THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL-04-15-T
TRIAL CHAMBER I

THE PROSECUTOR
OF THE SPECIAL COURT
v.
SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

THURSDAY, 5 AUGUST 2004
9.05 A.M.
DECISION ON BAIL APPLICATION FOR MOININA FOFANA

Before the Presiding Judge:
Benjamin Mutanga Itoe

For Chambers:
Mr. Clemens Daburon

For the Registry:
Mr. Jeff Walker

For the Prosecution:

Mr. Peter Harrison

For the Principal Defender:

Ms. Haddijatou Kah-Jallow

For the accused Moinina Fofana :

Mr. Arrow Bockarie

Court Reporter:
Ms. Roni Kerekes

Thursday, 5 August 2004

[The accused Fofana entered court]

[Open session]

[Upon commencing at 9.05 a.m.]

MR. WALKER:

This is case number SCSL-2004-14-T, the Prosecutor against Moinina Fofana. This is listed for the rendering of a decision on the bail application for bail by Moinina Fofana.

PRESIDING JUDGE:

Appearances, please.

MR. BOCKARIE:

Your Honour, Arrow Bockarie for --

PRESIDING JUDGE:

For the applicant.

MR. BOCKARIE:

Yes, Your Honour, for the applicant, yes.

MR. HARRISON:

My name is Harrison, H-a-r-r-i-s-o-n, initials P.H., appearing on behalf of the Prosecution.

PRESIDING JUDGE:

Prosecution, thank you.

Learned counsel, this is my ruling on this application. You will try and follow it very attentively because I will be a bit fast, but the decision will be circulated to you today. So even if you miss out on certain details, you will have it today.

[Ruling]

This is my ruling. 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 the 27th of January 2003 on behalf of Mr. Moinina Fofana pursuant to Rule 65 of the Rules of Procedure and Evidence of the Special Court;

Noting the response to the motion filed on the 9th of February 2004 by the Office of the Prosecutor to which the Defence filed a reply on the 16th of February 2004;

Noting the unsigned confidential Defence Declaration filed on the 11th of March 2004;

Noting the unsigned submission filed confidentially by the government of Sierra Leone on the 23rd of February 2004;

Noting the Defence request for an oral hearing which was granted by 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 17th of March, 2004;

Mindful of the provisions of Rule of 65 of the Rules under Article 17 of the Statue of the Special Court;

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 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 lead 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 humanitarian law.

3. The application before me as the 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 this application, I would first detail and examine the submissions of the parties.

For the applicant.

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

6. Relying on the ruling for bail in the case of the Prosecutor vs. Brima, the Defence submits that the Prosecution has to demonstrate there are good reasons for 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)*.

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

Appearance at the 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.

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 with Sierra Leone, being a sole supporter of his four wives and 18 children. In addition, the accused is the 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.

No danger to any victim, witness or other person.

10. Regarding the second criteria of the two-pronged test, that the accused would not cause any 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.

Conditions.

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

A) not to apply for a passport;

B) live within the confines of the Gbap village;

C) abide to a 10.00 p.m. to 7.00 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 to have contact with the other accused or persons testifying;

F) not engage in any political activity or contact the press and media and refuse any interview;

G) attend the trial and respond promptly to all orders summonses, subpoenas, warrants and requests issued by the Special Court.

12. The Prosecution's response is that none of the various grounds submitted by the accused in his application are sufficient to meet the preconditions for granting bail.

13. Relying on the jurisprudence from the International Criminal Tribunal for Yugoslavia, the Prosecution submits that the accused has the onus to satisfy his entitlement to provisional release, and that he should fulfil the two-pronged tests contained in Rule 65(B). The Prosecution also submits that bail is a matter which cannot be characterised in a general fashion as either an exception or the rule but that each case must be determined on its own merits.

On the risk of flight.

14. The Prosecution stresses that the Special Court lacks the necessary means for the execution of its own 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.

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 from the 5th of February 2004 stating that the accused has travelled to Liberia and Guinea and has previous associations with individuals situated across those 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.

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.

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-prong 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 endangered by the release of the accused.

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 an exception rather than the general rule.

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. 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. The Defence submitted in its reply that it had not been served with the Confidential Declaration of the Chief of Investigations.

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 the accused, that if the accused is released on bail, he 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 of the state of Sierra Leone that result from the granting of bail and that unless these practical consequences were addressed satisfactorily, bail should not be granted.

23. On the oral submissions by the parties, it should be recalled that during the hearing of this application on the 5th of March 2004, the accused 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 held 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 the 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 involved in advancing the peace and reconciliation process in Sierra Leone and 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 and to 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 of the ICTY in the Celebici case. 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 accused persons 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 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.

