

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-12-26-ES.1

Date: 1 April 2021

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Carmel Agius, President

Registrar: Mr. Abubacarr Tambaou

Decision of: 1 April 2021

PROSECUTOR

v.

THÉONESTE BAGOSORA

PUBLIC REDACTED VERSION

**DECISION ON THE EARLY RELEASE OF
THÉONESTE BAGOSORA**

The Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for Mr. Théoneste Bagosora:

Mr. John Philpot

Republic of Mali

1. I, Carmel Agius, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively), am seised of Mr. Théoneste Bagosora’s direct petition for early release filed on 6 March 2019 (“Bagosora” and “Application”, respectively).¹

I. BACKGROUND

2. Bagosora was arrested on 9 March 1996 in the Republic of Cameroon and was transferred to the International Criminal Tribunal for Rwanda (“ICTR”) on 23 January 1997.² At his further appearance on 7 March 1997, Bagosora pleaded not guilty to the charges against him.³ Following amendments to the indictment, Bagosora entered new pleas of not guilty on 13 August 1999.⁴

3. On 18 December 2008, Trial Chamber I of the ICTR (“Trial Chamber”) found Bagosora responsible pursuant to Articles 6(1) and 6(3) of the Statute of the ICTR for genocide, for murder, extermination, and persecution as crimes against humanity, and for violence to life and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II.⁵ Bagosora was further found responsible pursuant to Article 6(3) of the Statute of the ICTR for rape and other inhumane acts as crimes against humanity and for outrages upon personal dignity as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II.⁶ He was sentenced to life imprisonment.⁷

4. On 14 December 2011, the Appeals Chamber of the ICTR (“Appeals Chamber”): (i) found Bagosora responsible as a superior under Article 6(3) of the Statute of the ICTR for crimes committed at Kigali area roadblocks between 7 and 9 April 1994, and in so doing set aside the finding of the Trial Chamber that he was responsible, pursuant to Article 6(1) of the Statute of the ICTR, for ordering these crimes;⁸ (ii) reversed certain convictions entered by the Trial Chamber;⁹

¹ Requête au Président du Mécanisme de M Théoneste Bagosora pour une libération anticipée et questions de santé reliées, 6 March 2019 (confidential and *ex parte*) (“Application”). An English translation of the Application was filed on 18 April 2019. See Théoneste Bagosora’s Application for Early Release and Related Health Issues, 18 April 2019 (confidential and *ex parte*); Théoneste Bagosora’s Application for Early Release and Related Health Issues, 14 October 2019 (public redacted). All references herein are to the English translation of the Application.

² *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008 (“Trial Judgement”), paras. 53, 76, 94, 2285, 2290.

³ Trial Judgement, paras. 76, 94, 2291.

⁴ Trial Judgement, para. 2293.

⁵ Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245, 2254, 2258.

⁶ Trial Judgement, paras. 2201-2203, 2224, 2254, 2258.

⁷ Trial Judgement, para. 2277.

⁸ *Théoneste Bagosora & Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011 (“Appeal Judgement”), paras. 721, 739, 742.

⁹ Appeal Judgement, paras. 573, 631-634, 638, 695, 730, 737, 742.

(iii) affirmed all other convictions entered by the Trial Chamber;¹⁰ and (iv) set aside the sentence of life imprisonment and imposed a sentence of 35 years of imprisonment.¹¹

5. On 1 July 2012, Bagosora was transferred to the Republic of Mali (“Mali”) to serve the remainder of his sentence.¹²

II. APPLICATION

6. On 6 March 2019, Bagosora filed the direct petition for early release, indicating that if released early he would like to stay in the Kingdom of the Netherlands (“Netherlands”) [REDACTED], and otherwise he would like to live in Mali.¹³

7. On 31 July 2019, I ordered Bagosora to file a public redacted version of the Application,¹⁴ and, on 23 September 2019, I reiterated my order urging him to do so expeditiously.¹⁵ Bagosora filed a public redacted version of the Application on 23 September 2019.¹⁶

8. On 27 September 2019, I requested the Registrar of the Mechanism (“Registrar”) to undertake the steps prescribed in paragraphs 3, 4, and 5 of the relevant Practice Direction.¹⁷ In particular, I sought: (i) a psychiatric or psychological evaluation taking into account the type of crimes committed by Bagosora, with a view to assessing his attitude towards his crimes and the victims of his crimes, as well as his ability to reintegrate peacefully into society; (ii) a medical report on Bagosora’s physical condition; (iii) a statement on Bagosora’s cooperation with the Office of the Prosecutor (“Prosecution”) and any other comments from the Prosecution it considers to be of importance, including in relation to the gravity of the crimes and any particular victims or witnesses, if deemed necessary; (iv) information whether any formal steps had been taken by Bagosora to acquire a residence status in the Netherlands or Mali, the specific address where he

¹⁰ Appeal Judgement, paras. 634, 697, 721, 739, 742.

