] Reply para. 4.
[19] *Id.*, para. 6.
[20] *Id.*, para. 7.
[21] *Id.*, para. 10. The document was served on the Defence on 18 February 2004 only.

E. ORAL SUBMISSIONS

a. Defence Oral Submissions

23. It should be recalled that during the oral hearing of this application on the 5th of March, 2004, the Accused's Counsel, Mr. Pestman, assisted by Mr. Bockarie, applied for oral evidence to be taken from a witness who he said was present in Court. This witness was indeed present in Court. According to the Defence, she was to testify to the good character of the applicant and to confirm that he will appear for trial if released on bail.

24. The Prosecution objected to the application without prior notice of evidence from a witness whose background they are not aware of but conceded that affidavit evidence could be filed in this regard for the matter to be heard on a later date.

25. I ruled that the witness files a sworn affidavit to this effect to be served on the Prosecution and adjourned the matter to the 17th of March, 2004, for hearing. At the hearing on the 17th of March, 2004, there was no affidavit filed in the records of the Court as ordered. Learned Counsel for the Applicant in an oral argument urged the Court to admit an unsigned Declaration by the witness whose affidavit evidence necessitated the adjournment of the matter to this date.

26. The Defence explained that this witness, the Director of a local Non Governmental Organisation, who was present in Court on the 5th of March, 2004, and prepared to give evidence, was out of the Country. She has instead filed an unsigned and unauthenticated Declaration in which she confirms that the Applicant is a very active person who is very involved in advancing the peace and reconciliation process in Sierra Leone and that if released on bail, he will not abscond nor will he pose a threat to others.

27. It should be noted that the Order for her to swear to and file an affidavit was made in Court in her presence. In her absence, the Defence resorted to urging the Court to admit in evidence, the unsigned Declaration as proof of the good character of the applicant and this, in conformity with the provisions of Rule 89(C) of the Rules.

28. It is pertinent at this stage to question why the Defence at whose instance the matter was adjourned for an affidavit to be filed, did not act immediately and diligently to give effect to the ruling of the Court and to give the Prosecution, a chance to reply appropriately to the facts deposed.

29. Moreover, the Defence stated that the submissions of the Government of Sierra Leone are not signed and should therefore not be taken into account. The Defence contested the practice whereby the Special Court always requests the Government to give an opinion on bail. It argued that this should only be done if the Court is minded to grant the application, as the last threshold to pass,

as shown in a decision in the ICTY *Celebici* case.[22] The Defence further submitted that the Government of Sierra Leone is a party to the Agreement that established the Special Court and was therefore interested in keeping the Accused detained.

30. The Defence stated that the nature of the crimes charged should not be a factor impeding the release, as all the Accused are ***charged with crimes against international humanitarian law and*** that nevertheless, the Rules provide for provisional release.

31. The Defence stressed again that there is no risk of flight and no risk to witnesses, in particular because the Accused does not know the witnesses following the Order on Protective Measures.[23]

32. Finally, the Defence argued that the Accused has only been charged with command responsibility and not with having committed these crimes directly. It was submitted that direct perpetrators posed a higher security risk than indirect ones.

b. Prosecution Oral Submissions

33. In its oral submissions the Prosecution stated that following the Confidential Declaration of the Chief of Investigations[24] accompanying the Prosecution Response, security threats exist and the Order on Protective Measures alone does not guarantee security for the witnesses.

34. Regarding the Defence submissions on the Sierra Leonean Government, the Prosecution submitted that according to Rule 65(B), it is mandatory to hear the Sierra Leonean authorities on this issue.

35. Concerning the charges in the Indictment, the Prosecution stressed that Fofana is charged with both direct and command responsibility and that it is impossible to argue that someone who ordered the commission of these crimes was not as dangerous as someone who executed the orders.

36. Regarding the Prosecution's position on the question whether provisional release is either the rule or the exception, the Prosecution submitted that the Defence has to prove the two-pronged-test, then the Defence has to appeal to the discretion of the Court for the granting of bail, and that it is only afterwards that the Prosecution has to prove that it is not in the public interest to grant the provisional release.

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[22] A proper citation of this decision was not submitted by the Defence for Fofana.

