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RESIDUAL SPECIAL COURT FOR SIERRA LEONE

Before: Justice Renate Winter, President

Registrar: Ms. Binta Mansaray

Date: 29 May 2017

PROSECUTOR

Against

ALLIEU KONDEWA

Public

Decision of the President on Application for Conditional Early Release

Office of the Prosecutor:

Ms. Brenda J. Hollis

Defence Office

Mr. Ibrahim Sorie Yillah

The Republic of Rwanda

RESIDUAL SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT THE HAGUE	
30 MAY 2017	
NAME	Frances Ngaboh-smat
SIGN	<i>[Signature]</i>
TIME	09:00am

JUSTICE RENATE WINTER, PRESIDENT OF THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, (“Residual Special Court”);

RECALLING that Allieu Kondewa (“Kondewa”) submitted an Application for Eligibility for Consideration for Conditional Early Release contained in Annex A, Form A(1) of the Practice Direction on Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone (“Application” and “Practice Direction” respectively) together with additional supporting documents pursuant to Article 3(A) of the Practice Direction;

COGNISANT of the Notification by State of Enforcement to Establish Eligibility for Conditional Early Release as set out in Annex B, Form B of the Practice Direction, by which the Republic of Rwanda notified the Residual Special Court that Kondewa had served two-thirds of his total sentence pursuant to Article 2(A) of the Practice Direction and Article 246 of the Law of Rwanda code of criminal procedure (Law No. 30/2013 of 24/5/2013) together with supporting documents thereto;

RECALLING that the President determined that Kondewa is eligible for consideration for conditional early release pursuant to Article 4(A) of the Practice Direction and granted the Application on 2 December 2016;

COGNISANT of Article 24 of the Statute of the Residual Special Court for Sierra Leone (“Statute”), pursuant to which there shall only be pardon or commutation of sentence if the President of the Residual Special Court, in consultation with the judges who imposed the sentence where possible, so decides on the basis of the interests of justice and the general principles of law, Rule 124 of the Rules, Article 8 of the Practice Direction and 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 ;

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

HEREBY DECIDES AS FOLLOWS:**I. BACKGROUND**

1. Kondewa, a former member of the Civil Defence Forces (“CDF”) and its High Priest was indicted jointly with the late Sam Hinga Norman and Moinina Fofana before the Special Court for Sierra Leone (“CDF Trial” and “Special Court” respectively) and was charged with eight counts of war crimes, crimes against humanity and other serious violations of international humanitarian law as stipulated in the Statute.¹ Kondewa was convicted on four counts of war crimes and one count of an other serious violation of international humanitarian law and was acquitted on three counts of crimes against humanity by a majority of Trial Chamber I of the Special Court on 2 August 2007. He was subsequently sentenced to a total term of eight years imprisonment.² On appeal by the Prosecution, Kondewa’s acquittal on crimes against humanity was overturned, and a majority of the Appeals Chamber increased his sentence to a total term of 20 years.³

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

3. Kondewa submitted an Application for Determination of Eligibility for Consideration for Conditional Early Release in September 2016, 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 Kondewa had served two-thirds of his total sentence with supporting documents attached to both.

4. The President determined in accordance with Article 4(A) of the Practice Direction after considering the Application and accompanying documents and having

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

² Prosecutor v. Moinina Fofana and Allieu Kondewa, *SCSL-04-14-T-796*, Judgment 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*, Judgment, 28 May 2008 (“CDF Appeal Judgment”).

⁴ Prosecutor v. Allieu Kondewa, *SCSL-04-14-ES-831*, Order Designating State in Which Allieu Kondewa is to Serve His Sentence, 1 August 2009.

carried out the required consultations, that the requirements set out in Article 2 had been met, and that Kondewa was eligible for consideration for conditional early release on 2 December 2016. The Registrar was ordered to provide the information required under Article 5(B) of the Practice Direction not later than 14 days and that required under Articles 5(C) to (H) thereof not later than 30 days from the date of filing of the Decision.⁵

5. Requests for extensions of time to provide the information required under Articles 5(B), (C) to (H) were submitted by both the Registrar and the Defence Office. The President granted both requests for extension of time following which the Registrar submitted the information received from the Defence Office pursuant to Article 5(B) of the Practice Direction pertaining to the suitability of Kondewa's "Requested Areas of Release" and how he will be supported financially if released on 13 January 2017.