¹¹ Appeal Judgement, paras. 740-742.

¹² See ICTR Press Release, More ICTR Convicts Transferred to Mali and Benin to Serve their Sentences, 3 July 2012, available at: <https://unictr.irmct.org/en/news/more-ict-convicts-transferred-mali-and-benin-serve-their-sentences>.

¹³ Application, para. 8.1.

¹⁴ Order to File Public Redacted Version of Théoneste Bagosora’s Application for Early Release, 31 July 2019, p. 2.

¹⁵ Further Order to File Public Redacted Version of Théoneste Bagosora’s Application for Early Release, 23 September 2019, p. 1.

¹⁶ Requête au Président du Mécanisme de M Théoneste Bagosora pour une libération anticipée et questions de santé reliées, 23 September 2019 (public redacted). The English translation was filed on 14 October 2019. See Théoneste Bagosora’s Application for Early Release and Related Health Issues, 14 October 2019 (public redacted).

¹⁷ Internal Memorandum from the President to the Registrar, dated 27 September 2019 (confidential) (“Memorandum of 27 September 2019”), para. 2; Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism, MICT/3/Rev.2, 20 February 2019. This Practice Direction has since been revised. See Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, or Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism, MICT/3/Rev.3, 15 May 2020 (“Practice Direction”). All references below are to the current Practice Direction.

wishes to reside in case of release, and how he intends to support himself financially; and (v) any media reports of significance concerning Bagosora that had been published in the previous two years.¹⁸

9. On 1 November 2019, the Registrar conveyed to me comments from the Prosecutor of the Mechanism (“Prosecutor”), setting forth his views on the Application and stating that Bagosora did not cooperate with the Prosecution at any time.¹⁹

10. On 10 December 2019, the Registrar conveyed to me, from the Malian authorities, a medical report, as well as a socio-behavioural report containing information on the place Bagosora intends to reside after being released and ways of financially supporting himself.²⁰ Further, the Registrar provided me with an overview of recent media reports of significance concerning Bagosora in the previous two years.²¹

11. On 15 June 2020, I asked the Registrar to follow up with the Malian authorities with respect to the possibility of obtaining a psychiatric or psychological evaluation.²² I also requested the Witness Support and Protection Unit (“WISP”) to seek further information on any potential risks to witnesses should Bagosora be granted early release.²³

12. On 13 July 2020, I invited the authorities of Mali to submit their comments with regard to Bagosora’s indication that, if released, he would like to reside in Mali.²⁴ On the same day, I directed a similar invitation to the authorities of the Netherlands.²⁵ Simultaneously, I also invited the

¹⁸ Memorandum of 27 September 2019, paras. 4-9.

¹⁹ Internal Memorandum from the Registrar to the President, dated 1 November 2019 (confidential), *conveying* an Internal Memorandum from the Prosecutor to the Registrar, dated 29 October 2019 (confidential) (“Prosecution’s Submission”), paras. 2-3, 5-10, 15.

²⁰ Internal Memorandum from the Registrar to the President, dated 10 December 2019 (confidential) (“Memorandum of 10 December 2019”), *conveying* a letter from the Prison Warden of Koulikoro Prison to the President, dated 4 November 2019 (confidential) (“Socio-Behavioral Report”), *transmitting* a report by the Treating Physician in the Koulikoro Health Centre, dated 18 November 2019 (confidential) (“November 2019 Medical Report”).

²¹ Memorandum of 10 December 2019, *conveying* an Internal Memorandum from the External Relations Officer, Arusha branch, to the Registrar, dated 4 December 2019 (confidential).

²² Internal Memorandum from the President to the Registrar, dated 15 June 2020 (confidential) (“Memorandum of 15 June 2020”), para. 2. *See also* Internal Memorandum from the President to the Registrar, dated 10 September 2020 (confidential) (“Memorandum of 10 September 2020”), paras. 1, 3; Internal Memorandum from the Registrar to the President, dated 11 September 2020 (confidential) (“Memorandum of 11 September 2020”), para. 3.

²³ Memorandum of 15 June 2020, para. 3. *See also* Memorandum of 10 September 2020, para. 2.

²⁴ Invitation to the Republic of Mali Related to the Application for Early Release of Théoneste Bagosora, 13 July 2020 (confidential and *ex parte*) (“Invitation to the Republic of Mali”), p. 3. I note that Mali has not responded to this invitation.

