271,

SCSL-04-14-T
(10779-10810).

10779

SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

Before: Justice Ayoola, President
Justice A. Raja N. Fernando
Justice Renate Winter
Justice Geoffrey Robertson
Justice Gelaga King

Registrar: Robin Vincent

Date: 12 November 2004

THE PROSECUTOR

-Against-

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

MOININA FOFANA NOTICE OF APPEAL AND SUBMISSIONS AGAINST THE "DECISION ON APPLICATION FOR BAIL PURSUANT TO RULE 65"

Office of the Prosecutor:
Luc Côté
James C. Johnson
Raimund Sauter

Court Appointed Counsel for Moinina Fofana:
Michiel Pestman
Arrow J. Bockarie
Victor Koppe

Court Appointed Counsel for Samuel Hinga Norman:
Dr. Bu-Buakei Jabbi
Quincy Whitaker
Tim Owen, Q.C.

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana

NOTICE OF APPEAL

1. The Defence for the Second Accused Mr. Moinina Fofana (the "Defence") hereby files its Notice of Appeal and its Submissions against the "Decision on Application for Bail (the "Bail Application") Pursuant to Rule 65" (the "Decision") delivered by the Trial Chamber on 5 August 2004.

Summary of Proceedings

2. On 27 January 2004, the Defence filed its Application for Bail Pursuant to Rule 65.

3. On 9 February 2004, the Office of the Prosecutor (the "Prosecution") filed its Response to Defence Application for Bail Pursuant to Rule 65.

4. On 16 February 2004, the Prosecution filed its Reply to the Prosecution Response to the Application for Bail Pursuant to Rule 65.

5. On 17 March 2004, a hearing was held before the Trial Chamber.

6. On 5 August 2004, the Trial Chamber, by Hon. Judge Benjamin Mutanga Itoe, issued its Fofana Decision on Application for Bail Pursuant to Rule 65 refusing bail to the Second Accused.

7. On 27 August 2004, in the Moinina Fofana Application for Leave to Appeal Against Refusal of Bail (the "Leave Application"), the Defence sought leave to appeal against the Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court (the "Rules").

8. On 8 September 2004, the Prosecution filed its Response to the Application (the "Response").

9. On 13 September 2004, the Defence filed its Moinina Fofana Reply to Prosecution's Response Application for Leave to Appeal Against Refusal of Bail.

10. On 5 November 2004, in the "Decision on Application for Leave to Appeal Bail Decision", the Defence was granted leave to appeal.

Grounds of Appeal

11. The Defence sought leave to appeal the Decision on the grounds that the Trial Chamber, by Hon. Judge Benjamin Mutanga Itoe, made errors of both fact and law in his determination of the Bail Application.

12. The Defence respectfully submits that Judge Itoe made an error of fact by failing to accept the guarantees offered by the Defence in support of the Bail Application. These guarantees should have been sufficient to satisfy Judge Itoe that Mr. Fofana would appear for trial and, if released, would not pose any danger to victims, witnesses, or other persons.

13. The Defence further submits that Judge Itoe made several errors of law, namely:

(a) in his reliance on the "best evidence rule" to determine the *admissibility* rather than the *probative value* of evidence submitted by the Defence;

(b) in his refusal to admit a declaration submitted by the Defence in support of the Bail Application upon a finding that, because the declaration was unsigned, it was irrelevant;

(c) in his admission of a statement—based entirely on hearsay—of the Chief Investigator, an impartial party employed by the Prosecutor; and

(d) in his placing the burden of proof with regard to the conditions set forth in Rule 65(B) on the Second Accused, rather than on the Prosecutor as is consistent with the well-settled principle of customary international law which "consecrates liberty as the rule and detention as the exception".

14. The Defence reasserts its position—stated previously in the Leave Application—that the errors outlined above implicate issues of great legal and public importance.

Relief Sought

15. The Defence respectfully requests the Appeal Chamber to annul the Decision of the Trial Chamber and to grant Mr. Fofana's application for bail.

SUBMISSIONS

Error of Fact

16. The Trial Chamber erred by disregarding the substantial evidence presented by the Defence indicating that Mr. Fofana had satisfied the criteria established by the Rules and relevant jurisprudence for a grant of provisional release on bail.

17. Rule 65(B) permits the Trial Chamber to order bail "only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person".

18. Rule 65 must be read in light of the presumption of innocence afforded to the accused under Article 17(3) of the Statute and customary international law as well

as the doctrine of proportionality which dictates that rules of criminal procedure be suitable, necessary, and reasonably related in both degree and scope to their envisaged target[1]. Consistent with these principles, an accused who presents sufficient evidence that he will appear for trial and not pose a danger to any victim, witness, or other person, should be released provisionally[2]. Only in exceptional circumstances, to be demonstrated by the prosecution, should the discretion afforded to the Trial Chamber be exercised to the detriment of the accused.

19. Since the removal from ICTY Rule 65(B) of the requirement of exceptional circumstances[3], rendering the rule identical to that of the Special Court, the relevant jurisprudence has proceeded upon the basis that, where the accused succeeds in establishing that he will meet the other conditions, he is in principle entitled to provisional release[4].

20. Furthermore, it is a rule of customary international law that pre-trial detention should remain an exception rather than the norm. For example, according to the International Covenant on Civil and Political Rights (the "ICCPR"): "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 ..."[5]. Other international human rights instruments contain the same principle[6].

21. Although Judge Itoe couched his Decision in terms consistent with the above-stated rules and principles, he seemingly ignored the substantial submissions made by the Defence and gave limited response, if any, to the specific guarantees

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[1] *See Prosecutor v. Hadzihasanovic, et al*, ICTY, Trial Chamber, "Decision on Motion for Provisional Release", 19 December 2001, where the Trial Chamber granted provisional release in light of detailed guarantees proposed by the accused, noting that there could never be a total guarantee of appearance for trial and that the accused did not pose a danger to any sources of evidence. ("Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, it must be applied.")

[2] *See, e.g., Prosecutor v. Brdjanin & Talic*, ICTY, Trial Chamber, IT-99-36-T, "Decision on the Motion for Provisional Release of the Accused Momir Talic", 20 September 2002, (annex 5).

[3] The stipulation that provisional release may only be ordered in "exceptional circumstances" was deleted from Rule 65 (ICTY) at the 21st Plenary Session on 30 November 1999.

[4] *See* ECHR, 25 June 1991, Letellier, para. 46, (annex 6).

[5] ICCPR, Article 9, Section 3.

[6] *See* Article 5, European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 7, American Convention on Human Rights; Articles 6 & 7, African Charter on Human and Peoples' Rights; United Nations General Assembly Resolution 43/17, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 9 December 1998, Principle 39: "Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to conditions, (annex 7).

proposed by Mr. Fofana—all of which amounted to satisfaction of Rule 65's requirements.

22. In paragraphs 15 through 20 of the Bail Application, the Defence highlighted Mr. Fofana's strong commitment to both his family and Chiefdom[7]. Further, as Mr. Fofana is not in possession of travel documents or funds necessary for travel, his appearance at trial—subject to the proposed guarantees—can be assured. In paragraphs 21 through 23 of the Bail Application, the Defence explained in detail why Mr. Fofana would not pose a danger to any victim, witness, or other person, if released[8].

23. The Defence further submitted that Mr. Fofana agreed to the imposition of various and comprehensive conditions under Rule 65(D) deemed necessary by the Trial Chamber, such as, but not limited to, those set out in paragraph 25 of the Bail Application[9].

24. To a large extent however, Judge Itoe chose to ignore the substantial legal, moral, and material guarantees offered by the Defence in support of Mr. Fofana's Bail Application. Such guarantees should have been sufficient to satisfy the Trial Chamber that Mr. Fofana would appear for trial and, if released, would not pose any danger to victims, witnesses, or other persons.