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 the direct perpetrators posed a higher security risk than indirect ones.

33. In its reply to the oral submissions, the Prosecution stated that following the Confidential Declaration of the Chief of Investigations accompanying the Prosecution's response, security threats exist and the order on protective measures alone does not guarantee security for the witnesses.

34. Regarding the Defence submission 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 rules 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 granting 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 bail.

On the deliberation.

Documents produced by the parties.

It is noted that three documents have been filed in the Registry by the parties to support their submissions. These include: a Confidential Declaration of the Chief of Investigations of the Special Court tendered by the Prosecution for use to object to bail; a document containing submissions by the government of Sierra Leone for use as a basis to object to the application for bail; a Defence Declaration purportedly offered by a witness, namely the director of a local non-governmental organisation to support the Defence bid to have the applicants released on bail.

37. 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 the 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 fulfils 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.

38. 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.

39. Counsel for the applicant urges the Court not to take these recommendations into account as they have not been signed.

40. 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.

41. 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 rather than importing into them some extraneous interpretations that defeat the meaning, the purpose and necessary intendment of the Rule.

42. This principal was adopted in my decision dated the 16th of September 2003, and was applied in interpreting Sections 125 of the 1991 Constitution of Sierra Leone in the *habeas corpus* proceedings that were brought before me by one Alex Tamba Brima.

43. In yet another case of Alex Tamba Brima versus the Principal Defender and the Registrar of the Special Court, this Chamber again had this to say on this subject, and I quote: "In this regard, we would like to recall in order to emphasise, 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."

44. This Trial Chamber reiterated this stand in its recent decision on a motion to compel the production of exculpatory evidence, witness summaries and materials pursuant to Rule 68 where the Chamber again had this to say, and I quote: "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 should be interpreted in accordance with the legislative intent."

45. In the light of the above, if the submission of 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). In the light therefore of the above, I consider 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.

46. It should be understood, however, and the Defence knows this too well, that notwithstanding this agreement, the government of Sierra Leone, in this Court, is considered and treated as any other, and not a privileged party, to the proceedings before us and that our decisions will be rendered in all objectivity and in conformity with the principles of judicial independence which the judges are endowed with.

Admissibility of the three documents produced by the parties under Rule 89(C) of the Rules of Procedure and Evidence.

47. 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.

48. 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 for the Prosecution for the admissibility of evidence," such evidence is admissible "as long as it

is relevant and furthermore is deemed to have probative value."

49. 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 Rules 89*(C)* on a case-to-case basis.

50. In the Aleksovski case, 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..."

51. In a "Directive on Guidelines on the Standards Governing the Admission of Evidence" issued by Trial Chamber I of the International Criminal Tribunal for Yugoslavia on the 23rd of April 2003, in the case of the Prosecutor vs. Blagojevic and three others, 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 particular circumstances, attached to each document..."

52. 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 on the opinion and reservations expressed in the submissions. This he did not do.

53. 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 that purpose in order to also give the Prosecution the opportunity to exercise the right of reply on the facts that were to be sworn to in the affidavit.

54. 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.

55. 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 the international criminal tribunals should be left open but at varying degrees 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 principals and processes, thereby inevitably bringing the administration of justice and the entire judicial process into disrepute.

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

57. On the contrary, the signed Declaration of the Chief of Investigations which is relevant and has probative value, is admitted under 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.

On the applicable law.

58. Rule 65 of the Rules of Procedure and Evidence under which this application is brought provides as follows: "Once detained, an accused shall not be granted bail except by an order of a Judge or a Trial Chamber; 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 after 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."

59. From these provisions, certain key elements that condition the granting of bail are apparent, namely: The granting of bail is a matter entirely within either the discretion of the Judge or that of the Trial Chamber so seized of the application; the Judge or the Trial Chamber will grant bail only after hearing the State to which the accused seeks to be released; 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 and material guarantees to assure the Judge or the Chamber that he will not escape if released on bail; 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.

60. It stands to reason therefore, that before exercising my discretion to grant this application or not, I must first be satisfied, considering 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 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.

61. 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 of this Court. Furthermore, in determining whether the bail should be granted or not, I am of the opinion that the conditions laid down in Rule 65 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.

62. In considering arguments by the parties, the facts contained in both the Defence Declaration and the submissions of the government of Sierra Leone will not, following my ruling, be taken into consideration.

The possibility of the accused appearing for trial.

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

64. 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.

65. 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 society to which he is seeking to be released. The Defence even admits that he does not own a bank account.