²⁵ Invitation to the Kingdom of the Netherlands Related to the Application for Early Release of Théoneste Bagosora, 13 July 2020 (confidential and *ex parte*), p. 3.

authorities of Rwanda to provide their views on the Application, to which Bagosora was given the opportunity to respond.²⁶

13. On 4 August 2020, the Rwandan authorities filed their comments concerning the Application.²⁷ The authorities of the Netherlands also filed their submission that same day.²⁸

14. On 11 September 2020, the Registry conveyed to me the requested risk assessment prepared by WISP.²⁹

15. On 22 September 2020, Bagosora filed his response to Rwanda's Submission.³⁰

16. On 30 October 2020, I received a psychological evaluation from the Malian authorities relating to Bagosora's physical and psychological status.³¹ The same day, I instructed the Registrar to communicate the collected information to Bagosora, in a language that he understands, in accordance with paragraph 12 of the Practice Direction.³²

17. On 15 December 2020, Bagosora provided his submissions with respect to the relevant information that had been collected in relation to the Application.³³

²⁶ Invitation to the Republic of Rwanda Related to the Application for Early Release of Théoneste Bagosora, 13 July 2020 ("Invitation to Rwanda"), p. 3.

²⁷ Opposition of the Republic of Rwanda to Request for Early Release, dated 3 August 2020 ("Rwanda's Submission").

²⁸ *Note verbale* from the Ministry of Foreign Affairs of the Netherlands to the Mechanism, dated 3 August 2020 (confidential and *ex parte*).

²⁹ Memorandum of 11 September 2020, conveying an Internal Memorandum from the Head of WISP, Arusha branch, to the Registrar, dated 11 September 2020 (confidential). See Internal Memorandum from the President to the Registrar, dated 11 September 2020 (confidential), para. 1.

³⁰ Réponse à l'opposition de la République du Rwanda à une demande de libération anticipée, 22 September 2020 ("Response to Rwanda's Submission"). An English translation was filed on 29 September 2020. See Response to the Republic of Rwanda's Opposition to Request for Early Release, 29 September 2020. All references herein are to the English translation of the Response to Rwanda's Submission. I note that the Invitation to Rwanda indicated that Bagosora was to file any response to the submissions of Rwanda by 17 August 2020, which was 14 days after the date set for Rwanda's Submission. Bagosora submits that the French version of Rwanda's Submission was provided to him on 8 September 2020 and he responded 14 days thereafter. See Invitation to Rwanda, p. 3; Response to Rwanda's Submission, para. 6. In these circumstances, I find it appropriate to consider the Response to Rwanda's Submission as validly filed.

³¹ Internal Memorandum from the Registrar to the President, dated 30 October 2020 (confidential), conveying an expert report by the Physician in the Koulikoro Health Centre, dated 21 October 2020 ("Psychological Evaluation").

³² Internal Memorandum from the President to the Registrar, dated 30 October 2020 (confidential), paras. 2-3.

³³ Réponse aux représentations du Procureur et du Greffier, 15 December 2020 (confidential) ("Bagosora's Response"). An English translation was filed on 18 December 2020. See Response to Prosecutor's and Registrar's Submissions, 18 December 2020 (confidential). Public redacted versions were filed on 21 December 2020 and 5 January 2021, respectively. All references herein are to the English translation of Bagosora's Response. I note that paragraph 13 of the Practice Direction sets a 14-day deadline for a convicted person to provide his or her comments following receipt of the information. Bagosora submits that he received the relevant material on approximately 21 November 2020 and his instructions to his counsel only reached the latter on 7 December 2020. See Bagosora's Response, paras. 3, 5-6. See also Internal Memorandum from the Registrar to the President, dated 3 December 2020 (confidential), para. 2 (indicating that the proof of service returned to the Registry is dated 21 November 2020). In these circumstances, I find it appropriate to consider Bagosora's Response as validly filed.

18. On 15 March 2021, the Malian authorities indicated that Bagosora is eligible for pardon, commutation of sentence, or early release under Malian law.³⁴

19. With regard to the Application, I consulted with Judge Theodor Meron and Judge Liu Daqun in their capacity as Judges of the sentencing Chamber,³⁵ as foreseen under Rule 150 of the Rules of Procedure and Evidence of the Mechanism (“Rules”).

III. APPLICABLE LAW

20. Pursuant to Article 26 of the Statute of the Mechanism (“Statute”), there shall only be pardon or commutation of sentence if the President so decides on the basis of the interests of justice and the general principles of law. While Article 26 of the Statute, like the equivalent provisions in the Statutes of the ICTR and the International Criminal Tribunal for the former Yugoslavia (“ICTY”) before it, does not specifically mention requests for early release of convicted persons, the Rules reflect the President’s power to deal with such requests and the longstanding practice of the ICTR, the ICTY, and the Mechanism in this regard.

21. Rule 150 of the Rules provides that the President shall, upon receipt of a direct petition from the convicted person, determine, in consultation with any Judges of the sentencing Chamber who are Judges of the Mechanism, whether pardon, commutation of sentence, or early release is appropriate. If none of the Judges who imposed the sentence are Judges of the Mechanism, the President shall consult with at least two other Judges.

