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SPECIAL COURT FOR SIERRA LEONE
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IN THE TRIAL CHAMBER

Before: Judge Pierre Boutet,
Designated Judge

Registrar: Robin Vincent

Date: 23 February 2004

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

DECISION ON THE MOTION BY MORRIS KALLON FOR BAIL

Office of the Prosecutor:

Luc Côté
Robert Petit
Boi-Tia Stevens

Defence Counsel for Morris Kallon:

James Oury
Stephen Powies
Melron Nicol-Wilson

The Government of Sierra Leone
Attorney-General of the Government of Sierra Leone

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

SEIZED of the Confidential Motion of Morris Kallon for Bail and Request for Hearing, filed on 29 October 2003 ("Motion") pursuant to Rule 65 of the Rules of Procedure and Evidence ("Rules");

NOTING the Confidential Response to the Defence Motion for Bail, filed on 5 November 2003 ("Response") by the Office of the Prosecution ("Prosecution");

NOTING the Confidential Defence Reply to the Prosecution Response to Defence Motion of Morris Kallon for Bail and Request for Hearing, filed on 10 November 2003 ("Reply");

NOTING the Confidential Order under Rule 65 (B) of the Rules of Procedure and Evidence Relative to the Submissions Made by the Government of Sierra Leone, issued on 6 November 2003;

NOTING the submissions filed confidentially by the Government of Sierra Leone on 18 November 2003;

NOTING that the Defence Request for Hearing has been granted by issuing a Notice of Hearing on 20 November 2003

AND MINDFUL of the Parties' submissions on the present issue made during the said hearing that took place on 3 December 2003;

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

CONSIDERING THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES:

I. THE SUBMISSIONS

A. The Motion

1. The Defence is relying on Rule 65 of the Rules to request that Morris Kallon ("Accused") be granted bail, subject to assurances with respect to residence, movement and conduct, encompassing, if need be, sureties to a value of $85,000 USD and on such terms and conditions as may be considered just and appropriate. In so doing, the Defence has submitted what it described as ten grounds in support of its application.

2. At this stage, it is my preliminary view that the grounds submitted by the Defence can be essentially grouped into two main categories. The first category pertains to the burden of proof under Rule 65(B), and the second encompasses several factors aimed at showing that the two-prong test of Rule 65(B), *i.e.* the certainty that the Accused will reappear to stand trial and the absence of threat to victims and witnesses, is satisfied.

3. First, the Defence contends that bail should be granted due to the absence of reasons for keeping the Accused in detention. The Defence relies on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which it interprets as stating that provisional release, rather than detention, is the general rule, and that provisional release is a basic right emanating from the presumption of innocence.

4. Second, among the several factors highlighted by the Defence as grounds for supporting the fact the the Accused will appear at trial and will not pose a threat to victims or witnesses are: the Accused's involvement in the demobilisation and disarmament process following the Lomé Accord and his initiative to protect the State of Sierra Leone from a potential *coup d'état*; the fact that the Accused is the head of a large family living in impoverished circumstances and needing his support; the Accused's strong community ties in Sierra Leone, which the Defence deems highly relevant in light of the previous relevant jurisprudence of the Special Court, namely a decision on bail rendered in the case of *Prosecutor v. Alex Tamba Brima*[1]; the lack of desire or means to flee the Special Court's jurisdiction, given the fact that he surrendered his passport upon arrest and is indigent; the fact that the Accused has always cooperated fully with the Special Court since his arrest and would have surrendered had he known that an indictment had been issued against him; the Prosecution's failure to provide the Defence with justification for opposing the Accused's provisional release; the assurances as regards residence, movement and conduct that the Accused would give if he were granted bail; the financial sureties secured by the Accused as part of the conditions that may be imposed in granting the application for bail; and finally, the Accused's good behaviour towards the detention authorities of the Special Court during his detention.

B. The Response

5. Relying on the jurisprudence of the ICTY, the Prosecution generally submits that the Accused's request for bail rests on a number of grounds, none of which meets the burden of satisfying the Court that such a request for bail should be granted.

