

# The Conditional Early Release of Offenders Transferred from the Special Court for Sierra Leone to Serve Their Sentences in Designated States: Some Observations and Recommendations

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## 1 INTRODUCTION

The Special Court for Sierra Leone<sup>1</sup> (SCSL) (now the Residual Special Court for Sierra Leone)<sup>2</sup> convicted various offenders of crimes, such as war crimes and crimes against humanity. These convicted offenders were sentenced to prison terms ranging from two to fifty years' imprisonment. The SCSL signed sentence-enforcement agreements with Sweden, Finland, Rwanda and the United Kingdom.<sup>3</sup> On the basis of these enforcement agreements, those convicted by the SCSL were transferred to serve their sentences in Rwanda<sup>4</sup> and the United

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<sup>1</sup> For the background of events leading up to the establishment of the Special Court of Sierra Leone, see, for example, Celina Schocken 'The Special Court for Sierra Leone: Overview and recommendations' (2002) 20 *Berkeley Journal of International Law* 436.

<sup>2</sup> When the SCSL completed all the cases it was established to deal with, it wound up its business. It was replaced by the Residual Special Court for Sierra Leone, website available at <<http://www.rscsl.org/>> (accessed on 15 January 2015).

<sup>3</sup> For a discussion of the features of this agreement see Jamil Ddamulira Mujuzi 'The enforcement of sentences imposed by the Special Court for Sierra Leone (SCSL): Examining the Agreement between the SCSL and the Government of Rwanda' (2010) *African Yearbook on International Humanitarian Law* 111-120.

<sup>4</sup> See The Special Court for Sierra Leone and the Residual Special Court for Sierra Leone, Freetown and The Hague 'Detention unit', available at <<http://www.rscsl.org/detention.html>> (accessed on 15 January 2015).

Kingdom.<sup>5</sup> Some of those convicted of contempt of court served their sentences in Sierra Leone.<sup>6</sup> The enforcement of the sentences is governed by Articles 22<sup>7</sup> and 23<sup>8</sup> of the Statute of the SCSL,<sup>9</sup> read with Rules 103 and 124 of the Rules of Procedure and Evidence which provide for the place of imprisonment of the offenders convicted by the SCSL and the issue of pardon respectively. The conditional early release (what is known as parole in some countries)<sup>10</sup> of the offenders is governed by the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone.<sup>11</sup> As at the end of 2014, only two offenders – Moinina Fofana and Eric Koi Senessie – had been granted conditional release by the President of the SCSL. The purpose of this article is to analyse the issues emerging from these two cases. Before I deal with those issues, it is important to draw a distinction between the transfer of offenders between countries and the transfer of offenders from international criminal tribunals, such as the SCSL, to sentence enforcement states.

## 2 THE FEATURES OF THE TRANSFER OF OFFENDERS FROM INTERNATIONAL CRIMINAL TRIBUNALS TO ENFORCEMENT STATES

For many years there have been agreements, bilateral and multilateral, on the transfer of offenders between states. A key feature of these

<sup>5</sup> Charles Taylor is serving a 50-year sentence in the United Kingdom. See Order Designating State in Which Charles Ghankay Taylor Is to Serve His Sentence, 4 October 2013, available at <<http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1391/SCSL-03-01-ES-1391.PDF>> (accessed on 3 November 2014).

<sup>6</sup> See Eleventh and Final Report of the President of the Special Court for Sierra Leone (December 2013) 17-18, available at <<http://www.rscsl.org/Documents/AnRpt11.pdf>> (accessed on 3 November 2014).

<sup>7</sup> Article 22 provides that '1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States. 2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to Article 23 of the present Statute.'

<sup>8</sup> Which is reproduced in part 3 of this article.

<sup>9</sup> Statute of the Special Court for Sierra Leone (2002) reproduced in Christine Van den Wyngaert *International Criminal Law: A Collection of International and European Instruments* 3 ed (2005) 307; the text of the Statute is also available at <<http://www.rscsl.org/Documents/scsl-statute.pdf>> (accessed on 24 February 2015).

<sup>10</sup> For example in South Africa.

