

The realisation of the right to bail in the Special Court for Sierra Leone: Problems and prospects

Melron C Nicol-Wilson*

Defence counsel and case manager, Kallon Defence Team, Special Court for Sierra Leone; Director, Lawyers Centre for Legal Assistance, Sierra Leone; Lecturer in International Humanitarian Law, Fourah Bay College, University of Sierra Leone

Summary

The right to bail, as provided for under some United Nations and regional human rights instruments, has in recent times been applied by international tribunals. This article reviews the implementation of this right by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, before focusing in more detail on the incorporation of this right into the Statute of the Special Court for Sierra Leone and its implementation by the Special Court. In conclusion, some suggestions are offered to ensure the more effective realisation of the right to bail at the Special Court for Sierra Leone.

1 Introduction

The right to bail is the right for an accused or indicted person in a criminal case to remain free and stay out of lawful custody while awaiting his or her trial. It is narrowly linked to other fundamental rights, such as the right to liberty, the right to a fair trial, the presumption of innocence and the right to have adequate time and facility to prepare one's defence.

Since the establishment of the United Nations (UN) in 1945,¹ a number of declarations and treaties have been passed by the General Assem-

* LLB (Fouray Bay College), LLM (Pretoria), LLM (Nottingham); mnwlaw@yahoo.co.uk

¹ Charter of the United Nations, signed on 26 June 1945, San Francisco, entry into force 24 October 1945.

bly which deal with human rights in general and the right to bail in particular.

The Universal Declaration of Human Rights (Universal Declaration),² although a non-binding legal document, provides that '[e]veryone has the right to life, liberty and security of person'.³ Though the Universal Declaration is still thought to be at the forefront of human rights, it has been somehow overshadowed by later binding treaties.

The International Covenant on Civil and Political Rights (CCPR)⁴ provides:⁵

Anyone arrested or detained on a criminal charge 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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgments.

This provision makes it abundantly clear that bail is a right that arrested, detained and accused persons are entitled to, and gives such persons a right to compensation for unlawful arrest or detention. CCPR is clear in its provisions that detention for defendants awaiting trial shall be an exception rather than the general rule.

CCPR constituted the first and one of the most important articulations on the right to bail in international law. The Covenant established a Human Rights Committee, recently superseded by a successor body, the Human Rights Council (HRC), with an array of responsibilities, including receiving complaints and reports on state parties.⁶ Though not a body of judges, the HRC is empowered to interpret disputed provisions of CCPR by examining evidence received from complaining individuals and states allegedly in violation. The HRC then issues rulings on law and fact which serve as a body of precedent on what CCPR means and its implications for specific state practices. In a landmark case, it was held that, under CCPR, the general rule is for bail to be granted and that provisional release should not be the exception.⁷

² Adopted by the General Assembly of the United Nations, Resolution 217 A(III) of 10 December 1948.

³ n 2 above, art 3.

⁴ Adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, Resolution 2200 A(XXI) of 16 December 1966.

⁵ n 4 above, art 9(3).

⁶ n 4 above, art 28.

⁷ *Hill v Spain* (526/93) UN Covenant on Civil and Political Rights: CCPR Commentary (2nd Ed) M Nowak 234-235. This case was brought by two British citizens who had been arrested and charged in Spain on allegations of having firebombed a vehicle. The HRC found 'that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witness or flee . . . The mere conjecture of a state party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9 paragraph 3 of the Covenant.'

The UN Standard Minimum Rules for the Administration of Juvenile Justice⁸ provide that '[d]etention pending trial shall be used only as a measure of last resort and for the shortest possible period of time'⁹.

The UN body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁰ provides that '[a] person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial'.¹¹

Regional systems for the protection of human rights have also enacted provisions dealing with the right to bail. The European Convention for the Protection of Human Rights and Fundamental Freedoms¹² provides that:¹³

Everyone arrested or detained . . . 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 . . .

Similar to the European regional system, the American Convention on Human Rights (Pact of San José)¹⁴ provides that '[a]ny person detained shall be brought promptly before a judge . . . and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings'.¹⁵

Within the African regional system, the African Charter on Human and Peoples' Rights (African Charter)¹⁶ does not contain any specific provision on the right to bail. This Charter does not effectively protect human and peoples' rights in Africa in this regard.

Thus, the right to bail is clearly provided for in international law, as reflected in the provisions of universal and regional human rights instruments. This article undertakes a study of the implementation of the right to bail through the different international and internationalised criminal tribunals, and specifically the Special Court for Sierra Leone (SCSL).

⁸ Adopted by the General Assembly of the UN, Resolution 40/33 of 29 November 1985 upon the recommendation of the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders at Nulan, 1985.

⁹ n 8 above, art 13(1).

¹⁰ UN General Assembly Resolution A/RES/43/173 of 9 December 1988.

¹¹ n 10 above, Principle 38.

¹² Adopted by the Council of Europe on 4 November 1950, Rome.

¹³ n 12 above, art 5(3).

¹⁴ Adopted by the Organisation of American States on 22 November 1969, San José, Costa Rica.

¹⁵ n 14 above, art 7(5).

¹⁶ Adopted by the OAU at the 18th Assembly of Heads of State and Government on 27 June 1981, Nairobi, Kenya.

2 The right to bail in international criminal tribunals

2.1 Review of the different international criminal tribunals' practices

2.1.1 International human rights treaties and *jus cogens*

The extent to which international human rights treaties bind international criminal bodies is as yet unsettled.¹⁷ The Universal Declaration and CCPR bind those nation-states that have ratified them. Since an international criminal tribunal is neither a state nor an organ of any government, it is not a party to the treaties. It may be argued that they are thus not bound by the constraints of the Universal Declaration or CCPR. There is, however, no consensus on this. At the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY),¹⁸ for example, the UN Secretary-General took a contrary position, implying that the procedural protections of CCPR should indeed bind international criminal courts as internationally accepted standards protecting the accused.¹⁹ He further stated: 'It is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of the proceedings.'²⁰

Additionally, one can maintain that both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) were created by acts of the Security Council. As such, 'those courts are bound not only by their statutes but also by the United Nations Charter and the applicable internal law of the United Nations'. This rationale would appear to extend to the SCSL, which was also created by an Act of the Security Council.

Additionally, regardless of whether they are explicitly bound by treaty, there is a body of customary international law that protects the presumption of innocence and right to bail. Scholars have noted that 'Equally with the other subjects of international law, international organisations are bound by customary law'.²¹ The phrase *jus cogens* is generally applied to describe a 'mandatory norm of general international law from which no two or more nations may exempt themselves

¹⁷ For further discussion on this, see K Gallant 'Individual human rights in a new international organisation: The Rome Statute of the International Criminal Court' in MC Bassiouni (ed) *International criminal law* (1999) 695.

¹⁸ This was established by the UN Security Council by Resolution 827 of 25 May 1993, UN Doc S/RES/827 (1993).

¹⁹ See notes 39-43 on Report of the Secretary-General pursuant to para 2 of Security Council Resolution 808, UN Doc S/25704 and Add 1 (1993) para 1.6. However, this argument loses force by virtue of the fact that not all internationally recognised human rights relevant to criminal cases are protected in the ICTY statute or the statute of the ICTR.