6. On 30 January 2017, the Registrar's Article 5(I) portfolio and submissions in respect of Kondewa's Application were filed. It included information required pursuant to Article 5(C) to (H), *inter alia*, psychological and medical reports from medical personnel in Rwanda, reports and 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 Kondewa if released, the Prosecutor's views on the application, Kondewa'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 Kondewa's behavior and comportment during the period of his imprisonment in Rwanda.

7. On 16 February 2017, the Prosecutor's filed submissions in response to the entirety of the Registrar's Article 5 portfolio pursuant to Article 6(B) of the Practice Direction. Similar to her submissions made to the Registrar pursuant to Article 5(G) of the Practice Direction, the Prosecutor requests that the Application be denied. The

⁵ Prosecutor v. Allieu Kondewa, RSCSL-04-14-ES-852, Decision on Allieu Kondewa's Eligibility for Consideration for Conditional Early Release, 2 December 2016, ("Kondewa Eligibility Decision").

Prosecutor submits that to grant the Application would not be in the interests of justice “as it risks ignoring the strongly expressed views of witnesses and victims who at great peril to themselves and their families came forward to testify about the heinous crimes he and/or his CDF subordinates committed against innocent civilians...” The Prosecutor submits in the alternative however that should the Application be granted, the release should be deferred until after the upcoming general elections in Sierra Leone, with conditions imposed to adequately address the concerns raised by all parties in the submissions.

II. APPLICABLE LAW

8. Articles 23(3) and 24 of the Statute in relevant part 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. 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. In accordance with Article 8(D) thereof, 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.

III. DISCUSSION

12. In reaching a decision on the Application, I have carried out the consultations required with Judges who took part in the sentencing of Kondewa before the Trial Chamber as well as the Appeals Chamber which revised his sentence under Article 8 (B) of the Practice Direction. The views of those Judges are considered in reaching my decision.

13. I will now evaluate the factors listed in Article 8(D) of the Practice Direction.

A. The Safety of the Community if Kondewa is released

14. The community into which a convicted person seeks to be released is a very important factor in the decision to grant conditional early release. From the provisions of the Practice Direction, it must be considered whether if conditional early release is granted, (i) the community to which he or she seeks to be released is suitable and (ii) that it will be safe for this community to release the convicted person in it.

15. In accordance with Article 5(B) of the Practice Direction therefore, once a convicted person is determined to be eligible for consideration for conditional early release pursuant to Article 4(A), he or she must provide information on his/her Requested Area(s) of Release. Pursuant to Article 5(B) the requirements are that the convicted person must provide;

- i. A proposed address of residence in the Home State (“Requested Area of Release”),
- ii. An alternative proposed address in the event the President deems the convicted person’s first choice to be unsuitable,
- iii. Reasons why the Requested Areas of Release are suitable for his resettlement including details of his personal connections to the area, and
- iv. How the convicted person will be supported financially.

16. In his submissions pursuant to Article 5(B) of the Practice Direction, Kondewa listed his first proposed place of residence as No. 38 Fifth Street, Bo # 2 Bo town, Kakua Chiefdom, Southern Province of the Republic of Sierra Leone. His second proposed place of residence is listed as Fefeyah village, Gbap Nongoba Bullom Chiefdom, Bonthe District, Southern Province of Sierra Leone.