6. First, the Prosecution submits that the Defence application fails to meet the two-prong test for bail; second, that the Special Court should refuse to exercise its discretion to grant bail.

7. As regards the test for bail, despite the lack of a clear indication in the Motion of the country to which the Accused is seeking to be released, the Prosecution assumes that it is Sierra Leone, and underlines the absence of a statement by that country that it would accept responsibility for the appearance of the Accused before the Special Court. The Prosecution expresses concern as to the ability of the Special Court to ensure that an accused released on bail will appear for trial, in so far as it does not have any enforcement powers, as well as the possibility of flight of the Accused, given the seriousness of the crimes with which he is charged. Furthermore, as regards the requirement that the Accused will not pose a danger to victims, witnesses or other persons, the Prosecution emphasises

[1] *Prosecutor v. Alex Tamba Brima*, SCSL-03-06-PT, Ruling on the Motion Applying for Bail or for Provisional Release, 22 July 2003 ("*Brima* Ruling").

the risk that exists now that the Accused knows of the specific charges and evidence against him, and underlines that the Sierra Leonean police force does not have the means to ensure the safety of such victims and witnesses.

8. In light of the foregoing, the Prosecution undertakes an assessment of the factors upon which the Defence is relying to obtain bail. The Prosecution deems that the Defence contention that bail should be granted in the absence of reasons for detention amounts to shifting the burden of proof in bail requests to the Prosecution, which would be contrary to the jurisprudence of the ICTY; that the involvement of the Accused in the implementation of the Lomé Accord is irrelevant since the Accused is himself a benefactor of the Accord; that the necessity to support a family describes a situation which is not unique to the Accused; that the Accused's community ties do not reduce the risk that he may fail to appear for trial; that the fact that the Accused no longer has a passport and is indigent does not constitute a guarantee against his flight, especially given the porous borders of Sierra Leone, as well as outside associations from which he may benefit; that the fact that the Accused would have surrendered had he known that an Indictment had been issued against him is speculative in nature and insufficient to establish a certainty that an accused will return to face trial; that the Defence's argument as to the Prosecution's refusal to state its reasons for opposition to bail is inadmissible in so far as no relevant conclusion can be inferred from this; that the assurances given by the Accused have not been regarded as decisive in the jurisprudence of the Special Court; that the financial sureties do not serve any purpose since the Special Court does not have its own enforcement mechanism; and finally, that the relationship of the Accused to the Special Court detention officers does not provide sufficient basis for assessing the risk of flight or the threat to witnesses and victims.

9. In relation to the Special Court's discretion to grant bail, the Prosecution submits that, should there be any finding that the test in Rule 65(B) of the Rules is satisfied, it should not grant such bail, because no country has stated it is prepared to accept responsibility for the Accused's appearance for trial; he is charged with the most serious crimes under international law; evidence may be jeopardised; and potential conspiracy with other accused persons who remain at large "should not be underestimated".

C. The Reply

10. The Defence generally avers that the Prosecution has failed to produce sufficient evidence that the Accused may not appear for trial if he were to be released on bail.

11. The Defence first underlines that the country to which the Accused is asking to be released is obviously Sierra Leone, and submits that the absence of a statement from the Government of Sierra Leone does not imply that it is not willing to accept responsibility. Further, reiterating its view that the Special Court does have the power to issue a warrant of arrest under Rule 65(F) of the Rules in the event of the Accused failing to appear for trial, the Defence also emphasises the fact that the disclosure process has not been completed and that the materials disclosed were mostly "mere summaries" of the proposed evidence. Finally, the Defence reiterates the relevancy of certain grounds advanced in the motion for the purpose of the Accused's request for bail.

D. The Submissions of the Government of Sierra Leone

12. The Government of Sierra Leone deems that the Defence has not met the burden of satisfying the Chamber that the Accused, if released on bail, will indeed appear for trial and will not represent a threat to victims, witnesses and other persons. Therefore, the Government of Sierra Leone is urging this Chamber to deny the Motion.

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

E. The Hearing of 3 December 2003

14. The hearing was held in open session, although a portion thereof was held in closed session at the request of the Defence, due to the nature of the evidence discussed.

