



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

TRIAL CHAMBER III

OR: ENG

Before Judges: Vagn Joensen, Presiding
Judge Bakhtiyar Tuzmukhamedov
Judge Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 17 November 2009

THE PROSECUTOR

v.

Michel BAGARAGAZA

Case No. ICTR-05-86-S

SENTENCING JUDGEMENT

Office of the Prosecutor:

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Moussa Sefon
Mr. Iskander Ismail

Counsel for the Defence:

Mr. Geert-Jan Alexander Knoops
Mr. Wayne Jordash
Ms. Anne-Marie Verwiël

CHAPTER I: INTRODUCTION AND PROCEDURAL HISTORY

1. Michel Bagaragaza (“Accused”) was charged with conspiracy to commit genocide, genocide and, in the alternative, complicity in genocide in an Indictment confirmed by Judge Sergei Alekseevich Egorov on 28 July 2005.¹
2. Before his surrender, the Accused agreed to cooperate with the Prosecution. He also agreed with the Prosecution to be tried before a national jurisdiction, which would be determined at a later stage.²
3. On 15 August 2005, Michel Bagaragaza voluntarily surrendered to the Tribunal’s authorities in Arusha, Tanzania, and made his first initial appearance the next day where he pleaded not guilty to each of the three counts set forth in the Initial Indictment.³ He was then transferred to the Detention Unit of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in The Hague, in accordance with a decision from the President of the Tribunal.⁴
4. On 19 May 2006, a Trial Chamber denied the Prosecution’s motion for referral of the case to the Kingdom of Norway as this State did not have any provision against genocide in its domestic criminal law.⁵ The appeal of the Prosecution against that decision was dismissed by the Appeals Chamber on 30 August 2006.⁶
5. On 30 November 2006 the Chamber granted the Prosecution’s request to amend the Indictment by adding a new count of killing and causing violence to health and physical or mental well-being as serious violations of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977, as an alternative to the initial three counts.⁷ On

¹ *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86 (“*Bagaragaza*”), Decision on Confirmation of an Indictment Against Michel Bagaragaza (TC), 28 July 2005.

² Joint Motion for Consideration of a Guilty Plea Agreement, dated 17 August 2009 but filed on 18 August 2009, para. 4; Exhibit D6, para. 4.

³ T. 16 August 2006.

⁴ *Bagaragaza*, Order for Special Detention Measures (President), 13 August 2005. The President of the Tribunal then granted several motions from the Prosecution to extend the Accused’s detention in The Hague: *see Bagaragaza*, Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit in The Hague, The Netherlands (President), 17 February 2006; *Bagaragaza*, Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit in The Hague, The Netherlands (President), 16 August 2006; Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit in The Hague, The Netherlands (President), 14 February 2007.

⁵ *Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway (TC), para. 16.

⁶ *Bagaragaza*, Decision on Rule 11 *bis* Appeal (AC), 30 August 2009.

⁷ *Bagaragaza*, Decision on the Prosecutor’s Application for Leave to Amend the Indictment (TC), 30 November 2006.

1 December 2006, the Accused made his second initial appearance where he pleaded not guilty to Count IV of the Amended Indictment.⁸

6. On 13 April 2007, the Chamber granted the Prosecution's Motion for referral of the case to the Kingdom of the Netherlands.⁹ However, on 17 August 2007, the Chamber revoked the referral of the case, following a formal notification that Dutch Courts did not have jurisdiction to try the crimes alleged in the Indictment.¹⁰

7. On 20 May 2008, the Accused was transferred by the Dutch authorities back to the United Nations Detention Facility ("UNDF") in Arusha pending trial.¹¹

8. On 14 April 2008, the Parties filed a first joint motion for consideration of a guilty plea agreement,¹² which was followed by a motion by the Prosecution for leave to amend the Indictment, retaining only the count of complicity in genocide.¹³ On 14 July 2008, the Chamber denied the Prosecution's motion for leave to amend the Indictment finding that the material facts supporting the proposed count did not sufficiently plead the crime of complicity in genocide.¹⁴ Following this decision, the Parties jointly requested leave to withdraw their joint motion for consideration of a guilty plea.¹⁵ The Chamber granted the application.¹⁶

9. The Parties then proceeded to be ready for the commencement of the trial before the Tribunal.¹⁷

⁸ T. 1 December 2006.

