

ICTR-05-86-S

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

OFFICE OF THE PRESIDENT

Before: Judge Khalida Rachid Khan, *President*

Registrar: Adama Dieng

Date: 24 October 2011

THE PROSECUTOR

v.

Michel BAGARAGAZA

Case No. ICTR-05-86-S

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DECISION ON THE EARLY RELEASE OF MICHEL BAGARAGAZA

Article 27 of the Statute, Rules 125 and 126 of the Rules of Procedure and Evidence, and the Practice Direction on the Procedure for the Determination of Application for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Criminal Tribunal for Rwanda

Counsel for the Defence

Mr. Geert-Jan Alexander Knoops

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INTRODUCTION

1. On 17 November 2009, Michel Bagaragaza was convicted of complicity in genocide and was sentenced to eight years' imprisonment with credit for time already served. The time was calculated beginning from the date of his surrender, 15 August 2005.¹

2. Recalling that under Article 27 of the Statute of the Tribunal, there shall only be pardon or commutation of sentence if the President so decides in the interests of justice, my predecessor President Byron decided on 20 October 2010 that the initial early release of Michel Bagaragaza proposed by the Government of Sweden from 1 December 2010, after having served only two-thirds of his sentence, was premature. This decision was reached pursuant to consultations with the Sentencing Chamber and Bureau. President Byron further decided to review the appropriateness of early release for Bagaragaza after three-fourths of his sentence had been served.² The Government of Sweden thereafter notified the Tribunal that Michel Bagaragaza would again be eligible for early release on 1 December 2011 after having served more than three-fourths of his sentence by that time.³

3. In accordance with Rule 125 of the Rules of Procedure and Evidence ("Rules"), I have consulted with the Sentencing Chamber and the Bureau, and the Government of Rwanda has been notified of Michel Bagaragaza's eligibility for early release under Swedish Law. I note that the Sentencing Chamber and a majority of the Bureau are of the view that early release from 1 December 2011 is appropriate.

DELIBERATIONS

4. Pursuant to Rule 126, when considering pardon or commutation of sentence, the President must consider, *inter alia*, the gravity of the crimes for which the prisoner was convicted, the treatment of similarly situated prisoners, the prisoner's demonstration of rehabilitation, and any substantial cooperation with the Prosecutor.⁴

Gravity of the crime

¹ *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86 ("*Prosecutor v. Bagaragaza*"), Judgement (TC), 17 November 2009, paras. 44, 45.

² Interoffice Memorandum from President Byron to Registrar Dieng, 20 October 2010.

³ Interoffice Memorandum from Registrar Dieng to President Khan, 7 July 2011.

⁴ Rules of Procedure and Evidence, 31 January 2010, Rule 126: General Standards for Granting Pardon or Commutation.



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5. Michel Bagaragaza was convicted of one count of complicity in genocide. Bagaragaza's participation consisted of aiding and abetting the planners and principal perpetrators with knowledge of their genocidal intent. I note that in his guilty plea, Bagaragaza acknowledged his criminal responsibility for, and admitted that through his actions, support, and encouragement, he substantially contributed to the massacre of more than one thousand Tutsis.⁵

6. In its sentencing, the Chamber considered that while Michel Bagaragaza participated by aiding and abetting the planners and principal perpetrators to a substantial degree with knowledge of their genocidal intent, there was no basis to conclude that he acted with premeditation when he agreed to the requests of the local political and *Interahamwe* leaders.⁶ As a mitigating factor, the Chamber also found that the Defence led credible evidence that Bagaragaza showed no bias against the Tutsi in his personal and professional life, and considered that his actions were likely driven by concern for his own safety and that of his family.⁷

7. Still, the Chamber found that Michel Bagaragaza's participation constituted a very serious offence, and sentenced him to eight years imprisonment. I note that the relative gravity of the crime was assessed when determining Bagaragaza's sentence and, in my opinion, does not *per se* bar him from early release, if otherwise appropriate.

The treatment of similarly-situated prisoners

8. No prisoner from this Tribunal has been granted early release to date.⁸ However, it has been the general practice of the International Criminal Tribunal for the former Yugoslavia ("ICTY") to grant early release if otherwise appropriate for serious humanitarian crimes after two-thirds of the sentence has been served.⁹ I note that this practice of the ICTY

⁵ *Prosecutor v. Bagaragaza*, Judgement (TC), para. 24.

⁶ *Prosecutor v. Bagaragaza*, Judgement (TC), paras. 31, 32.

⁷ *Prosecutor v. Bagaragaza*, Judgement (TC), para. 36.

⁸ *The Prosecutor v. Samuel Imanishimwe*, Case No. ICTR-99-46-S, Decision on Samuel Imanishimwe's Application for Early Release (P), 30 August 2007, p. 3.

⁹ See, e.g., *The Prosecutor v. Miroslav Tadić*, Case No. IT-95-9 ("*Prosecutor v. Tadić*"), Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadic (P), 3 November 2004, paras. 3-6 ("*Decision on Application for Pardon or Commutation of Sentence*"); *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1 ("*Prosecutor v. Furundzija*"), Order of the President on the Application for the Early Release of Anto Furundzija (P), 29 July 2004 ("*Order on Application for Early Release*"); *The Prosecutor v. Milan Simić*, Case No. IT-95-9/2 ("*Prosecutor v. Simić*"), Order of the President on the Application for the Early Release of Milan Simic (P), 27 October 2003 ("*Order on Application for Early Release*"); *The Prosecutor v. Zdravko Mucić*, Case No. IT-96-21-Abis ("*Prosecutor v. Mucić*"), Order of the President in Response to

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is based on the regulations in many countries for *conditional* early release.¹⁰ While the jurisprudence of the ICTY is not binding, I have considered it in order to inform me of the treatment of similarly-situated prisoners.