15. The oral submissions of both Parties were largely repetitive of their written submissions. The Defence highlighted that the Accused poses no threat to victims or witnesses and also presents no risk of flight. In support of this position, the Defence presented several statements from people who attest to the Accused's good character, together with other evidence in support. The Defence argued that the proposed conditions of bail were adequate protection against any such risks. The Prosecution opposed the Motion and argued that the evidence presented by the Defence was not relevant to the risk of non-attendance at trial or the threat to witnesses. The Prosecution also noted that the process of disclosing to the Defence the Prosecution evidence it intended to call at trial was not yet complete. If the Accused were released, it may mean some witnesses would no longer be prepared to testify. Furthermore, the Prosecution argued that there may be a risk to the Accused himself.

AFTER HAVING DELIBERATED:

II. THE APPLICABLE LAW

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

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

> (A) Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber.
>
> (B) Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the accused seeks to be released and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

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

> (3) The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
>
> (4) In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
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> [...]
>
> (c) To be tried without undue delay;
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> [...]

A. On the Public Nature of this Decision

19. All written submissions filed by both parties and the Government of Sierra Leone in connection with the Motion were marked as confidential and, accordingly, have not been disclosed to the public. I would like to reiterate that as a matter of general principle, all documents filed before the Special Court should be public, unless a cogent reason is offered to the contrary. Consistent with this approach, as stated above, a short part of the hearing of the Motion was held in closed session and the remainder was open in accordance with Rules 78 and 79 of the Rules.[2]

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

21. I will dispose of the confidential submissions pertaining to the Motion in accordance with Rule 54 and Rule 81(B) of the Rules.[3]

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

[3] Rule 54 of the Rule provides for the following:

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

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

> "The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when

B. The Burden of Proof

22. The first matter to be disposed of and submitted by the Defence in its Motion raises the issue of the burden of proof as regards applications for bail or provisional release. I am of the considered view that this issue should be dealt with first, given its fundamental importance in the determination of the matter before the Special Court.

23. The question of the burden of proof is closely linked to that of determining whether pre-trial detention is the rule or the exception in international criminal proceedings. If detention is the rule, thus the burden of establishing that detention is not required rests essentially with the Defence. If detention is the exception, the burden of proof would normally belong to the Prosecution.

24. According to the Defence, it should be the Prosecution's responsibility to show that the detention of the Accused is necessary to ensure his appearance for trial before the Special Court and to avoid jeopardy of evidence and intimidation of witnesses and victims. On the contrary, the Prosecution submits that established practice before the *ad hoc* International Tribunals, namely the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), imposes such burden of proof on the Accused. Very little guidance can be inferred from the text of Rule 65(B) as regards which party bears the burden of proof. Therefore, it is useful to examine the jurisprudence of the *ad hoc* International Tribunals, the Special Court, as well as that of the European Court of Human Rights.

25. Bail, or provisional release, has been the subject matter of many decisions before both *ad hoc* International Tribunals and of one decision from the Special Court. Indeed, it has given rise to substantial debate. Traditionally, the position of the ICTY and the ICTR has been that bail is the exception and that, therefore, the burden of proof rests on the Defence. The Rules of Procedure and Evidence of the ICTY and the ICTR both included, at first, reference to "exceptional circumstances" that needed to be shown by the Defence in order for the Accused to be granted bail. This formulation suggests that bail is the exception and pre-trial detention the rule. However, in November 1999, the ICTY Judges amended Rule 65 on Provisional Release, relieving the Defence of the burden of proving "exceptional circumstances".[4] The reason behind this amendment appears to have been to bring the ICTY more in line with international human rights norms. The European Court of Human Rights has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand. It also held that "shifting the burden of proof to the detained person in such matters is tantamount to overturning [...] a provision which makes detention an exceptional departure from the right to liberty".[5] Therefore, it is possible to deem after such amendment that pre-trial detention should not be the rule but, rather, the exception. This would seem to be confirmed by the decisions on bail rendered in December 2001 by Trial Chamber II of the ICTY in the case of *Prosecutor v.*

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the reasons for ordering the non disclosure no longer exist."