22. The general standards for granting early release are set out in Rule 151 of the Rules, which provides that in making a determination on pardon, commutation of sentence, or early release, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner’s demonstration of rehabilitation, and any substantial cooperation of the prisoner with the Prosecution.

23. Paragraph 5 of the Practice Direction provides that a convicted person may apply directly to the President for pardon, commutation of sentence, or early release, if he or she believes that he or she is eligible. Paragraph 10 of the Practice Direction indicates that the President may direct the Registry to collect information which he or she considers may be relevant to the determination of whether pardon, commutation of sentence, or early release is appropriate. Paragraph 13 of the

³⁴ Internal Memorandum from the Registrar to the President, dated 19 March 2021 (confidential), *conveying* a report from the Prison Warden of Koulikoro Prison to the President, dated 15 March 2021 (confidential) (“Eligibility Report”).

³⁵ *See* Trial Judgement; Appeal Judgement.

Practice Direction states that the convicted person shall be given 14 days to examine the information received by the Registrar, following which he or she may provide any written submissions in response.

24. Paragraph 19 of the Practice Direction specifies that the President shall determine whether early release is to be granted on the basis of the interests of justice and the general principles of law, having regard to the criteria specified in Rule 151 of the Rules, and any other information, as well as the views of the Judges consulted in accordance with Rule 150 of the Rules. If early release is granted, it may be subject to conditions.³⁶

25. According to Article 25(2) of the Statute, the Mechanism supervises the enforcement of sentences pronounced by the ICTR, the ICTY, or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States. The relevant enforcement agreement between the United Nations and Mali³⁷ provides in Article 3(1) that the Malian authorities shall be bound by the duration of the sentence pronounced by the ICTR or the Mechanism. Article 8(3) of the Enforcement Agreement provides that, in the event of a direct petition for early release by a convicted person to the President, Mali shall, upon the Registrar's request, inform the Registrar as to whether the convicted person is eligible for early release under Malian law. Article 8(5) of the Enforcement Agreement states that there shall only be pardon, commutation of sentence, or early release if the President so decides on the basis of the interests of justice and the general principles of law, and the Registrar shall transmit the President's decision to Mali, which shall execute the terms of the decision promptly.

IV. ANALYSIS

A. Eligibility

1. Eligibility before the Mechanism

26. All convicted persons serving a sentence under the Mechanism's supervision are eligible to be considered for early release upon having served two-thirds of their sentence, irrespective of: (i) whether the person was convicted by the ICTR, the ICTY, or the Mechanism; (ii) where the

³⁶ See, e.g., Practice Direction, para. 20; *Prosecutor v. Valentin Ćorić*, Case No. MICT-17-112-ES.4, Decision on Motions Related to Valentin Ćorić's Request for Variation of Early Release Conditions, 21 February 2020, para. 39; *Prosecutor v. Valentin Ćorić*, Case No. MICT-17-112-ES.4, Further Redacted Public Redacted Version of the Decision of the President on the Early Release of Valentin Ćorić and Related Motions, 16 January 2019, paras. 74, 76, 78; *Prosecutor v. Aloys Simba*, Case No. MICT-14-62-ES.1, Public Redacted Version of the President's 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019, paras. 81-82, Annex A.

sentence is being served; and (iii) whether the matter is brought before the President through a direct petition by the convicted person or a notification from the relevant enforcement State.³⁸

27. According to information provided by the Registry, Bagosora served two-thirds of his sentence of 35 years of imprisonment on 27 June 2019.³⁹ Bagosora is thus eligible to be considered for early release.

2. Eligibility under Malian Law

28. As set out above, Bagosora is currently serving his sentence in Mali. The Malian authorities have indicated that Bagosora is eligible for pardon, commutation of sentence, or early release under Malian law.⁴⁰

29. In this respect, I recall that even if Bagosora is eligible for release under Malian law, the early release of persons convicted by the ICTR falls exclusively within the discretion of the President, pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules.⁴¹

B. General Standards for Granting

30. A convicted person having served two-thirds of his or her sentence shall be merely eligible to apply for early release and not entitled to such release, which may only be granted by the President as a matter of discretion, after considering the totality of the circumstances in each case, as required by Rule 151 of the Rules.⁴² I recall that Rule 151 of the Rules provides a non-exhaustive list of factors to be considered by the President, which I will address in turn below.

1. Gravity of Crimes

31. As set out above, Bagosora is criminally responsible for genocide, for murder, extermination, rape, persecution, and other inhumane acts as crimes against humanity, and for

³⁷ Agreement between the United Nations and the Government of the Republic of Mali on the Enforcement of Sentences Pronounced by the International Criminal Tribunal for Rwanda or the International Residual Mechanism for Criminal Tribunals, dated 13 May 2016 (as amended on 30 June 2016) (“Enforcement Agreement”).