⁹ *Bagaragaza*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands (TC), 13 April 2007.

¹⁰ *Bagaragaza*, Decision on Prosecutor's Extremely Urgent Motion for the Revocation of the Referral to the Kingdom of the Netherlands pursuant to Rule 11 *bis* (F) and (G) (TC), 17 August 2007.

¹¹ When the Chamber revoked the referral of the case to the Kingdom of the Netherlands on 17 August 2007, a warrant of arrest and transfer was also issued (*Bagaragaza*, Warrant of Arrest and Order for Transfer and Detention (TC), 17 August 2009). The President of the Tribunal denied the Defence's application for detention at the ICTY Detention Unit in The Hague on 29 August 2007 (*Bagaragaza*, Decision on Defence Application for Modification of Detention Conditions of the Accused (President), 29 August 2007) and denied a joint motion on the same issue again on 6 March 2008 (*Bagaragaza*, Decision on Joint Prosecution and Defence Application for Modification of Detention Conditions of the Accused (President), 6 March 2008).

¹² Joint Motion for Consideration of a Guilty Plea Agreement Between Michel Bagaragaza and the Office of the Prosecutor (confidential), filed on 14 April 2008.

¹³ Prosecutor's Request for Leave to File an Amended indictment (Confidential), filed on 8 July 2009.

¹⁴ *Bagaragaza*, Confidential Decision on the Prosecution Motion to File a Further Amended Indictment (TC), 14 July 2008.

¹⁵ Joint Application to Withdraw the Joint Motion for Consideration of a Guilty Plea Agreement Between Michel Bagaragaza and the Office of the Prosecutor (confidential), dated 21 July 2008 but filed on 22 July 2008.

¹⁶ *Bagaragaza*, Confidential Decision on the "Joint Application to Withdraw the Joint Motion for Consideration of a Guilty Plea Agreement Between Michel Bagaragaza and the Office of the Prosecutor" (TC), 24 July 2008.

¹⁷ See Status conferences of 16 December 2008 and 9 March 2009.

10. On 17 August 2009, immediately before the trial was scheduled to start, the Parties filed a joint motion for consideration of a guilty plea agreement between the Prosecutor and the Accused (“Joint Motion”) that included a statement of admitted facts signed by the Accused (“Statement of Facts”) and a guilty plea agreement signed by the Prosecutor and the Accused (“Guilty Plea Agreement”).¹⁸

11. On 17 September 2009, during the hearing on the guilty plea before this Chamber, Michel Bagaragaza pleaded guilty to complicity in genocide and not guilty to the three other counts of the Amended Indictment.¹⁹ The Chamber also granted the Prosecution’s Motion for leave to Amend the Indictment. That same day, the Prosecution filed the operative Indictment (“Indictment”) charging the Accused with individual criminal responsibility pursuant to Article 6 (1) of the Statute of the International Criminal Tribunal for Rwanda (“Statute”) for one count of complicity in genocide. The Indictment is annexed to this judgement as an Annex.

12. On 3 November 2009, the Chamber heard one character witness.²⁰ The following day it admitted 12 written statements from character witnesses pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”) as well as the Parties’ joint statement on agreed facts concerning Michel Bagaragaza’s cooperation with the Prosecution.²¹ On that day, the Chamber also heard the Parties submissions on sentencing and Michel Bagaragaza’s personal address to the Chamber expressing remorse for his actions.²²

13. On 5 November 2009, the Chamber sentenced Michel Bagaragaza to a prison term of eight years and indicated in its oral ruling that the written reasons for its sentencing would follow.²³ The present Judgement is the authoritative statement of the Chamber’s findings and reasoning.