[4] See ICTY, Rules of Procedure and Evidence, IT/32/REV.17, 17 November 1999. The amendment of Rule 65(B) entered into force on 6 December 1999. Previous version of ICTR Rule 65(B) read as follows:

> "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose any danger to any victim, witness or other person."

[5] See, for instance, the case of *Ilijkov v. Bulgaria*, ECHR Appl. 33977/96, 26 July 2001 ("*Ilijkov v. Bulgaria*"), at para 85.

Hadžihasanović et al., where the Judges held that "*de jure* pre-trial detention should be the exception and not the rule as regard prosecution before International Tribunals".[6]

26. Nonetheless, the change in the ICTY Rule 65 did not result in immediate or even widespread success by accused in bringing motions for provisional release.[7] One of the major concerns of the ICTY Judges, in refusing to grant bail in other cases, has been the Tribunal's inability to execute arrest warrants on persons in the former Yugoslavia were they not to voluntarily appear for trial. In October 2001, for instance, in the case of Momcilo Krajišnik[8], where despite the new reading of Rule 65, provisional release was still held to constitute the exception and the Judges retained discretion to deny bail even if the requirements were fulfilled by the Accused. The decision in this case, however, was not unanimous. Judge Patrick Robinson appended a dissenting opinion to the majority's decision, thereby denouncing what he called a "culture of detention" prevailing at the ICTY, that is "wholly at variance with the customary norm that detention shall not be the general rule".[9]

27. On the contrary, at the ICTR, the Judges at that time declined to amend Rule 65 in line with the amendment introduced by the ICTY. The Defence of several accused argued that because the proof of exceptional circumstances was no longer required before the ICTY, such should also be the case before the ICTR. This argument was not initially

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[6] *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, 19 December 2001, para 7; *id.*, Decision Granting Provisional Release to Mehmed Alagić, 19 December 2001; *id.*, Decision Granting Provisional Release to Amir Kubura, 19 December 2001. Trial Chamber II of the ICTY reiterated its finding in subsequent decisions in other cases. See *Prosecutor v. Darko Mrdja*, Decision on Darko Mrdja's Request for Provisional Release, 15 April 2002 ("*Mrdja* Decision").

[7] Provisional release has not been granted in any case before the ICTR. Motions for provisional release have been denied at the ICTY in numerous cases since the rule was changed. See., e.g., *Prosecutor v. Mile Mrksić*,IT-95-13/1-AR65, Decision on Appeal against Refusal to grant Provisional Release, 8 October 2002; *Prosecutor v. Dragan Obrenović*, IT-02-60-PT, Decision on Dragan Obrenović's Application for Provisional Release, 19 November 2002, upheld on appeal in IT-02-60-AR65.3& AR.65.4, Decision on Applications by Blagojević and Obrenović for Leave to Appeal, 16 January 2003; *Prosecutor v. Naser Orić*, IT-03-68-PT, Decision on Application for Provisional Release, 25 July 2003; *Prosecutor v. Milan Milutonović et al.*, IT-99-37-PT, Decision on Provisional Release (Milan Milutinović), 3 June 2003 and Decision on General Ojdanić Third Application for Provisional Release, 16 December 2003; and *The Prosecutor v. Pasko Ljubičić*, IT-00-41-PT, Decision on the Defence Motion for Provisional Release of the Accused, 2 August 2002.

In those cases where provisional release has been granted, relevant factors in favour of granting provisional release have included: whether the accused voluntarily surrendered; whether the Prosecution supported the motion; and the nature of the guarantees offered by the State to which the accused will be released, as well as the compliance to date of that State. See, e.g., *The Prosecutor v. Miodrag Jokić*, IT-01-42-PT, Order on Miodrag Jokić's Motion for Provisional Release, 20 February 2002; *Prosecutor v. Sefer Halilović*, IT-01-48-PT, Decision on Request for Pre-Trial Provisional Release, 13 December 2001; *Prosecutor v. Momcilo Krajišnik and Biljana Plavsić*, IT-00-39 & 40-PT, Decision on Biljana Plavsić's Application for Provisional Release, 5 September 2001; *Prosecutor v. Obrenović and Jokić*, IT-02-53-AR65, Decision on Application for Provisional Release, 28 May 2002; and *Prosecutor v. Gruban*, IT-95-4-PT, Decision on Request for Provisional Release, 17 July 2002.