²⁰ n 19 above, para 106.

²¹ HG Schermers & NM Blokker *International institutional law: Unity within diversity* (1995) 824 988.

or release one another'.²² *Jus cogens* is thought to reflect a 'consensus concerning fundamental values'.²³ The concept of *jus cogens* was adopted by the International Law Commission and incorporated into article 50 of its Law of Treaties in 1966.²⁴ The Law of Treaties states:

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

One can argue that states cannot 'contract out' or get around rules of general international law. However, the existence of human rights treaties with so many signatories reflects an international consensus regarding fundamental values.

2.1.2 The right to bail/provisional release at the ICTY

One cannot properly understand the right to bail at the ICTY without looking at the background to the establishment of the ICTY. Security Council Resolution 827, adopted on 25 May 1993, sanctioned the UN to create the ICTY. When this happened, hostilities in the former Federal Republic of Yugoslavia (FRY) had been underway for almost two years. First, acting under chapter VII, the Security Council declared that the situation in the FRY posed a threat to international peace and security and it condemned the atrocities being committed there. Secondly, it publicised the atrocities and called for an investigation. Finally, after seeing other remedies fail, and armed with enough information, it determined that those who gravely violated international humanitarian law would be prosecuted and punished.²⁵ Recalling the two years of war, the Security Council's progressive procedure could easily be labelled a waste of time. However, when compared to the cumbersome and consensus-demanding nature of a treaty-based international criminal court, this proved to be the fastest and most appropriate method for the UN.

The earlier stages of the conflict in the FRY²⁶ included the declaration of independence by two FRY member states, Croatia and Slovenia, in

²² *Blacks law dictionary*, 7th ed 864.

²³ *Blacks law dictionary*, quoting JA Frowein in *Encyclopaedia of public international law* (1997) 66.

²⁴ See *Yearbook ILC* (1966) ii 247-249. See also 261 (art 61), 266 (art 67).

²⁵ JC O'Brien 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *American Journal of International Law* 639-659.

²⁶ For a more detailed discussion, see S Boelaert-Souminen 'The International Criminal Tribunal for the Former Yugoslavia and the Kosovo conflict' (2000) 837 *International Review of the Red Cross* 217-252, available at the website of the International Committee of the Red Cross (ICRC) at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQD2> (accessed 30 June 2007).

June 1991.²⁷ In April 1992, Serbia and Montenegro proclaimed that they had assumed the international, legal and political personality of the former Yugoslavia. However, the overwhelming majority of the members of the international community, including the UN, rejected this declaration, claiming that the former Yugoslavia's dissolution was one of state secession. This hostile attitude began to shift because of the advantageous political changes in the FRY in late 2000, after a decade of sanctions and isolation. Later, it would be seen that this process played a vital role in relation to the ICTY, although its prosecutor complained about the lack of co-operation with it.

Meanwhile, in early 1993, already shocked by the scale of the raging conflict, the UN Security Council was even more horrified by the mass crime witnessed in Bosnia-Herzegovina. It therefore requested the Secretary-General to report on the prospect of a new international criminal tribunal to try and punish persons responsible for those atrocities.²⁸ It was then that the Security Council decided to create the ICTY, to be based in The Hague. However, this move did not have the intended deterrent effect, and the atrocities continued until the 1995 Dayton Peace Agreement.

Although the Agreement embodied a provision on co-operation with the ICTY,²⁹ despite continuous warnings from the international community and the Tribunal itself, there were no significant outcomes in practice. However, Zagreb did improve its tendency to co-operate, whilst Belgrade believed that the major criminals should come before a domestic court. Since the states were hesitant to accept the Tribunal, generally speaking, the ICTY had to resort to its own means to assure that any person indicted would be arrested and tried. As a result, UN Special Forces arrested two indicted criminals, Dokmanovic and Kovačević, in the summer of 1997.³⁰

Rule 65 of the Rules of Procedure and Evidence (RPE) of the ICTY deals with provisional release. It stipulates:

- (a) Once detained, an accused may not be released except upon an order of a Chamber.

²⁷ This date was very important in respect of the future tribunal's jurisdiction. After this date, the conflict in the former Yugoslavia qualified as an international armed conflict, although in nature it was non-international as such. Further, the parties to the conflict concluded several agreements under the auspices of the ICRC that bound them to the law of international armed conflicts.

²⁸ See Security Council Resolution 808, 3175th meeting, 22 February 1993, UN Doc S/RES/808 (1993); Report of the Secretary-General under para 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704.

²⁹ Art IX of the General Framework Agreement for Peace in Bosnia and Herzegovina, 21 November 1995.

³⁰ Compare P Tavernier 'The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (1997) 321 *International Review of the Red Cross* <http://www.icrc.org> (accessed 30 April 2007).

- (b) Release may be ordered by a Trial Chamber only after giving the host country and the state of which the accused seeks to be released the opportunity to be heard 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.

Provisional release has been granted — always subject to a number of stringent conditions — in the case of eight accused: Dorde Dukic; Milan Simic; Drago Josipovic; Miroslav Tadic; Simo Zaric; Enver Hadzhihadsonovic; Mehmed Alagic and Amir Kubura.³¹

Before rule 65 was amended,³² there was a requirement of ‘exceptional circumstances’ for the granting of provisional release. The Court often relied on the ‘exceptional circumstances provision’ when it denied applications for bail. For example, in *Prosecutor v Landzo*,³³ the Court articulated its position on the exceptional circumstances requirement. The Court further articulated the standard it would follow in bail applications in *Prosecutor v Delalic*,³⁴ in which it found that an accused petitioning for bail carries a burden of establishing four conjunctive criteria before a Trial Chamber will grant provisional release, as follows:

[t]he presence of exceptional circumstances; that the accused will appear for trial; that the accused will not pose a danger to any witness or victim; and that the host country must be heard.

The exceptional circumstances requirement was removed upon amendment of rule 65. Nonetheless, the change in ICTY rule 65 did not result in immediate or even the widespread success by the accused in bringing motions for provisional release.³⁵ 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 some warrants of arrest.

The ICTY currently imposes a two-pronged test before a defendant is released on bail. First, the Trial Chamber must be satisfied that the accused will appear for trial if provisionally released. The judges con-

³¹ JRWD Jones & S Powles *International criminal practice* (2003) 601–602.

³² Amended at the 21st Plenary Session of the Judges of the Tribunal on 30 November 1999.

³³ IT-96-21-T.

³⁴ IT-96-21-T.