<sup>11</sup> Of 1 October 2013, available at <[http://www.rscsl.org/Documents/PRACTICE\\_DIRECTION\\_Conditional\\_Early\\_Release.pdf](http://www.rscsl.org/Documents/PRACTICE_DIRECTION_Conditional_Early_Release.pdf)> (accessed on 24 February 2015).

agreements is that the offender is convicted by a court in the sentencing state for breaking the law of that state and he is transferred to a state of his nationality or with which he has close ties to serve his sentence.<sup>12</sup> In *Krajisnik v the United Kingdom*<sup>13</sup> the European Court of Human Rights drew the distinction between the transfer of offenders between states on the one hand and the transfer of offenders from an international criminal tribunal to the enforcement state. The Court held that:

[T]he transfer of a prisoner pursuant to such an agreement [between an international tribunal and the enforcement state] cannot be likened to the transfer of prisoners between a convicting and a receiving State under bilateral and multilateral prisoner transfer treaties. In the latter case, the sentence could be enforced in the convicting State but the detainee's transfer to another State, usually his home State, is arranged to accommodate his own wishes or pursuant to a deportation order of the convicting State. Because such transfers are optional, in the sense that if not effected the sentence can nonetheless continue to be enforced in the convicting State, there is generally some scope for conversion of sentences; and the enforcement of the sentence, including questions of early release, is usually a matter solely for the receiving State .... If the convicting State is not satisfied with the proposed arrangements in the receiving State, it can refuse to allow the transfer. In the former case however ... the transfer is required in order for the sentence to be enforced. In agreeing to accept persons convicted by the ICTY, receiving States are in essence agreeing to act, in respect of those prisoners, as penal establishments of the ICTY. In these circumstances, and given the gravity of the offences leading to a conviction by the ICTY, it is not unreasonable that the link between the ICTY and the supervision of the enforcement of the sentence is maintained after transfer.<sup>14</sup>

The above observations, although made by the European Court of Human Rights relating to a case from the International Criminal Tribunal for the Former Yugoslavia, should apply with equal force to the transfer of offenders between the SCSL and the enforcement states. The following points should therefore be noted about these transfers. One, the SCSL does not have its own prisons. It has to rely on the enforcement state to have its prison sentences executed and therefore the transfer of the offenders is not optional. Two, the enforcement state cannot convert the sentence of the transferred offender. It has to continue with the enforcement of the sentence imposed by the SCSL. It should be recalled that there is a difference between converting the sentence of the transferred offender (conversion) on the one hand and continuing with the enforcement of the sentence of the transferred

<sup>12</sup> For a detailed discussion of the conditions in these agreements and the features of these agreements, see UNDOC, Handbook on the International Transfer of Sentenced Persons (2012), available at <[http://www.unodc.org/documents/justice-and-prison-reform/11-88322\\_ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/11-88322_ebook.pdf)> (accessed on 3 November 2014).

<sup>13</sup> ECHR *Momčilo Krajisnik v the United Kingdom* (23 October 2012) Application No 6017/11, available at <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114635>> (accessed on 24 February 2015) .

<sup>14</sup> *Supra* at para 57.

offender (continued enforcement) on the other hand.<sup>15</sup> The issue of whether or not the offender's sentence will be converted after the transfer is critical in determining whether the offender (where his consent is required)<sup>16</sup> and the sentencing and the enforcement states will agree to the transfer. Some states will not consent to the transfer if the offender's sentence will be converted into that of the enforcement state whereas other states take different approaches.<sup>17</sup> Three, the objective of the transfer is not to accommodate the interests of the offender. It is to serve the interests of the SCSL in seeing that its sentences are executed and the interests of the international community as a whole in seeing that the offender is punished for the

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<sup>15</sup> The Explanatory Report on the Council of Europe's Convention on the Transfer of Sentenced Persons differentiates between conversion and continued enforcement as follows: '49. Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State ...: the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer. 50. If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. [The convention] ... allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention ...[T]he procedure under Article 10.2 enables the administering State merely to adapt the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system.' Available at <<http://conventions.coe.int/treaty/en/reports/html/112.htm>> (accessed on 24 February 2015).

<sup>16</sup> See, for example, ECHR *Buijen v Germany* (Application No 27804/05) (1 April 2010) 438, where the European Court of Human Rights found that one of the reasons why the offender pleaded guilty to the charges against him was because he had been promised by the prosecutor that he would be transferred to serve his sentence in The Netherlands on condition that his sentence would be converted under Dutch law.

<sup>17</sup> See JD Mujuzi 'Prisoner transfer to South Africa: Some of the likely challenges ahead' (2013) 16:3 *Potchefstroom Electronic Law Journal* 151 at 169-170.

offences he committed.<sup>18</sup> Four, with regards to the transfer of offenders between states, in many cases after the transfer the offender's sentence is governed by the law of the administering state without the sentencing state monitoring the manner in which the sentence is being enforced. However, in cases where the offender has been transferred from the SCSL to the enforcement state, the sentence is governed by the law of the enforcement state but the SCSL still has control over the early release of the offender. This brings us to the issue of early release by the SCSL.