25. On an issue which implicates such a fundamental right as the presumption of innocence, the Defence respectfully submits that Judge Itoe's summary dismissal of valid submissions amounts to an abuse of discretion—especially given that the

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[7] In response to Judge Itoe's assertions in paragraph 67 of the Decision that the accused has failed to show a stake and attachment to his community, the Defence submits that proof of ownership of property and/or a bank account is not the *sine qua non* of community attachment. Indeed, it is submitted that many residents of Sierra Leone hold neither real property nor bank accounts. Furthermore, contrary to Judge Itoe's view, the Defence submits that Mr. Fofana's lack of cash assets actually militates in favour of his application as this shows he is without the financial means to flee the Court's jurisdiction.

[8] In this regard it must be noted that the prosecution's investigation is nearly complete and prosecution witnesses are more than adequately protected by the Witness and Victims Support Unit. *See Prosecutor v. Jokic et al*, ICTY, Trial Chamber, "Decision on Motions for Provisional Release", 20 February 2002.

[9] In paragraph 68 of the Decision, Judge Itoe summarily dismisses the detailed and comprehensive guarantees proposed by the accused: "these, to my mind, do not rise up to the expectation that would convince me to exercise [my] discretion in his favour." Yet these are the very guarantees accepted by the *Sainovic* court. While the Defence recognizes the discretion afforded to the Trial Chamber under the Rules, it does not recognize a judge's prerogative to dismiss valid arguments out of hand. It should be further noted that the Accused's incentive to abscond is merely one factor of many to be considered. If given effect, the proposed guarantees—which amount to virtual house-arrest—would be more than sufficient to ensure Mr. Fofana's attendance in court. With these measures in place, there is simply no risk of flight.

submissions of the Bail Application appeared to satisfy, on balance, the very test adopted by Judge Itoe himself in the *Brima* decision[10].

26. For the reasons stated above, it is respectfully submitted that the Trial Chamber committed an error of fact in declining to take into account the substantial evidence advanced by the Defence. Accordingly, this Appeals Chamber should annul the Decision.

Errors of Law

Improper Application of the "Best Evidence Rule" and Rule 89(C)

27. The Defence submits that Judge Itoe erred by relying on the "best evidence rule" to decide the admissibility of the declaration submitted by the Defence[11]. The "best evidence rule" merely advises a Judge as to the prioritisation of evidence. By logical inference, the necessity of such process only arises *after* evidence has been admitted to a Chamber. Judge Itoe erred in his application of the rule to determine admissibility, rather than to assess the probative value of evidence once it has been admitted to the Chamber.

28. Rule 89(C) of the Rules of Procedure and Evidence at both the ICTY and ICTR provides that "[a] Chamber may admit any relevant evidence that it deems has a probative value". Accordingly, the probative value of a piece of evidence to be admitted into evidence before these tribunals must be established at the admission stage. Contrastingly, Rule 89(C) of the Rules governing procedure at the Special Court provides simply that "[a] Chamber may admit any relevant evidence". Accordingly, the Trial Chamber is not required to establish and assess the credibility of a piece of evidence in deciding to admit such evidence. Rather, under Rule 89(C), a Chamber is simply asked to decide whether or not a piece of evidence is relevant.

29. The declaration submitted by the Defence (the "Defence Delcaration") in support of the Bail Application was clearly relevant evidence as it touched upon the core issues raised by an application for bail, namely whether or not the accused will appear for trial and/or pose a danger to any victim, witness, or other person. Accordingly, it was an error of law to deny admission of the declaration under the

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[10] *Prosecutor v. Tamba Alex Brima*, SCSL, Trial Chamber, SCSL-03-06-PT, "Ruling on Motion for Bail", 22 July 2003, (annex 1). It must be noted that in that decision, "the gravity of the offences for which he is indicted" was listed as only one of several factors to be considered as to the possibility of the accused's flight. In any event, the gravity of the crimes an accused is charged with and the role the accused allegedly played in those crimes are not relevant to the exercise of the court's discretion. *See Prosecutor v. Sainovic & Ojdanic*, ICTY, Appeals Chamber, "Dissenting Opinion of Judge Hunt on Provisional Release", 30 October 2002, paras. 26-31, (annex 4), nota bene: the majority did not disagree on this point, see para. 2 of the Opinion.

[11] Decision, para. 58.

"best evidence rule" given Rule 89(C)'s broad purview as to matters of admissibility.

Refusal to Admit the Unsigned Defence Declaration

30. The Defence Declaration should not have been denied admission based on the fact that it was unsigned. Upon receipt of the unsigned declaration filed on 9 March 2004, Judge Itoe could have adjourned the matter and allowed the Defence to file a signed and sworn affidavit as soon as the witness returned from abroad, so as to allow a fair determination of the matter in accordance with Rule 89(B). However, Judge Itoe instead chose to stand on procedural formalities and deny admission of the document. It is respectfully submitted that this type of rigid formalism is inconsistent with the liberal rules of admissibility as embodied in Rule 89(C). An unsigned document is not by definition irrelevant.

31. The Trial Chamber has previously admitted unsigned documents into evidence, in accordance with Rule 89(C). For example, during both cross-examination and re-examination of witness TF2-159 on 10 September 2004, unsigned witness statements were admitted into evidence. In admitting these documents, the Trial Chamber correctly recognised that the question of whether or not the document was signed went to the subsequent question of the evidence's probative value rather than its relevance. It is therefore submitted that the Trial Chamber's refusal to admit the Defence Declaration amounts to an error of law.

32. In any event, the author of the Defence Declaration—Ms. Frances Fortune—has executed a signed Affirmation[12] which is attached to this Notice and Submission. This Affidavit provides direct, relevant evidence in support of the assertions set forth in the Bail Application (as outlined at paragraph 16 above), namely that Mr. Fofana is neither a flight risk nor a danger to any victim, witness or any other person. Additionally, Ms. Fortune undertakes to report personally should Mr. Fofana breach any bail conditions imposed[13].

Improper Admission of the Declaration of the Chief of Investigations

33. The statement of the Chief Investigator should not have been admitted as evidence[14]. The Chief Investigator, as a party employed by the Prosecutor to carry out investigations for the Prosecutor, is not an impartial witness. Rather, his statement represents the point of view of the Prosecutor, a party to this proceeding. The statement also seems to be entirely based on hearsay. The Defence submits that for these reasons the probative value of the statement is

[12] *See* Affirmation of Frances Fortune, 11 November 2004, annexed hereto.

[13] Ibid, para. 14.

[14] Decision, para. 59.

questionable at best, and therefore not relevant for any decision to be taken in the bail procedure. Accordingly, its admission amounts to an error of law.

Improper Placing of the Burden of Proof on the Accused

34. With regard to the important issue of the burden of proof, the Defence disagrees with Judge Itoe's concession that in matters relating to bail, the burden of establishing the conditions set out in Rule 65(B) rests with the accused[15]. This position cannot be reconciled with the "customary international law principle which consecrates liberty as the rule and detention as the exception", a position recognised by Judge Itoe himself[16].

35. Notably, Rule 65 of this Court mirrors that of the ICTY and not the ICTR. Unlike the ICTR, the ICTY has affirmatively repudiated the requirement of exceptional circumstances as an element of an application for bail, thus giving further support to the view that detention should be the exception and not the rule.

36. It is respectfully submitted that the Trial Chamber, while paying lip service to principles of fairness and customary international law, incorrectly placed the burden on the Accused rather than the Prosecution. This amounts to an error of law, and the Defence urges this Court to annul the Decision accordingly.

CONCLUSION

37. For the reasons outlined above, the Defence respectfully requests the Appeal Chamber to annul the Decision of the Trial Chamber and to grant Mr. Fofana's application for bail.