17. With respect to his Requested Area of Release in Bo District, Kondewa submits that the address is suitable because of his close family ties in the area. He submits that his immediate family, including his wives and children live in the town and that he has the support of the community. Several affidavits sworn to by two paramount chiefs, members of the Non Governmental Organization (NGO) and civil society community and four of Kondewa's wives to show the acceptability and support of the community for his conditional early release were attached to his submissions. Regarding financial support, Kondewa submits that he has access to farm land to continue agricultural work with which he will support himself and his family.

18. With respect to his alternative proposed address in Bonthe District, Kondewa submits that he has close relatives and extended family members including his brothers and sisters living in the community. He also submitted affidavits from two paramount chiefs and a chiefdom speaker as evidence of the community's support for his conditional early release. Kondewa will rely on proceeds from agriculture on farm land to which he has access to support himself and his family financially.

19. I note that most of the affidavits submitted in support of Kondewa's Article 5(B) submissions evince an overall support for his release into either community. The affiants were not averse to the grant of conditional early release to him to settle in either Bo City or Fefeyah village in Bonthe District. The paramount chiefs, members of civil society and members of his family -his wives, expressed little or no concern about his potential release into the respective communities and supported his submissions regarding the suitability of the communities.

20. Regarding the safety requirement, pursuant to Article 8(D) (ii) and (vi) of the Practice Direction, the President must consider the safety of the community if the convicted person is released and the views, concerns, willingness and acknowledgments of members of the Requested Areas of Release particularly as provided pursuant to Article 5(F), in particular Article 5(F) (ix) and (x). As part of her submissions required pursuant to Article 5(F), the Registrar submitted a report on the views of communities in both Bo District and Bonthe District with interviews conducted also in communities in the South-Eastern Districts of Moyamba, Pujehun, Kenema and Kailahun. These communities include Bo town, Gerehun, Tikonko and Koribondo - a major crime base in the CDF Trials- (Bo District); Kenema Town, Panguma and Tongo Fields (Kenema District); Kailahun Town and Segbwema Town (Kailahun District); Pujehun Town (Pujehun District); Talia Yawbeko a.k.a Base Zero- where the CDF training base was located- and Mattru Jong (Bonthe District); Moyamba Junction, Kaiyamba and Gandorhun Fakunya Chiefdoms (Moyamba District) regarding Kondewa'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, women's groups, paramount chiefs and other traditional rulers, the police and ordinary citizens. 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 Kondewa's potential conditional early release also formed part of the report.

21. The overall views expressed showed favorable support for Kondewa's conditional early release to either Bo town or Fefeyiah village in Bonthe District. In Bo District, most of those interviewed acknowledged that there was concern after the breach of conditions of early release by Moinina Fofana, a fellow CDF convicted person but expressed hope that he will have learnt from the experience of Moinina Fofana. The leaders also pledged to work as a community and together with the Police to ensure that if granted conditional early release, Kondewa abides by the terms of his release. A radio discussion on a local F.M. radio consisting of an interactive phone-in session largely produced the same result. The Police superintendent interviewed in Bo Town stressed that Kondewa should be warned to refrain from interfering in politics especially given the

current political climate. The Police officers in Bo also exhibited a clear understanding of the role of the Sierra Leone police as a monitoring authority.

22. In Koribondo, interviewees expressed concern as to whether the Residual Special Court will undertake intensive outreach activity in the township and region prior to any early release of Kondewa, as they could still remember the activities of CDF Kamajors in the township. They were however quick to add that having witnessed the transitional processes in the country such as the Truth and Reconciliation Commission and the Special Court, coupled with Kondewa's public apology and show of remorse they had no fears about his pending release.

23. In Talia Yawbeko, Bonthe District, the community participants welcomed the prospect of Kondewa's release as the CDF had its training base there and Kondewa had found a village in Bonthe District where he lived. Even though they viewed him as a hero, they acknowledged that he had shown remorse and had learnt his lessons. In Mattru Jong, the community people were in agreement with the paramount chief's statement that because the Truth and Reconciliation Commission had taught Sierra Leoneans to forgive others for whatever happened during the war, they were prepared to welcome Kondewa in their community. Hence they had former Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC) combatants living with them harmoniously in their communities. The local police commander recalled the consultations that occurred before Moinina Fofana was granted conditional early release and expressed similar sentiments about welcoming Kondewa to the community should he choose to reside there if granted conditional early release.