¹⁸ Joint Motion for Consideration of a Guilty Plea Agreement, dated 17 August 2009 and filed on 18 August 2009 (“Joint Motion”) with Annex A: Statement of Admitted Facts (“Statement of Facts”), and Annex B: Guilty Plea Agreement (“Guilty Plea Agreement”).

¹⁹ T. 17 September 2009; *see* Statement of Facts, paras. 4-5.

²⁰ T. 3 November 2009.

²¹ T. 4 November 2009.

²² T. 4 November 2009.

²³ T. 5 November 2009.

CHAPTER II: THE GUILTY PLEA

14. There is no specific provision in the Statute regarding guilty pleas. The relevant provisions are to be found in Rules 62 (B) and 62 *bis*.²⁴

15. On 17 September 2009, the Accused pleaded guilty to the count of complicity in genocide²⁵ and confirmed that his plea was made freely and voluntarily without any kind of threat, pressure, coercion or duress²⁶ and that it was informed and unequivocal.

16. The Chamber noted that the guilty plea and the Indictment: (1) conformed to the terms and conditions articulated in the Guilty Plea Agreement;²⁷ (2) conformed to the declarations contained in the Statement of Facts; (3) relied on sufficient facts to establish complicity in genocide, and (4) that there was no material disagreement between the Parties about the facts of the Case. Therefore, the Chamber was satisfied that the conditions of Rule 62 (B) were fulfilled and entered a plea of guilty on behalf of the Accused.²⁸

²⁴ Rule 62: Initial Appearance of Accused and Plea

[...]

(B) If an accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:

- (i) is made freely and voluntarily;
- (ii) is an informed plea;
- (iii) is unequivocal; and
- (iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case.

Thereafter the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

Rule 62*bis*: Plea Agreement Procedure

(A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

- (i) apply to amend the indictment accordingly;
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty.

²⁵ T. 17 September 2009.

²⁶ T. 17 September 2009, p. 3.

²⁷ Guilty Plea Agreement, para. 3.

²⁸ T. 17 September 2009, p. 10.

CHAPTER III: THE EVENTS

I. The Accused

17. Michel Bagaragaza was born in 1945 in Bushiru region, Giciye *commune*, Gisenyi *préfecture*, Republic of Rwanda.²⁹ He is married and the father of eight children.³⁰

18. During the genocide, Bagaragaza was the Director General of OCIR/Thé, the government office that controlled the tea industry in Rwanda, one of the most important industrial enterprises in the country.³¹ In this capacity, Bagaragaza controlled eleven tea factories which employed approximately 55,000 persons.³² Bagaragaza was also the vice-president of the *Banque Continentale Africaine au Rwanda* (“BACAR”) and a member of the *comité préfectoral* of the MRND in Gisenyi *préfecture*, which established the *Interahamwe* in this *préfecture*.³³

19. Furthermore, Bagaragaza was part of a powerful and tight group of people known as the *Akazu*.³⁴ The *Akazu* exercised substantial political and financial power in Rwanda and included the President of Rwanda’s family members as well as persons from the regions of Bushiru, Gisenyi and Ruhengeri.³⁵

II. Factual and Legal Findings

A. The Indictment

20. In support of the Count of complicity in genocide, the Indictment alleges that in April 1994, in the Gisenyi *préfecture*, Michel Bagaragaza substantially contributed to the killings of more than one thousand members of the Tutsi ethnic group who sought refuge at Kesho Hill and Nyundo Cathedral.³⁶ For all the acts adduced in support of this count, the Prosecution alleges that the Accused acted with knowledge that the planners and principal perpetrators, including military and civilian leaders and members of the *Interahamwe* militia, members of the Presidential Guard, military personnel and staff of the Rubaya and Nyabitu Tea Factories, intended to destroy, in whole or in part, the Tutsi ethnic group. Therefore, the

²⁹ Indictment, 17 September 2009, para. 1.

