

I Honourable Justice Vivian M. SOLOMON, sitting as Designated Judge pursuant to the President's 'Order for Detention and Transfer and for Hearing pursuant to Article 12(F) of the Practice Direction on Conditional Early Release of Persons convicted by the Special Court for Sierra Leone';¹

COGNISANT of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone ("Practice Direction");

NOTING that Mr. Moinina Fofana ("Fofana"), was convicted on 4 counts of war crimes by Judgment of a Majority of the Special Court for Sierra Leone ("Special Court") Trial Chamber I on 2 August 2007 and sentenced to serve a term of imprisonment of 6 years on 9 October 2007 with credit for time already served, and that on appeal Fofana's acquittal on crimes against humanity was overturned with a majority of the Appeals Chamber finding him guilty on 5 counts and increasing his sentence to a total term of 15 years on 28 May 2008;²

FURTHER NOTING that Fofana served two-thirds of his term of imprisonment and applied for early release pursuant to the Practice Direction;

RECALLING the Decision of the President on Application for Conditional Early Release of 11 August 2014 in which Fofana was granted conditional early release on the following terms:

[that Fofana serves] ... of a further period of six (6) months from the date of [the] Decision, in prison custody. Within those 6 months, the Registrar of [the] Court in conjunction with the Prison Authorities in Rwanda, shall conduct training for Fofana and certify that he has, as far as his intelligence can take him, understood the nature of the crimes for which he was convicted....³

NOTING that Fofana successfully completed the additional training in accordance with the President's Decision, voluntarily expressed a public apology for his wrongful conduct, acknowledged his guilt and showed remorse to the people of Sierra Leone and the victims of his crimes.

RECALLING that upon successful completion of training, Fofana was released on execution of a Conditional Early Release Agreement in accordance with Article 9(C) of the Practice Direction and signed by him on 10 February 2015 in accordance with Article 10 (B) of the Practice Direction, in which he indicated that he had been advised by the Principal Defender of his obligations and the consequences of the Agreement, and that he understood and agreed to comply with the terms and conditions thereof including the special condition that:

¹ *Prosecutor v. Moinina Fofana*, RSCSL-04-14-ES, "Public Order for Detention and for Hearing Pursuant to Article 12(F) of the Practice Direction on Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone, dated 9 March 2015, ("Presidents Order for Detention and Transfer").

² *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-04-14-T, Trial Judgment, dated 2 August 2007; *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-04-14-A, Appeal Judgment, dated 28 May 2008.

³ *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-04-14-ES, "Decision of the President on Application for Conditional Early Release," dated, 11 August 2014, para. 47, ("President's Decision Granting Conditional Early Release").

The applicant shall conduct himself honorably and peacefully in the community and shall not engage in secret meetings intended to plan civil unrest or join local politics.⁴

CONSIDERING that in signing the Conditional Early Release Agreement Fofana also confirmed that:

- A. In the event that he violates any conditions of his early release he understands that the order for Conditional Early Release may be revoked and the order for reimprisonment for the time remaining on his sentence may be issued;
- B. He is subject to immediate detention and transfer to the Residual Special Court upon the reasonable belief by the Monitoring Authority that he is in violation of any condition of the Conditional Early Release Agreement or poses a risk of harm to any person;
- C. He may be returned to prison to complete his sentence should the Residual Special Court find that he breached any of the terms of his Conditional Early Release Agreement.

CONSIDERING the Supervision and Transfer Order issued on 20 February 2015⁵ under the terms of which Fofana was released to reside at Bo Town, Bo District, subject to the supervision of the Monitoring Authority, the Sierra Leone Police at Bo Town, and by which they were ordered to immediately detain Fofana if, *inter alia*, there is reason to believe that he has violated a condition of the Conditional Early Release Agreement signed by him and to transfer him to the custody of the Residual Special Court for Sierra Leone (“Residual Special Court”) without delay;

CONSIDERING the report received from the Registrar with supporting evidence alleging a violation by Fofana of the terms of his Conditional Early Release Agreement, and in particular of the aforementioned special condition;⁶

CONSIDERING, the President’s determination that probable cause exists to believe that Fofana may have violated a condition of his Conditional Early Release Agreement pursuant to Article 12 (F) of the Practice Direction;⁷

FURTHER CONSIDERING that pursuant to the determination of probable cause, the President Ordered the Monitoring Authority and the relevant authorities of the Government of Sierra Leone to immediately detain Fofana and to transfer him to the custody of the Residual Special Court pending the hearing and determination of the matter;⁸

⁴ Conditional Early Release Agreement, dated 12 February 2015, (Conditional Early Release Agreement), para. 6.3, special condition.

⁵ Annex D, Re: Practice Direction, SCSL Supervision and Transfer Order, dated 20 February 2015.

⁶ Confidential Inter Office Memorandum from the Registrar to the President “Investigation of Alleged Violation of Conditional Early Release Agreement of Moinina Fofana”, dated 2 March 2016, (“Registrar’s Confidential Investigation Memorandum”).

⁷ Presidents Order for Detention and Transfer, p.4.

⁸ Presidents Order for Detention and Transfer, p.4.