³⁵ 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 eg *Prosecutor v Mile Mrksic*, IT-95-13/1-AR65, Decision on Appeal against Refusal to grant Provisional Release, 8 October 2002; *Prosecutor v Dragon Obrenovic* IT-02-60-PT, Decision on Dragon Obrenovic Application for Provisional Release, 19 November 2002, upheld on appeal in IT-02-60-AR65.3 & AR.65.4, Decision on Applications by Blagojevic and Obrenovic for Leave of Appeal, 16 January 2003; *Prosecutor v Naser Oric* IT-03-68-PT, Decision on Application for Provisional Release, 25 July 2003; *Prosecutor v Milan Milutinovic et al* IT-99-37-PT, Decision on Provisional Release (Milan Milutinovic), 3 June 2003 and Decision on General Ojdanic Third Application for Provisional Release, 16 December 2003; and *Prosecutor v Pasko Ljubicic* IT-00-4-PT, Decision on the Defence Motion for Provisional Release of the Accused, 2 August 2002.

sider many factors and have articulated several that carry weight in their decision making. In *Prosecutor v Blaskic*,³⁶ the Tribunal found that a very high bail surety, in this instance 1 million Deutsch marks, was insufficient to satisfy the judges that the accused would appear for trial. When ruling on the bail application, they bore in mind the 'gravity of the criminal acts of which he stands accused; [and] of the severity of penalties to which he is liable ...'

In *Prosecutor v Jokic*,³⁷ the prior voluntary surrender of the accused was found to be significant in assessing the risk that he would not appear for trial after his provisional release. The Tribunal found that it is correct to give some 'credit' for voluntary surrender.

In *Prosecutor v Sainovic*,³⁸ the Tribunal found that the imposition of conditions on an accused enabled them to grant him provisional release. In that case, the Tribunal imposed restrictions on his travel, including the obligation to remain in his municipality and to surrender his passport.

If the first prong of the test can be met, the accused must then also satisfy the Tribunal that he will not pose a danger to victims of his alleged crime, to witnesses or others.

In *Prosecutor v Jokic*,³⁹ the Court found that the completion of the prosecution's investigation did reduce the risk that the accused would destroy documentary evidence or threaten witnesses.

The ICTY has applied several tests in order to grant bail or provisional release to indictees, thus complying with international human rights standards — unlike its sister tribunal, the ICTR.

2.1.3 The right to bail or provisional release at the ICTR

On 6 April 1994, an aircraft was downed with the Presidents of Rwanda and Burundi — Juvenal Habyarimana and Cyprien Ntaryamira — on board. After this event, a genocidal campaign against the Rwandan Tutsis by the more numerous Hutus began, spanning four months and resulting in more than 800 000 casualties. Although there was a tragic 'tradition' of massacres of the Tutsi minority by the Hutu majority, a conflict on this scale had never been experienced. The magnitude of the mass killings was clearly illustrated shortly after the atrocities began, when the UN was forced to withdraw most of its peacekeeping contingent, UNAMIR or 'blue helmets', from the troubled state.

A month later, although the UN had decided to create a bigger peacekeeping contingent, the international community failed to deploy these troops before the end of the crisis. Instead of international action, French forces entered Rwanda to end the violence within the frame-

³⁶ IT-95-14.

³⁷ IT-01-44-PT.

³⁸ IT-99-37-AR65.

³⁹ n 37 above.

work of the controversial Operation Turquoise. In this respect, the international community should shoulder moral responsibility for staying idle in the face of the Rwandan genocide. Since this gross negligence, with fatal consequences, can hardly be atoned for *ex post facto*, social reconciliation can only be promoted by judicial means.

The Security Council followed the very same 'step-by-step' approach adopted previously in relation to the Yugoslav conflict. However, this process, which was very rapid when compared to that ensuing from the Balkan conflict, became extremely time-consuming in light of the extent of the genocide that had swept across Rwanda. As such, and in contrast to the ICTY, the ICTR was created only after the armed conflict concluded and pursuant to the explicit request of the new Rwandan government.⁴⁰

Even though the Security Council enjoyed the political support of the Rwandan government, views clashed when the ICTR's statute was drafted. For example, Rwanda wanted the following: (a) to be a broad influence on the Tribunal's functioning; (b) the statute to observe its specificities to the utmost extent; and (c) to give voice to concerns regarding certain provisions of the statute.⁴¹

In contrast, the Security Council was determined to follow the ICTY's example. As a result, it was no wonder that the differences in opinions and expectations led Ambassador Bakuramutsa of Rwanda to vote against the issue⁴² in the Security Council.

The ICTR's creation, as it happened, gave rise to antipathy, not only in Rwanda, but also in certain neighbouring states, except Tanzania where the ICTR has its seat. The ice did not break until after the Harare Summit of the Organisation of African Unity (OAU), held in July 1997.⁴³ Shortly afterwards, the Tribunal recorded its first significant success

⁴⁰ Letter of 28 September 1994, sent by Rwanda's Permanent Representative to the UN to the President of the Security Council, UN Doc S/1994/1115.

⁴¹ Rwanda's objections focused mainly on the following points (the comments within parentheses reflect the government's objections): *ratione temporis* (this was determined arbitrarily); common organs with the ICTY (this undermined the specific nature of the Tribunal); the relation of the Tribunal to domestic courts and the appointment of judges (such states could also appoint judges who supported the genocide); enforcement of sentences (this would be taken out of Rwanda's hands); absence of death penalty; seat of the Tribunal (Arusha, Tanzania was chosen for several reasons, while the ICTR had only a Prosecutor's Office in Kigali, Rwanda). For more details, see CM Peter 'The International Criminal Tribunal for Rwanda: Bringing the killers to book' (1997) 321 *International Review of the Red Cross* <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNZ8> (accessed 30 April 2007); O Dubois 'Rwanda's national criminal courts and the International Tribunal' (1997) 321 *International Review of the Red Cross* [/web/eng/siteeng0.nsf/html/57JNZ8](http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNZ8) (accessed 30 April 2007).

⁴² Security Council Resolution 955, 3453rd meeting, 8 November 1994, UN Doc S/RES/955 (1994).

⁴³ 33rd ordinary session of the Assembly of Heads of State and Government and the 66th ordinary session of the Council of Ministers, Harare, Zimbabwe, 26 May to 4 June 1997.

within the framework of Operation Naki, which led to the arrest in Kenya of several major figures who had been members of the one-time provisional government of Rwanda.⁴⁴

Rule 65 of the RPE of the ICTR deals with provisional release. It stipulates:

- (a) Once detained, an accused may not be released except upon an order of a Trial Chamber.
- (b) Provisional 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 a danger to any victim, witness or other person.

This provision is similar to that of the ICTY. However, article 65 of the ICTR contains an exceptional circumstances requirement, which has been removed in the case of the ICTY.⁴⁵ No defendant has been able to meet the exceptional circumstances requirement and none has been granted provisional release, in spite of several applications.⁴⁶

2.1.4 The Rome Statute of the International Criminal Court⁴⁷

The Rome Statute of the International Criminal Court (ICC) deals with the issue of interim release pending trial. The statute builds upon the human rights protection for indictees that are contained in the RPE of the ICTY and ICTR.

Article 62 of the statute states that:

A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

- (a) Conditions under article 58(1):
 - (i) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of this Court; and
 - (ii) The arrest of the person appears necessary:
 - To ensure the person's appearance at trial; to ensure that the person does not obstruct or endanger the investigation or court proceedings, or; where applicable, to prevent the person from continuing with the commission of the related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

⁴⁴ Compare D Wembou 'The International Criminal Tribunal for Rwanda: Its role in the African context' (1997) 321 *International Review of the Red Cross* <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNZ6> (accessed 30 April 2007); Dubois (n 41 above).

⁴⁵ n 35 above.

