

## Commentary

### 1. Introduction

Do the accused for the Special Court for Sierra Leone (SCSL) have something like a basic right of individual freedom? Judges have to make choices between the safety of society and the basic right of individual freedom. It is of great importance to announce how much weight both of the sides will get because, these choices are important for decisions concerning pre-trial detention and the allocation of the burden of proof.

This commentary covers two decisions by the SCSL regarding provisional release (or bail): the Sesay decision<sup>1</sup> and the Fofana decision.<sup>2</sup> It will distinguish two subjects that are discussed in the decisions under review. These are: the presumption of innocence and the allocation of the burden of proof.

### 2. Applicable legal rules at the SCSL

The legal rules applicable at the SCSL are reflected by the SCSL Statute. According to Article 14, the Court shall apply the Rules of Procedure and Evidence (RPE) of the International Criminal Tribunal for Rwanda (ICTR).<sup>3</sup> Further, according to Article 20, the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR.<sup>4</sup>

Rule 65, paragraph B of the SCSL RPE articulates the standard that must be applied in deciding motions for provisional release. The moment the SCSL came in force, Rule 65, paragraph B of the ICTR RPE specified four requirements: 1) exceptional circumstances; 2) hearing the host country; 3) satisfaction that the accused will appear for trial; and 4) that he will not pose a danger to victims, witnesses, or others.

The first condition – ‘exceptional circumstances’ – was heavily debated. Under the initial version of Rule 65, paragraph B of the ICTR RPE, provisional release was granted “only in very rare cases in which the condition of the accused, notably the accused’s state of health, is not compatible with any form of detention.”<sup>5</sup> Because provisional release was only granted in very rare cases, it was more an exception than a rule. This exceptional status was not in compliance with international human rights law.<sup>6</sup>

By the time the SCSL took over the ICTR RPE, the ICTY had amended Rule 65, paragraph B of the ICTY RPE, by removing the condition of ‘exceptional circumstances’.<sup>7</sup> In March 2003, the SCSL followed the ICTY’s example and also abandoned the ‘exceptional circumstances’ requirement. Understandably, the amendment was interpreted as a step towards an international criminal system in which liberty is the rule and pre-trial detention the exception, as stated in Article 9, paragraph 3 of the ICCPR.

### 3. The presumption of innocence

The presumption of innocence is described by Viscount Sankey as the golden thread that runs through criminal law.<sup>8</sup> To presume that an accused is innocent means that punishment cannot begin until the accused is found guilty. According to Archbold, detention should therefore not be the rule, but the exception.<sup>9</sup> On the subject of human rights, the presumption of innocence as a governing principle can, for example, be found

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<sup>1</sup> SCSL, Sesay – Decision on Appeal Against Refusal of Bail, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-AR65, A. Ch., 14 December 2004, in this volume, p. 89.

<sup>2</sup> SCSL, Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-AR65, A. Ch., 11 March 2005, in this volume, p. 99.

<sup>3</sup> Article 14 of the SCSL Statute.

<sup>4</sup> Article 20 of the SCSL Statute.

<sup>5</sup> ICTY, Decision Rejecting A Request for Provisional Release, *Prosecutor v. Blaškić*, Case No IT-95-14-T, 25 April 1996, p. 4.

<sup>6</sup> D. Rearick, Innocent Until Alleged Guilty: Provisional Release at the ICTR, 44 *Harvard International Law Journal* 2003, p. 3.

<sup>7</sup> The amendment to the ICTY’s RPE was adopted at the 21<sup>st</sup> plenary session, November 1999.

<sup>8</sup> House of Lords, *Woolmington v. Director of Public Prosecutions*, 23 May 1935, [1935] AG-462, p. 481 (*per* Viscount Sankey) (cited by Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, footnote 22).

<sup>9</sup> R. Dixon and K. Khan, *Archbold International Criminal Courts – Practice Procedure and Evidence*, Sweet and Maxwell, London 2003, p. 175 (cited by M. Mackarel, Commentary, Klip/ Sluiter, ALC-XV-16, footnote 38).

in Article 9, paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR). This article states that “it shall not be the general rule that persons awaiting trial shall be detained in custody.”

On the one hand, there is the presumption of innocence as a golden thread, which – as some would argue – implies that liberty should be the rule and pre-trial detention the exception. But, on the other hand, some argue that there are reasons to constrain this liberty. Pre-trial detention is a means to guarantee that the accused appears for trial. As well as a safeguard for the criminal justice system, it also functions as a safeguard for the potential risks posed by the accused to society. One should note that the international tribunals do not have independent power to enforce conditions for provisional release, to re-arrest the released person, or to protect witnesses, victims or other persons. This situation can lead to many risks, because the tribunal has to rely on the abilities of the country in which the accused is released. These are arguments for pre-trial detention as a rule.