³⁰ Guilty Plea Agreement, para. 5.3

³¹ Statement of Facts, para. 4 ; *see also* Indictment para, 2.

³² Statement of Facts, para. 4.

³³ Statement of Facts, para. 5.

³⁴ Statement of Facts, para. 6; *see also* Indictment para, 3.

³⁵ Statement of Facts, para. 6.

Indictment alleges that the Accused is complicit in the crime of genocide pursuant to Article 2 (3) (e) of the Statute with criminal responsibility pursuant to Article 6 (1) of the Statute.³⁷

B. Criminal Responsibility of the Accused for Complicity in Genocide

1. Applicable Law

21. Article 6 (1) of the Statute reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit the crime, but also by individuals who participate in and contribute to the commission of the crime.³⁸

22. The jurisprudence of this Tribunal has defined complicity as aiding and abetting, instigating, and procuring.³⁹ Complicity by aiding and abetting implies a positive action, excluding, in principle, a complicit participation by failure to act or by omission.⁴⁰ The accomplice's criminal participation may occur at the planning, preparation or execution stage of the crime, occurring before or after the act of the principal offender.⁴¹ It is not necessary that the person aiding and abetting the principal offender be present during the commission of the crime.⁴²

23. Further the Appeals Chamber has held that complicity in genocide by aiding and abetting requires knowledge of the *mens rea* of the specific genocidal intent of the principal perpetrators, while the other forms of complicity may require proof that the accomplice shared the specific intent.⁴³

³⁶ Indictment, paras. 6-12.

³⁷ Indictment, paras. 4 and 5.

³⁸ *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A (“*Kajelijeli*”), Judgement and Sentence (TC), 1 December 2003, para. 757; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20 (*Semanza*), Judgement and Sentence (TC), 15 May 2003, para. 377; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1 (“*Kayishema and Ruzindana*”), Judgement (Reasons) (AC), 1 June 2001, para. 185; *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13 (“*Musema*”), Judgement and Sentence (TC), 27 January 2000, para. 114; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3 (“*Rutaganda*”), Judgement and Sentence (TC), 6 December 1999, para. 33; *Kayishema and Ruzindana*, Judgement (TC), 21 May 1999, paras. 196-197; *The Prosecution v. Jean-Paul Akayesu*, Case No. ICTR-96-4 (“*Akayesu*”), Judgement (TC), 2 September 1998, para. 473.

³⁹ *Semanza*, Judgement and Sentence (TC), 15 May 2003, para. 393; *Musema*, Judgement and Sentence (TC), 27 January 2000, paras. 177-183; *The Prosecutor v. Ignace Bagileshima*, Case No. ICTR-95-1A (“*Bagileshima*”), Judgement (TC), 7 June 2001, para. 69.

⁴⁰ *Musema*, Judgement and Sentence (TC), 27 January 2000, paras. 177-183.

⁴¹ *Kajelijeli*, Judgement and Sentence (TC), 1 December 2003, para. 766; *Semanza*, Judgement and Sentence (TC), 15 May 2003, para. 386.

⁴² *Musema*, Judgement and Sentence (TC), 27 January 2000, para. 125.

⁴³ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 and ICTR-96-17 (“*Ntakirutimana*”), Judgement (AC), 13 December 2004, para. 500; *The Prosecutor v. Milorad Krnojelac*, Case

The Prosecution is required to demonstrate that the accused carried out an act of substantial practical assistance, encouragement, or moral support to the principal offender, culminating in the latter's actual commission of the crime.⁴⁴ While the assistance need not be indispensable to the crime, it must have a substantial effect on the commission of the crime.⁴⁵

2. The Plea Agreement

24. In the Guilty Plea Agreement between the Parties, Michel Bagaragaza acknowledges his criminal responsibility for, and admits that through his actions, his support and encouragement, he substantially contributed to the massacre of more than one thousand members of the Tutsi ethnic group who had sought refuge at Kesho Hill, in the Kabaya area, and at Nyundo Cathedral in Gisenyi *préfecture*.

