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RESIDUAL SPECIAL COURT FOR SIERRA LEONE

Before: **Justice Philip Nyamu Waki, President**

Ag. Registrar: **Ms. Binta Mansaray**

Date: **11 August 2014**

PROSECUTOR

Against

**MOININA FOFANA
ALLIEU KONDEWA**

**PUBLIC
DECISION OF THE PRESIDENT ON APPLICATION FOR CONDITIONAL
EARLY RELEASE**

Office of the Prosecutor:
Ms. Brenda Hollis

Defence Office:
Ms. Claire Carlton-Hanciles

The Republic of Rwanda

RESIDUAL SPECIAL COURT FOR SIERRA LEONE	
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I, JUSTICE PHILIP NYAMU WAKI, PRESIDENT OF THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE (“Residual Special Court”)

RECALLING that Moinina Fofana (“Fofana”) submitted an Application for Determination of Eligibility for Consideration for Conditional Early Release on 21 January 2013, which said Application was rejected by reason of its being premature at the time;

SEIZED OF Fofana’s “Subsequent Petition by Convicted Person to Establish Eligibility for Conditional Early Release” dated 7 March 2014 as set out in “Form A2” annexed to the Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone (“Application” and “Practice Direction” respectively);

RECALLING that pursuant to Rule 19 (C) of the Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone(“ Rules”), the Practice Directions obtaining at the time of the closure of the Special Court shall apply *mutatis mutandis* to the functions of the Residual Special Court;

PURSUANT TO Article 24 of the Statute of the Residual Special Court for Sierra Leone (“Statute”), Rule 124 of the Rules and Article 8 of the Practice Direction;

BASED ON THE WRITTEN SUBMISSIONS OF THE CONVICTED PERSON, THE DEFENCE OFFICE, THE PROSECUTOR AND THE ACTING REGISTRAR;

HEREBY DECIDE AS FOLLOWS:

I. BACKGROUND

1. Fofana was a former member of the Civil Defence Forces (“CDF”) and was its National Director of War. He was indicted jointly with the late Sam Hinga Norman and Allieu Kondewa before the Special Court for Sierra Leone (“CDF Trial” and “Special Court” respectively) and was charged with eight counts of war crimes and crimes against

humanity. Fofana was convicted on four counts of war crimes and acquitted on four counts of crimes against humanity by a majority of Trial Chamber I of the Special Court on 2 August 2007.¹ He was subsequently sentenced to a total term of six years imprisonment.² On appeal, Fofana's acquittal on crimes against humanity was overturned and a majority of the Appeals Chamber found him guilty on five counts and increased his sentence to a total term of 15 years.³

2. On 12 August 2009, the Republic of Rwanda was designated as the State in which Fofana was to serve his sentence.⁴

II. THE APPLICATION

3. Fofana submitted an Application for Determination of Eligibility for Consideration for Conditional Early Release on 21 January 2013, which Application was rejected by reason of its being premature at the time. He re-submitted his Application on 7 March 2014 accompanied by "Notification by State of Enforcement to Establish Eligibility for Conditional Early Release" by which the Republic of Rwanda notified the Residual Special Court that Fofana had served two-thirds of his total sentence. The Acting Registrar transmitted both documents to me.

4. After considering the Application and accompanying documents in support of Fofana's compliance with Articles 2(B) through (D) of the Practice Direction and having carried out the required consultations, I determined on 24 April 2014 in accordance with Article 4(A) of the Practice Direction, that Fofana was eligible for consideration for conditional early release.⁵

¹ Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-T-785, Judgement, 2 August 2007 ("CDF Trial Judgment").

² Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-T-796, Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007, ("CDF Sentencing Judgment").

³ Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-A-829, Judgement, 28 May 2008 ("CDF Appeal Judgment").

⁴ Prosecutor v. Moinina Fofana, SCSL-04-14-ES-832, Order Designating State in Which Moinina Fofana is to Serve His Sentence, 1 August 2009.

⁵ Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-ES-834, Decision on Moinina Fofana's Eligibility for Consideration for Conditional Early Release, 24 April 2014, ("Fofana Eligibility Decision").

5. The Acting Registrar, on 2 May 2014, submitted the information required under Article 5(B) of the Practice Direction pertaining to the suitability of Fofana's "Requested Areas of Release" and how he will be supported financially if released.