[23] *Prosecutor v Moinina Fofana*, SCSL-03-11-PT, Order on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Disclosure, 16 October 2003.

[24] It has to be noted here that the document submitted is entitled as Confidential Declaration and is not sworn, therefore it can not be regarded as an affidavit.

DELIBERATIONS

A. DOCUMENTS PRODUCED BY THE PARTIES

37. It is noted that three documents have been filed in the Registry by the Parties to support their submissions. These include:

(i) A Confidential Declaration of the Chief of Investigations of the Special Court tendered by the Prosecution for use to object to bail.

(ii) A document containing submissions by the Government of Sierra Leone for use as a basis to object to the application for bail.

(iii) A Defence Declaration purportedly offered by a witness, namely the Director of a local Non Governmental Organization to support the Defence bid to have the Applicant released on bail.

38. I have observed that the Chief of Investigations' "Confidential Declaration" is signed. However, the document containing the submissions of the Government of Sierra Leone, supposedly dated the 23rd of February, 2004, objecting to the granting of bail to the Applicant, curiously enough, is not signed. The Defence Declaration, supposedly dated 7th of March 2004, that is, two days after the first hearing, filed in lieu of an Affidavit as ordered by the Court and which seeks not only to establish the good character of the Applicant but also to demonstrate that he fulfills the conditions laid down in Rule 65(B) to be released on bail, is also not signed by its alleged maker, in whose name it was prepared and who instead was supposed to have sworn to an affidavit on the issues raised in the unsigned Declaration.

39. As I have indicated, the submissions of the Government of Sierra Leone are neither signed nor authenticated and yet, the Court is not only being called upon to take cognizance of the recommendations contained therein but also to base its decision on the said recommendations.

40. Counsel for the Applicant urges the Court not to take these submissions into account as they have not been signed.

41. After due consideration of the arguments advanced by the Defence against hearing the Government of Sierra Leone in applications for bail, I hold that they are misguided because hearing the opinion of the Government of Sierra Leone, in the light of the provisions of Rule 65(B) of the Rules is mandatory, and is a prerequisite for examining the merits of the application and this, notwithstanding the fact that it is a party to the Special Court Agreement..

42. In this regard and as a matter of statutory interpretation, I hold that the words in Rule 65(B)

should be given their ordinary meaning[25] rather than importing into them some extraneous interpretations that defeat the meaning, purpose, and necessary intendment of the Rule.

43. This principle was adopted in my decision dated the 16th of September, 2003, and was applied in interpreting Section 125 of the 1991 Constitution of Sierra Leone in the Habeas Corpus proceedings that were brought before me by one Alex Tamba Brima

44. In yet another case of *ALEX TAMBA BRIMA VS THE PRINCIPAL DEFENDER AND THE REGISTRAR OF THE SPECIAL COURT*, this Chamber again had this to say on this subject and I quote:[26]

> In this regard, we would like to recall in order to emphasize, that in interpreting statutory or regulatory instruments, due regard should primarily be paid to their ordinary and natural meaning so as to avoid [...]importing extraneous interpretations to statutory provisions or regulations which are as clear as those we have just reproduced for purposes of scrutinous examination.

45. This Trial Chamber reiterated this stand in its recent Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Material Pursuant to Rule 68 where the Chambers again had this to say, and I quote:[27]

> a statute or rule must not be interpreted so as to produce an absurdity. In effect, it is rudimentary law that a statute or rule must be interpreted in the light of its purpose. Another basic law of statutory interpretation is that a statute is to be interpreted in accordance with the legislative intent.

46. In the light of the above, if the submission by Counsel for the Applicant that the opinion of the Government of Sierra Leone should not be sought and if at all, only when the Court is minded to grant the application is upheld, it would have the effect of defeating the necessary intent of Rule 65(B).

47. In the light therefore of the above, I consider that the submission of Counsel for the Applicant in this regard is misconceived as it lacks any legal basis to support it. It is accordingly overruled.

48. It should be understood however, and the Defence knows this too well, that notwithstanding

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[25] Bank of England Vs. Vagliano Brothers [1891] AC 107.

[26] Prosecutor v Tam Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, SCSL-04-16-PT, BRIMA - DECISION ON APPLICANT'S MOTION AGAINST DENIAL BY THE ACTING PRINCIPAL DEFENDER TO ENTER A LEGAL SERVICE CONTRACT FOR THE ASSIGNMENT OF COUNSEL, 30 July 2004.

