SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice Raja Fernando
Justice George Gelaga King

Registrar: Robin Vincent

Date: 14 December 2004

PROSECUTOR Against Issa Hassan Sesay
Morris Kallon
Augustine Gbao
(Case No.SCSL-04-15-AR65)

SESAY - DECISION ON APPEAL AGAINST REFUSAL OF BAIL

Office of the Prosecutor:
Luc Côté
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Defence Counsel for Issa Sesay:
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Defence Counsel for Morris Kallon:
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Defence Counsel for Augustine Gbao:
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THE APPEALS CHAMBER of the Special Court for Sierra Leone ("Special Court");

SEIZED of the Appeal against Refusal of Bail filed on behalf of Issa Sesay ("Accused") on 4 August 2004 ("Appeal");

NOTING the Prosecution Submissions in response to the Appeal filed on 31 August 2004;

NOTING that the Defence did not file a Reply;

NOTING the Sesay - Order under Rule 65(H) of 20 September 2004 appointing a bench of three judges to determine the Appeal and stating that no oral hearing would be held;

NOTING the Decision on Application for Leave to Appeal Against Refusal of Bail by Justice Gelaga King of 28 July 2004 ("Decision on Leave to Appeal");

NOTING the Decision on Application of Issa Sesay for Provisional Release by Judge Boutet of the Trial Chamber of 31 March 2004 ("Trial Chamber Decision on Bail");

HEREBY DECIDES:

I. BACKGROUND

1. The original indictment against the Accused was confirmed on 7 March 2003 and he was subsequently arrested on 10 March 2003. He made his initial appearances before the Special Court on 15 and 21 March 2003. The Accused made a further appearance on an additional count on 17 May 2004 after the original indictment was consolidated and amended. He is now charged with 18 counts relating to the crimes of terrorising the civilian population, collective punishments, unlawful killings, sexual violence, physical violence, use of child soldiers, abductions and forced labour, looting and burning, and attacks on UNAMSIL personnel.[1]

2. The Defence application for provisional release (bail) was filed confidentially on 4 February 2004. By the time of the delivery of the Trial Chamber Decision on Bail on 31 March 2004, the case against the Accused was entering the final stages of pre-trial proceedings, although a date was not set for the trial to commence until 11 May 2004.[2] The trial commenced on 5 July 2004 and is still ongoing.

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[1] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-2004-15-PT, Amended Consolidated Indictment, 13 May 2004.
[2] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-2004-15-PT, Order for the Commencement of Trial, 11 May 2004.

II. SUBMISSIONS OF THE PARTIES

1. Defence Appeal

3. Making reference to paragraphs 46-54 of the Trial Chamber Decision on Bail, the Defence argues that the Judge failed to conduct a balancing exercise, weighing the various public and individual interests, and failed to base his decisions on an assessment of whether public interest requirements outweighed the need to ensure respect for an accused's right to liberty. Instead, the Defence argues, no weight was attached to the individual interests of the Accused or findings adverse to the Accused were made without explanation amounting to an error of law.

4. The Defence argues further that the Judge elevated the public interest and factors outside the control of the Accused to the status of determining factors and that this approach demonstrates that an accused at the Special Court can never be granted bail. The Defence submits that facts relied upon by the Accused to demonstrate his individual circumstances provided powerful proof of his commitment to attend his trial which outweighed public considerations.

5. The Defence argues that the view of the Government of Sierra Leone should have been balanced with competing individual interests and not elevated to the status of a determining factor.

6. Under the heading "Errors of Fact and Law", the Defence submits, first, that the Judge failed to make a finding on the evidence relied upon to demonstrate the Accused's character, trustworthiness and willingness to take part in his trial which was not rebutted by Prosecution evidence and could have counterbalanced competing public interest findings.