6. On 5 June 2014, the Acting Registrar further complied with Articles 5(B) through (H) of the Practice Direction and submitted the information required pursuant to those provisions. That information included, *inter alia*, psychological and medical reports from medical personnel in Rwanda, affidavits from Prison authorities in Rwanda providing information required under Articles 5(D)(i) to (v) of the Practice Direction, views of relevant witnesses and others who might be at risk, feedback from the communities and local government officials in the Requested Areas of Release, correspondence with the Government of Sierra Leone on the establishment of an authority for monitoring and supervision of Fofana if released, the Prosecutor's views on the application, Fofana's personal details and detention record during his incarceration at the Special Court Detention Facility, comments and conclusions of the Trial Chamber and Appeals Chamber during sentencing and periodic reports and correspondence pertaining to Fofana's behavior and comportment during the period of his imprisonment in Rwanda.

7. On 16 June 2014, the Acting Registrar transmitted the Residual Defence Officer's submissions, filed on behalf of Fofana pursuant to Article 6(A) of the Practice Direction. The Prosecutor indicated that she would not file submissions in response under Article 6(B), but filed a response to Fofana's submissions in accordance with Article 6(C) of the Practice Direction on 24 June 2014.

III. APPLICABLE LAW

8. I recall the provisions of Article 23(3) and 24 of the Statute in relevant part, which confer on the Residual Special Court the power to supervise the enforcement of sentences including the implementation of the sentence enforcement agreements, and on the President, the power to grant pardon or commute the sentence of persons eligible for

such pardon or commutation respectively. Article 24 in particular provides, *inter alia*, as follows:

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Residual Special Court accordingly.

9. Pursuant to Article 8 of the Amended Agreement Between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone, if, pursuant to the applicable national law of the Government of Rwanda the convicted person is eligible for early release, pardon or commutation of sentence, the Government of Rwanda shall notify this to the Registrar of the Special Court in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence. Article 246 of the Law of Rwanda code of criminal procedure (Law No. 30/2013 of 24/5/2013) which is the applicable national law, recognizes service of two-thirds of total sentence for conditional early release. This provision is also reflected in Article 2(A) of the Practice Direction which states in relevant part that:

A Convicted Person shall be eligible for consideration for Conditional Early Release no sooner than upon serving two-thirds of his total sentence ...

10. Once a convicted person has been determined to be eligible for consideration for conditional early release under Article 4(A) of the Practice Direction, Rule 124 of the Rules which mirrors Article 24 of the Statute provides in relevant part that:

There shall only be ... early release if the President of the Residual Special Court in accordance with Article 24 of the RSCSL Statute and in consultation with the Judges who imposed the sentence where possible, and after considering the position of the Prosecutor, which shall incorporate the interests of

Prosecution witnesses and victims, as well as the convicted person individually or through counsel, so decides on the basis of the interests of justice and the general principles of law. An early release shall only occur after a convicted person has served at least two-thirds of his or her original sentence.

11. A convicted person therefore has no entitlement to conditional early release from his or her sentence and the power to grant conditional early release is not exercisable on whim or caprice, but in consultation with the Judges who imposed the sentence, where possible, and on the basis of the interests of justice and the general principles of law. I reiterate that the President merely considers, on the basis of facts supplied and the applicable law, whether it is safe and proper for the convicted person to serve the remaining part of the sentence other than in prison.

12. The standard as set out in Article 8(B) of the Practice Direction is that the President, in consultation with the Judges shall determine whether the convicted person has shown clear and convincing evidence that he will be a safe member of society and comply with the conditions imposed by a conditional early release Agreement.

13. In accordance with Article 8(D) of the Practice Direction, the President's decision shall be accompanied by a reasoned opinion in writing and the factors that must be considered and evaluated include the following:-

- a. the safety of the community if the convicted person is released;
- b. the views and concerns of the victims, witnesses and their families, if any, regarding the conditional early release of the convicted person;
- c. the effect of any conviction for contempt of court for any manner of interference or attempted interference with witnesses, bearing in mind that such a conviction alone may justify denial of conditional early release;
- d. the convicted person's participation in any remedial, educational, moral, spiritual or other programme to which he was referred within the Prison,

his demonstration of remorse and his commitment to contribute to the restitution of victims and to reconciliation and maintenance of peace in Sierra Leone; and

- e. the views and concerns of the community to which he seeks to be released.