25. In particular, the Accused admits that, on or about 8 April 1994, he participated in a meeting with the *bourgmestre*, Mr. Gahinjori, and the chief of the *Interahamwe* and assistant *bourgmestre*, Thomas Kuradusenge, of Giciye *commune*, and learned that the two men had agreed that Kuradusenge would organise and lead attacks against members of the Tutsi ethnic group at Kesho Hill and Nyundo Cathedral and that reinforcements would continue to be sent to the attackers. Further, the Accused authorised that vehicles and fuel from the Rubaya and Nyabihu Tea Factories be used to transport members of the *Interahamwe* for the attacks,⁴⁶ that personnel from the factories participate in the attacks and that the attackers be provided with heavy weapons. Bagaragaza had been instructed by the Army Chief of Staff, General Deogratias Nsabimana, to conceal those weapons at the factories in 1993. Moreover, Bagaragaza met with Kuradusenge two or three times between 9 and 13 April 1994 who informed him that the *Interahamwe* needed motivation to continue with the killings of the Tutsi ethnic group and requested money to buy alcohol for the *Interahamwe* in order to

No. IT-97-25, Judgement (AC), para. 52; *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgement (AC), para. 229.

⁴⁴ *Kayishema and Ruzindana*, Judgement (Reasons) (AC), 1 June 2001, para. 186; *Kajelijeli*, Judgement and Sentence (TC), 1 December 2003, paras. 763, 766; *The Prosecution v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A (“*Kamuhanda*”), Judgement and Sentence (TC), 22 January 2003, para. 597; *Akayesu*, Judgement (TC), 2 September 1998, paras. 473-475; *Rutaganda*, Judgement and Sentence (TC), 6 December 1999, para. 43.

⁴⁵ *Bagilishema*, Judgement (TC), 7 June 2001, paras. 33, 71; *Kamuhanda*, Judgement and Sentence (TC), 22 January 2003, para. 597 and Judgement (AC), 19 September 2005, para. 70. *Kayishema and Ruzindana*, Judgement (Reasons) (AC), 1 June 2001, para. 186; *Kajelijeli*, Judgement and Sentence (TC), 1 December 2003, paras. 763, 766; *Akayesu*, Judgement (TC), 2 September 1998, paras. 473-475, 537-538, 540; *Rutaganda*, Judgement and Sentence (TC), 6 December 1999, para. 43. *Musema*, Judgement and Sentence (TC), 27 January 2000, paras. 180-182; *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14; Judgement (AC), 29 July 2004, para. 49.

⁴⁶ Statement of Facts, para. 11.

motivate them to continue with the killings in the Kabaya and Bugoyi areas,⁴⁷ whereupon the Accused gave Kuradusenge a substantial amount of money for that purpose.

3. Legal Findings

26. The Chamber finds the Accused guilty in accordance with his guilty plea and, thus, that he provided substantial assistance to the killings of more than one thousand members of the Tutsi ethnic group with the knowledge of the planners' and principal perpetrators' genocidal intent.

27. Accordingly, the Chamber is satisfied beyond reasonable doubt that the Accused is individually criminally responsible, pursuant to Article 6(1) of the Statute for complicity in genocide pursuant to Article 2 (3) (e) of the Statute.

CHAPTER IV: DETERMINATION OF SENTENCE

I. Applicable Sentencing principles

28. The Chamber considers that the sentence imposed should reflect the goals of retribution, deterrence, rehabilitation and the protection of society. Pursuant to Article 23(2) of the Statute and Rule 101 of the Rules, the Chamber must take into account a number of factors, including the gravity of the offence, the individual circumstances of the accused, any aggravating or mitigating circumstances, including substantial cooperation with the Prosecution by the Accused, and the general practice regarding prison sentences in the courts of Rwanda.