### 3 EARLY RELEASE

The early release of the offenders is governed by Article 23 of the Statute of the SCSL which provides that:

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 Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 23 of the Statute should be read with Rule 124 which provides that '[t]here shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.' Article 23 of the Statute of the SCSL makes it very clear that the pardon or commutation of the sentence is governed by the law of the enforcement state. However, the decision to pardon a prisoner or to commute his sentence has to be made by the President of the SCSL. For the President to make the decision in question he has to consult with the judges who imposed the sentence on the prisoner and the decision has to be based on two grounds, both of which have to be in place: the interests of justice and the general principles of law. Article 23 of the Statute is operationalised by the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone.<sup>19</sup> The Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone deals

<sup>18</sup> Some people have argued that these days the objective of the transfer of offenders between countries is to serve the interests of the sentencing countries as opposed to those of the offenders being transferred. See Dirk van Zyl Smit and John R Spencer 'The European dimension to the release of sentenced prisoners' in Nicola Padfield, Dirk van Zyl Smit and Frieder Dünkel (eds) *Release from Prison: European Policy and Practice* (2010) 43; and M Cherif Bassiouni 'United States policies and practices on execution of foreign penal sentences' in M Cherif Bassiouni (ed) *International Criminal Law Vol II: Multilateral and Bilateral Enforcement Mechanisms* 3 ed (2008) 588.

<sup>19</sup> Op cit note 11.

with different issues relating to the early release of offenders, such as eligibility for consideration for conditional early release,<sup>20</sup> initiating the process to determine eligibility for conditional early release,<sup>21</sup> determination of eligibility for consideration for conditional release,<sup>22</sup> duties of the registrar,<sup>23</sup> participation in the determination process,<sup>24</sup> confidentiality,<sup>25</sup> determination of application for conditional early release,<sup>26</sup> post-decision procedure,<sup>27</sup> execution of the decision,<sup>28</sup> review of conditions of release,<sup>29</sup> violations of conditions of release,<sup>30</sup> expiration of sentence,<sup>31</sup> and applicability.<sup>32</sup> It is beyond the scope of this article to deal with all the aspects of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone. This article will focus on those provisions of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone which have been invoked in the two decisions so far.

### 3.1 *Eligibility for Consideration for Early Release*

Article 2 of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone provides for the criteria which an offender has to meet before he is eligible for release. Article 2(A) provides that an offender ‘shall be eligible for consideration for Conditional Early Release no sooner than upon serving two-thirds of his total sentence provided that he meets the requirements’ under Article 2(B)–(D). In terms of Article 2(A), the offender has a right to be considered for early release after serving two-thirds of the sentence. However, that does not mean that he has a right to be released. In *Prosecutor v Senessie*<sup>33</sup> the President of the SCSL referred to Article 23 and to Rule 124 and held that ‘a Convicted Person has no entitlement to Conditional Early Release from his or her sentence.’<sup>34</sup> The President added that in deciding whether or not to conditionally release the offender, ‘he merely considers, on the basis of facts supplied and the

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<sup>20</sup> Article 2.

<sup>21</sup> Article 3.

<sup>22</sup> Article 4.

<sup>23</sup> Article 5.

<sup>24</sup> Article 6.

<sup>25</sup> Article 7.

<sup>26</sup> Article 8.

<sup>27</sup> Article 9.

<sup>28</sup> Article 10.

<sup>29</sup> Article 11.

<sup>30</sup> Article 12.

<sup>31</sup> Article 13.

<sup>32</sup> Article 14.

<sup>33</sup> SCSL *Prosecutor v Eric Koi Senessie* (Decision of the President on Application for Conditional Early Release) (4 June 2014) Case No SCSL-11-01-ES.

<sup>34</sup> *Supra* at para 15.

applicable law, whether it is safe and proper for the convict to serve the remaining part of his sentence other than in prison.<sup>35</sup> Before an offender is considered for early release, he has to show that he has served at least two-thirds of the sentence otherwise his application will be dismissed as premature. For example, this is what happened when one of the offenders submitted his application before he had served two-thirds of the sentence.<sup>36</sup>

In terms of Article 3(A) of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone, '[t]he process to determine eligibility for Conditional Early Release shall be initiated' by the state in which the offender is serving his sentence. For the state to initiate the process, Article 3(A)(i) requires the prisoner to directly apply to the state in question and copy his application to the registrar of the SCSL. Failure by the offender to follow the procedure above will lead to the rejection of his application. This is what happened to one prisoner's initial application when he submitted his application to the registrar directly.<sup>37</sup> The facts are not clear as to why the prisoner did not follow the procedure under Article 3(A)(i). If this happened because the prisoner was not aware of the procedure to follow, then it means that there is a need for all the prisoners to be educated on the relevant procedure to be followed in applying for conditional early release. If it happened because of any reason, that reason has to be investigated, and if there are problems, they must be solved.