Despite the removal of the ‘exceptional circumstances’ requirement, provisional release remained the exception and pre-trial detention the rule.<sup>10</sup> The SCSL reiterated the initial meaning of Rule 65 and called for argumentation concerning the potential risks posed by the accused to society and to the criminal justice system.<sup>11</sup> The reiteration of Rule 65 as leading to pre-trial detention as a rule, reduces the impact of the amendment to Rule 65.

Why, if the meaning of the rule on this subject was unchanged when compared to the initial version, did they amend the rule? It can, in any case, not be seen as a step towards an international criminal system in which pre-trial detention is not the rule. It is more likely that, the fact that pre-trial detention was becoming lengthy, has contributed to the decision to remove the first condition of Rule 65, paragraph B.<sup>12</sup> If true, we should interpret the amendment more as a pragmatic solution that is intended to reduce the number of accused persons in custody.

A reason to reiterate the initial meaning of Rule 65, paragraph B – in which pre-trial detention is the rule – was given by Judge May, who again drew attention to the argument that an international tribunal lacks a police force to execute its own arrest warrants.<sup>13</sup> By contrast, Judge Robinson stated that it is wrong “to justify a principle that provisional release is the exception and not the rule on the basis of the absence within the tribunal of a police force”.<sup>14</sup>

As we have seen, there are two different approaches to Rule 65: the approach in which the presumption of innocence prevails and the approach in which pre-trial detention prevails. It is important to realize that these approaches are symptoms of a more fundamental tension; namely the tension between the safety of society and the basic right of individual freedom.

According to the Appeals Chamber in the Sesay decision, public interest factors, such as the absence of a police force and the need to rely on the ability of the country to provide for this, should be taken into account. What’s more, in the particular situation of Sierra Leone, public interests factors, such as the ability of the authorities to uphold conditions, may take on a greater relevance. As the Trial Chamber stated in the Sesay decision, the particular situation of the Special court and its direct presence in Sierra Leone makes it an “important, difficult critical and sensitive situation.”<sup>15</sup> The fact that the SCSL is seated in the country where the crimes are alleged to have occurred should, therefore, according to the Trial Chamber, be taken into account.

<sup>10</sup> See, for example, ICTY, Decision on Simo Zarić’s Application for Provisional Release, *Prosecutor v. Simić, Simić, Tadić, Todorović and Zarić*, Case No. IT-95-9-PT, T. Ch. III, 4 April 2000, Klip/ Sluiter, ALC-IV-81. See also Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 36.

<sup>11</sup> Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 38.

<sup>12</sup> Sergey Vasiliev is, in this context, referring to the increase in the number of detainees in custody before the amendment of the ICTY RPE. See S. Vasiliev, Commentary, Klip/ Sluiter, ALC-XIV-158.

<sup>13</sup> See ICTY, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Cases No. IT-00-39 and 40-PT, T. Ch. III, 8 October 2001, Klip/ Sluiter, ALC-VIII-45 (cited in Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, footnote 24).

<sup>14</sup> *Ibid.*, par. 11.

<sup>15</sup> SCSL, Decision on Application of Issa Sesay for Provisional Release, *Prosecutor v. Sesay*, Case No. SCSL-04-15-PT, T. Ch., 31 March 2004, Klip/ Sluiter, ALC-IX-315, par. 55.

The Appeals Chamber in the Sesay decision was satisfied that the Trial Chamber took into account the public interests including the “important, difficult, critical and sensitive” situation with which he was faced, as well as the accused’s right to be presumed innocent and to be released on bail.<sup>16</sup> The Appeals Chamber articulated the principle “that each case must be decided on its own merit” and regarded this as fundamental.<sup>17</sup> According to this principle, the public interests, as well as the right to be presumed innocent are both relevant factors.<sup>18</sup>

As mentioned before, it is, according to Judge Robinson, wrong to justify a principle on the basis that the international tribunal lacks a police force.<sup>19</sup> However, the justification of a principle on the basis of a practical need is something different from taking into account a practical need as a balancing factor, as was seen in the Sesay decision. The lack of a police force does not, in itself, provide sufficient justification for concluding that pre-trial detention should be the rule. However, from a pragmatic point of view, the potential risk posed by the accused to society should also be taken into account. In this context, the Appeals Chamber decision in the case of Fofana referred to the heinous crimes and to the victims of these crimes.<sup>20</sup>