NOTING that the President directed the Registrar to set a Preliminary Hearing of the matter within 7 days, and that such hearing occurred at 10h00 on 16 March 2016 in Freetown, Sierra Leone;⁹

NOTING that at the Preliminary Hearing of 16 March 2016, Fofana denied the allegation of the violation of paragraph 6.3 of the Conditional Early Release Agreement;¹⁰

NOTING that during the course of the Preliminary Hearing, the Prosecutor notified the Designated Judge and the Defense of two additional allegations of violations of the terms of Fofana's Conditional Early Release Agreement, namely:

The applicant shall strictly observe the reporting schedules set by the Monitoring Authority and the Registrar, and shall personally report to such centre or centres as are designated, at least twice every month;¹¹

I will keep in contact with the agent of the Monitoring Authority as s/he instructs me;¹² and

I will report in person to my Monitoring Agent or any agent of the Monitoring Authority authorised for that purpose or my local police station or any other location designated by the Registrar or the Monitoring Authority at the times stipulated by the Registrar or the Monitoring Authority.¹³

NOTING that Fofana also denied these two additional allegations;¹⁴

NOTING that the Preliminary Hearing was adjourned to 18 March 2016, and at the adjourned Preliminary Hearing Fofana notified the Designated Judge that he had not fully understood the allegations against him; and that having since benefited from the Defence's explanation of the said allegations, the Defence requested that the allegations be read out to him again to answer;

NOTING that Fofana, having had the allegations re-read to him, decided to change his initial answer to the allegations and subsequently admitted to all alleged violations;¹⁵

NOTING that the Defence oral application for the release of Fofana from the custody of the Residual Special Court pending the disposition of the matter was granted subject to the imposition of certain additional conditions;¹⁶

NOTING that the Parties were directed to file any further written submissions with the Registrar within 14 days of the adjourned Preliminary Hearing which were subsequently filed on 1 April 2016;¹⁷

⁹ Presidents Order for Detention and Transfer, p.4.

¹⁰ *Prosecutor v Moinina Fofana* Transcript, 16 March 2016 ("Transcript 16 March 2016"), p.11.

¹¹ Conditional Early Release Agreement, para. 6.4, special condition.

¹² Conditional Early Release Agreement, para. 5. d., standard term and condition.

¹³ Conditional Early Release Agreement, para. 5. h., standard term and condition.

¹⁴ Transcript 16 March 2016, p.14.

¹⁵ *Prosecutor v Moinina Fofana* Transcript, 18 March 2016 (Transcript, 18 March 2016), pp. 8, 10 & 16.

¹⁶ *Prosecutor v Moinina Fofana*, "Public Decision on the Defence Oral Application for the Release of Moinina Fofana from the Custody of the Residual Special Court for Sierra Leone Pending the Disposition of the Matter of the Alleged Violations of the Terms of his Conditional Early Release", RSCSL-04-14-ES, dated 18 March 2016 ("Decision Granting Release pending Disposition"), p.3.

NOTING that the Registrar was directed to set a date for the delivery of the Disposition and that the date was set for 25 April 2016.¹⁸

A. Submission of the Parties:

Prosecution Submissions

1. The Prosecution made submissions concerning: 1) the gravity of the violations; 2) the mandatory nature of Fofana's conditional early release agreement, 3) Fofana's alleged lack of candour, 4) Fofana's alleged lack of understanding of the terms of the conditional early release, 5) deterrence considerations, 6) grounds in mitigation, and 7) recommended disposition.
2. Concerning the seriousness of the violation of Condition 6.3 (Violation I),¹⁹ the Prosecution submits that this violation is 'most serious' and contends that given Fofana's past position of authority and the esteem in which many Sierra Leoneans hold him, his attendance carried 'significant import'. Further, it asserts on the basis of eye witness testimony that Fofana declared for a political party and remonstrated against another political party.²⁰
3. Concerning the violation of Conditions 6.4 and 5.d (Violation II)²¹ and 5.h and 6.4 (Violation III)²², the Prosecution contends that these violations were not committed in isolation, nor for an innocent purpose, but that they must be viewed in conjunction with the commission of Violation I.²³

¹⁷ Decision Granting Release pending Disposition, p.4.

¹⁸ Decision Granting Release pending Disposition, p.4.

¹⁹ Violation I, Fofana's attendance at the APC Youth League Conference in October 2015.

²⁰ Transcript, 18 March 2016, p.20, Prosecution Final Submissions (Public with Confidential Annexes), 1 April 2016, ("Prosecution Submissions"), paras. 11 & 12.

²¹ Violation II, i) failing to obtain advance permission from the Monitoring Authority or its agent to deviate from his approved travel from his designated location, Bo Town to Freetown, such deviation being to travel to Makeni, and for purposes not approved by the Monitoring Authority or its agent; ii) failing to return to Bo Town on the date authorised by the Monitoring Authority or its agent without obtaining advance permission for late return to Bo Town.

²² Violation III, failing to report to the Monitoring Authority in person on one occasion in October 2015, instead falsely certifying his physical presence on that date by signing the required form in advance of the sign in date.

²³ Prosecution Submissions, para. 15.

4. Concerning the mandatory nature of the terms of the Conditional Early Release Agreement, the Prosecution refers to Fofana's statement to SLP Superintendent Saffa (Superintendent Saffa)²⁴ and his assertion that he tried unsuccessfully to reach his Monitoring Agent and however decided to still go to Makeni. The Prosecution argues that this is indicative that Fofana views the terms of his conditional early release as elective which defeats the 'central tenet' of conditional early release.²⁵
5. Concerning Fofana's alleged lack of candour, the Prosecution submits that his responses to the alleged violations have consistently lacked truthfulness.²⁶
6. The Prosecution submits three main arguments in support of its contention concerning Violation I. First, the Prosecution submits that Fofana tailored his statement once confronted with a videotape to conform to its content. It argues that the statements of the eye witnesses established that Fofana was untruthful about his denial that he did not declare for any political party.²⁷ Second, the Prosecution submits that Fofana was untruthful concerning his purpose for travelling to Makeni, and that Fofana has provided conflicting evidence in such regard.²⁸ Third, the Prosecution submits that Fofana lacked candour concerning the manner in which he came to be at the APC Youth League Conference ("Conference"). It further submits that Fofana has given the impression that this occurred through a series of coincidences, notwithstanding, that the evidence indicates that this formed part of an 'eventual plan' enabling Fofana to declare at the Conference.²⁹
7. Concerning Violations II and III, the Prosecution argues firstly that Fofana's assertion that he tried unsuccessfully to contact his Monitoring Agent regarding the change to his itinerary is unsupported by the evidence. It submits that Inspector Bassie advised that his mobile phone was indeed operative during the relevant

²⁴ Registrar's Confidential Investigation Memorandum, Annex 5, Report of the Sierra Leone Police, dated 16 December 2015 ("Annex 5"), Affidavit of the Superintendent of the Police confirming his appointment as team leader by the Inspector General of the Police to investigate and report on the alleged violation of Fofana's conditional early release.