7. Second, the Defence argues that the Judge failed to deal fairly with the evidence relied upon to show that the Accused had been aware of the Special Court prior to his arrest. The Defence highlights the following errors:

    a. No reasonable tribunal could have concluded that the absence of knowledge of a sealed indictment could be relevant to the question of whether the Accused would attend his trial;

b. The Judge's approach to the issue of whether the Accused was aware of the extreme seriousness of the crimes within the jurisdiction of the Special Court was flawed and there was powerful evidence to demonstrate that the Accused would not flee;

c. There was no evidence to support the conclusion that the Accused would not have voluntarily surrendered to the Special Court.

8. Third, the Defence argues that the Judge failed to address the significance of the role the Accused played in bringing the RUF through the disarmament process and helping to bring an end to the conflict as evidence of character going directly to the issue of whether the Accused could be trusted to abide by the authority of the Court.

9. In conclusion, the Defence emphasizes its argument that the Judge failed properly to assess the evidence relating directly to the Accused and his individual circumstances and to conduct the necessary balancing exercise.

10. The Defence submits that bail should be granted, or in the alternative, if no errors of law or fact are found, that the Judge be required to provide reasons in support of the Trial Chamber Decision on Bail.

2. Prosecution Response

11. The Prosecution argues that the Appeal should be summarily dismissed for failing to conform to the requirements of Rule 108 of the Rules of Procedure and Evidence ("Rules"), and that, in the alternative, the Judge did not err.

12. The Prosecution's first main argument is that the Judge did not err in balancing the relevant interests and that the weight attached to evidence is a matter to be determined only by the Judge. According to the Prosecution, the fact that the Judge ruled that the public considerations outweighed the Accused's individual circumstances can not in itself constitute an error of law or fact and that the Appeal does not demonstrate that an error of law was committed. Furthermore, the Prosecution argues that there is no error of law or fact in the way the Judge dealt with the submissions of the Government of Sierra Leone which he noted were important but not decisive and these submissions were not elevated to a determining factor.

13. The second main argument of the Prosecution is that the Judge did not err on the issue of the Accused's appearance for trial since evidence related to the Accused's character and trustworthiness was considered and the Judge gave sufficient reasons to justify his findings. The Prosecution argues further that the Judge rightly considered relevant the question of the Accused's knowledge of the charges against him in the context of the risk of flight. Finally, the Prosecution submits that the Judge did not fail to address the role of the Accused in the peace process and it was the Judge's discretion to determine whether the evidence was relevant.

14. The Prosecution submits that the basis for granting bail is even further restricted now that the trial of the Accused has begun since there is a stronger incentive to flee, and refers to the jurisprudence of other international criminal tribunals which distinguishes applications for provisional release in the pre-trial phase from the trial phase.

15. Finally, the Prosecution argues that the risk of flight is particularly high due to the possible non-recognition by the Accused of the Court's legality in the light of his threat not to attend Special Court proceedings until a case brought before the Supreme Court of Sierra Leone challenging the legality of the Court has been decided.

III. APPLICABLE LAW

16. Rule 65 (Bail) provides:

> (A) Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber.
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> (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.
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> (C) An accused may only make one application for bail to the Judge or Trial Chamber unless there has been a material change in circumstances.
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> (D) The Judge or Trial Chamber may impose such conditions upon the granting of bail to the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial and the protection of others.

(E) Any decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a Single Judge of the Appeals Chamber, upon good cause being shown. Applications for leave to appeal shall be filed within seven days of the impugned decision.

(F) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been granted bail or is for any other reason at large. The provisions of Section 2 of Part V shall apply.

(G) The Prosecutor may appeal a decision to grant bail. In the event of such an appeal, the accused shall remain in custody until the appeal is heard and determined.

(H) Appeals from bail decisions shall be heard by a bench of at least three Appeals Chamber Judges.

17. Article 17(3) of the Statute on Rights of the Accused states:

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

18. Rule 108(C) of the Rules provides: "In appeals pursuant to Rule [...] 65 [...] the notice and grounds of appeal shall be filed within 7 days of the receipt of the decision to grant leave".