[8] *Prosecutor v. Momcilo Krajišnik and Biljana Plavsić*, IT-00-39 & 40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001 ("*Krajišnik* Decision").

[9] *Id.*, Dissenting Opinion of Judge Patrick Robinson, para. 22. Judge Robinson held that there must be "cogent reasons" for pre-trial detention, but found that this "does not mean that it is impermissible to impose a burden on an accused person awaiting trial to justify his release," *Id.* para. 7. See generally, paras 6-11 for a discussion on pre-trial detention under customary international law and in light of international human rights standards, and particularly the right to be presumed innocent.

accepted by the Judges:

> concerning the argument that the Chamber should apply the Rule [65] as it appears at the ICTY, the Chamber recalls that Article 1 of the Statute establishes the Tribunal as separate and sovereign, with a competence *ratione materiae* and *ratione temporis* distinct from that of the ICTY. The Judges of the Tribunal are bound to apply the ICTR Rules.[10]

28. Despite such an initial approach, the ICTR Judges recently decided to amend the Rules during the 13th Plenary Session of 26 - 27 May 2003. In conformity with the ICTY provisions, the proof by the Defence of "exceptional circumstances" is now no longer required for bail to be granted.[11]

29. It would appear from the majority of the jurisprudence of both the ICTY and ICTR, however, that through the weighing process of the submissions of both parties, the burden of proof continues to rest on the Defence, and not on the Prosecution.[12] The removal of the "exceptional circumstances" requirement from Rule 65(B) of each set of Rules does not *per se* make detention the exception and provisional release the rule, but I would say that this was rather intended to lower the burden of proof by the Defence when attempting to establish that an accused should be provisionally released[13] by introducing a two-prong rather than a three-prong test.

30. In the case of *Prosecutor v. Miodrag Jokić* and *Prosecutor v. Rahim Ademi*,[14] the Trial Chamber of the ICTY held that, when dealing with a request for bail, the focus must be on the particular circumstances of each individual case without considering that the eventual outcome is either the rule or the exception. More explicitly, as stated in the *Mrdja* Decision, the Trial Chamber "must interpret Rule 65 of the Rules not *in abstracto* but with regard to the factual basis of the single case and with respect to the concrete situation of the individual applicant".[15] As a general rule, a decision to release an accused should be based on an assessment of whether public interest requirements outweigh the need to ensure respect for an accused's right to liberty,[16] as formulated in the two-prong test found in Rule 65(B).

31. Pursuant to Article 14 of the Statute of the Special Court, the Rules of the ICTR in force at the time of the establishment of the Special Court applied *mutatis mutandis*. However, Rule 65 was amended during the 2nd Plenary Meeting of the Special Court on 7

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[10] *Prosecutor v. Elie Ndayambaje*, ICTR-98-42-T, Decision on the Defence Motion for the Provisional Release of the Accused, Tr. Ch., 21 October 2001, para. 20; see also: *Innocent Sagahutu v. Prosecutor*, Decision on Leave to Appeal against the Refusal to Grant Provisional Release, App. Ch., 26 March 2003.

[11] ICTR, Rules of Procedure and Evidence, Adopted on 29 June 1995, as amended on 27 May 2003.

[12] See *Krajišnik* Decision, supra note 8, paras 11-12.

[13] See *Prosecutor v. Brdanin et al.*, IT-99-36-PT, Decision on Motion by Momir Talić for Provisional Release, 28 March 2001, para 17; *id.*, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000, para 12.

[14] *Prosecutor v. Miodrag Jokić* and *Prosecutor v. Rahim Ademi*, IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, Tr. Ch., 20 February 2002.

[15] *Mrdja* Decision, supra note 6, para 29.