COUNSEL FOR MOININA FOFANA

pp Michiel Pestman

[15] Decision, para. 95.

[16] Decision, para. 96. *See Hadzihasanovic, supra* at fn. 1, where the Trial Chamber stressed that mandatory detention on remand is incompatible with article 5(3) of the ECHR (decision paragraph 7); see also Article 9(3) of the International Covenant on Civil and Political Rights, which provides that "[i]t shall not be a general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial."

INDEX OF DOCUMENTS NECESSARY FOR THE DECISION IN APPEAL

1. Defence, "Application for Bail Pursuant to Rule 65", 27 January 2004.

2. Prosecution, "Response to Defence Application for Bail Pursuant to Rule 65", 9 February 2004.

3. Prosecution, "Reply to the Prosecution Response to the Application for Bail Pursuant to Rule 65", 16 February 2004.

4. Trial Chamber, "Fofana Decision on Application for Bail Pursuant to Rule 65", 5 August 2004.

5. Defence, "Moinina Fofana Application for Leave to Appeal Against Refusal of Bail", 27 August 2004.

6. Prosecution, "Response to Moinina Fofana Application for Leave to Appeal Against Refusal of Bail", 8 September 2004.

7. Defence, "Moinina Fofana Reply to Prosecution's Response to Application for Leave to Appeal Against Refusal of Bail", 13 September 2004.

8. Trial Chamber, "Decision on Application for Leave to Appeal Bail Decision", 5 November 2004.

9. Defence, "Affirmation of Frances Fortune", 11 November 2004.

DEFENCE INDEX OF AUTHORITIES

1. *Prosecutor v. Hadzihasanovic, et al*, ICTY, Trial Chamber, "Decision on Motion for Provisional Release", 19 December 2001.

2. *Prosecutor v. Brdjanin & Talic*, ICTY, Trial Chamber, ICTY-99-36-T, "Decision on the Motion for Provisional Release of the Accused Momir Talic", 20 September 2002, (annex 5).

3. ICTY Rules of Evidence and Procedure, Rule 65.

4. ICTR Rules of Evidence and Procedure, Rule 65.

5. ECHR, 25 June 1991, Letellier.

6. International Covenant on Civil and Political Rights, Article 9, Section 3.

7. *Prosecutor v. Jokic et al*, ICTY, Trial Chamber, "Decision on Motions for Provisional Release", 20 February 2002.

8. *Prosecutor v. Tamba Alex Brima*, SCSL, Trial Chamber, SCSL-03-06-PT, "Ruling on Motion for Bail", 22 July 2003.

9. *Prosecutor v. Sainovic & Ojdanic*, ICTY, Appeals Chamber, "Dissenting Opinion of Judge Hunt on Provisional Release", 30 October 2002.

SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

Before: Justice Ayoola, President
Justice A. Raja N. Fernando
Justice Renate Winter
Justice Geoffrey Robertson
Justice Gelaga King

Registrar: Robin Vincent

Date: 12 November 2004

THE PROSECUTOR

-Against-

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

AFFIRMATION OF FRANCES FORTUNE

Office of the Prosecutor:
Luc Côté
James C. Johnson
Raimund Sauter

Court Appointed Counsel for Moinina Fofana:
Michiel Pestman
Arrow J. Bockarie
Victor Koppe

Court Appointed Counsel for Samuel Hinga Norman:
Dr. Bu-Buakei Jabbi
Quincy Whitaker
Tim Owen, Q.C.

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana

I, Frances Fortune of 13C off Garbar Lane, Juba Hill, Freetown, in the Western Area of the Republic of Sierra Leone do hereby make oath and say as follows:

1. I am the Regional Director of Search for Common Ground presently residing at the above address. I have lived and worked in Sierra Leone since 1985.

2. Search for Common Ground is an international non-governmental organisation which seeks to transform the manner in which the world deals with conflict. Using media as a tool for peace building, we have developed an independent multi-media studio called the Talking Drum Studio. We have small offices in Makeni and Bo, as well as one in Freetown at 44 Bathurst Street. We seek to link community issues and concerns to the national dialogue ensuring voices of everyone are consulted and considered. Working around four major thematic areas of corruption—quality education, governance and marginalized people—Search for Common Ground integrates media work with community outreach to ensure an engaged and informed populace.

3. I first met Mr. Moinina Fofana in 1998 when I was working for Conciliation Resources (CR), a small British non-governmental organisation.

4. I began working with the CDF in 1998 to assist them with the development of a methodology to address the increasingly problematic interface between the CDF and some communities. We sought to facilitating dialogue between the community elders, chiefs, and youth, and the CDF was wholly committed to this process. Following the signing of the Lomé Peace Agreement, we established 'Campaign for Peace' within the CDF. Its objective was to ensure the CDF was informed and prepared for the peace process. We worked mainly in the southern and eastern parts of the country, and I worked closely with Mr. Fofana for over two years. Funded by the European Union, we hosted reconciliation workshops in every regional headquarters and in selected district headquarters.

5. Mr. Fofana was a key member of the team, talking to CDF all over the south and east to convince them that the peace process was in their best interests. We travelled extensively together and spent many hours in each other's company as well as the company of other members of his office. A willing interlocutor, Mr. Fofana greatly assisted in bringing the CDF on board to the peace process through his active engagement and travel with us to many

communities, particularly in the south. Mr. Fofana was not paid for his services. In recognition of his efforts, he was dubbed by the CDF the 'Director of Peace'.

6. In June 2000, I accepted the work with Search for Common Ground and moved to Freetown from Bo. After this time, I did not see Mr. Fofana frequently; only a few times in Freetown and twice in Bo.

7. Although the collaboration between the CR and the CDF began as an effort of the CDF Administrator in Bo—Mr. Kosseh Hindowa—we quickly found out that his office was not interested in problem-solving and did not actively support the work. We were put in touch with Mr. Fofana through Mr. I.F.M. Kanneh, another prominent CDF member, who was helping us with the community facilitation. This is why we reached out to Mr. Fofana.

8. I found Mr. Fofana's office very willing to support the peace work that we were doing and prepared to actively engage without any payment. We called on him on many occasions to help our work and to develop a conceptual framework for action with his office once the Lomé Peace agreement was signed—this was the Campaign for Peace. He was an active member and gave his full support.

9. With the support of locally-sourced European Union funds, two provincial workshops and then six district ones were held to talk to the localised and horizontal leadership of the CDF about the peace process. Reports for these workshops are with the European Union office in Bo. Also a number of other workshops in strategic areas were held which Mr. Fofana attended and supported often driving long miles in his own vehicle (with no pay and no fuel) to give a speech about peace.

10. As part of a team, Mr. Fofana and I also negotiated a reconciliation agreement between two chiefdoms that had been actively fighting—Kagboro and Bumpeh in Moyamba district—over the course of a three day workshop. Subsequently, other members joined the Campaign for Peace, including an RUF member.

11. Mr. Fofana's role in the reconstruction of the hearts and minds of the CDF to embrace peace is substantial. No other member of the CDF actively engaged at the community level to ensure that the membership had a clear understanding of the expectations integral to the

Lomé Peace Agreement. His contribution to the restoration of peace and democracy was significant and meaningful.

12. Mr. Fofana poses no threat to peace in any way whatsoever. He is a peace-loving man who believes in authority and the institution of the state. He will comply with the rules and obligations which are clearly explained to him.

13. He will not abscond, nor does he pose a threat to others if he is released. Mr. Fofana has a firm belief that he has done nothing wrong and has nothing to hide, therefore he expects that justice will be done in his case and he will eventually be acquitted of the charges against him. This is the reason he will not abscond. As previously stated he poses no threat to others as he is highly respectful of other people.