³⁸ *Prosecutor v. Dragoljub Kunarac*, Case No. MICT-15-88-ES.1, Decision on Dragoljub Kunarac’s Application for Early Release, 31 December 2020 (public redacted) (“*Kunarac Decision*”), para. 31; *Prosecutor v. Vujadin Popović*, Case No. MICT-15-85-ES.2, Decision on the Early Release of Vujadin Popović, 30 December 2020 (public redacted) (“*Popović Decision*”), p. 3; *Prosecutor v. Laurent Semanza*, Case No. MICT-13-36-ES.2, Decision on Laurent Semanza’s Application for Early Release, 17 September 2020 (public redacted) (“*Semanza Decision*”), para. 26.

³⁹ This information was provided by the Registry through an informal communication on 19 March 2021.

⁴⁰ Eligibility Report, pp. 2-3.

⁴¹ *Kunarac Decision*, para. 32; *Semanza Decision*, para. 29; *Prosecutor v. Radoslav Brđanin*, Case No. MICT-13-48-ES, Decision on the Application of Radoslav Brđanin for Early Release, 28 February 2020 (public redacted) (“*Brđanin Decision*”), para. 33.

⁴² *Kunarac Decision*, para. 33; *Popović Decision*, p. 4; *Semanza Decision*, para. 30.

violence to life and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II.⁴³

32. The Trial Chamber emphasised that “between 6 and 9 April 1994, Bagosora was the highest authority in the Ministry of Defence and exercised control over the Rwandan Armed Forces, the most powerful entity at the time in the Rwandan government”.⁴⁴ It went on to find that “there is no doubt that he was one of the main, if not the most important, person in Rwanda at this time”, during which “members of the military and militiamen working with them as an auxiliary or complementary force participated in a widespread and systematic campaign of slaughter and targeted political assassinations”.⁴⁵

33. Among other crimes, Bagosora bears superior responsibility for the systematic killing of prominent personalities and opposition political figures on the morning of 7 April 1994, namely Prime Minister Agathe Uwilingiyimana; Joseph Kavaruganda, the President of the Constitutional Court; Frédéric Nzamurambaho, the chairman of the *Parti Social Démocrate* and Minister of Agriculture; Landoald Ndasingwa, the vice-chairman of the *Parti Libéral* and Minister of Labour and Community Affairs; and Faustin Rucogoza, an official of the *Mouvement Démocratique Républicain* and Minister of Information.⁴⁶ Notably, Bagosora had actual knowledge that his subordinates were about to commit these crimes⁴⁷ and he failed to prevent them, even though he knew, for instance, that the UNAMIR commander was trying to organise a radio address by the Prime Minister to speak to the population of Rwanda shortly before she was killed by forces under Bagosora’s authority on the morning of 7 April 1994.⁴⁸ Bagosora likewise bears superior responsibility for failing to prevent the killing of six United Nations peacekeepers who were arrested during the attack on the Prime Minister’s residence that morning.⁴⁹

34. In the hours and days that followed, horrific crimes were perpetrated on civilians across the Rwandan capital.⁵⁰ “The toll of human suffering was immense,” as stated by the Trial Chamber.⁵¹ “Simple murder was compounded with extreme brutality and cruelty”: persons seeking refuge “were herded to places of worship, such as Gikondo Parish, before being brutally killed as

⁴³ See *supra*, paras. 3-4.

⁴⁴ Trial Judgement, para. 2265. See also Appeal Judgement, paras. 518, 523-524.

⁴⁵ Trial Judgement, para. 2265. See also Appeal Judgement, paras. 523-524, 714.

⁴⁶ Trial Judgement, paras. 695, 725, 2178-2179.

⁴⁷ Trial Judgement, paras. 2038, 2040; Appeal Judgement, paras. 652, 660, 680.

⁴⁸ Trial Judgement, paras. 714, 723, 2040; Appeal Judgement, paras. 600, 680.

⁴⁹ Trial Judgement, paras. 720, 783, 792-793, 796, Appeal Judgement, paras. 607, 630, 634, fn. 1692.

⁵⁰ See Trial Judgement, paras. 2119-2138. See also Trial Judgement, para. 2237 (“[M]ost of the victims were primarily unarmed Tutsi civilians who were either murdered in their homes, at places of refuge such as religious sites and schools, or at roadblocks on their way to these sanctuaries while fleeing the resumption of hostilities or other attacks.”).