II. Sentencing Factors

29. The Chamber recalls that it must take into account any aggravating and mitigating circumstances but has unfettered discretion in its assessment of the facts and the attendant circumstances.⁴⁸ The Chamber also recalls that it may also consider any factor that it deems pertinent⁴⁹ and that aggravating circumstances must be proved beyond reasonable doubt,

⁴⁷ Statement of Facts, para. 12.

⁴⁸ *The Prosecutor v. Omar Serushago*, Case No. ICTR-98-39 (“*Serushago*”), Reasons for Judgement (AC), 6 April 2000, para. 23; *The Prosecutor v. André Ntaregura, Emmanuel Bagambiki, Samuel Imanishimwe*, Case No. ICTR-99-46, Judgement (AC), para. 430.

⁴⁹ *Serushago*, Reasons for Judgement (AC), 6 April 2000, para. 23.

while mitigating circumstances must be proved on a balance of probabilities.⁵⁰

A. Gravity of the Crime

30. The Chamber recognizes that the gravity of the crime committed by the Accused and the extent of the Accused's involvement are essential factors for a just sentence.⁵¹

31. The crime for which the Accused has been convicted, relates to genocide which is the most heinous of crimes and shocks the collective conscience of mankind.⁵² The Accused's personal participation consisted in aiding and abetting the planners and principal perpetrators to a substantial degree, with knowledge of their genocidal intent, to kill more than one thousand Tutsi who were fleeing for their lives.

32. However, there is no basis for the Chamber to conclude that Bagaragaza consented to the concealment of weapons in the tea factories in 1993 because he knew they would be used for genocidal acts, or that he otherwise acted with premeditation when he agreed to the requests of the local political and *Interahamwe* leaders. Still, the Chamber finds that the Accused's participation constitutes a very serious offence and a gross violation of international humanitarian law.

B. Aggravating Circumstances

33. The Chamber notes that the Parties have not made any submissions on aggravating circumstances and considers that in the present instance there are no aggravating circumstances.

C. Mitigating Circumstances

34. Mitigating circumstances do not have to be directly related to the offence.⁵³ The Chamber has wide discretion in determining what constitutes mitigating circumstances and the weight to be accorded thereto.⁵⁴ Proof of mitigating circumstances does not automatically

⁵⁰ *Kajelijeli* Judgement (AC), 23 May 2005, para. 294; *The Prosecutor v. Joseph Serugendo*, Case No. ICTR-2005-84 ("*Serugendo*"), Judgement and Sentence (TC), 12 June 2006, para. 40; *The Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60 ("*Bisengimana*"), Judgement (TC), 13 April 2006, para. 111; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76, Judgement and Sentence (TC), 13 December 2005, para. 438; *The Prosecutor v. Callixte Kalimanzira*, case No. ICTR-05-88 ("*Kalimanzira*"), Judgement (TC), 22 June 2009, para. 748.

⁵¹ See e.g. *Serugendo*, Judgement and Sentence (TC), 12 June 2006, para. 39.

⁵² *The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32 ("*Ruggiu*"), Judgement and Sentence (TC), 1 June 2000, para. 48.

⁵³ *Bisengimana*, Judgement and Sentence (TC), 13 April 2006, para. 125; *The Prosecutor v. Mirmir Nikolić*, Case No. IT-02-60/1 ("*Nikolić*"), Sentencing Judgement (TC), 18 December 2003, para. 145; *The Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61, Sentencing Judgement (TC), 30 March 2004, para. 155.