One should realize that undertaking a balancing exercise between the public interest and the interests of the accused to be presumed innocent and to be released on bail, does make the absolute character of the presumption of innocence disappear. Thus, the decision of the Appeals Chamber is at odds with pre-trial detention as an exception and with the presumption of innocence as an absolute rule. Furthermore, undertaking a balancing exercise is not in line with a ‘right to bail’. However, according to the Appeals Chamber, there is not such a right; there is only a right to *apply* for bail.<sup>21</sup>

By making a decision based on the principle that each case must be decided on its own merits, the Appeals Chamber has decided against the presumption of innocence as an absolute rule and has taken sides in the debate about Rule 65, paragraph B, opting for a balance in which the presumption of innocence weighs only at one side of the scale. We can conclude that, by doing so, it reduced the presumption of innocence to only the individual right of the accused to be released on bail.

#### 4. Allocation of the burden of proof

Another dimension to the debate relating to Rule 65, paragraph B, is the question of the allocation of the burden of proof. As some would argue, this question is linked to the question of whether pre-trial detention is the rule or the exception.<sup>22</sup>

At first sight, Rule 65 does not say anything about who bears the burden of proof for release on bail. However, Article 9, paragraph 3 of the ICCPR states that pre-trial detention should be the exception. The burden of proof should therefore, according to this provision – if we agree on the presumption that the link can be made – be on the prosecution.<sup>23</sup>

On the contrary, the initial version of Rule 65, as well as the current version of this rule are, as we have seen, interpreted as stating that provisional release is the exception and not the rule.<sup>24</sup> Therefore, although the ‘exceptional circumstances’ condition has been removed, the majority of the jurisprudence of the tribunals places the burden to prove the various requirements as set out in Rule 65, paragraph B, on the accused.<sup>25</sup>

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<sup>16</sup> Sesay – Decision on Appeal Against Refusal of Bail, *Prosecutor v. Sesay et al.*, *supra* note 1, par 36.

<sup>17</sup> *Ibid.*, par. 37.

<sup>18</sup> *Ibid.*

<sup>19</sup> Decision on Momčilo Krajišniks Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, *supra* note 13, par. 11.

<sup>20</sup> Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 31.

<sup>21</sup> *Ibid.*, par 32.

<sup>22</sup> See, for example, Decision on Application of Issa Sesay for Provisional Release, *Prosecutor v. Sesay*, *supra* note 15.

<sup>23</sup> In this context, the Human Rights Committee has stated that: “[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.” Human Rights Committee, General comment No. 13: Article 14 (Administration of Justice), 13 April 1984, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, p. 184, par. 7.

<sup>24</sup> See, for example, Decision on Simo Zarić’s Application for Provisional Release, *Prosecutor v. Simić et al.*, *supra* note 10 (cited in Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 38).

<sup>25</sup> See, for example, ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, T. Ch., 25 July 2000, p. 2 (cited in Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 36).

Several Trial Chambers have decided that, although detention remained the rule and release the exception, the accused no longer had to show ‘exceptional circumstances’.<sup>26</sup> Thus, the amendment did not shift the burden of proof, but rather lowered it for the defence.

The Appeal Chamber deals with this disagreement by stating that Article 9, paragraph 3 of the ICCPR does not refer to bail, because Rule 65 of the SCSL RPE does not require mandatory detention; it simply makes release subject to a guarantee to appear for trial. A guarantee is only a guarantee if it can be established by the applicant.<sup>27</sup>

As stated in the Sesay decision, we should decide on a ‘case by case’ basis, and there is no principle of provisional release as an exception or as a rule. Thus, we should not make a link at all between the burden of proof and the question of provisional release as an exception or a rule. The Fofana decision emphasised this again in the context of the burden of proof.

The prosecution in this case reasoned that the allocation of the burden of proof on the accused does not result in a regime whereby detention is the rule and provisional release on bail the exception. There is no presumption one way or the other: a Trial Chamber should proceed on a case by case basis. The prosecution relied, on this matter, on the majority decision of the Trial Chamber in the Krajišnik case,<sup>28</sup> to

“the effect that the presumption of innocence is a procedural safeguard of fair trial which is not infringed because the question of whether bail conditions are met does not go to the ultimate finding of guilt or innocence.”<sup>29</sup>

Thus, the question of whether bail conditions are met is not a question about guilt and is therefore a different question, in relation to which the presumption of innocence is not applicable.