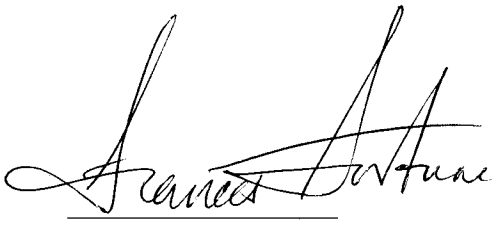
14. If Mr. Fofana is released on bail, I am willing to have him stay with me, either in my house in Freetown or in my family farm in Senehun, Kamajei, Moyamba district. I live in an extended family system with the family of my husband and our two children, amongst others. Therefore, there are always people in both houses where I live, despite the fact that I travel frequently. I undertake to report personally to the Court if Mr. Fofana breaches any bail conditions that may be imposed, such as an overnight curfew or an obligation to report to local authorities. In the event of my absence, I will ensure that other responsible members of my family take on this obligation.

15. I attended the scheduled hearing on Mr. Fofana's application for bail on 5 March 2004 in order to testify to the fact contained in this affidavit, as well as to give the Court the opportunity to put any questions to me they considered relevant. However, the hearing was postponed to 17 March 2004, on which date I was unfortunately out of the country. I very much regretted that I was unable to attend the postponed hearing and had hoped that this would not have had a negative impact on Mr. Fofana's application.

16. I am, in short, quite convinced that Mr. Fofana will neither abscond nor pose any threat to other persons.

I, Frances Fortune, affirm that the information contained herein is true to the best of my knowledge, information and belief. I understand that wilfully and knowingly making false statements in this declaration could result in prosecution before the Special Court for Sierra Leone for giving false testimony. I have not wilfully or knowingly made any false statements in this declaration.

Dated: Freetown, Sierra Leone
11 November 2004



Frances Fortune

Case No. IT-99-36-T

10794

IN TRIAL CHAMBER II

Before:
Judge Carmel Agius, Presiding

Judge Ivana Janu

Judge Chikako Taya

Registrar:
Mr. Hans Holthuis

Decision of:
20 September 2002

PROSECUTOR
v.
RADOSLAV BRDJANIN
and
MOMIR TALIC

DECISION ON THE MOTION FOR PROVISIONAL RELEASE OF THE ACCUSED MOMIR TALIC

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Mr. Milan Trbojevic, for Radoslav Brdjanin
Mr. Slobodan Zecevic and Ms. Natacha Fauveau-Ivanovic, for Momir Talic

TRIAL CHAMBER II ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of the "Motion for Provisional Release of Momir Talic" ("Motion") filed confidentially by the Accused Momir Talic ("Talic") on 10 September 2002.

INTRODUCTION AND PROCEDURAL BACKGROUND

• In the Motion Talic seeks to be provisionally released pursuant to Rule 65(B) to his family home in Banja Luka on the grounds of his ill-health, under the terms and conditions that he shall remain within the confines of the municipality of Banja Luka, except for

occasional visits for tests, medical treatment and therapy , as may be required by the medical doctors, to the Military-Medical Academy ("VMA ") in Belgrade. The VMA, according to Talic is the only specialised institution in the territory of Bosnia and Herzegovina and Federal Republic of Yugoslavia that can deal with the illness that he is suffering from, and the place where he can receive the satisfactory medical care. Subsequently, on 18 September 2002, Talic filed an "Amendment to the Motion for Provisional Release" ("Amendment") in which the condition to remain within the confines of a certain municipality was amended and supplemented to include the municipality of Belgrade, also as an alternative to that of Banja Luka.[1]

• On 9 September 2002, following receipt of the results of a series of medical tests, Dr. P.T.L.A. Falke ("Dr. Falke") – Medical Officer of the United Nations Detention Unit ("UNDU") communicated a confidential medical report to the Registrar of this Tribunal ("Registrar") and subsequently to this Trial Chamber. In the report Dr. Falke indicated that Talic is suffering from carcinoma and that Talic is not fit to stand trial and not fit to remain in detention.

• On 10 September 2002 the Trial Chamber heard the Parties in the absence of Talic who, due to his illness, could not attend. Talic had waived his right to be present.

• During the same hearing the Trial Chamber had an opportunity to hear the testimony of Dr. Falke and to examine the documents he produced. Dr. Falke explained that the diagnosis was a carcinoma in the liquid layers of the lungs without any possible cure except palliative care with prognosis of several months maximum.[2] The diagnosis was the result of a series of tests carried out on Talic, and followed the consultation of a lung specialist and an oncologist.[3] Dr. Falke stressed again that the present state of health of Talic was incompatible with the regime of detention.[4]

• On 10 September 2002, the Trial Chamber decided to hear a second opinion[5], and through the intervention of the Registrar[6], appointed two leading experts, namely Dr. Paul Baas ("Dr. Baas") – a lung cancer specialist and primary consultant in Antoine van Leeuwenhoek Hospital in Amsterdam - and Dr. Jan van Meerbeek ("Dr. van Meerbeek") – a consultant in the Department of Pulmonary Medicine at the Erasmus Medical Centre in Rotterdam, to examine Talic and report to it.

• On 10 September 2002, the Trial Chamber received a letter of guarantees from the Government of Republika Srpska undertaking to honour all the orders made by this Trial Chamber in the event that Talic were to be provisionally released.

• On 11 September 2002, the two medical experts testified in closed session before this Trial Chamber. Dr. Baas explained at the hearing that he had performed a medical examination of Talic in the penitentiary hospital unit and following a puncture of his pleura extracted some pleural liquid from the left side of his thoracic cavity in order to analyse it. Reserving his opinion on the final diagnosis until he obtained the results of such analysis, Dr. Baas informed the Trial Chamber that Talic is suffering from a localised but advanced form of cancer, probably originating from the lung.[7] This kind of cancer is inoperable and incurable. Chemotherapy would only serve as a palliative treatment.[8]

• Dr. van Meerbeek testified at the same hearing that he performed a medical examination of Talic in the penitentiary hospital unit and he informed the Trial Chamber that Talic is suffering of a carcinomatous pleurisy (malignant cancer cells in the left side of the thoracic cavity). He stated that this is an incurable disease , which cannot be cured by means of surgery, radiotherapy or chemotherapy.[9] The only possible treatment is palliative chemotherapy.[10] Asked by the Trial Chamber about the prognosis, Dr. van Meerbeek explained that the average survival of a patient in Talic's condition is about one year and that the chance that Talic will be alive in two years is about 40 per cent.[11]

• Both experts agreed that Talic, in his current state of health, was not unfit to remain in detention for some days pending the debate on the Motion and that for the short term Talic is fit to stand trial.[12]

• On 12 September 2002, Dr. Baas submitted a written report informing the Trial Chamber that he had carried out a cytological diagnostic test and that he was able to confirm that Talic is suffering of advanced carcinoma probably of the lung, which is inoperable and incurable.[13]

• Following the testimonies of the medical experts, the Prosecution asked that , before the Trial Chamber should proceed with the hearing on the Motion, it be granted time to discuss the various implications involved with the Prosecutor who was at the time abroad on official business.[14]

• On 12 September 2002, the Trial Chamber granted the Prosecution's Request and adjourned the hearing on the Motion to 17 September 2002, indicating that, following the testimony of the two experts, there was no clear and present danger or prejudice attached to Talic's continued detention in the UNDU for a short period pending discussion and the determination of the Motion.