⁴⁶ See *Prosecutor v Kanbayashi*: The accused requested the application of rule 65(B) under the ICTY formulation without the 'exceptional circumstances' requirement. The judge rejected this as the ICTR was a 'separate and sovereign body'. Accordingly, following *Prosecutor v Kayashema*, it held that an accused must show 'exceptional circumstances' to be granted provisional release.

⁴⁷ As corrected by *proces-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

One could sum up by saying that various standards have been adopted for provisional release in the international criminal tribunals. While the ICTR has not granted provisional release to any defendant, the ICTY has made use of its statutory bail provisions with more regularity. Each of these bodies recognises the right to provisional release in limited circumstances, and that right is often tied to the presumption of innocence.

3 The right to bail and the specific case of the Special Court for Sierra Leone

3.1 Background to the establishment of the Special Court

Similar to the conflict in the Balkans and Rwanda, widespread and horrendous violations of human rights⁴⁸ and humanitarian law have characterised the brutal ten-year civil war in Sierra Leone. Even though the Revolutionary United Front (RUF) in Sierra Leone was mainly responsible for the systematic and widespread abuses throughout this period, other parties were not blameless.⁴⁹ The Armed Forces Revolutionary Council (AFRC),⁵⁰ former soldiers of the Sierra Leone Army (ex-SLA),⁵¹ members of the Civil Defences Forces (CDF)⁵² and soldiers from

⁴⁸ For more information, see generally Human Rights Watch 'Sierra Leone: Sowing terror — Atrocities against civilians in Sierra Leone' July 1998, 10:3(A) <http://www.hrw.org/reports98/sierra/>, especially Part III 'Human rights abuses in a war against civilians' (13 September 1995); 'Sierra Leone: A disastrous setback for human rights' <http://web.amnesty.org/library/Index/engAFR510051997> (20 October 1997); 'Sierra Leone: Recommendations to the International Contact Group on Sierra Leone' New York, 19 April 1999 [http://web.amnesty.org/library/Index/ENG.AFR510051999?open\\$ef=ENG-SLE](http://web.amnesty.org/library/Index/ENG.AFR510051999?open$ef=ENG-SLE) (accessed 30 November 2007); Amnesty International Report 2000 <http://web.amnesty.org/report2000/ar2000>. For the key UN documents, refer to UN Security Council 'Sierra Leone and Liberia' <http://www.globalpolicy.org/security/issues/slindy/ex.htm> (accessed 20 November 2007).

⁴⁹ On 23 March 1991, Foday Saybana Sankoh (an ex-army corporal who had served time for treason) led RUF forces into Sierra Leone from neighbouring Liberia and tried to overthrow the one-party rule there by the All Peoples Congress Party (APC). Rt Major-General Joseph Saidu Momoh had led the APC then. However, the RUF's motives were questionable, though it acted on the pretext of ridding corruption, misrule and one-party statism in Sierra Leone. Later, 26 year-old Captain Valentine Esegrobo Melvin Strasser and others overthrew President Momoh's government in April 1992: Federation of American Scientists, 27 May 2000 'Sierra Leone' <http://www.fas.org/irp/world/para/docs/footpaths.htm> (accessed 20 November 2007).

⁵⁰ This was the military junta formed in May 1991 after President Ahmad Tejan Kabbah's democratically elected government was removed from power: UN Security Council 'Sierra Leone and Liberia' (n 48 above).

⁵¹ When President Kabbah returned to power in March 1998, he disbanded the army. Some former soldiers retreated into the jungle and began a brutal campaign against innocent and unarmed civilians. In January 1999, this group (together with AFRC and RUF elements) invaded the capital, Freetown, and committed unspeakable atrocities: MM Khobe 'The evolution'n and conduct of ECOMOG operations in West Africa'

the Economic Community of West African State Monitoring Group (ECOMOG)⁵³ were also alleged to have committed gross human rights abuses, mainly against innocent and unarmed civilians.

In March 1996, Sierra Leone returned to civilian rule after its first democratic elections in almost three decades. President Ahmad Tejan-Kabbah's government negotiated a peace agreement, commonly known as the Abidjan Peace Agreement, with the RUF on 30 November 1996 in Côte d'Ivoire.⁵⁴ The aim was an immediate ceasefire, demobilisation and acceptance of the RUF as a political party. However, the Agreement failed soon after its inception. In May 1997, a military *coup* ousted the Kabbah government and the AFRC invited the RUF to join it in governing the country. This step did not, however, bring about the intended peace.⁵⁵ Several months of chaos, barbarism, murder and civil disobedience ensued.⁵⁶ In February 1998, ECOMOG (assisted by British-based Sandline mercenaries and the CDF) forced the AFRC from power.⁵⁷ The following month, President Kabbah returned to Sierra Leone from Guinea (where he had sought refuge) for a ceremonial reinstatement.⁵⁸

In January 1999, elements of the AFRC, ex-SLA members and the RUF attacked the capital, Freetown, and occupied the central and eastern

<http://www.iss.co.za/Pubs/Monographs/No44/ECOMOG.html> (accessed 20 November 2007). See also generally Human Rights Watch (n 48 above) 10:3 (A) 'Atrocities against civilians in Sierra Leone' <http://www.hrw.org/reports98/sierra/> (accessed 20 November 2007).

⁵² The government formed and supported civil militia groups to fight RUF. They were from different tribes, such as the Kamajors from the Mende tribe, the Tamaboros from the Koranko tribe and the Kapras from the Temne tribe: SJ Kemokai 'The security issue' Sulima Internet <http://www.sulima.com/pubs/kamajors.html> (accessed 20 November 2007).

⁵³ This was the peacekeeping force of the Economic Community of West African States (ECOWAS), consisting mainly of Nigerian soldiers. Originally deployed to Liberia to monitor a ceasefire agreement, it was later sent to Sierra Leone after the RUF invaded Sierra Leone in March 1991. It fought the RUF and the AFRC alongside the army. See generally ET Dowyaro 'ECOMOG operations in West Africa: Principles and praxis' <http://www.iss.co.za/Pubs/Monographs/No44/ECOMOGPraxis.htm1> (accessed 21 November 2007).

⁵⁴ See 'Peace agreement between the government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL)' http://www.usip.org/library/pa/sl/sierra_leone_0707/999_toc.html (accessed 21 November 2007).

⁵⁵ US Committee for Refugees 'Coup in Sierra Leone culminates in months of insecurity' *News and Resources* 27 May 1997 http://www.refugees.org/new/press_releases/1997/o52797.htm (accessed 21 November 2007).

⁵⁶ As above.

⁵⁷ See M Nicol-Wilson 'Accountability for human rights abuses: The United Nations Special Court for Sierra Leone' (2001) *Australian International Law Journal* 161, citing Amnesty 'Killing for gain — The Sierra Leone affair' *Amnesty News* <http://www.amnesty.org.uk/news/mag/jul98/killinghtm> (accessed 21 November 2007).