19. Rule 117 provides for an "Expedited Procedure" for appeals under Rule 65. Rule 117(A) states: "any appeal under Rule [...] 65 [...] shall be heard expeditiously and may be determined entirely on the basis of written submissions". Rule 117(B) provides that "All time limits and other procedural requirements not otherwise provided for in these Rules shall be fixed by a practice direction issued by the Presiding Judge". In the context of an ordinary appeal against conviction and/or sentence, Rules 111 to 114 provide the time limits for full submissions, response and reply to be followed by the fixing of a date for a hearing if it is decided to hold one. Since Rule 117(C) states that Rules 109 to 114 do not apply to appeals falling within the expedited procedure, the provisions and time limits set out in those Rules do not apply to appeals against bail decisions.

20. At the time of the current Appeal there was no practice direction pursuant to Rule 117(B) in existence. The Practice Direction for Certain Appeals Before the Special Court ("Practice Direction for Certain Appeals") came into effect on 30 September 2004 and is therefore not applicable to this Appeal. Rule 108(C) is nevertheless explicit in terms of setting out a time limit of 7 days for the filing of "notice and grounds of appeal," a document which is clearly designed to put the other party and the judges on notice of the existence of an appeal and the main grounds to be relied upon.

21. Prior to the adoption of the Practice Direction on Certain Appeals there was a lack of clarity on the procedure applicable to Rule 65 bail appeals. Rule 108(C) is clear in terms of setting out a time limit of 7 days, however, there seems to be confusion over what precisely is meant by "notice and grounds of appeal" in this context. The Rules suggest that a two stage process for appeals under Rule 65 is envisaged, by analogy with ordinary appeals against judgment. Thus, the first stage, after leave to appeal has been granted, is for the Defence to file a notice of appeal with grounds within 7 days under Rule 108. The second stage is for full submissions on the merits of the appeal, response and reply to be filed. This appears to be the understanding of the Prosecution which argues: "filing an Appellant's brief containing its submissions on the merits of an appeal was premature. A notice of appeal should have been filed, allowing the Chamber the opportunity to order the time table for submitting the parties' briefs, in accordance with Rule 117 of the Rules".[3]

22. By comparison, the International Criminal Tribunal for the Former Yugoslavia's ("ICTY") Rules of Procedure and Evidence similarly contain no express provision on the procedure for interlocutory appeals and contain no equivalent provision to Rule 108(C) in the comparable rule (Rule 108 of the ICTY Rules) dealing with notices of appeal. The provisions to be applied are set out in a Practice Direction on Procedure for the Filing of Written Submissions in Appeal proceedings before the International Tribunal.[4]

23. Notably, according to the ICTY provisions there is only one round of "submissions" and no distinction is drawn between a notice of appeal containing grounds and the actual submissions on the merits of the appeal.

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[3] Prosecution Submissions, para. 12.
[4] IT/155/Rev.1, 7 March 2002.

24. The key issue is the interpretation of Rule 108(C) of the Special Court Rules in the absence of any additional guidance in the form of a Practice Direction. The Appeal was filed within the time limit under Rule 108(C) and therefore 'notice of appeal' was provided in due time even though the form of this 'notice' lacked clarity. In particular, confusion is caused by the fact that the Sesay Appeal does not separate grounds of appeal from submissions and in fact has the heading "submissions" only. The Defence might have been expected to set out clearly their grounds of appeal under Rule 108(C) even if their submissions were included in the same document or combined with the grounds of appeal as an elaboration of them. It is not for the Appeals Chamber to pick out the grounds of appeal from the detailed submissions. Thus, the document presented by Sesay as an Appeal would appear to be deficient even though the Rules applicable at the time of its filing may be said to have provided inadequate guidance.