⁵⁴ *Kalimanzira*, Judgement (TC), 22 June 2009, para. 748.

entitle the accused to a “credit” in the determination of the sentence; it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination.⁵⁵

35. The Chamber has considered that the following factors constitute mitigating circumstances to varying degrees.

36. The Defence has led credible evidence that Michel Bagaragaza, in his personal and professional life, showed no bias against the Tutsi and was on excellent terms with them.⁵⁶ Two of his children, who are integrated into his family, have a Tutsi mother, whom he protected during the genocide. Further, he engaged Tutsi for leading posts in his department and openly socialised with Tutsi. Therefore, the Chamber considers that it is likely that, when he agreed to provide assistance to the *genocidaires*, he was driven by concern for his own safety and that of his family.⁵⁷ Nevertheless, there is not sufficient evidence to conclude that Michel Bagaragaza, being a resourceful and notable person in the community, would have faced imminent and direct danger, had he not complied with the requests of the local political and *Interahamwe* leaders.

37. The Accused is a married man with children who has convinced the Chamber to believe in his chances of rehabilitation after his release. Further, he is sixty-three years old, in frail health, and has shown good behaviour prior to and during detention.

38. A more important mitigating factor, however, is that Michel Bagaragaza confessed his actions from an early point, surrendered voluntarily to the Tribunal and pleaded guilty when the charges against him were reduced to comport to his confession. Furthermore, in his public address to the Court, he expressed genuine remorse for his actions. The jurisprudence has established that a guilty plea may have mitigating effects because it shows remorse and repentance and contributes to reconciliation, the establishment of the truth, the encouragement of other perpetrators to do so, the sparing of a lengthy investigation and trial and thus resources and time, and relieves witnesses from giving evidence in court.⁵⁸

39. An even more important mitigating factor is that, according to the Parties’ submissions, Michel Bagaragaza has been cooperating with the Prosecution in the

⁵⁵ *The Prosecutor v. Éliézer Niyitegeka*, Case No. ICTR-96-14 (“*Niyitegeka*”), Judgement (AC), 9 July 2004 para. 267.

⁵⁶ T. 3 November 2009, p. 11; Exhibits D3, D4, D5, D7, D8, D9, D10, D11, D12, D13 (all under seal).

⁵⁷ T. 3 November 2009, p. 20; T. 4 November 2009, p. 21; Exhibit D2 (under seal).

⁵⁸ *Bisengimana*, Judgement (TC), 13 April 2006, para. 126. See also *Ruggiu*, Judgement (TC), 1 June 2000, paras. 53, 55; *The Prosecutor v. Biljana Plavšić*, Case no. IT-00-39 and 40/1 (“*Plavšić*”), Sentencing Judgement (TC), 27 February 2003, paras. 70, 73; *Nikolić*, Sentencing Judgement (TC), 18 December 2003, para. 248.

investigation and prosecution of cases since May 2002 and provided the Prosecution with information about his own role and the role of others in the events before and during the genocide without concern for self-incrimination. On 19 December 2004, he signed a cooperation agreement with the Prosecutor and continued his cooperation unreservedly after he was arrested on 15 August 2005. He testified for the Prosecution in the *Zigiranyirazo* case and remains committed to testifying for the Prosecution in other cases, as required.⁵⁹ His assistance is qualified as invaluable.⁶⁰ The Chamber further notes that the Accused continued his cooperation with the Prosecution even after his identity was disclosed in breach of court orders and despite threats to his own life and to the life of members of his family and that he has been in solitary confinement for security reasons since August 2005.⁶¹

40. The Chamber recalls Rule 101 of the Rules, which expressly provides that substantial cooperation with the Prosecution before or after a conviction must be deemed a mitigating circumstance.⁶² As such, the Chamber finds that the Accused's ongoing cooperation with the Prosecution, dating back to May 2002, constitutes substantial cooperation to an unusually high degree.

III. Sentencing Recommendations

41. In the Guilty Plea Agreement, the Parties jointly recommended a sentencing range of between six and ten years imprisonment with credit for time spent in detention.⁶³ The Chamber has taken the joint recommendation into due consideration, but notes that Rule 62 *bis* (B) provides that the Chamber is not bound by any such agreement.