⁵⁸ CNN Interactive 'Jubilant crowds greet returning Sierra Leone leader' *World News* 10 March 1998 <http://www.cnn.com/WORLD/9803/10/sierra.leone/> (accessed 21 December 2001).

parts for almost three weeks until ECOMOG troops removed them. The egregious abuses of human rights during this period⁵⁹ shocked the international community's conscience and the UN finally focused its attention on this state.⁶⁰ Persuaded by military weakness and by the blandishments of Western governments, the government of Sierra Leone concluded the Lomé Peace Agreement with the RUF.⁶¹ *Inter alia*, article IX of the Agreement granted amnesty to all collaborators and combatants for activities undertaken in pursuit of their objectives throughout the conflict. Further, the Agreement granted amnesty to all collaborators and combatants for activities undertaken in pursuit of their objectives throughout the conflict. The Agreement also granted Foday Sankoh the protocol rank of Vice-President and the leadership of a government commission that controlled the state's mineral wealth (including diamonds). A UN peacekeeping force, part of the UN Mission in Sierra Leone (UNAMSIL), was formed and mandated with peacekeeping duties in a transfer of responsibilities from ECOMOG.

The Lomé Peace Agreement's amnesty and pardon provisions in article IX were widely condemned by human rights groups and other non-governmental organisations (NGOs).⁶² Ambassador Francis G Okelo, Special Representative of the Secretary-General of the UN, signed the Agreement on behalf of the UN, but attached a disclaimer regarding these pardon provisions. This disclaimer provided that international crimes (such as genocide, crimes against humanity and war crimes) and other serious violations of international humanitarian law were to be excluded from the interpretation of article IX. This was in keeping

⁵⁹ During the fighting, there were innumerable killings, amputations, rapes of women and girls, child abductions and the burning of houses and vehicles. For more information, see generally Human Rights Watch 'Getting away with murder, mutilation and rape — New testimony from Sierra Leone' <http://www.hrw.org/reports/1999/sierra> (accessed 20 November 2007).

⁶⁰ Eg, the UN High Commissioner for Human Rights, Mary Robinson, described the human rights situation as worse than in Kosovo: BBC News 'Sierra Leone abuses worse than Kosovo' *BBC News Online* 25 June 1999 <http://news.bbc.co.uk/1/hi/africa/377541.stm>; BBC News 'Sierra Leone and Britain: Key dates' *BBC News Online* 9 February 1999 http://news6.thdo.bbc.co.uk/1/hi/english/special_report/1999/sierra_leone/newsid_ (accessed 21 November 2007).

⁶¹ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed in Lomé, Togo on 7 July 1999 <http://www.sierraleone.org/lome.accord> (accessed 21 December 2001).

⁶² In a letter to the UN Secretary-General, Human Rights Watch condemned the amnesty and pardon provisions and called for the punishment of the perpetrators of human rights violations: Amnesty International Press Release 'A peace agreement but no justice' 9 July 1999 [http://web.amnesty.org/library/Index/ENGAFR510071999?open\\$ef=ENG-SLE](http://web.amnesty.org/library/Index/ENGAFR510071999?open$ef=ENG-SLE) (accessed 21 November 2007). The Sierra Leone Bar Association condemned the provisions and called for an independent inquiry into the gross human rights abuses committed in Sierra Leone since 1991. Furthermore, it urged the government to ratify the 1998 Rome Statute of the International Criminal Court, referring to the urgent need to bring the perpetrators to justice: News Archives, 31 May 2000 <http://www.sierra-leone.org/slnews0500.htm1> (accessed 21 November 2007).

with international law, which does not allow amnesty for crimes of this nature.⁶³

Although the amnesty and pardon provisions amounted to impunity and injustice and were perceived to have a negative effect on the prospects for peace in Sierra Leone, the Agreement was subsequently ratified by the Sierra Leonean Parliament and enacted into law as the Lomé Peace Act 2000. This was despite the amnesty and pardon provisions being inconsistent with section 28(1) of the 1991 Sierra Leone Constitution,⁶⁴ which is deemed to be the supreme law of the land.

Notwithstanding the Lomé Peace Agreement, hostilities continued. In November 2000, a ceasefire paved the way for further peace talks to consolidate and observe the Agreement during the first half of 2001, finally ending the hostilities.⁶⁵

These events forced the government of Sierra Leone to reconsider the Lomé Peace Agreement and to request assistance from the UN Security Council to establish an appropriate judicial forum to try and punish those responsible for the gravest atrocities. As a result, the Security Council passed Resolution 1315 (2000), requesting the Secretary-General to pursue negotiations with the government of Sierra Leone to create an independent 'Special Court'. Following successful negotiations, the Secretary-General submitted to the Security Council a report dated 4 October 2000, which incorporated an agreement between the UN and the government of Sierra Leone.⁶⁶ The Court's statute was annexed to the Agreement and the latter incorporated into Sierra Leonean law by the 2001 Special Court (Ratification) Act.⁶⁷

3.2 SCSL Statute and its Rules of Procedure and Evidence

The Special Court for Sierra Leone is one of the 'mixed' courts guided by both international and domestic law, such as the Extraordinary

⁶³ Amnesty International Report 'Sierra Leone: Ending impunity — An opportunity not to be missed' 31 July 2000 3 [http://web.amnesty.org/library/Index/ENG.A-FR510642000?open\\$ef=ENG-332](http://web.amnesty.org/library/Index/ENG.A-FR510642000?open$ef=ENG-332) (accessed 21 November 2007).

⁶⁴ If individuals allege that their constitutional rights are infringed, sec 28(1) of the Constitution gives them the right to apply by motion to the Sierra Leone Supreme Court for redress. However, the amnesty and pardon provisions of the Lomé Peace Agreement, in law inferior to the Constitution, bar them from enjoying this right. See art IX.

⁶⁵ 'UNAMSIL chairs peace talks between Sierra Leone government and the RUF' at <http://www.un.org.av/radio/news/2001/may/01051500.htm> (accessed 21 December 2001).

⁶⁶ See UN Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915 http://sss.afrol.com/countries/Sierra_Leone/documents/un_sil_court_041000.htm (accessed 20 November 2007).

⁶⁷ See M Nicol-Wilson 'International Criminal Tribunals — A comparative study of the Tribunal in former Yugoslavia, Rwanda and Sierra Leone' (2002) *Australian International Law Journal* 134.

Chambers in the Court of Cambodia, the State Court of Bosnia-Herzegovina or the more recently established Special Tribunal for Lebanon.

There are several sources of law that guide the Rules of Procedure and Evidence of the Special Court. First among them are the Rules of the ICTR. Article 14(1) articulates that

[t]he Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

Thus, under article 14(1), the Rules of the ICTR apply. Article 14(2) provides for their amendment by the judges of the Special Court:⁶⁸

The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable rules do not or do not adequately provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act 1965 of Sierra Leone.

The mixed nature of the Special Court is apparent in this provision. The Special Court is not a part of the judiciary of Sierra Leone, just as the other tribunals do not form part of the judiciaries of their own host countries. The laws of Sierra Leone, however, specifically its Criminal Procedure, do factor into its jurisprudence. The Special Court is distinct from the other tribunals in this regard.

Again, multiple sources of law are apparent in article 20(3), which states,

The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

3.3 The presumption of innocence and the right to bail at the SCSL

Article 17 of the Statute of the SCSL deals with the rights of the accused. Article 17(3) provides that '[t]he accused shall be presumed innocent until proven guilty according to the provisions of the present statute'.