The Appeals Chamber chose a similar direction. It cited a ruling of the House of Lords, and stated that

“[t]he presumption of innocence is no more (but no less) than the principle that the prosecution must prove beyond reasonable doubt the guilt of the defendant. It is a fundamental right directed to serving the overriding end that the trial itself is fair.”<sup>30</sup>

The presumption of innocence, described as the golden thread that runs through criminal law, has, according to this decision, no application or relevance to the preconditions for bail under Rule 65, paragraph B of the SCSL RPE.<sup>31</sup>

In this respect, the Appeals Chamber cited a ruling of the United States Supreme Court, in which it was held that, although a pre-trial detainee is presumed to be innocent for purposes of a criminal trial, this presumption of innocence “has no application to a determination of the rights of a pre-trial detainees during confinement before his trial has even begun.”<sup>32</sup> Thus, the golden thread, which states that an accused is innocent and that punishment – in this case: detention – cannot begin until the accused is found guilty, is of no relevance for a decision on provisional release. The Appeals Chamber added that liberty should not be seen as a sacred or sacrosanct right. On the matter of provisional release, liberty is not the rule; it is only a factor in the balance. This is because, each case, as the Appeals Chamber explained in the Sesay decision, must be decided on its own merits.

Knowing that the principle of detention as a rule, as well as the principle of detention as an exception, is of no importance in the allocation of the burden of proof for provisional release, the Appeals Chamber had to allocate the burden of proof on another basis. According to the Appeals Chamber decision in the case of Fofana, the language of Rule 65, paragraph B of the SCSL RPE confirms that the burden rests with the applicant. It referred to the word “only” in Rule 65, paragraph B. Under the amended rule, the Trial Chamber

<sup>26</sup> See, for example, Decision on Simo Zarić’s Application for Provisional Release, *Prosecutor v. Simić et al.*, *supra* note 10.

<sup>27</sup> Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 39.

<sup>28</sup> Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, *supra* note 13.

<sup>29</sup> Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 16.

<sup>30</sup> House of Lords, *Sheldrake v. Director of Public Prosecutions*, 14 October 2004, [2005] I ALL ER 237, p. 251 (*per* Lord Bingham), par 21 (cited in Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 37).

<sup>31</sup> Fofona – Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, *supra* note 2, par. 37.

<sup>32</sup> *Ibid.* (citing Supreme Court of the United States, *Bell v. Wolfish*, 14 May 1979, 441 U.S. 520, p. 533).

will grant provisional release “*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.” (emphasis added)

The accused must prove both of these conditions before the Trial Chamber will consider granting the request for provisional release pursuant to its discretionary power. Thus, the force of the word “*only*” in Rule 65, paragraph B of the SCSL RPE, requires the applicant to satisfy the court that there can be no real risk that setting the accused at liberty will have consequences for the court or for others.<sup>33</sup> This places the burden of proof on the accused.

After the accused has shown that bail should be granted, the prosecution has the burden to rebut or challenge the submissions made by the defence.<sup>34</sup> Thereafter, the Trial Chamber has to determine whether, in the circumstances of the case, the public interests outweigh the right to be released. As the Appeals Chamber stated:

“Each case [...] must turn on its own facts and circumstances, with the ultimate question being whether the applicant for bail has produced sufficient (i.e. sufficiently convincing) guarantees for his attendance at trial and for his good conduct while on provisional release.”<sup>35</sup>

## 5. Conclusion

As we have seen, choices that must be made between the safety of society and the basic right of individual freedom concern pre-trial detention and the allocation of the burden of proof.

The Appeals Chamber of the SCSL preferred a burden of proof that rests with the accused and chose for a decision based on a balancing exercise between the public interest and the interests of the accused. This is a means to decide each case on its own merit. The presumption of innocence as an interest of the accused is just one side of the equation in deciding whether an accused should be granted provisional release on bail. In doing so, the Appeals Chamber reduced the presumption of innocence to only the individual right of the accused to be released on bail.

This was emphasised again by the Appeals Chamber in reference with the allocation of the burden of proof in the Fofana decision. In this decision, the Appeals Chamber clarified that the presumption of innocence was of no importance at the stage in which the pre-conditions for bail must be established.

The reduction of a fundamental principle to an individual right, which is only an element at one side of the equation, makes clear that the SCSL prefers the public interests above the interests of the accused.

I agree with Judge Robinson that the lack of a police force does not, in itself, provide sufficient justification for concluding that pre-trial detention should be the rule. However, from a pragmatic point of view, the potential risk posed by the accused to society should also be taken into account. Taking this into account is not unjust. However, it should be clear that the presumption of innocence is not an absolute rule at the SCSL. On the contrary, by making a decision based on the principle that each case must be decided on its own merits, the SCSL chose for liberty as an exception.

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<sup>33</sup> *Ibid.*, par 33.

<sup>34</sup> *Ibid.*, par. 34.

<sup>35</sup> *Ibid.*, par. 41.