9. I agree with the comments provided in 2010 by President Byron and the Sentencing Chamber that neither the Statute nor the Rules provide for conditional early release and the Tribunal has no means to supervise convicted persons on parole or to react if conditions for early release are being violated.¹¹ Thus, early release pursuant to the Rules is, in fact, an unconditional reduction or commutation of the sentence.

10. Moreover, while I recall that the ICTY has granted early release after two-thirds of the sentence has been served, it is important to note that the ICTY has not yet had to adjudicate on an early release request for a person convicted of genocide or complicity in genocide.¹² I consider that in this case, given the gravity of the crime, it is appropriate to consider the early release of Michel Bagaragaza only from 1 December 2011, after three-fourths of his sentence has been served.

The prisoner's demonstration of rehabilitation

11. This assessment is usually based upon, *inter alia*, the prisoner's statements and demeanour in Court and a statement from the prison authorities as to his or her conduct in prison.¹³ In its Judgement, the Sentencing Chamber noted that Michel Bagaragaza confessed his actions from an early point, surrendered voluntarily to the Tribunal, exhibited good behaviour prior to and during detention at the time of sentencing, and expressed genuine

Zdravko Mucic's Request for Early Release (P), 9 July 2003 ("Order on Application for Early Release"); *The Prosecutor v. Simo Zarić*, Case No. IT-95-9 ("Prosecutor v. Zarić"), Order of the President on the Application for the Early Release of Simo Zaric (P), 21 January 2004 ("Order on Application for Early Release").

¹⁰ Among others, the following countries grant early release after two-thirds of the sentence has been served: Germany, Sweden, and Finland (conditional release after two-thirds of sentence); Kenya (remission may be granted when one-third of the sentence remains); Canada (federal inmates automatically granted statutory release after two-thirds of sentence); France (parole may be granted after half of sentence for first-time offenders and after two-thirds of sentence for repeat offenders).

¹¹ Interoffice Memorandum from President Byron to Registrar Dieng, 20 October 2010.

¹² See, e.g., *Prosecutor v. Tadić*, Decision on Application for Pardon or Commutation of Sentence (P); *Prosecutor v. Furundzija*, Order on Application for Early Release (P); *Prosecutor v. Simić*, Order on Application for Early Release (P); *Prosecutor v. Mucić*, Order on Application for Early Release (P).

¹³ See e.g. *Prosecutor v. Mucić*, Case No. IT-96-21-Abis, Order on Application for Early Release, (P), 9 July 2003; *Prosecutor v. Kos*, Case No. IT-98-30/I-A, Order of the President for Early Release of Milojica Kos (P), 30 July 2002.



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remorse in his public address to the Court.¹⁴ I note that Bagaragaza's guilty plea is a strong positive factor in my deliberations.

12. Moreover, the Government of Sweden has provided a report which indicates that Michel Bagaragaza has displayed good behaviour towards fellow inmates and members of staff, participates in the programme of activities on offer, and has good relations with his wife and family with whom he wishes to be reunited.¹⁵

Substantial cooperation of the prisoner with the Prosecutor

13. The Sentencing Chamber has noted in its Judgement that Michel Bagaragaza provided invaluable cooperation to the Prosecutor from May 2002 about his own role and the role of others in the events before and during the genocide without concern for self-incrimination, went on to sign a cooperation agreement in 1994, and continued to cooperate unreservedly after his arrest in 2005, including testifying in the *Zigiranyirazo* trial. It is also noted that Bagaragaza continued to cooperate even after his identity was disclosed in breach of court orders, forcing him to be placed in solitary confinement for security reasons for the majority of his time at the United Nations Detention Facility in Arusha.¹⁶

14. Although I acknowledge that cooperation with the Prosecutor was considered as a mitigating factor in the determination of his sentence, this does not preclude its consideration during this determination of eligibility for early release.

CONCLUSION

15. Having considered the previous decision of President Byron, the gravity of the crimes for which Michel Bagaragaza was convicted, the treatment of similarly situated prisoners, the prisoner's demonstration of rehabilitation – primarily his guilty plea, and his substantial cooperation with the Prosecution, I agree with the Sentencing Chamber and majority of the Bureau that early release after Bagaragaza has served three-fourths of his sentence is appropriate.

¹⁴ *Prosecutor v. Bagaragaza*, Judgement (TC), para. 38.

¹⁵ Notification to the ICTR from the Ministry of Justice of Sweden concerning the early release of Mr. Michel Bagaragaza, 20 September 2010 (annexed to Interoffice Memorandum from Registrar Dieng to President Byron dated 24 September 2010).

¹⁶ *Prosecutor v. Bagaragaza*, Judgement (TC), para. 39.



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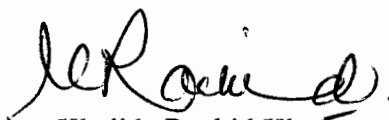
16. I am therefore satisfied that Michel Bagaragaza should be granted early release from 1 December 2011 in accordance with his entitlement to be released under Swedish law. The Registrar is directed to inform the Swedish and Rwandan authorities of this decision as soon as practicable.

17. I note that this decision is not intended to create a precedent at this Tribunal that early release is to be granted after three-fourths of a sentence has been served, and that future decisions on early release will continue to be determined on a case-by-case basis.

FOR THE ABOVE REASONS, THE PRESIDENT

REQUESTS the Registrar to inform the Swedish and Rwandan authorities of her decision to grant early release for Michel Bagaragaza from 1 December 2011.

Arusha, 24 October 2011, done in English.



Khalida Rachid Khan
President

[Seal of the Tribunal]