²⁵ Prosecution Submissions, paras. 16 – 17.

²⁶ Prosecution Submissions, para. 18.

²⁷ Prosecution Submissions, para. 19.

²⁸ Prosecution Submissions, para. 20.

²⁹ Prosecution Submissions, para. 21.

period, and that he did not receive a request from a third party asking that Fofana be permitted to travel to Makeni.³⁰

8. Secondly, the Prosecution contends that Fofana was untruthful concerning his stated reason for failing to return to Bo Town on the approved date. It refers to Fofana's statement that he fell sick with malaria and submits that notwithstanding his alleged illness, Fofana was still able to travel to Makeni on 22 October 2015 and attend the Conference on 23 October 2015.³¹
9. Concerning Fofana's alleged lack of understanding of the terms of his conditional early release, the Prosecution submits such allegation is disproved by, *inter alia*, Fofana's affirmation on 12 February 2015, that the conditions had been adequately explained to him, and his reaffirmation to that effect which he gave to the Registrar upon his arrival in Freetown.³²
10. Furthermore, the Prosecution argues that the Defence submissions regarding mitigating factors should be attributed little weight. It submits that Fofana's expression of remorse should be viewed in light of the circumstances, first, as a prerequisite of conditional early release, and second, during the hearing at which he admitted the violations of his conditional early release.³³ It also contends that Fofana's 'reliance on [his] lack of formal education is misplaced'. It argues that to understand the import of Conditions 6.4 and 5.d does not demand a high level of education,³⁴ and that in any event, Fofana admitted that the meaning of Condition 6.3 was explained to him by the Registrar. Finally, with reference to his medical condition, it asserts that Fofana will receive the required medical care if he is returned to prison.³⁵
11. The Prosecution requests that the Designated Judge revokes Fofana's conditional early release and return him to the custody of the Residual Special Court for the remainder of his sentence or for a specified period. Alternatively, the Prosecution

³⁰ Prosecution Submissions, para. 22.

³¹ Prosecution Submissions, para. 23.

³² Prosecution Submissions, paras. 24 – 25.

³³ Prosecution Submissions, para.27.

³⁴ Transcript 18 March 2016, p. 19; Prosecution Submissions, para. 28.

³⁵ Prosecution Submissions, paras. 28 – 29.

requests that the Designated Judge modifies the terms of Fofana's conditional early release.

Defence Submissions

12. The Defence makes submissions concerning 1) Fofana's health condition, 2) Fofana's demonstrated good behavior in prison, 3) Fofana's remorse; 4) the unintentional nature of the violations, 5) Fofana's cooperation in court, 6) that Fofana poses no threat to witnesses and victims, and 7) the recommended disposition.
13. Concerning Fofana's health conditions, the Defence submits that Fofana underwent major surgery in prison as a result of which he cannot survive unaided and requires assistance with his daily activities.³⁶ Moreover, that Fofana is unable to obtain this assistance when incarcerated.³⁷
14. Concerning Fofana's demonstrated good behavior in Prison, the Defence submits that in addition to his good conduct in prison, Fofana, has demonstrated good behavior whilst released on conditions of early release and has cooperated with the Monitoring Authority at all times.³⁸
15. The Defence submits that Fofana has expressed remorse to the people of Sierra Leone when released from Rwanda, and during his admission of the violations of the terms of his conditional early release.³⁹
16. The Defence submits that the violations were unintentional and in some cases occurred due to Fofana's misunderstanding of the terms of his Conditional Early Release Agreement. It posits that such misunderstanding is "understandable" given Fofana's level of understanding and education.⁴⁰

³⁶ Defence Submission filed in compliance with the Order of the Hon. Justice Vivian M. Solomon JSC, 1 April 2016, ('Defence Submissions'), para. 2.3.

³⁷ Transcript, 18 March 2016, pp. 13, 17 & 18.

³⁸ Defence Submissions, para. 2.4.

³⁹ Transcript, 18 March 2016, pp. 13, 18; Defence Submissions, para. 2.3.

⁴⁰ Transcript, 18 March 2016, p. 17; Defence Submissions, para. 2.5.

17. Concerning Fofana's cooperation with the Residual Special Court, the Defence submits that Fofana admitted the allegations at the earliest opportunity and as a result has saved the Residual Special Court time, resources and expense.⁴¹ It further argues that upon becoming aware of the President's Order for his arrest by the Principal Defender, Fofana, voluntarily contacted and surrendered to the Sierra Leone Police before the Order was served on him. Additionally, whilst in detention, Fofana was fully cooperative with Court personnel and the Defence Office; and displayed good conduct and respect for the law and authority in Court.⁴² The Defence asserts that Fofana does not pose as a flight risk.⁴³
18. The Defense submits that Fofana understands the gravity of the crimes for which he was convicted and sentenced, and intends to uphold and maintain the integrity of the Special Court's sentence and terms of his conditional early release, including any further terms imposed by this court.⁴⁴
19. The Defence also submits that Fofana does not pose a threat to protected witnesses and victims and further, that no evidence has been adduced to that effect.⁴⁵
20. The Defence requests that the Residual Special Court issue Fofana with a stern warning and release him on conditional early release based on the terms and conditions of his existing Conditional Early Release Agreement.⁴⁶

B. Applicable Law

21. Paragraph 12(G) of the Practice Direction provides: *If the Convicted Person admits the allegation the matter shall proceed to disposition pursuant to Paragraph I.*
22. Paragraph 12 (I) of the Practice Direction provides:
23. *Upon admission by the Convicted Person or a finding that the allegations have been proved, the Judge shall:*

⁴¹ Transcript, 18 March 2016, p. 17; Defence Submissions, para. 2.6.