• On 13 September 2002 the Defence filed a Request[15] to lift the confidentiality of the Motion and all related documents and closed session hearings, which was granted by this Trial Chamber in the course of the hearing of 17 September 2002.[16]

• On 17 September 2002, the Prosecution filed a "Prosecution's Response to Motion for Provisional Release of Momir Talic" ("Prosecution's Response") objecting to Talic being provisionally released on the grounds that he is charged with the gravest possible violations of international humanitarian law that the public perception of such provisional release could be extremely damaging to the institutional authority of the Prosecutor and her ability to conduct investigations in the territory of the former Yugoslavia. Furthermore, the Prosecution argued that victims and witnesses who have agreed to co-operate with the Prosecution will not have a favourable view of such a release and in the context of their own suffering will not understand the humanitarian motivation behind such a release. Consequently the Prosecution suggested an alternative strategy, namely that the Accused remain in detention at the VMA in Belgrade, subject to certain conditions.[17]

• In the course of the hearing of 17 September 2002, the Trial Chamber heard oral submissions by the Parties.

• At the same hearing the Representative of the Government of the Federal Republic of Yugoslavia ("FRY") was heard. He confirmed the letter of intent filed on 13 September 2002 by the Federal Ministry of Justice of the FRY in which the Ministry provided guarantees regarding Talic's provisional release for treatment in the VMA, but he was unable to take a position on the additional guarantees would eventually be necessary in case the Trial Chamber decides to put Talic at home arrest.

• On 19 September 2002 Talic provided the Trial Chamber with signed written guarantees .

• In the course of the hearing held of 19 September 2002, the Trial Chamber heard again the Representatives of the FRY and further submissions by the Parties. The Representatives of FRY provided the Trial Chamber with a letter of guarantees signed by the President of FRY undertaking the obligation to comply with all orders of the Trial Chamber to ensure that, on being summoned by the Trial Chamber, Momir Talic will be able to appear before it at any time. The guarantees are made pursuant to the provisions contained in the Law of FRY on Co-operation with this Tribunal . These guarantees include the following: (a) the obligation of the Yugoslav authorities to take charge of the accused Momir Talic from the Dutch authorities at Schiphol airport, on the day and time determined by the Trial Chamber; (b) the obligation of the Yugoslav authorities to escort the accused during his journey to FRY; (c) the obligation of the Yugoslav authorities to return the accused from the FRY to Schiphol airport and to turn him over to the Dutch authorities, on the day and time determined by the Trial Chamber; (d) the accused shall be taken over from the Dutch authorities, escorted during the journey and return to the Dutch authorities by a representative to be appointed in due time by the Federal Government of the FRY ; (e) the obligation of the Federal Ministry of the Interior, through the appropriate secretariat of the Ministry of the Interior of the Republic of Serbia, to ensure that the accused shall report daily to the police station, that records shall be kept in this regard, and a monthly written report submitted confirming that the accused is adhering to these obligations, and to immediately inform the International Criminal Tribunal in case of accused's absence; (f) the obligation of the Yugoslav authorities to immediately arrest the accused if he tries to escape or violates any of the conditions of his provisional release from detention, and to inform the International Criminal Tribunal so that preparations can be made for his transfer back to the Tribunal.

DISCUSSION

Applicable law

• Rule 65 of the Rules of Procedure and Evidence ("Rules") sets out the basis upon which a Trial Chamber may order provisional release of an accused.

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

(B) Release may be ordered by a Trial Chamber only 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.

(C) The Trial Chamber may impose such conditions upon release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others."

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• Article 21(3) of the Statute of the Tribunal ("Statute") mandates that:

"*the accused shall be presumed innocent until proved guilty*".

This provision both reflects and refers to international standards as enshrined *inter alia* in Article 14(2) of the International Covenant on Civil and Political Rights of 19 December 1966 ("ICCPR") and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR").

• The Trial Chamber, in interpreting Rule 65 of the Rules, believes it must focus on the concrete situation of the individual applicant and consequently that the provision cannot be applied in *abstracto,* but must be applied with regard to the factual basis of the particular case.[18]

• The burden of proof rests on the accused to satisfy the Trial Chamber that he will appear for trial and will not pose any danger to any victim, witness or other person. It should be noted that the Trial Chamber retains discretion not to grant provisional release even if it is satisfied the accused complies with the two requirements in the Rule.[19]

• Moreover, when interpreting Rule 65, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure , that measure must be applied.[20]

• In determining the factors relevant to the decision-making process, Trial Chamber recalls what Trial Chamber I has stated:

"*First the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. It must also rely on the co-operation of States for the surveillance of accused who have been released . This calls for a more cautious approach in assessing the risk that an accused may abscond. It depends on the circumstances whether this lack of enforcement mechanism creates such a barrier that provisional release should be refused. It could alternatively call for the imposition of strict conditions on the accused or a request for detailed guarantees by the government in question.*

(...) Among other factors that may be relevant in relation to the circumstances of individual cases the following may be mentioned: completion of the Prosecution's investigation which may reduce the risk of potential destruction of documentary evidence; a change in the health of the accused or immediate family members". [21]

• The Trial Chamber must make its own assessment and decide, taking into consideration the arguments, the submissions made, the facts of the case, the law, and the final assessment will in addition depend on all the contributions, the guarantees of the accused and all the guarantees provided by the relevant authorities taken as a whole .

Application of the law to the facts

• This Trial Chamber is seised of an application by the accused Talic for provisional release on humanitarian grounds, namely on the grounds of his ill-health. The humanitarian basis makes this application distinct from most of the other applications considered and decided by this Tribunal. It is different from the cases like those of Plašvic , Gruban, Hadžihasanovic, Alagic and Kubura, for instance, because in all of those cases provisional release was sought during the pre-trial phase and there was no critical state of health involved. It is different from the *Đukic* case because in that case too, provisional release was sought in the pre-trial stage and in addition , the terminal cancer condition of the accused was such as to be unequivocally incompatible with any kind of detention. It is being pointed out from the very outset, therefore , that Talic's case cannot be considered and dealt with in the same manner as that adopted by this Tribunal in any of the above mentioned decisions and others with which this case cannot be strictly compared.

• Still, having heard the testimonies of the medical officer of the UNDU and of the two experts appointed by this Trial Chamber in addition to the documentation made available, there can be no doubt that Talic is suffering from an incurable and inoperable locally advanced carcinoma which presently is estimated to be at stage III-B with a rather unfavourable prognosis of survival even on short term.

• The Trial Chamber is of the view that Rule 65(B) is silent on the circumstances justifying provisional release specifically to enable individual cases to be determined on their merits and by application of discretion in the interests of justice. In determining these individual cases, it is necessary to bear in mind the *rationale* for the institution of provisional release, which is linked to the *rationale* for the institution of detention on remand.

• The Trial Chamber stresses that the *rationale* behind the institution of detention on remand is to ensure that the accused will be present for his/her trial. Detention on remand does not have a penal character, it is not a punishment as the accused, prior to his conviction, has the benefit of the presumption of innocence . This fundamental principle is enshrined in Article 21, paragraph 3 of the Statute and applies at all stages of the proceeding, including the trial phase.

• The argument of the Prosecution that it would be inappropriate for this Trial Chamber to grant Talic provisional release given the stage the trial has reached and the nature of the evidence that has been brought forward to date can only be relevant in the context of an application for provisional release in so far as it may convince the Trial Chamber that once provisionally released Talic may try to abscond or in any way interfere with the administration of justice by posing a danger to any victim, witness or other person. The Trial Chamber is satisfied that no evidence has been adduced to show that there are any such clear present or future dangers .

• The Trial Chamber has also considered the submission by the Prosecution that the provisional release of Talic could be "extremely damaging to the institutional authority of the Prosecutor and her ability to conduct investigation in the territory of the former Yugoslavia and the subsequent trial in The Hague". The Trial Chamber has carefully balanced two main factors, namely the public interest, including the interest of victims and witnesses who have agreed to co-operate with the Prosecution , and the right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and of the presumption of innocence.[22] As a result it is convinced

that what would indeed be extremely damaging to the institutional authority of the Prosecutor and even more so, that of this Tribunal, is if this Trial Chamber were to disregard the stark reality of Talic' s medical condition and ignore the fact that this is a Tribunal created to assert, defend and apply humanitarian law.