Rule 65 of the RPE deals with the right to bail. At the inception of the Court, rule 65 contained an 'exceptional circumstances' requirement, just as rule 65 of the ICTR does. However, this rule was later amended

⁶⁸ The Special Court itself wrestled with this issue in *Prosecutor v Norman*, Decision on the Applications for a Stay of Proceedings, holding that the Criminal Procedure Act of 1965 is a source of guidance and that SCSL judges have a 'broadly permissive power' to amend the SCSL rules.

and the 'exceptional circumstances' requirement removed.⁶⁹ As such, the text of the statute currently reads:

- (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 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.

What was the significance of the amendment? Its exact significance is unclear, since as yet no accused has been released on bail from the Special Court, neither before nor after the removal of the 'exceptional circumstances' requirement. This will be explored in greater detail in subsequent sections.

3.4 The Constitution of Sierra Leone and the SCSL Statute

The Special Court does not form part of the judiciary of Sierra Leone. Nonetheless, it was created by means of an agreement with the government of Sierra Leone. The Court also sits in Sierra Leone. Within this context, the Constitution of Sierra Leone⁷⁰ provides for the right to bail.⁷¹

The Criminal Procedure Act⁷² also deals with the issue of bail.⁷³ It provides for the granting of bail to persons charged with any offence, including murder and treason.

In his application for a writ of *habeas corpus*, Special Court indictee Alex Tamba Brima contended that any divergence by the SCSL from Sierra Leone's constitutional bail provisions must be deemed void as the Constitution is the supreme law of the land. Under the Constitution, the Supreme Court has a supervisory jurisdiction over all courts in Sierra Leone and over any adjudicating authority.⁷⁴ It was thus contended that any questions about the interpretation of the Constitution could only be resolved by the Supreme Court and not by the SCSL.

The Trial Chamber noted that it was an international agreement and not the Constitution of Sierra Leone that created the SCSL. Justice Itoe maintained:

... the natural interpretation of section 125 and other provisions of the Sierra Leonean Constitution is that these provisions are only meant to apply to the courts of Sierra Leone and the courts which come within the judicial hierarchy of the Constitution of the Republic of Sierra Leone. I therefore hold that application of section 125 and other sections of the Constitution ... is only

⁶⁹ Amended on 7 March 2003.

⁷⁰ Act 6 of 1991.

⁷¹ n 70 above, art 17.

⁷² Act 32 of 1965.

⁷³ n 72 above, sec 79.

⁷⁴ Sec 28(3) 1991 Constitution of Sierra Leone.

limited to the courts created by the 1991 Constitution of Sierra Leone and not to a post-1991 international creation that owes its existence to an international instrument of the Security Council and an equally international instrument of the Security Council and an equally international agreement between the United Nations and the government of Sierra Leone.

I therefore hold, from the foregoing analysis, that the Special Court, even though created by a special international agreement between the United Nations and the government of Sierra Leone . . . is not, should not and cannot be considered as forming an integral part of courts of the Republic of Sierra Leone . . . it therefore has no connection with the Supreme Court of Sierra Leone nor is it subjected to its jurisdiction, supervisory or otherwise.

4 The implementation of the right to bail in the SCSL

4.1 Evaluation of bail applications at the SCSL

Since the inception of the SCSL, it has received four applications for bail⁷⁵ and one application for a writ of *habeas corpus*.⁷⁶ None of the applications were successful based on the decisions and the standards by which the judges evaluated the bail applications.

4.1.1 Is the SCSL bound by decisions of the ICTY and the ICTR?

The SCSL was created after the establishment of both the ICTY and ICTR. Its enabling statute reflects that its appeals chamber is to be guided by those of the other tribunals.⁷⁷ When considering bail applications, however, the judges of the SCSL have asserted that they will not be bound by the precedent of the ICTY and ICTR. For example, in the application of Issa Sesay, the judge held that the SCSL is 'not generally bound by the jurisprudence of other international tribunals'.⁷⁸ The judge echoed this in the bail application of Monina Fofana, noting that granting bail is a matter that is 'entirely within either the discretion of the judge or that of the trial chamber so seized of the application'.⁷⁹ It is therefore difficult to assess how and how much decisions of the other tribunals have influenced the SCSL. At times, the judges have relied on those decisions, sometimes quoting them as authority, yet they have also at other times conspicuously ignored relevant decisions.

⁷⁵ *Prosecutor v Alex Tamba Brima* (SCSL 03-06-PT); *Prosecutor v Monina Fofana*; *Prosecutor v Morris Kallon*; *Prosecutor v Issa Hassan Sesay*.

⁷⁶ *Prosecutor v Sam Hinga Norman*.

⁷⁷ See, in particular, Special Court Statute art 20(3), which states: 'The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda.'

⁷⁸ *Sesay* bail application (n 75 above).

⁷⁹ *Fofana* bail application (n 75 above).

4.1.2 The application of rule 65

Rule 65 has been applied by the judges as a two-part test. The Trial Chamber must be satisfied that if released, '[t]he accused will appear for trial; and [t]he accused will not pose a danger to any victim, witness or other person'.

Will the accused appear for trial?

In the determination of bail applications, the SCSL has relied on the case of *Neumeister v Austria* before the European Court of Human Rights, 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.⁸⁰ Additionally, the Court argued that the issue of community ties does not constitute sufficient foundation to meet the prescribed requirement for bail and that release of an accused person within the local community of Sierra Leone would undermine their own safety and indeed the likelihood of their appearance for trial.⁸¹

The opinion of the government of Sierra Leone in granting or denying bail

Pursuant to rule 65(B) of the RPE, the SCSL has given a lot of weight to submission (9) of the government of Sierra Leone, which expressed an objection to the granting of bail. The government of Sierra Leone has argued that it is unable to guarantee to the Court that accused persons granted bail will not move outside of the jurisdiction. Even though the SCSL has argued that it cannot be bound by the opinion expressed by the government of Sierra Leone as to whether an accused should be provisionally released or not, one can conclude that such objections have influenced the court in denying bail.

The presumption against release

In several bail applications, the prosecution and the accused have each claimed a presumption weighing in their favour. Counsel for the various accused have argued that the fundamental nature of the right to liberty in international law mandates that there must be a presumption in favour of granting bail. This presumption would, on its face, only be defeated through a sufficient demonstration of good cause by the prosecution. Prosecutors have countered that the plain text of rule 65, which requires the satisfaction of the Trial Chamber, imposes a burden that naturally falls to the accused. Without satisfying that burden, they argue, no accused ought to be granted bail under rule 65. The implications of this dispute are significant, as it is determinative of the argu-

⁸⁰ Decision on the Motion by Morris Kallon for bail, 25 February 2004.

⁸¹ n 80 above, 13.

ment required to be made on behalf of an accused who seeks release on bail.