24. A discussion on a local radio station similar to what took place in Bo showed support by a majority of callers for Kondewa's conditional early release as long as he abides by his conditions and lived a crime free life.

25. Pursuant to Article 5(G) of the practice Direction, the Prosecutor is required to submit a report to the Registrar for onward transmission to the President containing *inter alia* the Prosecutor's views on the request for conditional early release. In her report to the Registrar dated 12 January 2017, the Prosecutor opposes the Application and requests

that it be denied. The Prosecutor's major concern relates to strongly held security concerns of witnesses who testified during the trial. She submits that to extend the "mercy or grace" of conditional early release to Kondewa in light of those concerns would be contrary to the interests of justice and the proper administration of justice.

26. In the report filed under Article 5(G) of the Practice Direction, the Prosecutor disclosed that 18 prosecution witnesses who testified in the CDF trial were interviewed to ascertain their views regarding the Application. Four categories of witnesses were chosen: insider witnesses, severely traumatized victim witnesses, witnesses from locations severely affected by CDF crimes (Koribondo) and witnesses who were victims of sexual violence. According to the Prosecutor, even though the majority of these witnesses did not absolutely oppose the granting of early release, the security concerns raised by them were very serious and of such a nature and degree that conditional early release would not be appropriate. The views of these witnesses and their reactions will be appropriately considered in more detail in the next section.

27. For the purposes of the discussion under this section however, I note that even though the Prosecutor submits that of the 18 witnesses interviewed some were from Koribondo (a major crime base during the CDF Trial), there was no evidence submitted to show that these witnesses were from Bo city or Fefeyama village or that they were particularly opposed to Kondewa being resettled in Bo Town or Fefeyama village if granted conditional early release. Neither was specific evidence submitted in this regard in the Prosecutor's Response pursuant to Article 6(B) of the Practice Direction.

28. In fact it is the Prosecution's submission that should Kondewa be granted conditional early release, one of the conditions proposed as part of the terms of his release by these witnesses is that contrary to the freedom given to Moinina Fofana, Kondewa's movements should be limited to the specific location to which he is authorized to be released.

29. In light of all of the above, it is clear to me that communities in both the Requested Area of Release and the alternative in which Kondewa seeks to live if granted conditional early release are receptive of such release and are largely unconcerned about

their safety or that of Kondewa. In the absence therefore of clear opposition by Prosecution witnesses to Kondewa's resettlement in either community if granted conditional early release, I find that this is a factor favoring the grant of the application for conditional early release.

30. 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 and which as stated earlier I will consider in detail in the next section. But on the material placed before me on this aspect of the matter, I am satisfied that Kondewa's release into the communities of Bo City or Fefeyama village in Bonthe District will not pose a risk to the members of those communities and that by engaging in farming, he would be able to support himself financially, if his application for conditional early release is successful.

31. I also recall that there is an 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 *inter alia* by reason of absence of a suitable programme of supervision. This factor will be considered below as one of the major concerns expressed by the witnesses interviewed when assessing the role of the Monitoring Authority.

B. The Views and Concerns of Victims, Witnesses, their Families and Others who are at risk

32. The views and concerns expressed by 18 witnesses interviewed by the Prosecution and contained in her Article 5(G) submissions, border mainly on their security if Kondewa is granted conditional early release. These concerns were expressed variously as a fear that Kondewa is still viewed as a "gallant leader of the Kamajors" and a "war hero" rather than as a convicted war criminal by many of former CDF fighters and initiates who remain loyal to him, his likely involvement in politics because of the wide support he still enjoys and fear of being contacted by his supporters for retaliation or harassment. Other concerns bordered on Kondewa's ability and sincerity to abide by the conditions of his release. Some witnesses as well as the Prosecutor herself also expressed concern about the efficacy of the Sierra Leone Police and its National Witness Protection Programme in providing the necessary protection for witnesses and monitoring and

response mechanism, which, in their view, has still to prove its merits, considering the recent breach by Moinina Fofana of the terms of his conditional early release. These concerns were largely reiterated by the Prosecutor in her submissions in response pursuant to Article 6(B) of the Practice Direction.