[27] *Prosecutor v. Kondewa*, Case No. SCSL-04-14-T, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Material Pursuant to Rule 68, 8 July 2004, ("*Kondewa* Decision") para. 19.

this Agreement, the Government of Sierra Leone is, in this Court, considered and treated as any other, and not a privileged party, to any proceedings before us and that our Decision will be rendered in all objectivity.

B. ADMISSIBILITY OF THE THREE DOCUMENTS PRODUCED BY THE PARTIES UNDER RULE 89 (C) OF THE RULES OF PROCEDURE AND EVIDENCE

49. The issue to be determined here is whether the Court can, under the provisions of Rule 89(C) of the Rules of Procedure and Evidence, admit the three documents tendered by the Parties in evidence.

50. Section 89(C) of the Rules provides, as follows:

> "A Chamber may admit any relevant evidence."

It stands to reason that for such evidence to be admissible, it must be relevant. On this issue and as was decided in the *CELEBICI CASE* by the Trial Chamber of the ICTY in its "Decision On the Motion of the Prosecution for the Admissibility of Evidence", 19th of January, 1998, such evidence is admissible "as long as it is relevant" and furthermore "is deemed to have probative value."

51. The contents of both the unsigned submissions of the Government of Sierra Leone and the unsigned Defence Declaration are relevant but what is to be determined is whether they are, in the circumstances, admissible under the provisions of Rule 89(C). As these circumstances would invariably vary from one situation to the other, it is necessary to consider decisions to be taken under Rule 89(C) on a case to case basis.

52. In the case of ALEKSOVSKI, the Appeals Chamber of the ICTY held that "Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence." The Appeals Chamber went further to hold that "Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose..."[28]

53. In a "Directive on Guidelines on the Standards Governing the Admission of Evidence" issued by the Trial Chamber 1 of the ICTY on the 23rd of April, 2003, in the case of THE PROSECUTOR VS BLAGOJEVIC AND THREE OTHERS[29], it was laid down as a rule that "THE BEST EVIDENCE RULE" will be applied in the determination of matters before this Trial Chamber; this means that the Trial Chamber will rely on the best evidence available in the circumstances of the case. What is the best evidence will depend on the particular circumstances, attached to each document..."

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[28] *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

[29] *Prosecutor v. Blagojevic*, Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement, 18 September 2003, para. 15.

54. In the application under consideration, the unsigned Document containing the submissions of the Government of Sierra Leone on one hand, is certainly not the best evidence available in the circumstances particularly where a representative of the said Government could alternatively have appeared to be heard during the oral hearing by the Chamber on the opinion and reservations expressed in the submissions.

55. On the other hand, the unsigned Defence Declaration is equally not the "best evidence" to attest to an issue as fundamental as establishing the good character of the Applicant for purposes of securing his bail, particularly in circumstances where the Court had ordered that a sworn affidavit be filed and an adjournment granted for this purpose in order to also give the Prosecution, the opportunity to exercise a right of reply on the facts that were to be sworn to in the affidavit.

56. Besides and more importantly, a sworn affidavit has more probative value than an ordinary Declaration particularly where it touches on and concerns threshold issues that are canvassed for purposes of fulfilling the conditions laid down by Rule 65(B) of the Rules, the reason being that the facts which are deposed to on oath and which legally engage the personal responsibility of the deponent in the event of a perjury, have a more convincing probative value which the ordinary Declaration does not have.

57. Indeed, I would say that even though Rule 89(C) enlarges the scope of admissibility of evidence which, under the rigid conventional evidentiary rules would ordinarily not be admissible, this door of a liberalised concept of admissibility which has been thrown so widely open in International Criminal Tribunals should be left open but at varying degrees and with a lot of caution and scrutinous control of all incoming facts so as to avoid admitting in evidence, facts and documents which, *prima facie*, are clearly inadmissible and which, if admitted, could lead to abuse and a violation of established judicial norms, principles and processes, thereby inevitably bringing the administration of justice and the entire judicial process into disrepute.