• The stark reality of Talic's medical condition is that there is no escape for him from the natural consequence that his illness will ultimately bring about because his condition is incurable and inoperable and can only deteriorate with or without treatment. The stark reality is that the odds in favour of his being alive a year from now are few indeed. This scenario ultimately also means that it is very unlikely that Talic would be still alive when this trial comes to its end, or more so, that if found guilty he would be in a position to serve any sentence. Indeed this is the stark reality of the situation that this Trial Chamber is faced with. Yet the Prosecution continues to show concern with the fact that the victims and witnesses who have agreed to co-operate with its Office will not have a favourable view of such a release and in the context of their own suffering they will not understand the humanitarian motivation behind such a release. The Trial Chamber is certainly not insensitive to the concerns of the Prosecution and even more so to those of the victims and witnesses who may fail to understand as suggested by the Prosecution . It is the duty of this Trial Chamber, however, to emphasise that such concerns cannot form the basis of any decision of this Tribunal, which would be tantamount to abdicating from its responsibility to apply humanitarian law when this is appropriate . There can be no doubt that when the medical condition of the accused is such as to become incompatible with a state of continued detention, it is the duty of this Tribunal and any court or tribunal to intervene and on the basis of humanitarian law provide the necessary remedies. In this context the Trial Chamber makes reference to the recent decision of the First Section of the European Court of Human Rights *in re* Mouisel v. France,[23] which ruled for admissibility in a case which dealt with the continued detention of a person suffering from cancer requiring intensive treatment involving transfer to hospital under escort as being in violation of Article 3 of the ECHR. The Trial Chamber has no doubt at all that Talic's medical condition is such as to warrant in an unequivocal manner a prompt and effective humanitarian intervention. It would be inappropriate for this Trial Chamber to wait until Talic is on the verge of death before considering favourably his application for provisional release and in the meantime allow a situation to develop which would amount to what is described in the Mouisel decision *supra* as being an inhumane one. This is all the more so when, as stated earlier, detention on remand is not meant to serve as a punishment but only as a means to ensure the presence of the accused for the trial. The Trial Chamber, given the scenario depicted above, fails to understand the request of the Prosecution for the continued detention of Talic knowing that before long and in all probability before this trial reaches its end, his condition will not be any different from Djjukic's and would, as in that case, necessitate a practically unconditional provisional release.

• The Trial Chamber believes that, given the medical condition of Talic, it would be unjust and inhumane to prolong his detention on remand until he is half-dead before releasing him. Basing itself upon the medical reports and the testimony of the medical doctors involved, the Trial Chamber is of the opinion that the gravity of Talic's current state of health is not compatible with any continued detention on remand for a long period. As explained in the Mouisel case, the palliative care and treatment, which Talic's condition requires, and will require more in the future , justifies a different environment. Moreover, it has rightly been pointed out by the Commander of the UNDU, as well as by the Prosecution, that security and

logistical problems may arise if Talic seeks to have treatment by way of chemotherapy, while he remains in the custody of the UNDU and even if he is given treatment for some time in a hospital in The Netherlands.

• The Trial Chamber, in addition, believes that, for the same considerations outlined in the previous paragraphs, the suggestion of the Prosecution, namely that of providing for the continued detention of Talic at the VMA in Belgrade in a secure environment without the possibility of leaving that environment instead of continuing to detain him in the UNDU in the Hague, is not the appropriate solution as the circumstances that necessitate the humanitarian intervention of this Tribunal, would remain the same. The Trial Chamber, however, as stated earlier, has no doubt that Talic's case cannot be treated the same way as that of Djukic and a number of conditions attached to his release are necessary and appropriate to ensure that this on-going trial is in no way prejudiced. One of these conditions is in line with what the Prosecution has asked, namely that this Trial Chamber agrees that until and unless otherwise decided by this Tribunal, the request by Talic to enable him to return to the municipality of Banja Luka in Republika Sprska should not be acceded to. This Chamber believes that the fact that the trial against him is on-going justifies this measure or restriction and the Trial Chamber is further satisfied that no prejudice will be caused to him as a consequence because in any case he will be confined to Belgrade where he can equally have, and benefit from, the proximity of his family .

• For the same reason mentioned in the previous paragraph, namely that Talic's case cannot be treated the same as that of Djukic and a number of conditions attached to his release are necessary and appropriate to ensure that this on-going trial is in no way prejudiced, this Trial Chamber has reached the conclusion that the circumstances are such that his ability to move freely in the city to which he will be returned will be restricted. In the course of the debate before this Trial Chamber , the possibility of confining him to a specified residence under house arrest terms and conditions was explored and discussed. In this context, this Trial Chamber refers to the decision of 3 April 1996 of the then President of this Tribunal, Judge Antonio Cassese, in the Blaškic case, in which the notion of house arrest was considered *funditus*. Considering that house arrest is not a measure that is specifically dealt with by the Rules or the Statute of this Tribunal and is also not addressed by the laws of the FRY, and considering further that the notion of house arrest is more akin to the subject of non-custodial sanctions as an alternative form of post-conviction detention, this Trial Chamber believes that it is appropriate to distinguish it from the imposition of a residence requirement. The Trial Chamber believes that the circumstances are such that the imposition of a controlled residence requirement for the time being will be sufficient. This Trial Chamber believes that such a measure would for all intents and purposes be tantamount to what would technically be classified as house arrest, at least in so far as freedom of movement is concerned and as explained in the Blaškic decision *supra* can still be considered as a form of detention.

• The Trial Chamber will also impose all those conditions which, in its opinion , on the one hand are necessary to ensure that Talic receives all the medical treatment he requires and, on the other hand are appropriate in the circumstances to ensure that the requirements of Rule 65 governing provisional release are observed.

• Having premised all the above, the Trial Chamber next turns to examine the requirements set out in Rule 65. As a matter of procedure, the Trial Chamber, before provisionally

releasing Talic, is required to hear from the host country.

• On 13 September 2002 the Dutch authorities communicated in writing to this Trial Chamber that they have no objections to Talic being provisionally released on condition that he does not reside in The Netherlands thereafter.[24]

• As to the requirement that the accused satisfies the Trial Chamber that he will re-appear, in the event he recovers sufficiently to resume attending trial, the Trial Chamber takes into account and attaches importance to the Law of Co-operation passed in April 2002 by the Government of the FRY. This recent legislation sets out a procedure for the arrest and surrender of accused persons to the International Tribunal,[25] and obliges the "organs of internal affairs" to arrest such persons. Procedure of this nature did not previously exist, and the Trial Chamber accepts that the Government has taken steps to lessen chances of accused evading arrest while in the territory of the FRY. In this connection , the Trial Chamber is also satisfied that the proposed level of co-operation is satisfactory.

• In this context this Trial Chamber takes into consideration the guarantees provided by the FRY. As a whole, this Trial Chamber is satisfied with the assurances that have been put forward by the Government of the FRY, in particular that the local authorities will closely monitor Talic at his residence in Belgrade. Consequently , the Trial Chamber does not identify *in concreto* any clear and present risk that Talic will not re-appear for trial.

• As to the requirement that Talic, if provisionally released, will pose no risk to any victim, witness or other person, the Trial Chamber reiterates that no evidence or material has been adduced tending to prove that any clear and/or present danger of such risk exists and further notes that there is no suggestion that Talic has interfered with the administration of justice in any way whatsoever since March 14, 1999, the date when the indictment was confirmed against him. Nonetheless, in reaching its decision, this Trial Chamber has striven to minimise as much as possible any such risk in the future especially by restricting Talic's residence to an area distant from the one where he initially sought to be returned and which is part of the territory covered by the Indictment.