33. In accordance with Article 5(E) of the Practice Direction, another set of 20 prosecution witnesses, consisting of insider and victim witnesses, were interviewed by the *Witnesses and Victims Section* on behalf of the Registrar. The witnesses were from Bo Town and surrounding villages, Mattru Jong in Bonthe District and other towns in the south-eastern region of Sierra Leone. The views of these witnesses on the Application were divided – some being totally against (two of them), others in favor, some with conditions. The majority, were however in favor of the granting of conditional early release with conditions such as close monitoring and regular visits by the Witnesses and Victims Section to the witnesses’ communities to build confidence and ensure their safety and a delay in granting conditional early release until after the multi-tier national elections scheduled for 2018. Similarly, this set of witnesses expressed concern about the mystical powers that Kondewa is supposed to have had through which he had conducted initiations considered sacred, thereby ensuring that most former CDF fighters still respected and remained loyal to him.

34. The Witnesses and Victims Section also interviewed a group of insiders who were not witnesses, local authorities and stakeholders in the communities visited. The report states that a majority of them welcomed the idea of granting Kondewa conditional early release, making reference to the Truth and Reconciliation Commission which they considered had paved the way for lasting peace in the country.

35. As stated earlier, most of the fears and concerns border around the issue mentioned above i.e. that Kondewa is still viewed as a “gallant leader of the Kamajors” and a “war hero” rather than as a convicted war criminal by many of former CDF fighters and initiates. Flowing from this was another concern expressed by at least one witness interviewed by the Prosecution. This latter concern was the genuine fear of his likely involvement in politics because of the wide support he still enjoys. This is true especially as the country is in a political period leading up to the multi-tier national elections. The

Police superintendent interviewed in Bo Town also stressed that Kondewa should be warned to refrain from interfering in politics especially given the current political climate.

36. This is a serious factor that might militate against the granting of conditional early release to Kondewa. The seriousness of this factor is further heightened by the current political climate within the country. I note the Prosecutor's request that should Kondewa be granted conditional early release, that release should be deferred until after the upcoming general elections in the country.

37. It is also a fact that many former CDF commanders and fighters participated in post conflict transitional justice mechanisms in Sierra Leone, either before the Truth and Reconciliation Commission or as prosecution witnesses in the Special Court for Sierra Leone. I also refer to the earlier decision in Moinina Fofana's application for conditional early release in which the President noted that, most of the views gathered from interviewees by the Witnesses and Victims Section, on whether Moinina Fofana will still be powerful and popular among CDF fighters, were that he would 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".⁶ In my view, it will not be far-fetched to consider these views to be applicable to Kondewa also. Furthermore in the instant Application, a significant number of interviewees showed an understanding of the process by which Kondewa was convicted, acknowledged that he had been convicted for crimes committed during the war and were of the view that he had paid the price.

38. In light of the foregoing, I find that the security issues raised by the witnesses are legitimate and serious enough to militate against the granting of conditional early release to Kondewa. I will consider this factor further in my disposition of the Application.

⁶ Prosecutor v. Moinina Fofana, *RSCSL-04-14-ES-836*, Decision of the President on Application for Conditional Early Release, 11 August 2014.
Prosecutor v Allieu Kondewa

39. The concern expressed by some witnesses as well as the Prosecutor about the efficacy of the Sierra Leone Police and its National Witness Protection Programme in providing the necessary protection for witnesses and a monitoring and response mechanism is also a genuine one, especially in light of the recent breach by Moinina Fofana of the terms of his conditional early release. This was a matter of very grave concern for the Residual Special Court. The Sierra Leone Police came under very serious criticisms from the Court for that breach by Moinina Fofana.