25. Nonetheless, the Chamber finds that to reject the Appeal on the basis of this technicality might be unfair to the Defence especially since it was unclear what was expected under Rule 108(C) in the absence of a Practice Direction. Moreover, even though the submissions seem somewhat confused, full arguments have been presented, and despite its objection, the Prosecution has responded to these arguments in full. The Chamber will therefore proceed to a determination of the merits of the Appeal.

V. MERITS OF THE APPEAL

1. Failure to balance public and individual interests

26. It should be observed from the outset that the Appeals Chamber will not interfere with the valid exercise of discretion by a Judge of the Trial Chamber unless it is clear that the Judge erred.

27. The Defence argues that the entire section of the Trial Chamber Decision on Bail addressing the question whether the Accused will appear for trial and not pose a danger to any witness if granted bail demonstrates an error by the Judge in the manner in which individual and public interests were balanced. The Judge based the exercise of his discretion 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".[5] The Defence agrees that this is the correct approach but that no weight was attached to the individual interests of the Accused or that findings were made without explanation.

28. A close reading of paragraphs 46-52 of the Decision reveals that 5 of the 7 paragraphs relate to individual factors. While these factors are dealt with succinctly, the Judge clearly undertook a balancing exercise before reaching his conclusion that the public interest requirement *in this case* outweighed the right to bail.[6] The fact that the Judge accorded more weight to the factors beyond the direct control of the Accused and less to individual factors which did not satisfy him of the Accused's commitment to attend his trial if granted bail does not in itself constitute an error. In a decision on provisional release in the ICTY case of *Brđanin*,[7] the Trial Chamber pointed out that the need to rely upon local authorities to effect arrests placed a substantial burden upon any applicant to satisfy the Chamber that he would appear for trial, and that this did not constitute a re-introduction of the requirement in a previous version of the ICTY Rules that an applicant had to establish exceptional circumstances to justify the grant of provisional release. Rather, it was "simply an acceptance of the reality of the situation in which both the Tribunal and applicants for provisional release find themselves". In the circumstances of the present case, it has not been established that the Judge erred simply in according weight to this reality.

29. Furthermore, there is nothing to suggest that the view of the Government of Sierra Leone was treated as a determining factor. Indeed, the Judge stated that this view was "important although not decisive of the issue" and to be given "due consideration" as an "important factor in determining the public interest aspect".[8] It should be noted in this context that Rule 65(B) requires the Judge to hear the State to which the accused seeks to be released before making a decision on bail.

2. Personal guarantees provided by the Accused

30. The Judge did not elaborate upon or make a specific finding in relation to the personal guarantees provided by the Accused as to his character, trustworthiness and willingness to take part in his trial, which, notably, were not rebutted by the Prosecution. In this context it

[5] Ibid, para. 45.
[6] Trial Chamber Decision on Bail, para. 57, emphasis added.
[7] *Prosecutor v Brđanin et al.*, Case No. IT-99-36, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000.
[8] Ibid, para. 42.

is to be recalled that all written submissions filed by both parties and the Government of Sierra Leone in connection with the original application dated 4 February 2004 were filed confidentially and the Judge noted in the Trial Chamber Decision on Bail that the confidentiality of particular submissions or evidence would not be endangered and would be limited to a general reference.[9] Thus, because the confidentiality of the personal guarantees needed to be ensured, the impression may have been created that these guarantees were given less attention in the reasoning than the public interest factors. Whether or not the Judge's failure to elaborate on the personal guarantees was in fact influenced by the need to protect confidentiality, the Appeals Chamber is satisfied that these guarantees were taken into account in the context in which they were presented and weighed against the public interest findings. Moreover, as pointed out by the Prosecution, the Judge was not required to "articulate every step of its reasoning for each particular finding it makes",[10] in order to fulfil his duty to provide a reasoned opinion. While it is desirable for the reasoning to be fully articulate and transparent, and the Judge could have indicated where his reasoning was influenced by the need to protect confidentiality, the Appeals Chamber is unable to discern any error.