Under Article 2(B) for a prisoner to be eligible for consideration for conditional early release, he 'shall demonstrate' the following: successful completion of any remedial, educational, moral, spiritual or other programme to which he was referred to within the prison; that he is not a danger to the community or to any member of the public; and that he complied with the terms and conditions of his imprisonment. However, the form which he is required to complete in the process of the application has two additional requirements which are slightly different from those which appear under Article 2(B). The first requirement is that the offender has to show that he does not 'pose a risk of danger to the community or to any member of the public, in particular the witnesses who testified against me' and that the offender has done nothing during his incarceration 'to incite against the peace and security of the People of Sierra Leone, either personally or through others.'<sup>38</sup> It is argued that there is a need to harmonise the requirements

<sup>35</sup> Supra at para 15.

<sup>36</sup> SCSL *Prosecutor v Moinina Fofana and Allieu Kondewa* (Decision of the President on Application for Conditional Early Release) (11 August 2014) Case No SCSL-04-14-ES para 3.

<sup>37</sup> *Prosecutor v Senessie* supra at para 3.

<sup>38</sup> See Annex A to the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone, Form A(1).

in the form with those under Article 2(B) so that the offenders know exactly what is required of them. Most importantly, the validity of the form could be questioned if it is contrary to the provision it is meant to give effect to. Another challenge with Article 2(B) is that it appears that the offender does not have to choose which programmes to participate in while in prison. The offender has to be *referred* to those programmes. The danger is that the offender may participate in those programmes not because he believes that they are essential to his rehabilitation, but simply to increase his chances of early release.

### 3.2 *Determination of Application for Conditional Early Release*

Article 8 of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone provides the criteria that the President of the SCSL has to follow in determining the outcome of the application for early release. Below I will deal with each of the criteria and illustrate how each has been given effect to in practice.

#### 3.2.1 *Consulting with the judges who imposed the sentence*

Article 8(A) provides that '[i]n determining the application for Conditional Early Release, the President shall consult with the Judges who imposed the sentence if available or, if unavailable, at least two other judges.' Article 8(B) provides that:

The President, in consultation with the judges and based on the written record and the oral submissions, if any, 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.

The above two provisions require the President to 'consult with the judges' or to act 'in consultation with the judges' before he makes a decision. In *Prosecutor v Fofana and Kondewa*<sup>39</sup> the President emphasised the fact that the conditional early release of the offender '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.'<sup>40</sup> The Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone is not clear on whether the President is bound by the views expressed by the judges in question. In some jurisdictions, such as South Africa, courts have held that:

[W]hen a statutory provision requires a decision-maker to act 'in consultation with' another functionary, it means that there must be concurrence between the two. This is to be distinguished from the requirement of 'after

<sup>39</sup> Supra.

<sup>40</sup> Supra at para 11.



consultation with', which demands no more than that the decision must be taken after consultation with and giving serious consideration to the views of the other functionary, which may be at variance with those of the decision-maker.<sup>41</sup>

If the above interpretation were to be applied to Article 8 of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone, it would mean that there would have to be consensus between the President and the judges that the offender should or should not be conditionally released early. Jurisprudence emanating from the SCSL shows that the President has indeed consulted with the judges before deciding on whether or not to conditionally release the offender early. In *Prosecutor v Fofana and Kondewa*<sup>42</sup> the President indicates that he had to consult with the judges before deciding whether or not the offender was eligible for conditional early release because that is a requirement under Article 8(B) and that 'their views form part of the process through which I have to make my decision.'<sup>43</sup> The President received written comments from two judges who took part in imposing the sentence on the prisoner. He writes that '[o]ne 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.'<sup>44</sup> The judge concluded that Fofana has not understood that it was unacceptable to violate the laws of war in an armed conflict even if you are fighting for a just cause. The judge recommended that before he is released, he should be trained '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 violations of International Humanitarian Law.'<sup>45</sup> The President observed that the above factors 'are not in favour of granting the application for conditional early release. But they must be considered against the evaluation of other factors ....'<sup>46</sup> The President allowed the application on condition that the offender served six more months in prison during which period he was to be trained on international humanitarian law issues.<sup>47</sup> In *Prosecutor v Senessie*<sup>48</sup> the President wrote that in deciding that the prisoner was eligible for conditional early release, he 'consulted with the Judge who imposed the sentence.'<sup>49</sup> The decision is silent on what the consultation in question entailed and in

<sup>41</sup> See SCA *National Director of Public Prosecutions and Others v Freedom Under Law* (Judgment of 14 April 2014) *SA Law Reports* (2014) 4 para 38.