⁴² Defence Submissions, para. 2.7.

⁴³ Transcript, 18 March 2016, p.18.

⁴⁴ Defence Submissions, para. 2.8.

⁴⁵ Defence Submissions, para. 2.9.

⁴⁶ Defence Submissions, para. 3.

- (i) *Revoke the order for Conditional Early Release and order re-imprisonment of the Convicted Person for the time remaining on the sentence at the date that Conditional Early Release went into effect, with credit for time served in detention pending disposition of the violation and any credit the Judge may order for time served under Conditional Early Release;*
- (ii) *Revoke the order for Conditional Early Release and order the release of the Convicted Person subject to modified conditions of the Conditional Early Release Agreement; or*
- (iii) *Order the release of the Convicted Person on the terms and conditions of the original Conditional Early Release Agreement.*

C. Discussion

24. During the Preliminary Hearing of 18 March 2016, Fofana admitted the violations in question.⁴⁷ As such, a determination of the appropriate disposition must be made in accordance with Article 12(I) of the Practice Direction. Such determination must be made on a case by case basis having regard to the facts and circumstances of the case and the evidence at hand.
25. In the instant case, having regard to the Parties' submissions, I consider it pertinent to assess the following factors in arriving at my Decision:
- a. the alleged unintentional nature of the violations;
 - b. the gravity and impact of the violations;
 - c. whether Fofana can continue to live in the community without posing a threat to victims, witnesses, their families and society as a whole;
 - d. whether the conditional early release and Fofana's continued rehabilitation remains a viable option;
 - e. mitigating factors; and
 - f. the role of the monitoring authority concerning the violations in question.
26. I will consider these factors in turn.

a) The alleged unintentional nature of the violations

⁴⁷ Transcript, 18 March 2016, pp. 8, 10 & 16.
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27. The Defence submits that Fofana's violations were unintentional and that in some cases occurred because Fofana misunderstood the terms of his Conditional Early Release Agreement. The Defence asserts that this misunderstanding is "understandable" given Fofana's level of understanding and education.⁴⁸ It further submits that Fofana did not understand that mere presence at the Conference constituted a joining in local politics.⁴⁹ The Prosecution argues that reliance on Fofana's lack of formal education is misplaced and that one does not require a great deal of education to understand the import of conditions concerning Violations II and III. Insofar as the condition relating to Violation I is concerned, it points out that Fofana himself admitted that the Registrar explained to him the meaning of joining in local politics.⁵⁰
28. The Court recalls that during his time at Mpanga Prison, Fofana underwent and successfully completed all remedial and educational programs to which he was referred; thereby improving his educational level.⁵¹ As part of a condition pursuant to his conditional early release, Fofana also underwent a six month training programme to enable him to understand the nature and gravity of the crimes for which he was convicted; to understand that there is no justification for using illegal means to undertake a legitimate cause; and to acknowledge his own responsibility and role in the armed conflict.⁵²
29. Moreover, a prerequisite for Fofana's release and prior to his signing of the Conditional Early Release Agreement, the Principal Defender, *inter alia*, explained to Fofana the terms of his conditional early release and the consequences of any breach of the Conditional Early Release Agreement. Pursuant to such explanation and prior to his signing of the Conditional Early Release Agreement, Fofana

⁴⁸ Transcript, 18 March 2016, p. 17; Defence Submissions, para. 2.5.

⁴⁹ Transcript, 18 March 2016, p. 17.

⁵⁰ Transcript 18 March 2016, p. 19; Prosecution Submissions, para 28.

⁵¹ Prosecution Submissions, Confidential Annex 10, Annex B in re Practice Direction Article 5(D)(ii), (Fofana's Attestation as to his completion of the 6 month training, dated 6 May 2014); See also President's Decision Granting Conditional Early Release, paras. 35-42.

⁵² President's Decision Granting Conditional Early Release, paras. 47 & 49(a).

affirmed his understanding of the terms of his conditional early release to the Principal Defender in the presence of two witnesses.⁵³

30. On a second occasion and upon his arrival in Sierra Leone, Fofana reaffirmed his understanding of the terms of his conditional early release to the Registrar and his intention to comply with same.⁵⁴ In addition, the Court notes Fofana's own admission in Court concerning the Registrar's explanation to him as to the meaning of joining in local politics, namely that "if you go to a place where politics is going on, then you are joining into local politics".⁵⁵
31. Consequently, I hold that the Defence submissions regarding Fofana's educational background and alleged lack of understanding of the terms of his conditional early release are baseless and lack merit. But as the Defence submits that Fofana's violations were unintentional, I consider it imperative at this juncture, to address Fofana's motive.
32. Fofana gave several conflicting explanations for his travel to Makeni and his presence at the Conference in that location. At the hearing of 18 March 2016, Fofana stated that his initial intention - for which he obtained the approval from the Monitoring Authority - was to travel to Freetown.⁵⁶ He explained that while he was in Freetown, he received an invitation from his sibling to travel to Makeni.⁵⁷ On arrival in Makeni, he met a large crowd in a hall and learnt that it was the Conference.⁵⁸ He maintained that he did not travel to Makeni to join or to participate in politics,⁵⁹ and that he did not know that the Conference was taking place in Makeni at the time.⁶⁰

⁵³ Practice Direction, Article 10 (B).