3. The Accused's knowledge of the Special Court prior to his arrest

31. The Appeals Chamber is unable to discern any error in the manner in which the Judge considered the Accused's personal knowledge of the existence of the Special Court and the indictment against him, and the likelihood that he would surrender. Ordinarily, where a sealed indictment has been used, the fact that an Accused did not surrender voluntarily is irrelevant to a decision on bail.[11] In the current case, however, specific evidence was adduced to demonstrate that the Accused would have surrendered voluntarily had he known about the indictment. This evidence failed to satisfy the Judge that the Accused would have surrendered and the Appeals Chamber is unable to find any error in the reasoning. The reference to the fact that the indictment was sealed was not inappropriate since it was taken as evidence that the Accused could not have known the precise charges against him or their gravity.

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[9] Trial Chamber Decision on Bail, para. 33.
[10] Prosecution Submissions, para. 27, citing *Prosecutor v Musema*, Case No. ICTR-96-13-A, Judgment, 16 November 2001, para. 18.
[11] See Decision on Motion by Radoslav Brđanin for Provisional Release, para. 17.

4. The role of the Accused in the peace process

32. The Judge referred to the evidence indicating that the Accused participated in the peace process that followed the end of hostilities but concluded that it was not relevant in the circumstances of the bail application. The Appeals Chamber finds that this was a conclusion the Judge was entitled to reach as an exercise of his discretion and finds no error in it.

5. Can bail be granted after the start of trial?

33. The Prosecution argues that bail could not be granted in any event now that the trial of the Accused is ongoing since there is a stronger incentive to flee. Reference is made to the case of *Prosecutor v Ndayambaje* before the International Criminal Tribunal for Rwanda ("ICTR") in which the Appeals Chamber considered "that the Trial Chamber rightly took into account the fact that there is an ongoing trial, which...needs to be completed in an orderly manner, and found that in these circumstances, provisional release would not be justified."[12] The Prosecution also distinguishes the ICTY case of *Momir Talic* where provisional release was granted during trial on humanitarian grounds.[13]

34. The Appeals Chamber is unconvinced by these submissions and does not consider it to be established as a general principle (with exceptions) that bail cannot be granted after the commencement of trial. In its Decision in the *Aleksovski* case, the ICTY Trial Chamber declared the defence motion for provisional release to be admissible (although it was denied on the merits) despite the Prosecution's objections on the basis that the trial had started. The Trial Chamber held:

> the justification for provisional release must be seen as emanating from or as the corollary of the principle of the presumption of innocence. Thus provisional release must accord with the presumption of innocence, and this principle applies until such time as the final decision has been taken. In any case in respect of questions of individual freedom, the Trial Chamber considers that an accused must be able to turn to it at any time.[14]

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[12] *Prosecutor v Ndayambaje*, Case No. ICTR-96-8-A, Decision on Motion to Appeal against the Provisional Release Decision of Trial Chamber II of 21 October 2002, 10 January 2003.
[13] *Prosecutor v Brdanin and Talic*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002.
[14] *Prosecutor v Zlatko Aleksovski*, Case No. IT-95-14/1-T, Decision Denying a Request for Provisional Release, 23 January 1998, p. 3.

Furthermore, in ICTY jurisprudence provisional release has been granted pending a judgment on appeal against conviction where it could be argued that the incentive to flee is at its strongest.[15]

6. Can bail ever be granted before the Special Court?

35. The Defence argues that by elevating the public interest and factors outside the control of the Accused to the status of determining factors, the Judge demonstrated that an accused at the Special Court could never be granted bail. In the view of this Chamber, the Judge was right to reflect on the "particular circumstances" of the Special Court, which in contrast to the ICTY and ICTR has its seat in the country where the crimes are alleged to have occurred, but this does not appear to have been treated as anything more than another factor to be weighed in the balance. Pointing to the fact that in contrast to the ICTY, no accused person before the ICTR has been granted provisional release, the Judge stated: "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."[16]

36. In the particular situation of Sierra Leone, public interest factors such as the ability of the authorities to uphold conditions may take on a greater relevance. While in principle a judge could be satisfied that a particular accused would appear for trial notwithstanding any lack of police enforcement capability, at the same time conditions and guarantees need to be meaningful. This Chamber is satisfied that the Judge took into account the "important, difficult, critical and sensitive" situation with which he was faced, as well as the Accused's right to be presumed innocent and to be released on bail.