IV. DISCUSSION

14. I have carried out the consultations and obtained the reports as prescribed in the Statute, Rules and Practice Direction, and I am grateful for the assistance rendered to me by those who complied with those provisions of the law.

A. Gravity of the Crime

15. Before I consider the specific factors enumerated under Article 8(D) above, I must recall the gravity of the offence for which Fofana was convicted. As stated earlier, Fofana and two others were arrested on 29th May 2003 for allegedly committing serious offences, including crimes against humanity and war crimes as stipulated in the Statute. Ultimately, the Appeals Chamber determined his case as follows:-

COUNT 1: Murder, a crime against humanity, punishable under Article 2.a. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 2: Violence to life, health and physical or mental well-being of persons, in particular murder, punishable under Article 3.a. of the Statute, **GUILTY**, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 3: Other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the other inhumane acts committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the other inhumane acts committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, punishable under Article 3.a. of the Statute, **GUILTY**, of aiding and abetting under Article 6(1) of the Statute the cruel treatment committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the cruel treatment committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 5: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute, **GUILTY**, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Bo District; and **SENTENCES** Fofana to five (5) years of imprisonment;

COUNT 6: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute, **NOT GUILTY**;

COUNT 7: Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute, **NOT GUILTY**, by majority;

COUNT 8: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an other serious violation of international humanitarian law, punishable under Article 4.c. of the Statute, **NOT GUILTY**, by majority.⁶

As for the nature and gravity of those offences, I can do no better than the Trial Chamber in its Sentencing Judgment which was quoted with approval by the Appeals Chamber *in extenso* as follows:-⁷

46. With respect to the crimes for which Fofana was found liable under Article 6(3), the Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, as described in the Judgment, were of a very serious nature, and were committed against innocent civilians. The Chamber considers actions such as the mutilation and the targeted killing of Limba civilians and the killing and mutilation of Chief Kafala (whom the CDF/Kamajors considered a collaborator) in Koribondo, to be indicative of the brutality of the offences committed by Fofana's subordinates. The Chamber also notes the gruesome murder of two women in Koribondo who had sticks inserted and forced into their genitals until they came out of their mouths. The women were then disembowelled, and while their guts were used as checkpoints, parts of their entrails were eaten.

⁶ CDF Appeal Judgment, at Disposition.

⁷ *Ibid*, at pp 184, 185. [Internal footnotes omitted].

47. The Chamber also finds that many of the offences for which Fofana was convicted under Article 6(1) were committed on a large scale and with a significant degree of brutality. In particular, the Chamber notes the murder of 150 Loko, Limba and Temne tribe members in Talama, the killings of 20 men on the 15th of January 1998 at the NDMC Headquarters in Tongo, who were hacked to death with machetes, and the killing of 64 civilians in Kamboma, who were placed in two separate lines and killed, after which their corpses were rolled into a swamp, as indicative of the scale and brutality of the crimes that Fofana was found to have aided and abetted in the Tongo Field area. Furthermore, the Chamber finds that the crimes were particularly serious insofar as they were committed against unarmed and innocent civilians, solely on the basis that they were unjustifiably perceived and branded as rebel collaborators.

48. The Chamber notes that many of the victims of these crimes were young children and women, and therefore belong to a particularly vulnerable sector of society. For instance, we note our findings of the hacking to death by the CDF/Kamajors of a boy named Sule at a checkpoint in the Tongo area, the murder of a 12 year old boy in Talama, the murder of an unidentified woman who was alleged to have cooked for the rebels in Bo, and the atrocious murder of the two women in Koribundo as described earlier.

49. The Chamber considers these crimes to have had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community. The testimony of witnesses heard by the Chamber during the trial, and appended to the Prosecution Brief in Annex D, indicates the impact which events such as amputations and the loss of family members have had on the lives of victims and witnesses. As appropriately described and summarized by our sister Trial Chamber II, victims who had their limbs hacked off not only endured extreme pain and suffering, if they survived, but lost their mobility and capacity to earn a living or even to undertake simple daily tasks. They have been rendered dependent on others for the rest of their lives. In particular, the Chamber notes the lasting effect of these crimes on victims such as TF2-015, who was the only survivor of an attack on 65 civilians who were hacked to death by machetes or shot, and who was himself hacked with a machete and rolled into a swamp on top of the dead bodies in the belief that he was dead.