The 'exceptional circumstances' requirement

Lawyers for the accused have also inferred that the removal of the 'exceptional circumstances' requirement from rule 65 suggests a presumption in favour of bail. However, the judges have not agreed. In fact, in his decision on the bail application of Morris Kallon, which barely addresses the relevant human rights norms, Judge Pierre Boutet rejected this very argument.⁸² He held that '... it is for the defence to show that further detention of the accused is neither justified nor justifiable in the circumstances at hand'.⁸³ Judge Benjamin Mutanga Itoe treated the issue in greater depth in his analysis of the application of Monina Fofana. He recognised the applicable standard in international human rights law, noting that

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.

He conceded that a presumption against release is not in conformity with human rights norms. In spite of this, Judge Itoe found that since the accused 'is the person seeking to benefit from the Court's discretion', the burden is on the accused to 'furnish legal, moral, or material guarantees to assure the judge or the Chamber' that he will not escape if released on bail or otherwise pose a danger to any victim, witness or other person.⁸⁴ In effect, he agreed that the prosecution is not required to show cause to have a detainee imprisoned indefinitely, and that the onus falls instead on the accused to win his release from the judges.

In spite of his application of a presumption against provisional release, Judge Itoe finds that the right to liberty should 'under either customary international law or municipal law, continue to be and remain the rule and detention the exception'.⁸⁵

For their purposes, it appears that the judges of the SCSL seem to have resolved among themselves that there is a presumption weighing against release, as in the *Fofana* bail application, as a result of which no indicted has been released on bail by the SCSL judges. What are the implications of this decision for international criminal practice? Does this presumption comport with human rights norms? These questions will be addressed in subsequent paragraphs.

⁸² *Kallon* bail application (n 75 above).

⁸³ n 75 above, 7.

⁸⁴ *Fofana* bail application (n 75 above).

⁸⁵ n 75 above.

Burden shifting: A new standard?

In his analysis of Fofana's bail application, Judge Itoe provided an expanded framework for the analysis of rule 65 applications.⁸⁶ He concurred with his colleagues that there is an initial burden on the accused to satisfy the Trial Chamber as to both prongs of rule 65(B). What he added, however, is that if the accused succeeds in this, the application for bail can then be defeated by a sufficient demonstration by the prosecution of '... good reasons for continuing to deprive the detainee of his fundamental right to liberty'.⁸⁷ He described this as a burden-shifting standard by way of which the Special Court judges could analyse specific bail applications.

4.1.3 Factors used in evaluating each prong of the rule 65 two-part test

The court has weighed up a number of issues in evaluating rule 65 applications. For the purposes of analysis, the factors used in evaluating each prong of the test will be considered separately.

*First prong: Will the accused appear for trial?**Amount of security posted by the accused*

The amount of the security posted by the accused has been significant in several of the applications.⁸⁸ In his decision on the application of Monina Fofana, Judge Itoe found that the surety offered by the accused 'does not rise up to the expectation that would convince me to exercise discretion in his favour'. There is no articulation of what level of surety would convince the judge to so exercise his discretion.

Severity of the sentences

The amount of the surety required by the Court is linked to the severity of the potential sentences to be imposed. Special Court judges have cited and agreed with ICTY decisions in which a very high amount of surety was required because of the severity of the sentence. In the *Kallon* bail application, Judge Itoe maintained that the allegations against the accused are of such gravity and seriousness that if released the safety of the accused himself would be undermined.

Risk of flight

The risk of flight posed by indictees has also been a primary consideration. Judges have given particular weight to the fact that the SCSL does

⁸⁶ *Fofana* bail application (n 75 above).

⁸⁷ As above.

⁸⁸ See *Fofana* bail application (n 75 above), quoting the ICTY.

not have an enforcement arm able to execute a warrant of arrest issued by the Court's Trial Chambers. They have also factored the lack of resources available to the Sierra Leonean police force against the granting of bail.

Awareness of indictment and seriousness of alleged crimes

In his application for bail, the accused Issa Sesay argued that as interim leader of the RUF, he had been aware that he was the subject of an impending investigation by the SCSL. As such, his lack of flight prior to his eventual arrest should be taken into consideration in favour of granting his bail application. However, Judge Boutet noted that on his review of certain 'evidence', which was totally unspecified in his decision, he was not satisfied that the accused had been aware of the indictment or that he would have surrendered to the tribunal given a more comprehensive understanding. Judge Boutet was also not satisfied that the accused had been aware of the seriousness of the crimes being investigated by the SCSL. Since Judge Boutet did not articulate the evidence relied upon, there is no basis on which to determine how much any of this made an impact on his decision. The judge did, however, conclude that the current awareness of the accused of the seriousness of the crimes alleged against him does now weigh against his release on bail.

Family ties within Sierra Leone

In evaluating Sesay's application, Judge Boutet noted that the accused presented unspecified 'evidence in support of this factor'. However, he found that 'these allegations do not suffice . . . to meet the prescribed requirements for bail'. Since Judge Boutet neither addressed the submissions by the accused, nor gave any indication of what type of submissions would meet the standard, there is nothing to go on here.

Participation in the peace process

In Sesay's application, Judge Boutet acknowledged that the accused played a role in the peace process. However, Judge Boutet concluded that, whilst this factor may weigh in mitigation should the accused be convicted, it was not relevant to application for bail.

Second prong: Will the accused pose any danger to victims, witnesses or others?

Due to the protections accorded to witnesses testifying before the Special Court, much of the information regarding witnesses and their safety is contained in confidential documents submitted between counsel and the bench, and not made available for outside analysis.

However, in the *Fofana* application, the judge appears to indicate that the fact that some witnesses had been threatened (without speci-

fyng by whom or when) and that this weighed heavily against the application for bail. The question considered here is whether provisional release after the disclosure of sensitive information in court would heighten the risk to witnesses.

Public order concerns

Though not made explicit in the text of rule 65, the judges of the SCSL have weighed up the potential impact of release of the accused on the public. The nine accused are polarising figures for much of Sierra Leone. The judges have accordingly relied upon a government submission in which they note the 'potential for an extremist reaction to the SCSL'. Additionally, the UN Secretary-General referred to the trials at the Special Court as a 'potential source of instability'.

If an accused is released, it follows from such argument that this may provoke 'unrest in his supporters or detractors in the general population'.⁸⁹

Can bail ever be granted before the Special Court?

It has been argued by the judges of the SCSL that the particular situation of the SCSL and its physical presence in the territory of Sierra Leone, and more specifically in Freetown, the capital of the country, 'make[s] it even more important, difficult, critical and sensitive situation than that of the ICTR which sits in Tanzania, a neighbouring country to Rwanda'.⁹⁰

5 Recommendations and suggestions

The importance of the right to bail for indictees at the SCSL cannot be over-emphasised. Among other considerations, enjoyment of this right strengthens the presumption of innocence to which all indictees are entitled irrespective of the allegations against them.

The international community is expected to uphold the rule of law and to promote human rights in the course of helping to rebuild the country.

The question now is, what needs to be done to ensure the effective realisation of the right to bail at the SCSL? This question can be answered by way of recommendations and suggestions under various heads.

5.1 The standards used by judges/requirements for bail

The judges at the SCSL have used various standards to refuse the appli-

⁸⁹ *Fofana* bail application (n 75 above).