66. I have taken cognizance 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.

67. 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 is given by a person who faces a substantial sentence if convicted and therefore has a considerable incentive to abscond."

68. Furthermore, in the case of the Prosecutor vs. Blaskic, 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."

69. 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.

The gravity of the offence.

70. Even though it is not expressly provided for under Rule 65 of the Rules, it is discernable, from an examination of this Rule, that since the provision for release on bail is tied to the condition that the Judge or the Chamber should be satisfied that the accused will be 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.

71. 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 guarantees 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.

72. Indeed, as was decided in the case of Stogmuller vs. Austria on the risk of flight, the European Court of Human Rights had this to say: "On the risk of flight 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."

73. In my consideration of the application for bail introduced by Alex Tamba Brima, I had this to say in my decision on this issue in question, and I quote: "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 offences for which he is indicted, the character, antecedents and association of the accused, and community ties which he has, and which he enjoys in society, including a possible interference with the course of justice like posing a danger to victims, 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.

74. 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 possess sufficient resources and capabilities to re-arrest the fleeing indictee. In the Brima, Sesay and Kallon motions for bail, this Chamber considered this factor to be very determining in exercising the discretion to grant bail or not, in the view of the fragility of infrastructures relating to the maintenance of law and order in Sierra Leone.

75. In the case of the Prosecutor vs.Brdjanin and Talic, 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 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 that he will indeed appear for trial if released..."

On danger to victims and witnesses.

76. 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.

77. 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.

78. I believe the contents of the Chief of Investigations confidential report 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 provisions of the second arm of Rule 65(B) of the Rules.

79. 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.

Public order concerns.

80. The Prosecution has urged this Chamber, in the exercise of the discretion to grant or to 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 the public security could be endangered by the release of an accused.

81. One of the arguments to be factored into the examination of this application is that the applicant, like 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 hand. 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.

82. In the case of Letellier vs. France, the European Court held that if the nature of the crime alleged and the likely public reaction is such that a release of the applicant may give rise to public disorder, then the Court held a temporary detention on remand may be justified.

The burden of proof.

The status of Defence and liberty in issues of bail.

83. 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 by Rule 65(B).

84. The Defence further submits that the rule in customary international law is that pre-trial detention is the exception. This 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.

On detention which is characterised as a rule and liberty the exception.

85. 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 this 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.

86. What is interesting, however, is that the Trial Chamber of 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 Plavsic 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.

87. This very important and interesting case which was decided on the basis of a majority decision of two of the Honourable Learned Judges with a dissenting opinion by His Lordship, Honourable Judge Patrick Robinson. Honourable 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.

88. 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. Brdjanin on provisional release, decided that the since the phrase "exceptional circumstances" was deleted from the provisions of Rule 65(B), the presumption is that release will now remain the norm.

89. In the case of Ilijkov vs. Bulgaria, 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 which provides: "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 authorised 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."

90. 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 the principles of customary international law and in particular, the provisions of Article 9(3) of the International Covenant for Civil Rights, which have I've just referred to and 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."

91. In this regard, I did, in my decision in the Brima application for 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 the 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 the Trial Chamber, of their inherent discretion to release him on bail or not. In effect, 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 the Trial Chamber, that there are good reasons for continuing to deprive the detainee of his fundamental right to liberty.

"This position finds justification in the provision 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, I continue to say, be remarkable if the contrary were the case as this 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 exists and that are internationally recognised."

The burden of proof for applications of bail.

92. In the 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 the applications for bail.

93. 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.

94. 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.

95. I say this and I 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.

96. 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.

97. The application is therefore dismissed for wont of merits.

98. Accordingly, the accused will continue to remain in the custody of the Special Court.

Done at Freetown, this 5th day of August 2004, and signed Honourable Judge Benjamin Mutanga Itoe, Designated Judge.

Well, thank you. This was the business of the Court and I thank the parties for being present. We have -- when are we meeting? I think it is on the 8th of September. Yes, okay.

MR. BOCKARIE:

The 8th of September.

PRESIDING JUDGE:

Yes. So we'll see you on the 8th of September. The Court will rise.

[Whereupon the hearing adjourned at 10.04 a.m., to be reconvened on the 8th day of September 2004]

[Pages 1 to 19 by Roni Kerekes]

C E R T I F I C A T E

We, Roni Kerekes, Official Court Reporters for the Special Court for Sierra Leone, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand *(machine writer)* and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of my ability and understanding.

I further certify that I am not of counsel nor related to any of the parties to this cause and that I am in nowise interested in the result of said cause.

_____ Roni Kerekes