50. With respect to the form and degree of Fofana's participation, the Chamber notes that he was found liable for the crimes in Tongo Field as an aider and abettor under Article 6(1) of the Statute. The jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation. The Chamber also notes that while Fofana was found liable for aiding and abetting, he was not present at the scenes of the crimes and that the degree of his participation amounted only to encouragement.

51. With respect to the crimes for which Fofana was convicted under Article 6(3), the Chamber has considered the gravity of Fofana's conduct in failing to prevent the crimes. It finds that the gravity of the offence committed by Fofana given his leadership role as a superior who failed to prevent his subordinates from committing crimes, is greater than that of the actual

perpetrators of the crimes. In this case, the fact that Fofana's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity. This factor therefore, in our opinion, increases the seriousness of the crimes for which he has been convicted.

60. The Chamber considers that, given his role as a former Chiefdom Speaker, a community elder and the CDF National Director of War, Fofana breached a position of trust in committing the offences for which he has been convicted."

85. In executing this legitimate mission however, at a later stage that appears in the Indictment, and instead of limiting themselves and directing these attacks on legitimate military targets and objectives where collateral damage, if any ensued at all, could be perceived as justifiable, the Accused Persons and their Kamajors, as has been elucidated in the factual and legal findings of the Judgement, went beyond these acceptable military and legal limits and carried out killings and other atrocities against unarmed civilians who they characterised and designated as 'rebel collaborators'. We find that these atrocities were perpetrated, even though the evidence clearly established, and we so found, that the victims in fact, were disarrayed Sierra Leoneans including children fleeing for their lives and for safety from the bloody exchange of enemy fire, and further, that these civilian captives or fugitives, were unarmed and were not in the least, participating in hostilities. In fact, we note here that the crimes for which they have been found guilty were perpetrated by the Accused Persons and CDF/Kamajor fighters when combat activities and operations against the enemy AFRC forces were already over.

16. Those are the crimes which the appeals Chamber aptly described as "offences that do not affect the interests of one State alone, but shock the conscience of mankind." They are also the reason why the Appeals Chamber rejected the justification for a reduced sentence by the Trial Chamber which imported considerations of "just cause" and "civic duty" into the exercise of its sentencing discretion. In enhancing the sentence, the Appeals Chamber considered, inter alia, that "these were international crimes and not political crimes, in which consideration of national interest may be a relevant issue. What has to be paramount are international interests in protecting humanity."

17. It is apparent from the above review that the high gravity of the crimes for which Fofana was convicted is a factor that weighs against granting the application for early release.

B. Consultations

18. I must also consider the consultations made with Judges in respect of the application since, under Article 8 (B) of the Practice Direction, their views form part of the process through which I have to make my decision. Pursuant to Article 8 (A), I received written comments from two Judges who took part in the sentencing of Fofana before the Trial Chamber as well as the Appeals Chamber which revised the sentence. One report was supportive of the application but the other expressed serious reservations mainly because Fofana has not, at any stage, acknowledged his own responsibility and the leadership role he played in the armed conflict. By illustration, the learned Judge observed that in making this application, Fofana made statements regarding his remorse in the following words:

I was found guilty because I was a fighter for Civil Defence Force (CDF) fighting the Revolutionary United Front (RUF/SLA and the AFRC) but I honestly demonstrated my remorse during my trial and after to the Court, all of Sierra Leone and the Country at large.

As regards apology, Fofana stated as follows:

I sincerely apologise (*sic*) to the victims because of my role in the Sierra Leone Civil Conflict.

19. According to the learned Judge, these statements were unacceptable as they demonstrate the belief, wrongly held, that there was a civil conflict in Sierra Leone and not an armed conflict, and that the CDF had a “Just Cause” in that civil conflict, thus justifying the illegal actions and crimes committed. The applicant has therefore not understood that “what might be a legitimate cause does not justify the use of illegal means more specifically the violation of Internationally accepted and recognized rules governing the conduct of wars and fundamental standards of the International Humanitarian Law”. For this understanding to be ingrained in the applicant and other prisoners like him, the learned Judge suggested training in prison on the nature of the crimes committed in Sierra Leone, the convictions meted out for those crimes and the responsibility which the prisoner has to take for serious violation of International

Humanitarian law. Before such training can be done and Fofana's understanding reassured, the application should be declined.