⁹⁰ *Sesay* decision (n 75 above) on bail application.

cation for bail by indictees. For instance, they have maintained in some rulings that the amount of security posted by accused persons is not sufficient to convince them that the accused persons will not jump bail. Below are some recommendations:

5.1.1 The opinion of the government of Sierra Leone

The SCSL was established by means of an agreement between the government of Sierra Leone and the UN. Rule 65 stipulates that a judge or Trial Chamber may only order bail after hearing the states to which the accused seeks to be released. In every bail application, the government of Sierra Leone has argued against the granting of bail. It would therefore be unfair to the accused persons for the SCSL to rely exclusively on the opinion of the government of Sierra Leone in determining whether or not bail should be granted. In the alternative, rule 65(B) should be amended by removing the requirement to hear the state to which the accused seeks to be released.

5.1.2 The amount of security posted by accused

Sierra Leone is a poor country by international standards and all the indictees are considered to be indigent. As a matter of fact, none of the accused persons can afford to pay for the services of lawyers and investigators, so this responsibility has been taken on by the SCSL. Financial strength should not be a requirement for the enjoyment of a fundamental right, and so the judges should not lay undue emphasis on the financial strength of an accused as a requirement for the granting of bail. What the Court should consider, which is indeed the practice in most jurisdictions, is whether an accused has a credible and reliable surety that would ensure he attends trial.

5.1.3 The severity of the sentences

The amount of surety required by the Court, I propose, is linked to the severity of the potential sentences to be imposed. It should, however, be borne in mind that the charges against the indictees have, prior to sentencing, the status of mere allegations. It is quite possible, after all, for an accused person to be acquitted and discharged at the end of the trial. The granting of bail would ensure the presumption of innocence until the final determination of the case, and would in no way interfere with the severity of the sentences or the serving of terms of imprisonment.

5.1.4 The risk of flight

The SCSL has given a lot of weight to the fact that it does not have an enforcement arm able to execute a warrant of arrest, as well as to the declaration of the government of Sierra Leone that the police forces do

not have enough resources to ensure that an accused person does not jump bail. The indicted should not be deprived of their right to bail only because of the inefficiency of the police force.

5.1.5 Family ties within Sierra Leone

The judges of the SCSL have never given any indication of what types of submissions would satisfy the requirement of showing family ties within Sierra Leone. It is beyond question that all the indictees before the Court have very strong family ties in Sierra Leone, including members of their immediate and extended families. It would be important for the development of the jurisprudence of the SCSL if the judges were to give an indication as to what would be required to fulfil this condition.

5.1.6 Will the accused pose any danger to victims, witnesses or others?

The SCSL has not been objective in its evaluation of this requirement. For example, in the Fofana bail application, the judge mentioned that some witnesses had been threatened without giving precise circumstances. The accused persons do not pose any danger to victims or witnesses. This requirement must therefore be subjected to a more even-handed analysis, taking into consideration their present and past behaviour and also the stage of the inquiry.

5.1.7 The public order concerns

The issue of whether the accused would be put at risk if released on bail is not an objective consideration. There are many Sierra Leoneans who have committed more atrocities than some of the indictees, yet they walk along the streets of Sierra Leone without any risk to their personal wellbeing. The release on bail of the indictees would not in any way undermine their safety or invoke the anger of members of the public.

5.2 The consistency in the interpretation of rule 65

Rule 65, dealing with release on bail, is provided for in the ICTY, ICTR and the SCSL. With the exception of the provision of exceptional circumstances present in the equivalent ICTR rule 65, the content of this rule is the same in all the three tribunals. Whilst the ICTY has been flexible in its interpretation of the requirements for release on bail under rule 65 and has released a number of indictees on bail, the ICTR and the SCSL have been very rigid in their interpretation of the fulfilment of the requirements by indictees and have not released any on bail. This has created an impression that there is no right to bail at the SCSL in spite of the evident provisions of rule 65.

There must be some consistency in the interpretation of the requirements by all the Tribunals, which ought, after all, to be applying the same standard.

5.3 Bail is the rule, detention is the exception

According to international law as reflected in treaties, *jus cogens* and the reports of the HRC, bail is the rule and detention the exception. However, the requirements imposed by the SCSL in order for an indictee to be released on bail makes detention the rule and bail the exception.

The jurisprudence of the ICTY has established that provisional release, rather than detention, is the general rule,⁹¹ and that provisional release is a basic right that emanates from the fundamental presumption of innocence.⁹² The SCSL should respect this rule of precedent as it is noted in the case law.

It is important that international and internationalised judicial bodies comply with international human rights norms. The lessons of the SCSL will be followed by the ICC and other internationalised criminal tribunals.

The right to liberty is fundamental and cannot be ignored. In any criminal proceeding, the presumption should be in favour of bail. By placing the burden on the accused, the SCSL has sidestepped human rights norms.

5.4 The explicit incorporation of the writ of *habeas corpus* into the SCSL Statute

The writ of *habeas corpus* is a critical protection of the liberty of detainees wherever they are held. Though the SCSL did consent to hear a *habeas* application, it did so, noting that the writ of *habeas corpus* is not incorporated into or recognised by the SCSL Statute.

In *Prosecutor v Brdanin*, the ICTY found that, although the writ of *habeas corpus* is not explicitly recognised by the Court, the Court can nonetheless adjudicate on the lawfulness of a detention.

The writ of *habeas corpus* is not explicitly recognised by the enabling Statute of the Rwandan Tribunal either. That Court has found, however, that, though not explicitly recognised, the concept is universal, thus the writ of *habeas corpus* should apply to ICTR decisions⁹³ as well as the SCSL decisions.

6 Conclusion

International and internationalised criminal trials have historically taken a long time and there is no reason to believe that the SCSL is any different. Because of the seriousness of the crimes, and the correspond-

⁹¹ *Prosecutor v Hadzihasanovic*, Decision on Motion for Provisional Release, 19 December 2001, pointing out that mandatory detention on remand contravenes art 5(3) of the European Convention on Human Rights, and is incompatible with CCPR.

⁹² *Prosecutor v Aleksovski*, Decision of 23 January 1998.

⁹³ Brima application, quoting *Jean Bosco Barayagwiza v Prosecutor*.

ingly severe penalties that may be imposed, special care must be taken to ensure that these indictees are not given the opportunity to escape or to interfere with their eventual trials. Yet, the presumption of innocence that adheres to a defendant until the moment of his conviction is fundamental to many criminal justice regimes. Tied to that presumption is a conditional right to be provisionally released, upon production of sufficient surety.

Each of the tribunals thus far has been justifiably cautious in granting bail to indictees who present a particularly grave risk to flight or interference. The ICTR has categorically refused to grant bail to any defendant. Yet, how does that position relate to the presumption of innocence? A tribunal that refuses bail in all circumstances has in some ways vested the prosecution with the authority to imprison indictees throughout the pre-trial and trial phases, which have in some cases taken up to five years. Does this practice serve to erode the presumption of innocence built into the international legal system?

Releasing indictees on bail would enable them to participate in the preparation of the case for the defence through direct involvement in investigations. This would ensure equality of arms and reinforce the right to a fair trial.

As the Special Court continues its trials, it is hoped that the above-mentioned recommendations and suggestions might guide its work in the determination of bail applications.