⁵⁴ Practice Direction, Article 10 (D); Prosecution Submissions, Confidential Annex 9, Interoffice Memorandum from the Registrar to the President & Prosecutor, dated 12 March 2015, para. 3.

⁵⁵ Transcript, 18 March 2016, p.13.

⁵⁶ Transcript, 18 March 2016, p.4.

⁵⁷ Transcript 18 March 2016, p.4.

⁵⁸ Transcript, 18 March 2016, p.12.

⁵⁹ Transcript 18 March 2016, pp. 4, 10, 12.

⁶⁰ Transcript 18 March 2016, p.12.

33. Contrary to his explanation at the hearing of 18 March 2016, Fofana told Superintendent Saffa that he traveled to Makeni and attended the Conference solely because he wanted to see and thank the President of the Country for allowing him to return to Sierra Leone to serve his conditional early release.⁶¹ He further stated that he was unable to obtain the approval of the Monitoring Officer before travelling to Makeni given that he was unable to reach him due to a network problem.⁶² However, Fofana told his Monitoring Officer that he had travelled to Makeni to “seek assistance from the Vice President of Sierra Leone, because he was a personal friend; and that he did not return to Bo Town on the approved date because he was sick.”⁶³
34. Fofana’s conflicting statements concerning his motive for travelling to Makeni; coupled with the circumstances leading up to his request to travel to Freetown (i.e. signing the register in advance of his reporting date); and his various “excuses” for not obtaining prior permission for travelling to Makeni and his subsequent late return to Bo Town leads me to conclude that Fofana’s intention from the outset was to travel to Makeni to attend the Conference and that in order to achieve this purpose he intentionally deceived the Monitoring Authority into believing that he intended to travel to Freetown when in fact his real intention was to secretly travel to Makeni instead; to attend the Conference.

Conclusion

35. I therefore find that Fofana intended to travel to Makeni to attend the Conference and that he deceived the Monitoring Authority to achieve this aim. The Court will now address the impact of Fofana’s presence at the Conference.

⁶¹ Registrar’s Confidential Investigation Memorandum, Annex 5, para. 3.6, p. 5.

⁶² Registrar’s Confidential Investigation Memorandum, Annex 5, para. 3.6, p. 5.

⁶³ Registrar’s Confidential Investigation Memorandum, Annex 9, Mission Report from Support and Protection Officers to Senior Protection Supervisor on findings in Bo Town and Makeni regarding an alleged violation of a special condition, 2 March 2016, (Annex 9), p.2.

b) The Gravity of the Violations

36. The Prosecution advances three arguments concerning the gravity of the violations. First, the Prosecution argues that Fofana was not merely present at the Conference but that he also declared for a political party and remonstrated against another. Second, the Prosecution argues that in light of “Fofana’s past position of authority as CDF Director of War” and “the esteem in which many Sierra Leoneans hold him” Fofana’s attendance and participation at the Conference carries “significant import”.⁶⁴ Third, it argues that the violations are inextricably linked and their commission cannot be viewed independently of each other.⁶⁵

37. I will assess the Prosecutions arguments in turn.

i. The extent of Fofana’s Participation at the Conference

38. The Prosecution relies on the statements of two eyewitnesses, including Witness DCT-186 to support its assertion that Fofana made a declaration for a political party⁶⁶, and on the statement of the other witness to contend that Fofana also remonstrated against another political party.⁶⁷

39. Witness DCT–186 who was interviewed by the Senior Protection Supervisor during an investigation concerning Violation I, stated that he attended the Conference and that former members of the Sierra Leone Peoples Party participated in the meeting by declaring for the APC Party, including the Hinga Norman Family and Fofana. Witness DCT -186 further stated that he also heard about Fofana’s declaration over the radio.⁶⁸

40. On the other hand, Witness, TF1-174 who was also interviewed by the Senior Protection Supervisor stated that while he did not attend the Conference, he was

⁶⁴ Prosecution Final Submissions, para.12.

⁶⁵ Prosecution Submissions, para.15.

⁶⁶ Prosecution Submissions, para 12; Confidential Annex 3, Statement dated 2 November 2015, p.2; Statement dated 23 March 2016; Confidential Annex 4, Statement dated 26 February 2015, p.2, Statement dated 25 March 2016.

⁶⁷ Prosecution Submissions, para.12, Confidential Annex 3, Statement dated 2 November 2015, p.2, Statement dated 23 March 2016.

⁶⁸ Prosecution Submissions, Confidential Annex 4, Statement dated 26 February 2015, p.2; Registrar’s Confidential Investigation, Annex 9, pp.3-4.

informed by the APC Youth Leader that individuals from the Hinga Norman Family and former CDF members participated by declaring for the APC Party. He also stated that the APC Youth Leader knew Fofana, but that he could not confirm whether or not Fofana was present at the meeting.⁶⁹

41. Witness TF1-361 who was also interviewed by the Senior Protection Supervisor stated that he was on the campus on the day of the Conference, but that he did not participate in the Conference. He however heard from those who attended the Conference that the Hinga Norman family declared for the APC Party. He further stated that he learnt from the same sources that the CDF commander was present at the Conference.⁷⁰
42. I have seen the two videos clips and read the transcripts both of which depict Fofana standing with the Hinga Norman Family at the time the latter made the declaration. The video with sounds commences with an introduction by the Secretary General who spoke about the RUF, AFRC and Kamajors and referred to Fofana as one of the people who was arrested and taken to Rwanda and was present at the Conference that day and was with him.⁷¹ I observe that the video clips do not show that Fofana made a declaration for a political party or that he remonstrated against another political party. The Prosecution argues that the videos are not accurate depictions of the true state of events given that they are edited versions which solely focus on the Hinga Norman Family. However, the Prosecution has failed to adduce any evidence to support its assertion.