40. In the Disposition on the Matter of Moinina Fofana's Violations of the Terms of his Conditional Early Release, the Designated Judge, Justice V. Solomon had this to say about the role of the monitoring authority:

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.

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.

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.

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.

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.

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.

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.

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.⁷

41. Justice Solomon ordered *inter alia* that :

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.⁸

42. On 26 May 2016, the Registrar filed Submission of the Registrar Pursuant to Rule 33(B) as ordered in Terms of Paragraph 81(v) of the Disposition in the Matter of Moinina Fofana's Violations of the Terms of His Conditional Early Release. The Registrar submitted therein *inter alia* that in compliance with the Designated Judge's instructions as contained in the Order she had held meetings with the Inspector General and other senior officials of the Sierra Leone Police. The Inspector General had designated a focal point in Freetown within the Monitoring Authority and two-weeks of intensive training to ensure that the Monitoring Authority understands the modified conditions given to Fofana as well as its obligations pertaining to the enforcement thereof had been undertaken. Personnel from the National Witness Protection Unit also participated in the training.

43. The Monitoring Authority also undertook to ensure that certain measures will be taken to enhance future enforcement and adherence to its duties, of which it is noteworthy that its personnel that benefitted from the training should join personnel from

⁷ Prosecutor v. Moinina Fofana, *RSCSL-04-14-ES-849*, Disposition on the matter of Moinina Fofana's violations of the terms of his conditional early release, 25 April 2016, [internal footnotes and paragraph numbers omitted].

⁸ *Ibid*

the Residual Special Court as facilitators to train more people (including Local Unit Commanders) countrywide on conditional early release, beginning with the Southern Province.

44. Suffice it to say that pursuant to Orders by this Court the Monitoring Authority has again committed in written agreements and through the Inspector General of Police to assist the court in the enforcement of its orders. I am satisfied that the additional steps taken following the Disposition in the Moinina Fofana matter will ensure that the Residual Special Court is regularly kept abreast of the activities of the Monitoring Authority with respect to Kondewa's compliance with the terms of the Conditional Early Release Agreement, if granted conditional early release. I recall also that the Monitoring Authority is required to submit an annual report relating to the convicted person's compliance with the Conditional Early Release Agreement to the Registrar.

45. During interviews conducted in the Requested Areas of release, it was reported that the Police officers in Bo also exhibited a clear understanding of the role of the Sierra Leone police as a monitoring authority. In Talia Yawbeko (Bonthe District), the local police commander recalled the consultations that occurred before Moinina Fofana was granted conditional early release and expressed similar sentiments about welcoming Kondewa to the community should he choose to reside there if granted conditional early release. Recalling that there is 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 *inter alia* by reason of absence of a suitable programme of supervision, I would not, in the circumstances, consider the concerns about the efficacy of the Monitoring Authority to be an overriding consideration against granting the Application before me.

46. Other concerns expressed by the witnesses interviewed by the Prosecutor bordered on Kondewa's ability and sincerity to abide by the conditions of his release. The rationale for this concern seems to be based on submissions that Kondewa has repeatedly exhibited a ruthlessly violent side to his personality, including personally benefitting from acts of banditry and looting of civilian property during the conflict. This, it is

submitted will make it hard for him to eschew violence in the future, regardless of efforts in prison to help him reform his character.

47. I will defer a discussion of this issue to the next Section in which reports from the Prison Authorities in Sierra Leone and Rwanda are examined.

C. Reports from the Prison Authorities

48. 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. Kondewa was incarcerated in the Special Court Detention Facility from May 2003 before his transfer to Rwanda in October 2009.