[16] Accordingly, in *Ilijkov v. Bulgaria*, supra note 5, at para 84, the Court reiterated that "continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption on innocence, outweighs the rule of respect for individual liberty".

March 2003, in order to abolish the requirement of "exceptional circumstances". I do consider that the approach of the two sister International Tribunals previously referred to should be followed in the best interest of both Parties. In support of this position, reference may be made to the recent decision on the Appeals Chamber of the ICTY on a motion for provisional release in the case of *Prosecutor v. Limaj et al.*, rendered on October 2003, in which it was held that:

> It is the Bench's view, contrary to the argument of the Defence, that the Trial Chamber did not err in not imposing the burden on the Prosecution to demonstrate that provisional release was inappropriate. First, Rule 65(B) does not place the burden of proof on the Prosecution. Pursuant to that Rule, the Trial Chamber was required to determine whether it was "satisfied" that [the Accused], if released would appear for trial. After taking into account the information submitted to it by the parties and weighing all the relevant factors, it held that it was not satisfied. There is no basis for holding that, by not placing the burden of proof on the Prosecution, the Trial Chamber erred in its application of Rule 65(B).[17]

32. Although not generally bound by jurisprudence of the other International Tribunals,[18] I concur with this position and, therefore, I find based upon the preceding review and analysis that it is for the Defence to show that further detention of the Accused is neither justified nor justifiable in the circumstances at hand.

33. The Prosecution is not, however, relieved from any obligation in connection with such an application for the bail. After hearing from the State and were the Defence to satisfy the two-prong test of Rule 65(B), i.e. the certainty that the Accused will appear to stand trial and that he will not pose any danger to victims and witnesses or other person, the Prosecution would then be compelled to submit some information or evidence to rebut or challenge as appropriate what has been submitted by the Defence and demonstrate that, indeed in the circumstances, the public interest requirement for pre-trial detention does outweigh the right of the Accused to be released.[19]

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

35. This interpretation of the provisions of Rule 65 is consistent with that of the

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

[18] See *Prosecutor v. Issa Hassan Sesay*, SCSL-03-05-PT, *Prosecutor v. Alex Tamba Brima*, SCSL-03-06-PT, *Prosecutor v. Morris Kallon*, SCSL-03-07-PT, *Prosecutor v. Augustine Gbao*, SCSL-03-09PT, *Prosecutor v. Brima Bazzy Kamara*, SCSL-03-10-PT, *Prosecutor v. Santigie Borbor Kanu*, SCSL-03-13-PT, Decision on Prosecution Motions for Joinder, 27 January 2004, para 26.

[19] See also the *Brima* Ruling, supra note 1, p. 9-10.

President of this Court, Judge Geoffrey Robertson, who, in a recent ruling - albeit one that is not binding on this case - relative to an application seeking modification of the conditions of detention of an Accused into a regime arguably close to that of bail, has stated that "[t]here is no presumption in favour of bail, which is understandable given the very serious nature of the crimes charged".[20]

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

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

37. I deem that the opinion of the Government of Sierra Leone is very useful, and is a matter that must be properly assessed within the parameters of Rule 65(B). I encourage the filing of written submissions on such a sensitive issue as it has already done so in the past for the *Brima* Ruling.[21] However, considering that the Special Court, an independent institution, has been established by means of a bilateral agreement between the United Nations and the Government of Sierra Leone, not only it would not be appropriate but it cannot be bound by the opinion as expressed by the Government of Sierra Leone as the question whether the Accused should be provisionally released or not. This is a matter for the Court and the Court only. Nonetheless, it is important to stress the fact that the present submissions have been given due consideration in so far as they provide very valuable and substantial information on the current situation in Sierra Leone and is, in this respect, an important factor in determining the public interest aspect.

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

39. In my opinion, such a specific context should not be overlooked, and I duly take into consideration the information provided by the Government of Sierra Leone in its written submissions as to the ability of the Sierra Leonean authorities to assist the Special Court with the consequences of an order granting bail to the Accused.

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[20] *Prosecutor against Sam Hinga Norman*, SCSL-03-08-PT, Decision on Motion for Modification of Conditions of Detention, 26 November 2003, at para 8.