37. The fact that this situation was taken into account does not detract from the fundamental principle that each individual case must be decided on its merits, and there may well be

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[15] *Prosecutor v Miroslav Kvocka et al.*, Case No. IT-98-30/1-A, Decision on Request for Provisional Release of Miroslav Kvocka, 17 December 2003. In that case the fact that the appellant had already served around 80% of the sentence imposed by the Trial Chamber amounted to a special circumstance warranting his release. Notably in the case of *Prosecutor v Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordic's Request for Provisional Release, 19 April 2003, the Appeals Chamber denied Kordic's request for five days provisional release on compassionate grounds, pointing to the fact that he had been sentenced to 25 years imprisonment which, notwithstanding the guarantees offered by the Republic of Croatia, was found to create a strong incentive to flee. The Appeals Chamber did however remark that in case of exceptional circumstances such as a substantial deterioration of the health conditions of Kordic's mother, the Defence could submit a detailed request for a temporarily controlled visit to his mother.

[16] Trial Chamber Decision on Bail, para. 55.

circumstances where an accused person before the Special Court can be granted bail. In each case all relevant factors will need to be weighed. As the security situation and authoritative structures in Sierra Leone evolve and improve, the public interest factors may weigh less heavily in the balance.

7. The Accused's threat not to recognise the legitimacy of the Special Court

38. The Prosecution argues that the risk of flight is "particularly high" due to the possible non-recognition by the Accused of the Court's legality as indicated in a letter from the Accused dated 11 June 2004. This letter was not before the Judge as it was sent over two months after the Trial Chamber Decision on Bail, and there is no indication that this was a factor that was taken into account. However, the question of attending the proceedings after an initial appearance has already occurred should not necessarily be equated with that of whether the accused will appear for trial as referred to in Rule 65(B). This Rule must be read in conjunction with Rule 60, which states that:

> (A) An accused may not be tried in his absence, unless:
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> i. the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or
> ii. the accused, having made his initial appearance, is at large and refuses to appear in court.
>
> (B) In either case the accused may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present.

39. In either case, voluntary non-appearance by an Accused after he has made his initial appearance on the charges against him is no obstacle to the trial proceeding.[17] The factor of whether an accused will appear for trial as referred to in Rule 65(B) for the purposes of bail is therefore of greater significance when the application for bail is made prior to the initial appearance of the Accused, as the non-appearance would prevent the trial from proceeding. In this case, the application for bail was made well after the initial appearance. Although a further appearance took place after both the application and Trial Chamber Decision on Bail, neither party submits that the additional count constitutes a material change in

[17] This has been recently confirmed by the Trial Chamber in *Prosecutor v Sesay, Kallon and Gbao*, SCSL-2004-15-T, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 13 July 2004; and *Prosecutor v Norman, Fofana and Kondewa*, SCSL-2004-14-T, Ruling on the Issue of Non-Appearance of the First Accused, Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings, 1 October 2004.

circumstances. In any event, the Accused's threat not to attend hearings has not been acted upon. For these reasons this Chamber finds no merit in the Prosecution argument in this particular regard.

VI. DISPOSITION

40. This Appeal is dismissed for the foregoing reasons, and the request that the Judge be required to provide reasons in support of the Trial Chamber Decision on Bail is rejected.

Done at Freetown this fourteenth day of December 2004

Justice Emmanuel Ayoola
Presiding

Justice Raja Fernando

Justice George Gelaga King

[Seal of the Special Court for Sierra Leone]