Conclusion

43. In light of the above, it is unclear and there appears to be certain inconsistencies in the evidence pertaining to whether or not Fofana made a declaration at the Conference. Moreover, the videos clips do not support this assertion. Although, the Prosecution contends that the video clips focus solely on the Hinga Norman family and are thus not dispositive of the issue, it has not furnished the Court with any

⁶⁹ Registrar's Investigation Memorandum, Annex 9, p.4.

⁷⁰ Registrar's Investigation Memorandum, Annex 9, p. 3.

⁷¹ Video Transcript, English Translation, p.1.

evidence in support of such assertion, nor taken steps to provide the Court with an unedited video clip depicting what it considers to be a full picture of the events. I cannot therefore make a determination on evidence that is not before me; but rather I must rely solely on the evidence presented by the Parties. On this basis, and having carefully reviewed the evidence submitted by the parties, I am not satisfied that Fofana made a declaration for a political party or that he remonstrated against another political party at the Conference.

44. Furthermore, while there is no threshold regarding the number of witnesses that need to testify in order for their testimony to be relied upon, in this particular case, and on the basis of all the evidence presented before it, I am not willing to accept the uncorroborated testimony of a single witness to conclude that Fofana remonstrated against a political party.
45. Consequently, I hold that the Prosecution has failed to prove these allegations. Whilst Fofana was present at the Conference and stood with the Hinga Norman Family at the time of the latter's declaration, I am not satisfied on the preponderance of the evidence that Fofana's presence at the Conference extended to a declaration for or remonstrations against a political party.

ii. The Impact of Fofana's Participation and his Perceived Influence

46. The Prosecution submits that Fofana's attendance at the Conference is "most serious"; and asserts that owing to "Fofana's past position of authority as CDF Director of War" and the esteem in which many Sierra Leoneans hold him, his attendance carried "significant import" sending out a political message.⁷²
47. I note that this issue was raised by the Parties and deliberated on by the President of this Court in his decision of 11th August 2014.⁷³
48. In this regard, the President opined as follows:

⁷² Prosecution Submissions, paras. 11-12.

⁷³ President's Decision Granting Conditional Early Release.
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“A time will come, upon completion of sentence, when Fofana will unconditionally live in this community after paying his debt to society. This, in my view, seems to be the context in which Fofana is viewed as a hero by some members of both communities, a significant number of whom showed an understanding of the process by which Fofana was convicted, acknowledged that Fofana had been convicted for crimes committed during the war and were of the view that he had paid the price for those crimes and would have learned his lesson.”⁷⁴

49. The President also noted that:

‘.. most of the views gathered from interviewees by the Witnesses and Victims Section, on whether Fofana will still be powerful and popular among CDF fighters, were that he will no longer enjoy his former status because, according to them, "Special Court for Sierra Leone used most of their former commanders and fighters as prosecution witnesses. This alone has weakened any prospect of popularity for him because lots of divisions have occurred in his absence and there is disunity among them."’⁷⁵

50. I endorse these views and consequently find that notwithstanding Fofana’s presence at the Conference, this yielded minimal impact on the current political climate of Sierra Leone and its overall peace and stability.

iii. Violations are inextricably linked:

51. In light of the findings that Fofana intended to travel to Makeni to attend the Conference and that he deceived the Monitoring Authority to achieve this aim, I agree with the Prosecution submissions that the violations form part of a continuing and eventual plan with the ultimate aim of Fofana attending the Conference.⁷⁶

Conclusion

52. I find that Fofana’s presence at the Conference had minimal impact on the political climate of Sierra Leone. However, his attendance and presence at the Conference is significant as it reflects his general attitude of disregard and contempt for the orders of this Court and the terms of his conditional early release. Moreover, it is apparent that Fofana’s attendance at the Conference was planned from the outset and that he intentionally deceived the Monitoring Authority to achieve this aim.

⁷⁴ President’s Decision Granting Conditional Early Release, para.27.

⁷⁵ President’s Decision Granting Conditional Early Release, para.29.

⁷⁶ Prosecution Submissions, para.15.

c) Whether Fofana can continue to live in the community without posing a threat to victims, witnesses and their families

53. The issue of whether Fofana poses a risk to witnesses, victims, their families and society at large is a paramount consideration in assessing whether his conditional early release should be revoked. This issue should be assessed in light of the views and concerns of the victims, witnesses and their families, the interests of the community in which Fofana resides, the number of offences (if any) that Fofana may have committed during his conditional early release and the gravity of the violations.
54. The Prosecution has not made any submissions or raised any concerns regarding Fofana's suitability to continue to reside in his community despite the violations. The Defence contends that there is no evidence before this Court demonstrating that Fofana poses a risk to witnesses or victims.⁷⁷
55. So far, there is no evidence or complaint before this Court to suggest that Fofana has interfered or attempted to interfere with or threaten witnesses, their families or the public at large. The Court acknowledges the Report compiled by the Senior Protection Officer pursuant to his investigation concerning Violation I and specifically, the following letters addressed to the Senior Protection Officer from officials within the Witness and Victims Section addressing, *inter alia*, the safety of witnesses and victims.
56. First, the Court notes the letter from the Protection Officer advising that during missions and his regular contact with witnesses, especially CDF witnesses who testified against Fofana, none have expressed concern about Fofana. Moreover, the Protection Officer advised that none of the witnesses have seen Fofana since his return to Bo Town.⁷⁸
57. Second, the Court notes a letter from the Support Officer of the Residual Special Court who states that he works closely with victims and witnesses and is in close

⁷⁷ Defence Submissions, para. 2.9.