⁵¹ Trial Judgement, para. 2266.

peacekeepers and priests were forced at gunpoint to watch the carnage, including the mutilation of sexual organs”,⁵² while “women stopped at roadblocks were raped before being killed, their naked corpses left by the road”.⁵³ Bagosora is also criminally responsible for the attacks at Kibagabaga Mosque, *Centre Christus*, Kabeza, the Saint Josephite Centre, Karama Hill, and Kibagabaga Catholic Church.⁵⁴

35. The Trial Chamber found that Bagosora’s failure to discharge his superior responsibility “set Rwanda on a course of further slaughter in the days which followed”.⁵⁵ It emphasised the impact of Bagosora’s acts and omissions by stating that “[t]his would have been avoided or at least substantially mitigated had he reigned in the troops under his control and used them as a stabilising force rather than unleash them as one of death”.⁵⁶ The Trial Chamber concluded that Bagosora’s acts and omissions between 6 and 9 April 1994 are “worthy of the highest sanction”.⁵⁷

36. As stated above, the Appeals Chamber substituted Bagosora’s convictions pursuant to Article 6(1) of the ICTR Statute with convictions for superior responsibility under Article 6(3) of the ICTR Statute.⁵⁸ It specifically found, however, that this does not reduce Bagosora’s culpability.⁵⁹

⁵² Trial Judgement, para. 2266. *See* Trial Judgement, paras. 976, 986 (finding that the killing at Gikondo Parish had taken place as described by UNAMIR Major Brent Beardsley in his first-hand testimony: “Pregnant women had their stomachs slashed open, foetuses on the floor. Even a foetus was smashed. I remember – just from the time I was there, I remember looking down, a woman obviously had tried to protect her baby. Somebody had rolled her off the baby. The baby was still alive and trying to feed on her breasts. She’d been – her clothes had been ripped off. The killing that was done was not done, in their opinion, to kill the people immediately; it had been done to kill them slowly. Women’s breasts, women vaginas had been cut with machetes; men’s scrotum areas cut with machetes. Men had been hamstringed behind their Achilles’ tendons so that they couldn’t walk, but they would have to watch what was happening to their families. There was rape that had taken place in addition to the killings, and the murder. The priests and military observers were forced to watch, and the gendarmes beat them with rifle butts if they averted their eyes from the killing. After a few hours, the gendarmes and militiamen became tired of the killing and left.”). *See also* Appeal Judgement, para. 690.

⁵³ Trial Judgement, para. 2266. *See* Trial Judgement, paras. 2035 (“Many of the Kigali area roadblocks were exclusively manned by civilians, but they were part of an extensive network in an area of strategic importance to the Rwandan army in its battle for Kigali with the [Rwandan Patriotic Front]. They were at times alongside military roadblocks and positions or barriers which had a soldier or gendarme at its head. [...] The Chamber is mindful of its conclusion that militia groups became increasingly uncontrollable as the conflict progressed. However, at least in their initial days, these roadblocks could only have existed with the authorisation of the Rwandan military. The Chamber therefore finds that those manning them from 7 to 9 April 1994 were Bagosora’s subordinates.”), 2123 (“Roadblocks manned primarily by civilians, at times with a soldier or gendarme at its head, proliferated throughout Kigali, beginning on 7 April 1994. [...] Tutsis, persons without identification documents, and Hutu members of opposition parties were singled out. These roadblocks were sites of open and notorious slaughter and sexual assault from 7 April.”). *See also* Appeal Judgement, paras. 714, 720-721.

⁵⁴ *See* Trial Judgement, paras. 2127-2131, 2180. *See* Appeal Judgement, paras. 690, 697, pp. 253-254.

⁵⁵ Trial Judgement, para. 2267.

⁵⁶ Trial Judgement, para. 2267.

⁵⁷ Trial Judgement, para. 2267.

⁵⁸ *See supra*, para. 4.

⁵⁹ The Appeals Chamber stressed that “in the circumstances of this case, superior responsibility under Article 6(3) of the [ICTR] Statute is not to be seen as less grave than criminal responsibility under Article 6(1) of the [ICTR] Statute”. Appeal Judgement, para. 740.

37. Bagosora, for his part, states that he “has acknowledged the serious nature of the crimes committed”.⁶⁰ He disputes Rwanda’s submission that he “set the genocide in motion” and notes that he was not found criminally liable for events in Rwanda after 9 April 1994, but only for “a period of 65 hours from the attack on 7 April 1994”.⁶¹ Bagosora emphasises that he is merely asking that I consider the findings in the Trial Judgement and Appeal Judgement.⁶²

38. Even a cursory consideration of the Trial Judgement and Appeal Judgement reflects the enormous gravity of the crimes for which Bagosora was convicted, and my own detailed consideration of these Judgements leaves me appalled at the extremely high gravity of these crimes. There can be no question whatsoever that this factor weighs very strongly against granting early release to Bagosora.