20. The two factors considered above are not in favour of granting the application for conditional early release. But they must be balanced against the evaluation of other factors, which I now turn to.

C. The Safety and Views of the Community to Which Fofana Seeks to be Released

21. It is a requirement of Articles 8(D)(i) and (v) of the Practice Direction, that the President considers the safety of the community and the views and concerns of members of the community to which the convicted person seeks to be released. There is also absolute prohibition against early release under Article 8(C)(ii) of the Practice Direction, if the convicted person is unable to provide a suitable "Requested Area of Release", either by reason of absence of a suitable programme of supervision, or the unwillingness of the community to accept the convicted person or for any other cause.

22. Fofana expressly provided his area of release as the City of Bo in Bo District, or in the alternative Gbap in Nongoba Bullom Chiefdom of Bonthe District, both in the Southern Province of Sierra Leone. He submits that his entire family lives in Bo City and that he also lived there before his arrest and detention by the Special Court. Furthermore he would continue his vocations as a fisherman and agriculturist to support himself financially.

23. The Acting Registrar submitted a report on the views of both the Bo and Gbap communities regarding Fofana's potential conditional early release. The views catalogued in the report contain the results of interviews conducted with community activists, opinion leaders, representatives of civil society, local government officials, traditional leaders, women's groups, youth groups, chiefs and ordinary citizens through questionnaires; responses during phone-in radio interviews during which live telephone calls were received from the public on the issue of pardon and commutation of sentence and Fofana's potential conditional early release; and feedback from Town Hall meetings in both Bo and Gbap where participants included paramount chiefs and sub chiefs, women, children, war victims and relatives of Fofana.

24. The overall views expressed through the above media showed huge favorable support for Fofana's conditional early release to either Bo City or Gbap. In Bo City, the leaders there unanimously expressed willingness to receive Fofana in their community as they believed his presence will have a positive effect since he was a hero of the CDF faction which protected civilians from rebel atrocities, and his release would be greeted with jubilation. They had confidence that he would not incite members of the community for criminal activities or create political unrest. The community in Bo had forgiven him after he showed remorse for the crimes committed. Civil society groups in Bo also weighed in with support for Fofana's release pledging to take part in any arrangements for his supervision and monitoring. In Gbap, the community participants welcomed the prospect of Fofana's release as he was their Chiefdom Speaker and they were ready to take part in community guidance and monitoring of his activities upon his release.

25. The Residual Defence Officer obtained and exhibited several affidavits from chiefs, traditional leaders, local government officials, religious leaders, members of civil society, leaders of women's and youth groups and members of Fofana's family as part of the submissions required under Article 6(A) of the Practice Direction. Again most of the affiants were not averse to the grant of conditional early release to Fofana to settle either Bo City or Gbap.

26. But the Prosecutor was totally opposed to such release. The major concern relates to witnesses and their families who are also members of the community. Their reactions will be considered further in section C hereunder. In the report filed under Article 5(G) of the Practice Direction, the Prosecutor disclosed that 13 of the prosecution witnesses who testified in the CDF trial on behalf the prosecution were interviewed, but 11 of them expressed deep concern about their security and that of their families should Fofana be released to their locality, while eight were opposed to his release altogether. These concerns ranged from the fear of being contacted by Fofana or his agents, to not feeling safe to live in the same community with Fofana. Those who did not oppose the release, in the Prosecutor's view, did so on the strength of their belief that the Court will protect them against any harm, intimidation, interference or threats. The Prosecutor submits therefore that the safety and security of these courageous witnesses and victims of

Fofana's crimes and the aftermath of those crimes, should not be subordinated to the mercy and grace of early release extended to him. According to the Prosecutor, the interests of justice and proper administration of justice require the provision of a sense of security and actual security to witnesses and victims as a mitigation for early release. The Prosecutor further submitted that the interests of the witnesses and victims should be given more weight than that of members of the community who viewed Fofana as a hero rather than a convicted war criminal who was responsible for their suffering.