⁷⁸ Registrar's Confidential Investigation Memorandum, Annex 9, Letter from Protection Officer re: Alleged breach of conditional early release of Moinna Fofana, undated.

contact with witnesses particularly, those with mobile coverage in the Southern Province. In this context the Support Officer confirmed that since Fofana's release, the only feedback he received during routine checks with witnesses was that none of the witnesses have seen Fofana since his conditional early release to Bo Town.⁷⁹

58. Third, the Court notes a letter from the Senior Protection Officer to the Registrar advising, *inter alia*, that he has not received any complaint from protected witnesses that Fofana is participating in politics within their areas.⁸⁰

59. The Court further acknowledges that Fofana has to date, not been charged with or accused of any crime or civil offence during his conditional early release. By all indication, Fofana has otherwise complied with the terms of his conditional early release and comported himself in a reputable manner. There is also no indication to suggest that Fofana is not properly adjusting or integrating into society.

60. Consequently, I am satisfied that despite the violations in question, Fofana does not pose a threat to victims, witnesses, their families or society at large.

d) Whether conditional early release and Fofana's rehabilitation remains a viable option

61. The Preamble to the Practice Direction alludes to the objective of conditional early release being the rehabilitation and social reformation of the convicted person.⁸¹ Conditional early release is viewed as a manner of encouraging the convicted person to engage meaningfully in the process of reconciliation and ongoing peace within the community, subject to the paramount consideration of the safety of witnesses, victims and the public at large.⁸² Implicit in this provision is the role of the Monitoring Authority as an integral part of the process of assisting the convicted person through required guidance and enforcement to reintegrate into society and rehabilitate himself.

⁷⁹ Registrar's Confidential Investigation Memorandum, Annex 9, Letter from Tamba D Sammie re: alleged breach of one of the conditions of Moinina Fofana's Early Release, dated 2 March 2016.

⁸⁰ Registrar's Confidential Investigation Memorandum, Annex 9, Letter from Senior Protection Supervisor to Registrar re: alleged breach of one of the conditions on the early release of Moinina Fofana, dated 2 March 2016.

⁸¹ Preamble to the Practice Direction.

⁸² Preamble to the Practice Direction.

62. Conditional early release would therefore cease to be a viable option wherein the violations are ongoing and continuing and are of such a nature to suggest that the convicted person poses a threat to society or is otherwise not adjusting properly into the community; and therefore, cannot be counted on to comply with his conditional early release. So far, I am satisfied that despite the violations in question, Fofana has otherwise complied with the conditions of his conditional early release and above all poses no risk to witnesses, victims or their families. Taking these factors into account, I am inclined to not exclude conditional early release as a viable option for Fofana's continued rehabilitation.

e) Mitigating Factors:

63. I will now consider the Defence submissions in respect of the other proposed mitigating factors.

(i) Fofana's Health Conditions

64. The Defence submits that Fofana underwent major surgery in Mpanga Prison, in Rwanda; and as a result he cannot "survive unaided". The Defence further submits that Fofana's family members currently assist him with his daily activities.⁸³

65. Although mindful of Fofana's physical condition and that he appeared to suffer from physical pain following his surgery, the Prosecution argues that Fofana would nevertheless receive any required care should he be returned to prison.

66. In order to make a determination on the state of Fofana's health, the Court needs to be fully appraised of his medical condition by fully qualified and certified medical personnel. The Defence has failed to provide any evidence regarding the existence and extent of Fofana's physical disability; including the nature and level of care that he may require. The absence of such evidence puts the Court in a position where it is expected to second-guess the state of Fofana's health condition. It is not for the Court to engage itself in such exercise. Consequently, in the absence of any

⁸³ Defence Submission, para. 2.3.
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relevant evidence to that effect, I am unable to make any assessment concerning Fofana's disability and the nature and level of care that he may or may not require.

67. That notwithstanding, I observed that during the Hearings of 16 and 18 March 2016 respectively, Fofana's demeanor was as if he was in severe pain. I also observed that Fofana appeared to have difficulty walking, sitting and standing unaided. In as much as I empathise with Fofana's physical condition, I find that it does not militate in his favor as there is no evidence to show that Fofana will not receive the care he requires if he were sent back to prison to serve the remainder of his sentence. Fofana himself alluded to the special care that he has received from the Court, stating that "the Court did something very good for [him]" and that if it wasn't for the Court providing access to the medical attention that he required "[he] would not be here." Fofana further acknowledged that the Court spent a substantial amount of money towards his medical care and expressed his gratitude to the Court.⁸⁴

68. In light of the above, I hold that Fofana's health or physical condition does not amount to a mitigating factor.

(ii) Admission of the Allegations

69. I take cognisance of Fofana's admission of the allegations on 18 March 2016,⁸⁵ and considers this a mitigating factor in the overall assessment pertaining to its determination in accordance with Article 12 (I) of the Practice Direction.

(iii) Fofana's Remorse

70. I take cognisance of Fofana's apology and expression of remorse for committing the violations;⁸⁶ and consider them to have been made truthfully. I therefore find Fofana's remorse as a mitigating factor.

⁸⁴ Transcript, 18 March 2016, p.5.

⁸⁵ Transcript, 18 March 2016, pp.8, 10, 16.

⁸⁶ Transcript, 18 March 2016, pp. 4, 13; Defence Submissions, para.2.3.

Conclusion

71. I do not find Fofana's health considerations to be mitigating. However, I will take into account Fofana's admission of the allegations and his expression of remorse as mitigating in his favour.

f) Role of the Monitoring Authority

72. Before I conclude my disposition, I wish to admonish in the strongest possible terms, the Monitoring Authority whom I find to have been complicit in this matter and as such its role and dire failures in this instance need to be addressed.