<sup>42</sup> *Supra*.

<sup>43</sup> *Supra* at para 18.

<sup>44</sup> *Supra* at para 18.

<sup>45</sup> *Supra* at para 19.

<sup>46</sup> *Supra* at para 20.

<sup>47</sup> *Supra* at para 47.

<sup>48</sup> *Supra*.

<sup>49</sup> *Supra* at para 9.

particular whether the judge who was consulted was supportive of the prisoner's application for conditional early release.

At least two important points emerge from the discussion above. One, the President has the ultimate say on whether or not the offender should be conditionally released. The judges' views have to be considered against the evaluation of other factors. In other words, even if the judges are opposed to the offender's release but the President is of the view that he should be released, he could go ahead and release him. The second point that emerges from the above discussion is the appropriateness of the rehabilitation programmes that the offenders participate in while in prison. One would have expected the offenders who are serving sentences for gross violations of the law of war to at least be exposed to the basics of the law of war when serving their sentences. The prison authorities should not wait for the offender to serve almost two-thirds of his sentence before such a relevant topic is introduced as one of the subjects they have to deal with.

### 3.2.2 *Terms and conditions of the Conditional Early Release Agreement*

For the President to make a conditional early release order, Article 8(C) (i) requires the prisoner to agree to enter into and comply with the terms of the Conditional Early Release Agreement specified by the President. Annex C to the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone provides for 16 standard terms and conditions which have to be included in the Conditional Early Release Agreement all of which must be observed by the offender otherwise his early release order will be cancelled and he will be returned to prison to serve the balance of his sentence. Annex C also empowers the President to add 'special conditions' to the standard terms and conditions. In *Prosecutor v Fofana and Kondewa*<sup>50</sup> the President held that the prisoner may be released if he executes the Conditional Early Release Agreement in accordance with Annex C. The President also imposed a further five 'Special Conditions which do not appear in Annex C.'<sup>51</sup> Thus, on his release, Fofana will have to comply with 21 conditions; otherwise he will be arrested and imprisoned again. In *Prosecutor v Senessie*<sup>52</sup> the President imposed only the 16 conditions under Annex C as he found 'it unnecessary to impose further Special Conditions.'<sup>53</sup> However, the offender was not released and had to serve

<sup>50</sup> Supra.

<sup>51</sup> Supra at para 49.

<sup>52</sup> Supra.

<sup>53</sup> Supra at para 39.

his sentence in full because 'he was unwilling to abide by the terms imposed by the Court.'<sup>54</sup>

The question that has to be answered is this: why would an offender prefer to remain in prison and serve his full sentence as opposed to being released early? The answer to this question could be found in the standard terms and conditions that must be included in the Conditional Early Release Agreement. It is beyond the scope of this article to outline all 16 standard terms and conditions. However, some of them are worth mentioning. These are that the offender will not purchase, possess or consume alcohol; the Monitoring Authority is allowed to visit the offender at his residence, place of work or elsewhere as deemed appropriate by the Monitoring Authority; the offender will not commit any offence; the offender shall not privately incite or promote crime or behave in a way undermining public peace and security; and the offender shall not handle any weapon. One wonders as to why a person who was not convicted of an alcohol-related offence should be barred from purchasing, possessing or consuming alcohol, even in private. What if he purchases or consumes alcohol for medicinal purposes or for the purpose of fulfilling a cultural or religious ritual or practice? Would it not inconvenience the offender, his employer and fellow employees if the Monitoring Authority visited him at his place of work? What if the offender commits a minor offence such as a traffic offence, would he be in breach of the Conditional Early Release Agreement? What if the offender comes across a weapon and handles it for the purpose of taking it to the police station to report it?