58. In light of the above, I am not minded to favorably invoke the provisions of Rule 89(C) to accept these two documents which are unauthenticated and therefore unreliable. I accordingly exclude them from impacting on the substantive determination of this matter.

59. On the contrary, the signed Confidential Declaration of the Chief of Investigations which is relevant and has probative value, is admitted under the provisions of Rule 89(C) of the Rules. After examining its contents and the prevalent trends and circumstances, I consider it reliable even though the Defence has complained that it was not served with it.

C. APPLICABLE LAW

60. Rule 65 of the Rules of Procedure and Evidence under which this Application is brought

provides as follows:

Rule 65(A) Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber.

Rule 65(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.

61. From these provisions, certain key elements that condition the granting of bail are apparent, namely:

i. The granting of bail is a matter is entirely within either the discretion of the Judge or that of the Trial Chamber so seized of the Application.
ii. The Judge or the Trial Chamber will grant bail only after hearing the State to which the Accused seeks to be released.
iii. The Judge or the Trial Chamber in the exercise of that discretion in favour of the Accused, has to do so only if he is satisfied that the Accused will appear for trial. This requires that the Applicant furnishes legal, moral or material guarantees to assure the Judge or the Chamber that he will not escape if released on bail.
iv. The Judge or the Trial Chamber, before ordering the release on bail, should also be satisfied that the Accused, if released, will not pose a danger to any victim or witness or other person.

62. It stands to reason therefore, that before exercising my discretion to grant this application or not, I must first be satisfied, considering all the circumstances of the case and the submissions and facts presented by the parties, that the Applicant who stands indicted for alleged command and direct responsibility for the offences alleged against him in the indictment, if released on bail will:

(a) appear for trial; and

(b) not pose a danger to any victim, witness or other persons.

63. In the determination of the application, it is prudent, I would observe, for the Judge or the Chamber to apply those criteria on a case to case basis and to ensure a balance between the public interest and the presumption of innocence of the Accused as enshrined in the provisions of Article 17(3) of the Statute. Furthermore, in determining whether bail should be granted or not, I am of the opinion that the conditions laid down in Rule 65(B) should be read conjunctively and that if the

Applicant fails to satisfy the Court that he meets all the conditions enumerated therein, the application should necessarily be refused.

64. In considering arguments advanced by the Parties, the facts contained in both the Defence Declaration and in the Submissions of the Government of Sierra Leone will not, following my ruling, be taken into consideration.

D. THE POSSIBILITY OF THE ACCUSED APPEARING FOR TRIAL

65. The vital and more important question to be answered is whether the Accused, if released, will appear for trial.

66. In the case of *NEUMEISTER VS AUSTRIA*, it was stated that it is relevant in granting bail, to consider the character of the person, his home, his occupation and his assets.

67. In the application for bail for Alex Tamba Brima, one of the reasons for refusing it was that he did not exhibit any assets to show to the satisfaction of the Court, his stakes and attachment in the society to which he was seeking to be released. In this case, the Applicant, like Alex Tamba Brima, has failed to advance any proof of ownership of property to show his attachment to the society to which he is seeking to be released. The Defence even admits that he does not own a bank account.

68. I have taken cognisance of the guarantees he has offered in Counsel's submissions to back his application but these, to my mind, do not rise up to the expectation that would convince me to exercise the discretion in his favour.

69. The Trial Chamber of the ICTY in the case of *MOMCILO KRAJISNIK*, had this to say on undertakings like these and I quote:

> As to undertakings given by the Accused himself the Trial Chamber cannot but note that it given by a person who faces a substantial sentence if convicted and therefore has a considerable incentive to abscond.[30]

70. Furthermore, in the case of the *PROSECUTOR VS BLASKIC*,[31] the Trial Chamber of the ICTY observed that guarantees offered by General Blaskic are in no way sufficient to ensure that if released, he would appear before this International Tribunal; that the gravity of the crimes allegedly committed and the sentence which might be handed down justify fears as to the appearance of the Accused.

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[30] *Prosecutor v. Krajisnik*, Notice of Motion for Provisional Release, 8 October 2001.
[31] *Prosecutor v. Blaskic*, Decision Rejecting A Request for Provisional Release, 25 April 1996.