27. I have considered this aspect of the matter and it is clear to me that the community to which Fofana wishes to be released is receptive of such release and is largely unconcerned about its safety or Fofana's safety. That is a factor favouring the grant of the application for conditional early release. However, I note the Prosecutor's concern that Fofana is viewed as a hero rather than as a convicted war criminal in the communities of Bo and Gpab and that the proximate physical and social ties in the community significantly increase the risk that Fofana and/or his agents can reach out and intimidate or otherwise interfere with witnesses and their families. That is certainly not an idle or far-fetched proposition. It would have been particularly frightening if there was statistical certainty about the witnesses and their families who were involved and their proximity to either of the residences chosen by Fofana. In my view, the general fears expressed on the safety aspect of witnesses who are capable of identification can be ring-fenced by appropriate orders and conditions. At all events, 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.

28. This is not to downplay the concerns, interests and needs of witnesses and their families, a factor which must be a primary concern in considering whether or not to grant conditional early release to any prisoner. But on the material placed before me on this aspect of the matter, I am satisfied that Fofana's release into the communities of Bo City or Gpab will not pose a risk to the members of those communities and that as a fisherman

and agriculturist, he would be able to support himself financially, if his application for conditional early release is successful.

D. The Views and Concerns of Victims, Witnesses and their Families

29. The views and concerns expressed by some 13 witnesses interviewed by the Prosecution have been considered in section B above. Another set of 15 prosecution witnesses, including crime based and insider witnesses, were interviewed by the *Witnesses and Victims Section* on behalf of the Acting Registrar. Of this set of 15 witnesses, nine did not express any security concerns regarding Fofana's conditional early release. The remaining six expressed one form of fear or another regarding his release. It is significant that 11 of the 13 witnesses interviewed on behalf of the Prosecutor also expressed similar fears. Nevertheless, 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".

30. As stated earlier, most of the fears and concerns border around the issues already mentioned above i.e. that Fofana is viewed as a hero rather than as a convicted war criminal in the communities of Bo and Gpab and that the proximate physical and social ties in those communities significantly increase the risk that Fofana and/or his agents can reach out and intimidate or otherwise interfere with witnesses. The Prosecutor also expressed concern about the efficacy of the Sierra Leone Police and its National Witness Protection Programme in providing the necessary monitoring and response mechanism, which, in her submission, was wanting.

31. It is not in my province to second-guess the efficacy of the monitoring units which have been committed in written agreements and by the Inspector General of Police to assist the court in the enforcement of its orders. Suffice it to say that the orders made by this court have the full force of the law and ought to be executed. At any rate, the

Monitoring Authority is obliged by law to submit an annual report relating to the convicted person's compliance with the Conditional Early Release Agreement to the Registrar, and therefore the court will regularly be well abreast of its mandate.

32. Furthermore, pursuant to Article 11(B), of the Practice Direction, the President may review the conditions of the Conditional Early Release Agreement, *proprio motu* or upon the request of one of the parties including the Prosecutor under certain circumstances. Under Article 12(A), the Court also has the power to order the re-arrest of the prisoner and transfer him to it for detention pending the hearing and determination of any alleged violation of the terms of the Conditional Early Release Agreement. It is instructive that most of the witnesses interviewed by the Witnesses and Victims Section and on behalf of the Prosecutor requested, among other things, that the Court must ensure that Fofana is strictly monitored and that regular follow ups and visitations be made to them to assure them of their safety if the application is granted.

33. In the same vein, the Prosecutor proposed the following measures, if the application is granted:

- a. that he (Fofana) publicly apologises for his wrongful conduct, acknowledges his guilt and shows remorse;
- b. that he not be allowed to relocate in the same location as the witnesses who testified against him;
- c. that he not be allowed to directly or indirectly approach any of the witnesses in the future, to directly or indirectly try to harm, intimidate or otherwise interfere with them in any way;
- d. that he be cautioned generally to conduct himself peacefully in the community;
- e. that he refrain from being involved in any secret meetings intended to plan civil unrest;

- f. that stringent monitoring be put in place to ensure that Prisoner Fofana abides by the conditions in order to maintain public confidence in the integrity of the SCSL and RSCSL judicial processes.

34. It is in the light of the foregoing that I have no reason to doubt that the legitimate security issues raised by the witnesses are not insurmountable, as there are sufficient safeguards in place. I would not, in the circumstances, consider it an overriding consideration in the application before me, and I would make a similar finding as in section B above.