2. Treatment of Similarly-Situated Prisoners

39. Persons sentenced by the ICTR, like Bagosora, are considered “similarly-situated” to all other prisoners under the Mechanism’s supervision.⁶³ As noted above, all convicted persons supervised by the Mechanism are considered eligible to apply for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them and where they serve their sentence.⁶⁴

40. In this regard, I observe that Bagosora served two-thirds of his sentence as of 27 June 2019 and is thus eligible to be considered for early release.⁶⁵

3. Demonstration of Rehabilitation

41. Before turning to an individualised assessment of Bagosora’s demonstration of rehabilitation, I recall that I have set forth some of the considerations that will guide my assessment of whether a convicted person has demonstrated rehabilitation under Rule 151 of the Rules.⁶⁶

42. In my view, it is not appropriate to look at the rehabilitation of perpetrators of genocide, crimes against humanity, or war crimes through exactly the same paradigm as rehabilitation of perpetrators of ordinary domestic crimes.⁶⁷ For instance, while good behaviour in prison may

⁶⁰ Response to Rwanda’s Submission, para. 15.

⁶¹ Response to Rwanda’s Submission, paras. 11, 13-14; Bagosora’s Response, paras. 9.1, 9.1.3, 12-13. *See* Rwanda’s Submission, Registry Pagination (“RP”) 698.

⁶² Response to Rwanda’s Submissions, para. 9; Bagosora’s Response, paras. 9.1.1.

⁶³ *See Kunarac* Decision, para. 39; *Semanza* Decision, para. 41; *Brđanin* Decision, para. 29.

⁶⁴ *See supra*, para. 26.

⁶⁵ *See supra*, para. 27.

⁶⁶ *Kunarac* Decision, paras. 41-45; *Semanza* Decision, paras. 44-48; *Brđanin* Decision, paras. 47-51.

⁶⁷ *Kunarac* Decision, para. 42; *Semanza* Decision, para. 45; *Brđanin* Decision, para. 48 and references cited therein.

generally be a positive indicator of rehabilitation in a national context, given the particular nature and scope of the crimes within the jurisdiction of the ICTR, the ICTY, and the Mechanism, I do not consider that such behaviour can on its own demonstrate rehabilitation of a person convicted for some of the most heinous international crimes.⁶⁸

43. There are, however, a number of positive indicators of rehabilitation of persons convicted by the ICTR, the ICTY, or the Mechanism which have been recognised as such in the past or may be of persuasive relevance.⁶⁹ Such indicators include: (i) the acceptance of responsibility for the crimes a person was convicted for or for actions which enabled the commission of the crimes; (ii) signs of critical reflection of the convicted person upon his or her crimes; (iii) public or private expressions of genuine remorse or regret; (iv) actions taken to foster reconciliation or seek forgiveness; (v) evidence that a convicted person has a positive attitude towards persons of other backgrounds, bearing in mind the discriminatory motive of some of the crimes; (vi) participation in rehabilitation programmes in prison; (vii) a convicted person's mental health status; and (viii) a positive assessment of a convicted person's prospects to successfully reintegrate into society.⁷⁰ This is a non-exhaustive list and I do not expect convicted persons to fulfil all of these indicators in order to demonstrate rehabilitation.⁷¹ It falls, however, upon the convicted person to convince me that sufficient progress has been made in his or her rehabilitation and that granting release before the full sentence is served would be a responsible exercise of my discretion.⁷²

44. Rehabilitation entails that a convicted person may be trusted to successfully and peacefully reintegrate into a given society.⁷³ Consequently, I consider that rehabilitation involves indicators of readiness and preparedness to reintegrate into society.⁷⁴ I will, therefore, generally consider the convicted person's post-release plans, including the envisaged place of residence.⁷⁵ If the convicted person intends to return to the region where his or her crimes were committed, extra scrutiny will be called for, keeping in mind that the ICTR, the ICTY, and the Mechanism were established under Chapter VII of the United Nations Charter to contribute to the restoration and maintenance of peace and security.⁷⁶ I note in this respect that I generally do not consider it appropriate to enable

⁶⁸ *Kunarac* Decision, para. 42; *Semanza* Decision, para. 45; *Brđanin* Decision, para. 48 and references cited therein.

⁶⁹ *Kunarac* Decision, para. 43; *Semanza* Decision, para. 46; *Brđanin* Decision, para. 49 and references cited therein.

⁷⁰ *Kunarac* Decision, para. 43; *Semanza* Decision, para. 46; *Brđanin* Decision, para. 49 and references cited therein.

⁷¹ *Kunarac* Decision, para. 43; *Semanza* Decision, para. 46; *Brđanin* Decision, para. 49 and reference cited therein.

⁷² *Kunarac* Decision, para. 43; *Semanza* Decision, para. 46; *Brđanin* Decision, para. 49 and reference cited therein.

⁷³ *Kunarac* Decision, para. 44; *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50 and references cited therein.

⁷⁴ *Kunarac* Decision, para. 44; *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50 and references cited therein.