• Finally, this Trial Chamber observes that Pursuant to Rule 65(C) the Trial Chamber "may impose such conditions upon the release of the Accused as it may determine appropriate". It is noted that Talic has consented to the imposition of any conditions necessary to his provisional release. The Trial Chamber considers that the stringent conditions and the restrictions imposed on Talic's personal liberty and found in the disposition below, can adequately satisfy the requirements set out in the Rule . Therefore, the Trial Chamber, upon balancing all the relevant circumstances as required by Rule 65(B) and as discussed above, finds it appropriate to order that Talic should be provisionally released.

43. In reaching its decision the Trial Chamber has also taken into consideration Talic's offer to waive his right to be present, should the proceeding against him continue. The Trial Chamber is not imposing any such condition upon him as a pre -requisite for his provisional release mainly because of legal considerations, but certainly acknowledges his willingness not to obstruct the contination of the trial agains t him.

44. The Prosecution seeks a stay of the decision in order to appeal against the grant of provisional release. The Defence has entered its opposition. It is, however , fit and proper,

considering the Prosecution's Response, that the grant of provisional release will therefore be stayed pending any appeal by the Prosecution.

DISPOSITION

For the foregoing reasons,

PURSUANT TO Rule 65 of the Rules

TRIAL CHAMBER II HEREBY GRANTS the Motion **AND ORDERS** the provisional release of Talic on the following terms and conditions:

Talic shall be transported to Schiphol airport in the Netherlands by the Dutch authorities .

At Schiphol airport, Talic shall be provisionally released into the custody of the designated officials of the FRY (whose names shall be provided in advance) and who shall accompany him for the remainder of his travel to his place of residence in Belgrade.

During the period of his provisional release, Talic shall agree to abide and will abide the following conditions, and the FRY shall ensure compliance with each and every of them:

To reside and remain at all times at the address provided in Belgrade[26], except for occasional visits for tests, medical treatment and therapy, as may be required, to the VMA. For this purpose his address in Belgrade will be communicated by the Registrar to the authorities of FRY;

To inform the Representative of the Registry at the Field Office in Belgrade if he leaves the address provided for tests, medical treatment and therapy in VMA;

Without prejudice to condition a) above, to remain within the confines of the municipality of Belgrade;

Except when hospitalised at the VMA or when for reason of health unable to do so , to contact once a day the local police in Belgrade which will maintain a log and report accordingly to the Representative of the Registry at the Field Office in Belgrade at the end of each month;

To assume responsibility for, and bear all expenses necessary for his transport from Schiphol airport to Belgrade and back;

Under no circumstances will he travel to Banja Luka or any of the other municipalities covered by the Indictment, unless authorised by the Trial Chamber;

To surrender his passport to the Representative of the Registry at the Field Office in Belgrade or to the authorities of the FRY as required;

To surrender his driving license to the Representative of the Registry at the Field Office in Belgrade or to the authorities of FRY as required;

To consent to have the authorities of FRY verify his presence at the address provided in

Belgrade or at the VMA, as may be required;

To consent to have a Representative of the Registry at the Field Office in Belgrade to verify his presence at the address provided in Belgrade or at the VMA, as may be required;

To consent to have a Representative of the Registrar of the Tribunal to have access to him at any time, in order to assess arrangements for his security and welfare ;

To consent to have a medical specialist appointed by the Registrar of the Tribunal to visit him once a month or as required, in order to assess and report his state of health;

Not to have any contacts with the other co-accused in the case;

Not to have any contacts whatsoever or in anyway interfere with victims or any person who may testify at his trial, or otherwise interfere in any way with the proceedings or the administration of justice;

Not to discuss his case with anyone, including the media, other than his counsel ;

Not to occupy any official position;

To comply strictly with any requirements by the authorities of FRY necessary to enable them to comply with their obligations under the order for provisional release and their guarantees;

To comply with any other and further order and/or condition the Trial Chamber may deem necessary under the circumstances;

To return to the Tribunal at such time and on such date as the Trial Chamber may order;

To comply strictly with any order of the Trial Chamber varying the terms of, or terminating, the provisional release of the accused.

REQUIRES the Dutch authorities:

To transport Talic to Schiphol airport;

At Schiphol airport, to provisionally release Talic into the custody of the designated official (s) of the FRY (whose name(s) shall be provided in advance to the Registrar of the Tribunal) and who shall accompany Talic for the remainder of his travel to his place of residence in Belgrade;

On Talic's return flight, to take custody of the accused at Schiphol airport at a date and time to be determined by the Trial Chamber seised of the case;

To transport Talic back to the UNDU or to another place indicated by the Trial Chamber .

REQUIRES the authorities of FRY to assume responsibility for:

Transport expenses, jointly and severally with Talic, from Schiphol airport to his place of residence and back;

The personal security and safety of Talic while on provisional release;

Reporting immediately to the Registrar of the Tribunal the substance of any threats to the security of Talic, including full reports of investigations related to such threats;

Facilitating, at the request of the Trial Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;

Ensuring compliance with the conditions imposed on Talic by this or any future order ;

Submitting a written report to the Registrar of the Tribunal every month as to the presence of Talic and his compliance with the terms of this order and any further order;

Immediately detaining Talic should he breach any of the terms and conditions of his provisional release and reporting immediately any such breach to the Trial Chamber ;

Respecting the primacy of the Tribunal in relation to any existing or future proceedings in the FRY concerning Talic;

Not issuing to Talic any passport or document enabling him to travel.

INSTRUCTS the Registrar of the Tribunal

To consult with the Ministry of Justice of the Netherlands and the authorities of FRY as to the practical arrangements for Talic's release and travel to Belgrade;

To keep Talic in custody until relevant arrangements are made for his travel, unless hospitalisation is needed instead;

To take any necessary measure to grant to Talic all the medical assistance he requires during the transfer from the UNDU to his place of residence in Belgrade;

To communicate to the authorities of FRY Talic's address in Belgrade;

To appoint a medical specialist to have access to Talic once a month or as may be required in order to assess his state of health and who will provide a written report to this Tribunal on such state of health.

REQUESTS the authorities of all States through which Talic will travel:

to hold Talic in custody for any time he will spend in transit at the airport;

to detain and arrest Talic pending his return to the United Nations Detention Unit , should he attempt to escape.

ORDERS

That the provisional release of Talic is stayed pending an appeal by the Prosecution pursuant to Rule 65(D), (E), (F) and (G).

Done in French and English, the English version being authoritative. 10806

Dated this twentieth day of September 2002
At The Hague

The Netherlands

Carmel Agius
Presiding Judge

[Seal of the Tribunal]

1 - Amendment para. 7, page 3.
2 - T. 9728, T. 9734.
3 - T. 9732.
4 - T. 9728, T. 9747.
5 - T. 9752-3.
6 - OLAD fax concerning "Review of Mr. Talic medical files" dated 10 September 2002, filed to the Trial Chamber on 13 September 2002.
7 - T. 9789.
8 - T. 9793.
9 - T. 9809.
10 - T. 9810.
11 - T. 9810 – 9811.
12 - T. 9795, T. 9818.
13 - Letter of Dr. Baas on Mr. Talic's medical condition, dated 12 September 2002.
14 - T. 9824 ff.
15 - Requête aux fins de lever la confidentialité de la requête aux fins de la mise en liberté.
16 - T. 9845.
17 - Prosecution's Response, paras. 3-5.
18 - Prosecutor v. Hadzihasanovic et al., Case No. IT-01-47-PT, *Decision Granting Provisional Release to Amir Kubura*, 19 December 2001, para. 7.
19 - See, for example, Prosecutor v. Kovacevic, Case No. IT-97-24-PT, *Decision on Defence Motion for Provisional Release*, 21 January 1998; Prosecutor v. Brdjanin and Talic, Case No. IT-99-36-PT, *Decision on Motion by Momir Talic for Provisional Release*, 28 March 2001.
20 - Prosecutor. V. Dragan Jokic, Case No. IT-02-53-PT, *Decision on Request for Provisional Release of Accused Jokic*, 28 March 2002, para. 18.
21 - Prosecutor v. Ademi, Case No. IT-01-46-PT, *Order on Motion for Provisional Release*, 20 February 2002, paras. 24-27.
22 - Prosecutor v. Blaskic, Case No. IT-95-14-T, *Decision on Motion of the Defence seeking Modification of the Conditions of Detention of General Blaskic*, 9 January 1997.
23 - Appl. 67263/01 decided on 21/3/2002.
24 - Letter by the Deputy Director Cabinet and Protocol Department, dated 12 September 2002.
25 - Law on Co-operation between the FRY and the International Tribunal, artt. 18-31.
26 - The address was provided to the Trial Chamber as a confidential and ex parte filing on 18 September 2002.