E. Reports from the Prison Authorities

35. Article 5(D) of the Practice Direction requires the Registrar to request from the prison authorities of the State of Enforcement reports on the behavior of the convicted person during his imprisonment which should include information set out in subparagraphs (i) to (v) of same. Fofana was incarcerated in the Special Court Detention Facility from May 2003 to October 2009, when he was transferred to Rwanda. He has therefore spent the greater part of his detention/incarceration at the Special Court Detention Facility in Freetown before his transfer to Rwanda.

36. A report on Fofana's detention at the Special Court Detention Facility dated July 2009, prepared in accordance with Article 4 of the 2009 Practice Direction for Designation of State for Enforcement of Sentence was submitted by the Acting Registrar as part of the documents required under Article 5(I) of the Practice Direction. This report contains information such as Fofana's behavior within the prison including any violent or threatening behavior, violation of prison rules, dis-respect for the law, rules and authority while in prison, and participation in remedial, educational, moral, spiritual or other programmes to which he was referred within the prison. The report also includes observations on Fofana's adjustment within the prison, whether he is or would be a public safety concern or an escape risk, his potential for rehabilitation and his overall security rating.

37. The overall assessment of Fofana's behavior during the period of his detention at the Special Court Detention Facility was favourable, and he was classified as a "Medium Security Prisoner". Amongst other positives, he was described as:

- a. having actively participated in the vocational and educational programs at the Detention Facility;
- b. having always conducted himself in an appropriate and respectful manner;
- c. having always used proper channels when placing formal or informal requests within the Detention Facility;
- d. being the cause of minimal public safety concerns;
- e. posing minimal risk to the public;
- f. not considered an escape risk;
- g. having a very high potential for rehabilitation;
- h. and as having accepted his role and responsibility in the CDF during the war.

38. Five "Affidavits" were also filed and submitted from the Prison Authorities in Rwanda in compliance with Articles 5(D)(i) to (v) of the Practice Direction. The affidavits contained information attesting to Fofana's compliance with the requirements of the said provisions and confirmed, *inter alia*, that Fofana has refrained from:

- a. making prohibited contacts or threats;
- b. violent or threatening behavior;
- c. commission, incitement or promotion of crime;
- d. violation of prison rules or Special Court and Residual Special Court orders.

He has also:

- a. participated in remedial, educational, moral, spiritual or other programmes to which he was referred;
- b. acknowledged and expressed remorse for the crimes for which he was convicted;
- c. been a peaceful and well-disciplined prisoner who has not exhibited any continuing adherence to an ideology which is violent or contrary to peace and reconciliation;
- d. based on conversations with Fofana and observations, committed to agree to the conditions of residency, behavior and supervision if granted conditional early release.

39. The Prosecutor submits that the five affidavits should be given little weight as they are from one individual with no indication of the affiant's position or experience to facilitate a determination of what weight to attach to the affidavits. The affiant, in the Prosecutor's view, expresses uncertainty or an inability to state whether or not Fofana had shown empathy for his victims, was likely to commit crimes in the future, or instigate or participate in discrimination or political unrest. The affiant also states that Fofana has never explained why he committed the crimes. The Prosecutor further submits that the expression of remorse by Fofana was vague and at best self-serving; that the assertion that he followed prison Rules is of minor import since he had no choice in such environment; and that there was no indication by Fofana of any intent to provide meaningful restitution.

40. I have examined the five Annexures attested to and submitted by one Hillary Sengabo from the Prison authorities in Rwanda. They contain other signatures and stamps in the French language. As correctly observed by the Prosecutor, the person attesting to the documents does not disclose his position in the Prison hierarchy or his experience with the prisoner. It is even less clear whether these were affidavits sworn before a 'Commissioner of Oaths' or 'Notary Public', but it is not a requirement of Article 5 (D) that any Affidavits be filed. Nevertheless, the Prosecutor does not contend

that the Annexures were filed by bogus prison authorities. If that were so, it would be a serious indictment on the Registrar and the Court itself which has the mandate of enforcing and monitoring the prisoner's sentence through the Registrar. In the absence of any evidence to the contrary, I am satisfied that the reports came from authorized personnel of the Prison Authorities in Rwanda and expressly respond to the issues enumerated under Article 5 (D). As for the weight to be attached to the reports, I have no reason to doubt the candour of the officer in matters stated to be of his/her own knowledge and his/her neutrality when he/she had "no evidence in support of or contrary to" what Fofana stated to him/her, particularly in relation to Fofana's willingness to make restitution, empathise with victims, or participate in politics in future.