71. Mr. Fofana, the Applicant in this case who, it should be noted, is indicted for offences for which he could face a substantial term of imprisonment if found guilty, could have a considerable incentive to abscond as the hazards of flight could seem to be a lesser evil than continued imprisonment..

a. Gravity of the Offence and Severity of Sentence

72. Even though it is not expressly provided for in Rule 65 of the Rules, it is discernable, from an examination of this Rule, that since the provision for a release on bail is tied to the condition that the Judge or Trial Chamber should be satisfied that the accused will appear for trial, it necessarily leads to concluding that a release on bail is and should also inextricably be conditioned by factors which are germane to the gravity of the offence for which the applicant is indicted, and the sentence that is likely to be meted out to him if convicted.

73. This consideration is important because it continuously lingers in the mind of the adjudicating Judge. In fact, even though neither the gravity of the offence nor the severity of the sentence can "in themselves" be used to justify a refusal to grant bail to an applicant who, at that stage, still benefits from the statutory provisions of Article 17(3) of the Statute that guarantee his innocence until he is proven guilty, they remain capital elements that are and should be taken into consideration in the process of examining applications for bail because of their affinity with the primary consideration of the likelihood of flight of the indictee.

74. Indeed, as was decided in the case of *STOGMULLER VS AUSTRIA 1 EHRR 155*, "on the risk that the indictee would fail to appear for trial, bail should be refused where it is certain that the hazards of flight would seem to be a lesser evil than continued imprisonment."

75. In my consideration of the application for bail introduced by Alex Tamba Brima, I had this to say in my decision on the issue in question:

> In considering applications for bail under Rule 65(B) the greatest apprehension that surfaces immediately and at all times is the possibility of the accused, if released, to appear or not to appear for his trial. In this regard, it is important to consider a number of factors which are not incompatible with the spirit of the elements in Rule 65(B) and which are linked to the element of a possible flight of the accused, namely, the gravity of the offenses for which he is indicted, the character, antecedents and association of the accused, and community ties which he has, and which the accused enjoys in society, including a possible interference with the course of justice like posing a danger to victims or witnesses and other persons. Another factor to be addressed and considered in granting or refusing bail in a case of this nature is the need and imperatives to preserve public order.

b. Risk of Flight

76. On the risk of flight, the Prosecution argues that the Special Court does not have the means to execute a warrant of arrest issued by it in the event of the flight of the released prisoner and that the local Sierra Leonean Police (assuming the indictee is still within the territory) does not posses sufficient resources and capabilities to re-arrest the fleeing indictee. In the *Brima*, *Sesay* and *Kallon*[32] motions for bail, this Chamber considered this factor to be very determining in exercising the discretion to grant bail or not, in view of the fragility of infrastructures relating to the maintenance of law and order in Sierra Leone.

77. In the case of the *PROSECUTOR VS BRDJANIN & TALIC*,[33] the Trial Chamber of the ICTY had this to say on this issue:

> ...the absence of any power in the Tribunal to execute its own arrest warrant upon an applicant in the former Yugoslavia in the event that he does not appear for trial, and the said tribunals need to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf, places a substantial burden upon any applicant for provisional release to satisfy the Trial Chamber the he will indeed appear for trial if released...

E. DANGER TO VICTIMS AND WITNESSES

78. The other condition to fulfil for a release on bail is that if released, the Applicant will not pose any danger to any victims, witnesses, or other persons. As I had indicated, the Confidential Declaration alleges that the Applicant was present at meetings where members of the CDF were threatened not to provide information to the Special Court.

79. Besides, even though the Defence in their submissions, argue that the Applicant does not have travelling documents which could enable him escape, the same Confidential Declaration affirms that the Applicant has made visits to Guinea and Liberia and has had previous associations with individuals in those countries. I would like to add that in situations such as this where the frontiers are so vast and permeable, the Applicant does not need a travelling document to cross at will to any neighbouring Country

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[32] *The Prosecutor v Tamba Alex Brima*, SCSL-03-06-PT, Ruling on a Motion applying for Bail or Provisional Release, 22 July 2003 ("*Brima* Ruling"); *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Decision on the Motion by Morris Kallon for Bail, 24 February 2004 ("*Kallon* Decision"); *Prosecutor v. Issa Hassan Sesay*, Decision on Application of Issa Sesay for Provisional Release, 31 March 2004 ("*Sesay* Decision").