73. The Court recalls that the preamble to the Practice Direction envisages that the monitoring authority serves a vital and integral role in the process of the conditional early release of a Convicted Person. Thus the goals of rehabilitation, public safety and protection of victims and witnesses are inextricably linked to the Monitoring Authority's role of supervision and enforcement of the conditions of conditional early release.

74. Moreover, the Court notes the mandatory functions of the Monitoring Authority as per the 'Agreement to Perform the Duties of the Monitoring Authority' signed on 27 February 2015 and 2 March 2015 respectively between the Residual Special Court and the Monitoring Authority (Monitoring Agreement), to, *inter alia*, enforce the conditions of early release and its obligation to act in accordance with Article 12 of the Practice Direction in the event of a violation.⁸⁷

75. In this instance the Monitoring Authority has not only failed in its duty to enforce the conditions of early release but has in fact been complicit in Fofana's violations of his conditional early release.

76. It is of grave concern, that a Monitoring Officer can state unabashedly that "[Fofana] made a special request for him to be allowed to sign the [monitoring] register in advance of [the date that he was due to physically report at the police station]"; and that such request was in fact granted.

⁸⁷ Monitoring Agreement, p.1.
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77. Equally unacceptable and of grave concern is that Fofana was not instructed to report to the Monitoring Authority in Freetown and that the Monitoring Authority failed to immediately inform the Registrar about Fofana's failure to return to Bo Town on his due date.
78. Moreover, the fact that the Conference in Makeni took place under the watchful eyes of the Sierra Leone Police who provided security coverage at that event and who are supposed to be monitoring Fofana's compliance with his conditional early release is evident that the Monitoring Authority has not been performing its duties with the seriousness, commitment and diligence that it demands.
79. I therefore wish to remind the Monitoring Authority of its duties in accordance with the terms of the Monitoring Agreement, to strictly enforce the conditions of the Conditional Early Release Agreement and to act in accordance with Article 12 of the Practice Direction in the event that they have reason to believe that a violation has occurred. This role is mandatory and is not to be taken lightly if the objectives of Fofana's rehabilitation and meaningful reconciliation within the community are to be achieved.

D. Conclusion

80. Having carefully considered the submissions of the Parties, I find that Fofana intended to violate his conditions of early release to attend the Conference and intentionally deceived the Monitoring Authority to achieve this objective. However, I do not believe that Fofana's attendance and presence at the Conference had any meaningful impact on the political climate of Sierra Leone and hold that it did not in any way impede on the continuing peace and security of the Country. Whilst these violations nevertheless remain grave in light of Fofana's disregard for his conditions of early release in this instance, I find that Fofana does not pose a risk to witnesses, victims or society at large. I also find that the Monitoring Authority has failed to enforce the conditions of the conditional early release and ultimately created an environment which does not best serve the aim of rehabilitating and reintegrating Fofana into Society. I believe that this purpose would best be served

by Fofana's continued conditional early release subject, to stringent conditions set out hereunder and the Monitoring Authority's strict enforcement thereof.

E. Disposition

81. For the foregoing reasons and pursuant to Article 12(I)(ii) of the Practice Direction, I hereby **ORDER** as follows:

- (i) That the order for Fofana's Conditional Early Release is revoked with immediate effect; and
- (ii) That Fofana be released from the custody of the Residual Special Court subject to the following modified Special Conditions:
 - (a) Fofana or any person acting with his consent or authority shall not, directly or indirectly, approach any of the witnesses, victims or their families in the future, to directly or indirectly try to harm, intimidate or otherwise interfere with them in any way;
 - (b) That Fofana shall conduct himself honourably and peacefully in the community and not engage in secret meetings intended to plan civil unrest or join local politics which will include any form of participation including his presence at any gathering aimed at a political purpose;
 - (c) That Fofana be physically present at all times and not leave Bo Town for the next 6 months from the date of this Disposition;
 - (d) Following the expiration of the 6 months as provided for in subparagraph (c) above, that Fofana be permitted to leave Bo Town subject to his providing the exact location, purpose and return date for any requested travel to and receives the advanced written permission from the Registrar;
 - (e) Upon arrival at any approved location pursuant to any authorized travel by the Registrar, that Fofana immediately reports to the designated monitoring agent in such area;
 - (f) That Fofana shall report in person to the Monitoring Authority or Monitoring Agent in Bo Town every Monday at 10'o Clock in the morning;
 - (g) That Fofana should desist from the practice of signing his monitoring compliance sheet in advance of his sign-in-date;
 - (h) That the Monitoring Authority and the Registrar conduct spot checks to ensure that Fofana is where he is authorised to be at all times.

I further **ORDER** that:

- (i) The Registrar conducts an intensive two weeks training of Fofana on the Modified Special Conditions, as well as the standard terms and conditions;
- (ii) The Registrar certifies that Fofana has satisfactorily completed the training session aforesaid.
- (iii) Upon completion of the training session and following consultation with the Principal Defender in accordance with Article 10(A) of the Practice Direction, Fofana agrees to the conditions and certifies his understanding of the conditions in accordance with Article 10(B) of the Practice Direction;
- (iv) Fofana reaffirms his understanding of the modified terms of his Conditional Early Release to the Registrar in accordance with Article 10(D) of the Practice Direction;
- (v) The Registrar shall within 7 days hereof contact the Monitoring Authority and enter discussions concerning its failure to comply with the Monitoring Agreement and to fully brief the Monitoring Authority on the Modified Special Conditions and further assess the manner in which the Monitoring Authority proposes to ensure strict future enforcement of such conditions and adherence to its duties in terms of the Monitoring Agreement. The Registrar shall report back to this Court within 30 days hereof and provide the Court with a full update concerning the Registrar's discussions with the Monitoring Authority and further undertakings, if any, to ensure strict future adherence to its duties.

Done at Freetown, Sierra Leone

This 25th day of April 2016



Justice Vivian Solomon
Judge