The problem with the standard terms and conditions of early release is that their drafters adopted a 'one-size-fits-all' approach. It is argued that the best option would have been to list some of the terms and conditions that the President could impose on the offender and leave him with the discretion to determine which terms and conditions should be imposed on a given offender. This would enable the President to individualise the terms and conditions to suit the particular needs and circumstances of each offender. If this approach had been taken, there would not have been a need to provide for additional conditions. Most importantly, the offender would have been given an opportunity to explain to the President why a given condition should not be included in his release agreement. This one-size-fits-all approach needs to be changed so that the terms and conditions in the release agreements are tailored to suit the circumstances of a given offender. The fact that 'the President may, from time to time, review the conditions of the Conditional Early Release Agreement, *proprio motu*, or upon the request

<sup>54</sup> See RSCSL press release, 'Moinina Fofana granted conditional early release, after six more months in prison', available at <<http://www.rscsl.org/Documents/Press/2014/pressrelease-081114.pdf>> (accessed on 3 November 2014).

of the Convicted Person, the Monitoring Authority or the Prosecutor<sup>55</sup> does not solve the problem mentioned above. This is because this is more remedial – a ‘wait and see’ approach.

Another challenge is that sometimes the standard terms and conditions in the Conditional Early Release Agreement overlap with the special conditions. In *Prosecutor v Fofana and Kondewa*<sup>56</sup> one of the standard terms and conditions is that the offender will refrain from contacting directly or indirectly those who were designated as witnesses or potential witnesses against him at the original trial. One of the special conditions imposed is that the offender ‘or any person acting with his consent or authority shall not, directly or indirectly, approach any of the in future, to directly or indirectly try to harm them, intimidate or otherwise interfere with them in any way.’<sup>57</sup> One of the standard terms and conditions of the Conditional Early Release Agreement is that the offender will ‘not publicly or privately ... behave in a way which undermines public peace and security.’ One of the special conditions imposed on the offender is that he ‘shall not engage in secret meetings intended to plan civil unrest ...’<sup>58</sup> The other challenge with some special conditions that were imposed on Fofana is that one of them is vague and could be abused to have the offender arrested for violating the Conditional Early Release Agreement. This condition is that the offender ‘shall conduct himself honourably ... in the community’<sup>59</sup> What is considered honourable conduct by the offender may not be considered as such by the monitoring authority.

### 3.2.3 *Suitable requested area of release*

In terms of Article 8(C)(ii) of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone the President shall not grant early release if the convicted person is unable to provide a suitable requested area of release by reason of one or a combination of the following: absence of a suitable programme of supervision; or unwillingness of the community to accept the offender; or any other cause which the President finds renders the requested area of release unsuitable. In *Prosecutor v Fofana and Kondewa*<sup>60</sup> the Court held that there is ‘an absolute prohibition against early release’ if the offender does not meet the requirements under Article 8(C)(ii).<sup>61</sup> In the two cases considered by the Court so far, the President has not relied

<sup>55</sup> Article 11(B) of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone.

<sup>56</sup> *Supra*.

<sup>57</sup> *Supra* at para 49(ii).

<sup>58</sup> *Supra* at para 49(iii).

<sup>59</sup> *Supra* at para 49(iii).

<sup>60</sup> *Supra*.

<sup>61</sup> *Supra* at para 21.

on one of the conditions under Article 8(C)(ii) to reject an application for conditional early release.

Offenders are supposed to be supervised by specially created monitoring units established by Sierra Leone Police.<sup>62</sup> Members of civil society and members of the community are also permitted to participate in the offender's supervision and monitoring.<sup>63</sup> An offender identifies an area to which he would like to be released and the Court has to consider the views of the members of that community in deciding whether he qualifies for conditional early release. An offender is permitted to identify more than one area. For example, Fofana nominated two areas and the registrar sought the views of the community members in both these areas.<sup>64</sup> Senessie also identified two areas 'in the event that the President deems the first choice to be unsuitable.'<sup>65</sup> In both cases the offenders identified areas in which they have strong family ties, such as wives, children and relatives, and also areas in which they have strong economic ties. They both identified areas where they lived before they were arrested and prosecuted before the SCSL. In both cases, the registrar submitted reports detailing the categories or groups of community members consulted on whether the offender should be released to that area, their views and the methods used to collect those views. The witnesses who gave evidence leading to the offenders' convictions and the victims of the offenders' crimes were also consulted. In both cases the members of the communities identified by the offenders overwhelmingly approved their return to those communities on their release.<sup>66</sup> Some witnesses and victims did not express fear about the offender's return whereas others did.<sup>67</sup> However, the President was of the view that through strict monitoring in terms of the Conditional Early Release Agreement, there were safeguards to ensure that the offenders did not harm the witnesses or the victims.<sup>68</sup>

### 3.2.4 *Evidence of adequate means of financial support*

Article 8(C)(iii) provides that the President shall not grant conditional early release if the offender 'is unable to provide evidence of adequate means of financial support.' What amounts to 'adequate means of financial support' is neither defined nor described in the Practice

<sup>62</sup> Supra at para 31.