41. The officer concluded as follows:-

I believe, based on my conversation with and observation of him, Fofana is committed to agree to the conditions of residency, behavior and supervision if he is conditionally released. In support of this belief, I offer Fofana's recent statement to me that he is looking forward to being back in the community and starting his life anew, and hopes to have the opportunity to apologise to the public and victims of his crimes. Finally, I can attest that Fofana has always been an exemplary prisoner. So, I believe he is able and willing to follow Rules and Regulations.

42. In my assessment, the prison authorities in Rwanda have a positive report on Fofana and they confirm that he has been of good behavior and has demonstrated rehabilitation by his willing and enthusiastic participation in remedial, educational, moral, spiritual or other programmes to which he was referred within the prison, has demonstrated remorse and a commitment to reconciliation and maintenance of peace in Sierra Leone.

43. Taking into consideration the reports from the Special Court Detention Facility and the prison authorities in Rwanda, I find and hold that they militate in favour of granting Fofana conditional early release.

F. The Effect of Any Conviction for Contempt of Court

44. Fofana has not been convicted for contempt of court for any manner of interference or attempted interference with witnesses. Considering that pursuant to Article 8(D)(iii) of the Practice Direction, “such a conviction alone may justify denial of conditional early release”, I find that this factor weighs in favor of granting conditional early release.

V. CONCLUSION

45. The above analysis speaks to strong factors both for and against the grant of the application before me. There is no doubt that Fofana has served more than two thirds of his 15-year prison sentence which is more than 10 years now. I am nevertheless alive to the Totality principle which guided the Appeals Chamber in determining the sentence of 15 years. The Totality principle requires that “a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused”.

46. The Appeals Chamber also stated thus:-

What should be one of the paramount considerations in the sentencing of an accused person convicted of crimes against humanity and war crimes is the revulsion of mankind, represented by the international community, to the crime and not the tolerance by a local community of the crime; or lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes.⁸

47. Upon consideration of those principles, the Statute, Rules, Practice Direction and the totality of the material placed before me, I have come to the conclusion that the application be and is hereby granted subject to service by the applicant of a further period of six (6) months from the date of this Decision, in prison custody. Within those six months, the Registrar of this court in conjunction with the Prison Authorities in Rwanda,

⁸ *Ibid*, at para. 564.

shall conduct training for Fofana and certify that he has, as far as his level of intelligence can take him, understood the nature of the crimes for which he was convicted in that they were serious violations of International Humanitarian Law, Geneva Conventions and Crimes Against Humanity; understood that what may be a legitimate cause does not justify the use of illegal means; and that he acknowledges his own responsibility and the leadership role he played in the armed conflict in Sierra Leone.

48. Thereafter the applicant may be released on the terms stated in the Disposition hereunder.

VI. DISPOSITION

49. For the foregoing reasons and pursuant to Article 24 of the Statute, Rule 124 of the Rules and Article 8 of the Practice Direction, I hereby **GRANT** the Application conditional upon the following:-

- a. The applicant shall continue to serve in prison custody a period of six months from the date of this Decision to undergo additional specific training as stated in the Decision herein.
- b. Thereafter and upon certification of the Training by the Registrar of this Court, the applicant may be released on execution of a Conditional Early Release Agreement in accordance with Article 9(C) of the Practice Direction, the format of which is contained in Annex C of the Practice Direction.

I find it necessary to impose further Special Conditions which do not appear in Annex C as follows:

- i After the six-month Training session, the applicant shall publicly apologize for his wrongful conduct, acknowledge his guilt and show remorse;
- ii The applicant or any person acting with his consent or authority shall not, directly or indirectly, approach any of the witnesses in future, to

directly or indirectly try to harm, intimidate or otherwise interfere with them in any way;

- iii 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.
- iv 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.
- v Regular visits shall be made by the office of the Registrar to provide assurance of security to such vulnerable former witnesses as may desire it.

Done at The Hague, The Netherlands

This 11 day of August 2014



Justice Philip N. Waki,
President