[21] See *Prosecutor v. Alex Tamba Brima*, SCSL-03-06-PT, Submission of the Government of the Republic of Sierra Leone in Response to Motion for Bail or for Provisional Release, 7 July 2003.

III. THE MERITS OF THE APPLICATION

40. As discussed above at length, before granting a motion for bail, I must be satisfied, after hearing the State to which the accused seeks to be released, that (a) the accused will appear for trial and (b) if released, the accused will not pose a danger to any victim, witness or other person. I will now, therefore, examine the question of whether the Accused will appear for trial if granted bail and whether the said will pose a danger to any victim, witness or other person if granted bail, basing my findings on the submissions of the Accused, the Prosecution and the Government of Sierra Leone.

A. Will the Accused, Morris Kallon, Appear for Trial if Granted Bail?

41. The Accused was arrested on 10 March 2003, following the unsealing of the indictment against him; he did not know about the existence of the indictment brought against him. Therefore the issue of voluntary surrender, often a factor in decisions on bail, is not applicable to the present case.

42. The Accused puts forth various grounds to support his claim that he will appear for trial if granted bail. The Accused has provided assurances with respect to residence, movement and conduct, as well as financial sureties to a value of $85,000 USD. Such assurances and sureties are indeed indispensable when an accused decides to apply for bail. However, no matter the importance and certainty of the assurances and sureties secured by the Accused, it is within the purview of the discretionary power of this Court to determine the real value and weight should be given to them.

43. The Accused has submitted several other grounds in his application, as summarized above, none of which, separately or cumulatively, have succeeded in convincing me that in the specific circumstances of the presence of the Special Court in Sierra Leone, particularly in light of the submissions by the Government of Sierra Leone, and the power of either Sierra Leone or the Court to execute arrest warrants,[22] he should be granted provisional release. I believe, however, that the reference by the Defence to the *Brima* Ruling, in this respect, should be addressed. Indeed, when arguing that the Accused's strong community ties in Sierra Leone constitute evidence of his willingness to appear for trial if he were released, the Defence contends that such community ties are among the "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"[23]. However, after referring to the case of *Neumeister v. Austria* before the European Court of Human Rights[24], in which it was held that in granting bail, it is relevant to consider the character of the person, his morals, his home, his occupation and his assets, such Ruling held that the Accused "did not exhibit any assets to show to the satisfaction of the Court, his stakes and attachment in the society to which he is seeking to be released"[25]. Accordingly, I would like to state that I subscribe to these findings that community ties are indeed of importance when considering whether or not to grant bail, but I nevertheless find that in the present case the community ties alleged by the Defence on behalf of the Accused do not constitute sufficient foundation to

[22] See Response, paras 7-11.
[23] *Brima* Ruling, ,supra note n. 1, p. 11.
[24] European Court of Human Rights, *Neumeister v. Austria* 1EHRR 91.
[25] *Brima*, Ruling, supra note n. 1, p. 12.

meet the prescribed requirements for bail.

44. In addition, I have also satisfied myself that the allegations against the Accused are of such gravity and seriousness that, if released within the local community of Sierra Leone, could well undermine his own safety and, indeed, his appearance for trial. It is also necessary to point out the fact that the evidence adduced by the Defence pertains in essence to his community ties with Bo rather than with Freetown, which, considering the nature of the charges alleged against the Accused, as contained in the Indictment against him, I would suggest it could have been of more relevancy and of better assistance in assessing the factors in support of the bail application.

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

45. Having not been satisfied that the Accused will appear for trial if granted bail, I find it unnecessary to examine in detail the question of whether the Accused will pose a danger to any victim, witness or other person if granted bail.

FOR ALL THE ABOVE-STATED REASONS,

I DISMISS THE MOTION AND HEREBY DENY THIS APPLICATION FOR BAIL.

Accordingly, the Accused shall remain in the custody of the Special Court.

Done in Freetown, Sierra Leone, this 23rd day of February 2004

Judge Pierre Boutet,

Judge of the Trial Chamber