IV. Conclusion

42. The Chamber recognizes that a higher sentence is more likely to be imposed on the principal perpetrators of an offence than on their accomplices.⁶⁴ After examining the sentencing practice of this Tribunal and that of ICTY, the Chamber is mindful that principal perpetrators convicted of genocide have been punished with sentences ranging from fifteen years imprisonment to life imprisonment, and that a principal perpetrator in relation to the Kesho Hill massacre and another event, with a social background similar to that of Michel

⁵⁹ Joint Motion, para. 5.2 ; T. 4 November 2009, pp. 7, 21; Exhibit D6.

⁶⁰ Exhibit D6, para. 1.

⁶¹ T. 4 November 2009, p. 21. Exhibits D1, D5, D10, D13 (all under seal); D6, paras. 7, 8.

⁶² Rule 101 (B) (ii).

⁶³ Guilty Plea Agreement, para. 5.4.

⁶⁴ *Semanza*, Judgement (AC), 20 May 2005, para. 388.

Bagaragaza, was sentenced to 20 years imprisonment by the Trial Chamber.⁶⁵ Secondary or indirect forms of participation have generally resulted in a lower sentence.⁶⁶ The Chamber is aware that the sentence should reflect the totality of the criminal conduct of the accused. In this case, the Chamber finds that extraordinary mitigating circumstances exist, which warrant a substantial reduction of the sentence that the Accused's actions would otherwise carry.

V. Credit for Time Served

43. Pursuant to Rule 101 (C) of the Rules credit shall be given to a convicted person for the period during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal. The Accused was arrested and transferred to the UNDF Facility in Arusha on 15 August 2005. He is entitled to credit for time spent in custody and any additional time he might spend in custody pending a final determination of a possible appeal.

CHAPTER V: VERDICT

44. The Chamber has considered the Statute, the Rules, the gravity of the offence, the general practice regarding sentencing in Rwanda, evidence during the sentencing hearing and the Parties submissions. The Chamber has further weighed the mitigating circumstances.⁶⁷ The Chamber convicts and sentences Michel Bagaragaza for complicity in genocide pursuant to Article 2 (3) (e) of the Statute to:

8 years' imprisonment

45. The Chamber finds that, pursuant to Rule 101 (C) of the Rules, the Accused is entitled to credit for time spent in custody, to be computed from the date of his surrender, 15 August 2005, to the date of this judgement. Pursuant to Rule 102 (A), the sentence shall run as of the date of this judgement.

⁶⁵ *Semanza*, Judgement (AC), 20 May 2005, para. 388. *See also Musema*, Judgement and Sentence (TC), 27 January 2000, para. 1008, *Rutaganda*, Judgement and Sentence (TC), 6 December 1999, para. 473; *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73, Judgment (TC), para. 468.

⁶⁶ *See e.g., Ruggiu*, Judgement (TC), 1 June 2000, para. 81 (sentencing the accused to a concurrent twelve-year sentence for direct and public incitement to commit genocide and crimes against humanity (persecution)); *Ntakirutimana*, Judgement (TC), 21 February 2003, para. 921 (sentencing the accused to ten years' imprisonment for aiding and abetting genocide but making special note of the accused's age, state of health, his past good character and public service).

⁶⁷ *The Prosecution v. Vincent Rutaganira*, Case No. ICTR-95-1C ("*Rutaganira*"), Judgement and Sentence (TC), 14 March 2005, para. 168.

46. Pursuant to Rule 103 (B) of the Rules, the Accused shall remain in the custody of the Tribunal pending finalisation of arrangements for his transfer to the State where he shall serve his sentence.

Done in Arusha on 17 November 2009, in English.

Vagn Joensen
Presiding Judge

Bakhtiyar Tuzmukhamedov
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]