[33] *Prosecuor v. Brdjanin*, Decision on Motion by Radoslav Brdjanin for Provisional Release, 25 July 2000, para. 18.

80. I believe the contents of the Chief of Investigations' Confidential Declaration which highlights the threat made to CDF members not to cooperate with the Special Court and do observe that these threats which implicitly include threats that underscored the possibility of reprisals against those who are seen to be cooperating in any capacity, particularly as witnesses or victims, with the Special Court, legally deprive the Applicant of any possibility to be granted bail as this would be in contravention of the provisions of the second arm of Rule 65(B) of the Rules.

81. I am indeed, in the light of the above, not convinced by the sincerity of the Applicant in providing such glowing guarantees as an unequivocal assurance that he would, if released on bail, appear for his trial.

F. PUBLIC ORDER CONCERNS

82. The Prosecution has urged this Chamber, in the exercise of the discretion to grant or refuse bail, to deny the Applicant's Motion because the release of an accused should be based on an assessment of whether the public interests outweigh the right to liberty for the Accused since public security could be endangered by the release of the Accused.

83. One of the arguments to be factored into the examination of this application is that the Applicant, like the other co-accused, is alleged to be a member of the CDF which has sympathisers on the one hand, as well as many victims of their alleged crimes, on the other. In such a situation, it is normal to envisage a probability where granting a release on bail could provoke unrest and disgruntlement that could be prejudicial to public peace and security amongst supporters and opponents alike.

84. In the case of LETELLIER VS FRANCE, 14 EHRR 83, it was held that if the nature of the alleged crime and the likely public reaction is such that a release of the Applicant may give rise to public disorder, then a temporary detention on remand may be justified.

G. BURDEN OF PROOF

a. Status of Detention and Liberty in Issues of Bail

85. The Defence submits that the Prosecution has to demonstrate that there are good reasons for the continuation of the pre-trial detention of the Accused. The Prosecution, according to the Defence, has to demonstrate that a reasonable suspicion still exists that the Accused committed the crimes for which he is charged and that it is only after such a demonstration that the burden should shift to satisfy the Court that the Accused, if released, will fulfil the conditions laid down in Rule 65(B).

86. The Defence further submits that the rule in customary international law is that pre-trial detention is the exception. The submission by the Defence raises two issues:

(i) the status of "Detention" and "Liberty" in International Criminal Justice

(ii) the burden of proof in matters relating to bail.

b. "Detention" The Rule and "Liberty" the Exception

87. The perception of detention being the Rule and Liberty the exception appears to stem from the former formulation of Rule 65(B) of the Rules of Procedure and Evidence of the ICTY which provided that bail can only be granted "in exceptional circumstances." Following an amendment of the Rule, the phrase "exceptional circumstances" was deleted thereby creating the impression that the move was more towards making liberty the rule and detention the exception.

88. What is interesting however is that the Trial Chamber of the ICTY, even after that important amendment, still rendered a majority decision on the 8th of October 2001 in the case of the *PROSECUTOR VS MOMCILO KRAJISNIK AND BILJANA PLASVIC* to the effect that granting bail is the exception and detention the rule and further adopted the position that even when the Accused fulfils the criteria for granting bail, the Court is not bound to grant it.

89. This very important and interesting case which was decided on the basis of a majority decision or two of the Honourable Learned Judges with a dissenting opinion by His Lordship, Hon. Judge Patrick Robinson. Hon. Judge Robinson, to highlight his reasoning succinctly, is of the opinion that at no time should detention, as his Colleagues decided, be the rule, and liberty the exception. In so holding, he is of the opinion that the majority decision seriously compromises the right to liberty and is, to that extent, in contravention of International Customary Law principles and Conventions, particularly and amongst others, those of Article 9(3) of the International Covenant of Civil and Political Rights, (the ICCPR).

90. In yet another development which went contrary to the *MOMCILO KRAJISNIK* decision, the Trial Chamber of the ICTY in the case of the *PROSECUTOR VS BRANDIN* on provisional release, decided that since the phrase "exceptional circumstances" was deleted from the provisions of Rule 65(B), the presumption is that release will now remain the norm.