<sup>63</sup> Supra at para 24.

<sup>64</sup> Supra at paras 22-24.

<sup>65</sup> *Prosecutor v Senessie* supra at para 19.

<sup>66</sup> *Prosecutor v Senessie* supra at paras 18-25; *Prosecutor v Fofana and Kondewa* supra at paras 21-28.

<sup>67</sup> *Prosecutor v Fofana and Kondewa* supra at para 29; *Prosecutor v Senessie* supra at para 26.

<sup>68</sup> *Prosecutor v Fofana and Kondewa* supra at paras 32-34; *Prosecutor v Senessie* supra at paras 28-30.

Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone. The result is that the offenders adduced evidence of their prospects of employment after release to show that they meet the criterion. Senessie submitted that he was 'a carver by profession and earned his living and that of his family through sales of his artwork.'<sup>69</sup> He added that 'he served as a Priest in a local Church and Chairman of the Board of Governors of the National Secondary School, which positions entitled him to monetary allowances.'<sup>70</sup> Fofana submitted that 'he would continue his vocations as a fisherman and agriculturist to support himself financially.'<sup>71</sup> It is submitted that it is doubtful that the offenders on release would be able to continue with some of the jobs they used to do before their imprisonment. For example, it is unlikely that a person with a criminal record would continue to be a priest or a chairman of the board of governors of a secondary school. These are positions which ordinarily require people of high moral integrity and a person with a criminal record from an international criminal tribunal may not meet that criterion. It is also not very easy for a person who has been in prison for some years to continue with his trade as a carver, fisherman or agriculturist. The Court should scrutinise these submissions closely before holding that after release a person would indeed be able to financially support himself.

### 3.2.5 *The offender's behaviour during imprisonment*

One of the factors that the President has to evaluate in deciding whether to allow the offender's application for conditional early release is the offender's participation in any remedial, educational, moral, spiritual or other programme to which he was referred within the prison.<sup>72</sup> The President has had to rely on, inter alia, the reports from the prisons in which the offenders were serving their sentences at the time of the applications to assess whether or not the above criteria had been met. These reports are submitted to the President by the registrar who acquires them from the prison authorities of the state of enforcement in terms of Article 5(D) of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone. In the case of Fofana, the report (in the form of affidavits) was submitted by the Rwandan prison authorities<sup>73</sup> and in the case of Senessie by Sierra Leonean prison authorities.<sup>74</sup>

<sup>69</sup> *Prosecutor v Senessie* supra at para 20.

<sup>70</sup> *Prosecutor v Senessie* supra at para 20.

<sup>71</sup> *Prosecutor v Fofana and Kondewa* supra at para 22.

<sup>72</sup> Article 8(D)(iv) of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone.

<sup>73</sup> *Prosecutor v Fofana and Kondewa* supra at para 40.

<sup>74</sup> *Prosecutor v Senessie* supra at para 32.

The admissibility of the report in Senessie's case was not challenged by the Prosecution because there was evidence that the report had been authored by the Director of Inmate Affairs of the Sierra Leone Prisons Department.<sup>75</sup> However, the Prosecutor challenged the admissibility of the report from the Rwandan prison authorities on the ground that the affidavits did not indicate the 'affiant's position or experience to facilitate a determination of what weight to attach to them'.<sup>76</sup> The President agreed with the Prosecution that the above information about the affiant of the affidavits was indeed lacking and added that it was 'even less clear' whether the affidavits had been sworn before a Commissioner of Oaths or a notary public.<sup>77</sup> The Court added, however, that 'it is not a requirement under Article 5(D) that any affidavits be filed'.<sup>78</sup> The Court added that the prosecutor had not contended that the affidavits had been 'filed by bogus prison authorities'.<sup>79</sup> The President, in admitting the reports (affidavits) in evidence, held that '[i]n the absence of any evidence to the contrary, I am satisfied that the reports came from authorised personnel of the Prison Authorities in Rwanda and expressly responded to the issues enumerated under Article 5(D)'.<sup>80</sup> The *Fofana* case raised a very serious issue with regards to the authenticity of the reports that are submitted by the prison authorities in the state of enforcement. In the light of the fact that these reports contain valuable information relating to the offender's conduct in prison, there is a need to lay down rules that have to be followed to ensure that these reports meet certain requirements. For example, the rules could require that such reports should be signed by the head of the prison at which the offender is serving his sentence or by a person authorised by the head of prison to do so. Otherwise, such important reports may end up being written by a prison official who does not have a full understanding of their importance, which could affect their quality, hence resulting in their rejection by the court.