49. A report on Kondewa's detention at the Special Court Detention Facility dated July 2009, prepared in accordance with Article 4 of the Practice Direction for Designation of State for Enforcement of Sentence 2009 was submitted by the Registrar as part of the documents required under Article 5(I) of the Practice Direction. This report contains information such as Kondewa's behavior within the prison including any violent or threatening behavior, violation of prison rules, disrespect 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 Kondewa'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.

50. The overall assessment of Kondewa's behavior during the period of his detention at the Special Court Detention Facility was favorable, and he was classified as a "Medium Security Risk" due to his adjustment, acceptance of his conviction and good behavior as a prisoner. He was also described positively as:

- a. displaying a stable, calm demeanor and composure and his ability to adapt has been a positive example to the other prisoners incarcerated with him;

- b. having minimal public safety concerns, as a well adjusted prisoner having accepted responsibility for his role in the CDF during the civil war;
- c. not considered an escape risk;
- d. having a high potential for rehabilitation, as he has accepted his role and responsibility in the CDF during the war and is looking forward to living a productive life with his family after he has served his sentence;
- e. having actively participated in the tailoring program at the Special Court Detention facility, indicated an interest in soap making and learning how to drive a car.

51. 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, four of which were signed in December 2016 and one in January 2017. The affidavits contained information attesting to Kondewa's compliance with the requirements of the said provisions and confirmed, *inter alia*, that he 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 Kondewa and observations, committed to agree to the conditions of residency, behavior and supervision if granted conditional early release.

52. I recall the views expressed by witnesses interviewed by the Prosecutor as to Kondewa's ability and sincerity to abide by the conditions of his release. As already noted, the rationale for this concern seems to be based on submissions that Kondewa has repeatedly exhibited a ruthlessly violent side to his personality, including personally benefitting from acts of banditry and looting of civilian property during the conflict. However, I have no reason to doubt the candor of the prison officers in matters stated to be of his/her own knowledge and his/her neutrality.

53. Furthermore, in addition to the favorable prison reports submitted by the prison authorities of both the Special Court for Sierra Leone Detention Center and those in Rwanda showing that Kondewa had followed and complied with prison rules and regulations during his incarceration, he has expressed empathy for his victims, has been shown to have acknowledged his role and participation in the crimes committed by the CDF during the civil conflict as evidenced in the documentation in the Application and has offered a public apology to the people of Sierra Leone.

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

55. 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 Kondewa conditional early release.

D. The Effect of Any Conviction for Contempt of Court

56. Kondewa 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.

IV. CONCLUSION

57. Of all the factors discussed above, the factor that militates most against the granting of conditional early release to Kondewa is that concerning fears around the issue that Kondewa is still viewed as a “gallant leader of the Kamajors” and a “war hero” rather than as a convicted war criminal by many of former CDF fighters and initiates who remain loyal to him. As stated above, flowing from this concern is the genuine fear of his likely involvement in politics because of the wide support he still enjoys. I do not consider the fact that the latter concern appears to have been expressed by only one witness interviewed by the Prosecution on the record to be *di minimis*. I am of the view however, that the issues raised by these concerns are not insurmountable.

58. The remaining factors do however speak in favor of granting the Application. I note 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 Kondewa 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. I also note the Prosecutor’s request *inter alia* that should Kondewa be granted conditional early release, that release should be deferred until after the upcoming general elections in the country.

59. In light of the above, and in particular consideration of the factor militating against the grant of conditional early release to Kondewa, the Statute, Rules, Practice

Direction and the totality of the material placed before me, I hold that the Application be granted subject to service by the applicant of a further period of ten (10) months in custody from the date of this Decision under several conditions.

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

V. DISPOSITION

61. 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 ten months from the date of this Decision to undergo additional specific training especially on Human Rights and correct behavior as a citizen of Sierra Leone.
- b. Thereafter and upon certification of the training by the Registrar, 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 thereof.

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

- i After the ten-month training session, the applicant shall again 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 where he is ordered to live and shall not engage in secret meetings intended to plan civil unrest or join local or national 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.

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 29 day of May 2017



Justice Renate Winter
President