91. In the case of ILIJKOV VS BULGARIA, CASE NO 33977196 of the 26th of July, 2001, the European Court of Human Rights held that any system of mandatory detention or remand is per se, incompatible with Article 5(3) of the European Convention on Human Rights ("ECHR") which provides as follows:

> Everyone who is arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release

pending trial. Release may be conditioned by guarantees to appear for trial.

92. As far as the contention that detention is the rule and liberty the exception is concerned, I am of the opinion that it is contrary to internationally entrenched principles of the presumption of innocence which are enshrined in Article 17(3) of the Statute of the Special Court, and embedded in principles of customary international law, and in particular, the provisions of Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR) which provides as follows:

> It shall not be a general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial.

93. In this regard, I did, in my decision in the Brima Application for Provisional Release, observe as follows and I quote:

> On the submission by the Respondent that continued detention is the rule, and release on bail the exception, it is my opinion that in applications of this nature, the onus is on the Applicant, as the eventual beneficiary of the measure solicited, to satisfy the Judge or the Chamber factually and legally, that he fulfils the conditions necessary for the exercise of this discretion in his favour as pleaded in his application. I am further and also of the opinion, that thereafter, the Prosecution equally bears the burden, to convince and satisfy the Judge or Trial Chamber legally and factually, that the Accused is not likely to fulfil the conditions required to enable him to enjoy the benefit of the exercise by the Judge or Trial Chamber, of their inherent discretion to release him on bail or not. In effect, just as the accused canvasses for and justifies his release, the Prosecution bears the traditional burden of equally demonstrating to the satisfaction of the Judge or Trial Chamber, that there are good reasons for continuing to deprive the detainee of his fundamental right to liberty.
>
> This position finds its justification in the provisions of Article 17(3) of the Statute of the Special Court which is a restatement of a well known, tested and surviving principle of Customary International Law which is that the Accused shall be presumed innocent until he is proven guilty, and that the burden of proving his guilt lies with the Prosecution.
>
> It would indeed be remarkable if the contrary were the case as it would represent a major defection from global trends that hitherto have accorded respect and an attachment to very entrenched, tested, respected and universally accepted principles of Customary International Law, particularly where they touch on and affect the liberty of the individual which is one of the most, if not the most sacred and most frequently abused of all fundamental human rights that exist and are internationally recognised.

d. The Burden of Proof on Applications for Bail

94. In light of the above legal opinion, I would like to draw a distinction between the unsettled debate over "liberty" and "detention" and the burden of proof in applications for bail.

95. Even though I contest the rather controversial trend that expressly makes detention the rule and liberty the exception, I think it is compelling to concede that in matters relating to bail, the burden of establishing that the Applicant has fulfilled the conditions laid down in Rule 65(B), lies on him as the person seeking to benefit from the exercise of the Court's discretion in favour of granting those measures in his favour. I am also however, of the opinion and do so hold in this matter, as I did in the Brima Bail Application, that the prosecution has an equally formidable burden of negating the facts advanced by the Defence and to demonstrate that the requisite conditions have neither been met nor would they be fulfilled by the Applicant.

96. This mutual shift of the burden between the Parties should however not only be perceived but must be seen as operating within the context of the customary international law principle which consecrates liberty as the rule and detention the exception.

97. I say this and hold this opinion because I consider that even if it is conceded that the standards required in International Criminal Justice for the exercise of the discretion under Rule 65(B), because of the gravity of the offences and the penalties involved, are understandably placed on a very strict threshold, the liberty of the individual which is a very sacred, longstanding consecrated right is, and should, under either Customary International Law or Municipal law, continue to be and remain the Rule, and Detention, the exception.

98. In the light of the foregoing analysis, it is my ruling that the Applicant has not fulfilled the conditions laid down in Rule 65(B) to warrant the exercise of my discretion to grant him bail because I find that there is a likelihood that if he is released, he could escape and that he could also pose a danger to any victim, witness or person in the matter pending against him.

99. The Application is therefore dismissed for want of merits.

100. Accordingly, the Accused will continue to remain in the custody of the Special Court.

Done at Freetown this 5th day of August 2004

Hon. Judge Benjamin Mutanga Itoe
Designated Judge

[Seal of the Special Court for Sierra Leone]