#### 4 ARRESTING THE OFFENDER FOR VIOLATING A CONDITION IN THE CONDITIONAL EARLY RELEASE AGREEMENT

Article 12(A) of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone provides that:

<sup>75</sup> *Prosecutor v Senessie* supra at para 32.

<sup>76</sup> *Prosecutor v Fofana and Kondewa* supra at para 39.

<sup>77</sup> *Prosecutor v Fofana and Kondewa* supra at para 40.

<sup>78</sup> *Prosecutor v Fofana and Kondewa* supra at para 40.

<sup>79</sup> *Prosecutor v Fofana and Kondewa* supra at para 40.

<sup>80</sup> *Prosecutor v Fofana and Kondewa* supra at para 40.

In the event of the Monitoring Authority having reason to believe that the Convicted Person has violated a condition of the Conditional Early Release Agreement, the Convicted Person shall be arrested and transferred to the Special Court for detention pursuant to the Supervision Order and pending a decision of the President as to whether or not there is a probable cause to believe that the Convicted Person has violated a condition of his Conditional Early Release Agreement.

In not more than 24 hours after arrest, the registrar is supposed to inform the President of the offender's detention and transmit to him the supporting evidence alleging that the offender violated a condition of the Conditional Early Release Agreement.<sup>81</sup> The President has 48 hours within which 'to determine whether there is probable cause to believe that a violation has occurred.'<sup>82</sup> If there is no probable cause to believe that the offender violated a condition in the Conditional Early Release Agreement, the President shall order his immediate release<sup>83</sup> otherwise a detailed procedure has to be followed in determining whether the offender violated a condition in the Conditional Early Release Agreement.<sup>84</sup>

There is no doubt that Article 12 was drafted with the good intention of ensuring that the offender complies with the conditions contained in the Conditional Early Release Agreement. The offender knows that failure to observe the conditions will lead to his arrest and detention and possibly cancellation of the release order. It is argued that there are at least three problems with Article 12(A). The first challenge is that the threshold that has to be met by the monitoring authority to arrest the offender is low – any reason to believe. The belief does not have to be based on compelling evidence. The belief does not have to be reasonable. The second problem is that the offender does not have an opportunity to show cause as to why he should not be arrested and detained for allegedly violating a condition in the agreement. The third problem, which flows from the second, is that irrespective of the nature or seriousness or otherwise of the alleged violation, the monitoring authority has no alternative but to arrest the offender. It is submitted that the best approach would have been to use arrest as a method of last resort or in cases where the offender is alleged to have committed a very serious violation of a condition in the Conditional Early Release Agreement. The best approach would have been to make more options, such as subpoena or summons, available to the monitoring authority. In *Prosecutor v Senessie*<sup>85</sup> the local police station in the area where the offender was to be released was appointed as the 'official Monitoring Authority' and the Inspector-General of Police reassured the Court

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<sup>81</sup> Article 12(C).

<sup>82</sup> Article 12(D).

<sup>83</sup> Article 12(E).

<sup>84</sup> Article 12(F)–(J).

<sup>85</sup> *Supra*.



that his officials would closely monitor the offender.<sup>86</sup> In *Prosecutor v Fofana and Kondewa*<sup>87</sup> the Sierra Leone Police were also appointed as the monitoring authority.<sup>88</sup> It appears that in the future all released offenders will be monitored by the Sierra Leone Police; this is because of the fact that there are 'monitoring units which have been committed in written agreement and by the Inspector General of Police to assist the Court in the enforcement of its orders.'<sup>89</sup> It is recommended that the police should be given other methods to resort to, other than arrest, in case of a suspected violation of a condition in the Conditional Early Release Agreement.

## 5 CONCLUSION

In this article I have briefly dealt with the relevant provisions of the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone. I have highlighted the two cases in which the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone has been implemented so far. I have also made recommendations on how some of the loopholes in the Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone could be addressed. It is submitted, in conclusion, that these recommendations can positively contribute to the development of international penal law and practice.

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<sup>86</sup> Supra at para 29.

<sup>87</sup> Supra.

<sup>88</sup> Supra at paras 30-31.

<sup>89</sup> Supra at para 31.