Case: IT-99-37-AR65

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IN THE APPEALS CHAMBER

Before:
Judge Mohamed Shahabuddeen, Presiding
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar:
Mr Hans Holthuis

Decision of:
30 October 2002

PROSECUTOR

v

Nikola SAINOVIC & Dragoljub OJDANIC

DISSENTING OPINION OF JUDGE DAVID HUNT ON PROVISIONAL RELEASE

Counsel for the Prosecutor:

Ms Carla Del Ponte
Mr Geoffrey Nice

Counsel for the Defence:

Mr Toma Fila & Mr Zoran Jovanovic for Nikola Sainovic
Mr Tomislav Visnjic, Mr Vojislav Selezan & Mr Peter Robinson for Dragoljub Ojdanic

DISSENTING OPINION OF JUDGE DAVID HUNT

25. Discussion and conclusions

(A) *Burden of proof on factual issues in provisional release applications*

26. The logical starting point in this appeal by the prosecution is with the burden of proof, an issue which is applicable to both factual issues upon which the accused bears the onus, that he will appear for trial and that, if released, he will not pose a danger to any victim, witness or other person. If the Trial Chamber accepted the case put forward by the accused after applying a lower burden of proof than that which it should have applied, then the decision would have to be quashed.

27. The prosecution argues that a Trial Chamber should not grant provisional release unless it is satisfied that there is "no real risk" that the accused will fail to appear for trial or pose any danger to victims or witnesses or other persons.[98] That is not what the Rule says. Rule 65(B) requires only a satisfaction that the accused will appear for trial, not that there is no real risk that he will not appear . The difference is substantial. Nor did the prosecution make any such submission to the Trial Chamber. The rather opaque comment in its original Response to the Ojdanic Application – that, in order to satisfy the burden placed upon him, Sainovic must do more than simply tip the balance in his favour[99] – hardly suffices to make the point which is now sought to be made on appeal.

28. That the prosecution did not make this point before the Trial Chamber is conceded by it, but it says that this is irrelevant, because it was the duty of the Trial Chamber to ensure that it applies the correct standard of proof regardless of the submissions of the parties, yet it "did not adhere to the standard that every Trial Chamber is under an obligation to apply".[100] The prosecution does concede that the standard which it has now identified to the Appeals Chamber is "more *specific* than anything referred to in the jurisprudence so far", but nevertheless, the prosecution argues, the test it now proposes –

> [...] clearly falls within the general framework of, and is consistent with, all of the Tribunal's decisions emphasising the very substantial burden of proof upon an applicant for provisional release, given the particular context in which this Tribunal operates.[101]

The prosecution refers to three Trial Chamber decisions to support this argument . In the order in which the prosecution referred to them, they are:

Prosecutor v Brdjanin & Talic,[102] in which the Trial Chamber said:

> The absence of any power in the Tribunal to execute its own arrest warrant upon an applicant in the former Yugoslavia in the event that he does not appear for trial , and the Tribunal's need to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf, place a substantial burden upon any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released. That is not a re-introduction of the previous requirement that the applicant establish exceptional circumstances to justify the grant of provisional release. It is simply an acceptance of the reality of the situation in which both the Tribunal and applicants for provisional release find themselves.

Prosecutor v Ademi,[103] in which the Trial Chamber said:

> In considering the two pre-conditions expressly laid down in Rule 65(B), it must be remembered that, there are factors that are specific to the functioning of the Tribunal which may influence the assessment of the probability of the risk of absconding or interfering with these witnesses. [...] First, the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. It must also rely on the cooperation of States for the surveillance of accused who have been released. This calls for a more cautious approach in assessing the risk that an accused may abscond.

Prosecutor v Blaskic,[104] in which the Trial Chamber said:

> **CONSIDERING** that the guarantees offered by General Blaskic, including the payment of a bail bond, are in no way sufficient to ensure that, if released, he would appear before this International Tribunal; that the gravity of the crimes allegedly committed and the sentences which might be handed down justify fears as to the appearance of the accused;
>
> **CONSIDERING**, furthermore, that it is not certain that, if released, the accused would not pose a danger to any victim, witness or other person; that the knowledge which, as an accused person, he has of the evidence produced by the Prosecutor would place him in a situation permitting him to exert pressure on victims and witnesses and that the investigation of the case might be seriously flawed;

29. None of these statements (except perhaps the second paragraph quoted from the *Blaskic* Decision) supports the prosecution argument that there exists a heavier burden in relation to proof that an accused person will appear for trial and will not pose a danger to victims, witnesses and other persons when seeking provisional release than that which is required for proof of any other fact in any other application for relief. Contrary to the prosecution's submission, there does not exist any standard of persuasion fixed at an intermediate point between the satisfaction beyond reasonable doubt required to establish guilt of a criminal charge and satisfaction that more probably than not what any applicant for relief asserts is true (sometimes referred to as the balance of probabilities). Satisfaction that what such an applicant asserts is more probably true than not depends upon the nature and consequences of the matter to be proved. The more serious the matter asserted, or the more serious the consequences flowing from a particular finding, the greater the difficulty there will be in satisfying the relevant tribunal that what is asserted is more probably true than not. That is only common sense.[105] The nature of the issue necessarily affects the process by which such satisfaction is attained, but the burden of proof is the same: that more probably than not what is asserted by the applicant is true.

30. In the *Brdjanin* Decision, the reference to the "substantial burden" placed upon an applicant in establishing that he will indeed appear for trial if released is a reference only to the substantial difficulty he will have, by reason of the context within which the Tribunal is forced to operate, in satisfying a Trial Chamber that more probably than not he will appear.[106] The reference in the *Ademi* Decision to a "more cautious approach" in assessing the risk that an accused may abscond is a reference to the same thing. The reference in the *Blaskic* Decision to the absence of certainty that the accused would not pose a danger to victims, witnesses and others (which, depending how it is interpreted , may assist the prosecution's argument) does not sit well with the somewhat lesser

standard adopted in that decision for determining whether the accused will appear for trial, but the difference may be the result of a poor translation from the French original (the original French could just as readily be translated in this context as "it does not find it evident that" as "it is not certain that"). However, certainty can never be required except (in a limited sense) in proof of guilt of a criminal charge, and the difference between the burden of persuasion for guilt and the lesser burden of persuasion for other issues should not be confused. The difference between them is no mere matter of words; it is a matter of critical substance.

31. The prosecution's argument that there is, or should be, a burden of proof placed upon an applicant for provisional release to satisfy the Trial Chamber that there is no real risk that the accused will fail to appear for trial or pose any danger to victims or witnesses or other persons is rejected. The Trial Chamber made no error in relation to the burden of proof.