⁷⁵ *Kunarac* Decision, para. 44; *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50 and references cited therein.

⁷⁶ *Kunarac* Decision, para. 44; *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50 and references cited therein.

convicted persons to return to the affected regions before they have served their full sentence without having demonstrated a greater degree of rehabilitation.⁷⁷

45. Rehabilitation is a process rather than a definite result, and it is just one factor that I will consider alongside other factors when deciding on the early release of a convicted person who is eligible to be considered for such relief.⁷⁸ Conversely, there may be instances where, despite a lack of sufficient evidence of rehabilitation, I may consider pardon, commutation of sentence, or early release to be appropriate in light of the prevalence of other factors.⁷⁹

46. Turning to the extent to which Bagosora has demonstrated rehabilitation, I note at the outset that Bagosora advances no submissions in the Application that he has been rehabilitated. In a subsequent submission, Bagosora suggests that it would have been premature to have commented upon this issue,⁸⁰ yet even in his final submission he barely touches upon this important factor.⁸¹ To the contrary, Bagosora's arguments appear to be focused on minimising his responsibility.⁸²

(a) Behaviour in Prison

47. According to the Prison Warden, Bagosora is “[a] man with a forceful personality” who at times “is unable to control himself”.⁸³ Bagosora is reported to have “gradually adapted to life in prison, despite several sporadic sudden changes of mood”, and his “behaviour has improved more and more since [...] May 2016”.⁸⁴ Bagosora makes no submissions on this assessment, other than to claim that his “behaviour has been good, especially since 2016”.⁸⁵

48. While I note that the Prison Warden reports that Bagosora's behaviour has “improved more and more”, this does not equate with him demonstrating good behaviour in prison, especially in light of the Prison Warden's other observations about how Bagosora's personality manifests itself in the prison environment. I would therefore encourage Bagosora to continue his strides towards improving his behaviour in prison.

⁷⁷ *Kunarac* Decision, para. 44; *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50 and reference cited therein.

⁷⁸ *Kunarac* Decision, para. 45; *Semanza* Decision, para. 48; *Brđanin* Decision, para. 51 and reference cited therein.

⁷⁹ *Kunarac* Decision, para. 45; *Semanza* Decision, para. 48; *Brđanin* Decision, para. 51 and references cited therein.

⁸⁰ Response to Rwanda's Submission, para. 15.

⁸¹ See Bagosora's Response, para. 8.1.

⁸² See *supra*, para. 37.

⁸³ Socio-Behavioral Report, p. 2.

⁸⁴ Socio-Behavioral Report, p. 2.

⁸⁵ Bagosora's Response, para. 8.1

(b) Acceptance of Responsibility, Signs of Critical Reflection, and Genuine Expressions of Remorse

49. Bagosora offers no indication that he has accepted responsibility for the crimes of which he was convicted, nor are there any signs that he has reflected critically, or expressed any remorse or regret. To the contrary, all I see in Bagosora's submissions are arguments aimed at minimising his responsibility for the crimes he committed in 1994.⁸⁶ The lack of acceptance, critical reflection, or expressions or remorse weighs heavily against me finding that Bagosora has demonstrated that he has been rehabilitated.

(c) Prospects of Successful Reintegration into Society

50. Bagosora submits that if released early, he would like to live in the Netherlands [REDACTED], and otherwise he would like to live in Mali, where he would be able to provide for himself.⁸⁷ In this respect, the Prison Warden informs me that Bagosora has stated that he knows some family friends in Bamako, and that six of his children have sufficient income to support him.⁸⁸ The Prison Warden also reports that Bagosora has received regular visits from his children while serving his sentence in Mali.⁸⁹

51. I note that Bagosora appears to have retained strong ties with his immediate family and that he has indicated that he could sustain himself financially thanks to his family's support. While this may assist in Bagosora's attempts to reintegrate into society, I also note that he has not substantiated whether the authorities of either Mali or the Netherlands would permit him to reside there upon his release. In any event, I am of the view that the information before me does not convincingly demonstrate that Bagosora would be able to successfully reintegrate into society at this point in time, particularly in light of other concerns that call into question whether Bagosora has been rehabilitated.

(d) Overall Assessment

52. I am entirely unconvinced that Bagosora has been rehabilitated. In addition to the fact that Bagosora does not attempt to demonstrate that he has been rehabilitated, I am concerned that he is described as someone who "is unable to control himself". While his behaviour in prison has "improved" and he has retained strong ties with his immediate family, this is not even close to

⁸⁶ See *supra*, para. 37; *infra*, paras. 56, 59.

⁸⁷ Application, para. 8.1; Bagosora's Response, paras. 8.1, 15. Bagosora also submits that "if conditions were to change" in Rwanda, he may seek to return there in the future. Bagosora's Response, para. 16.

⁸⁸ Socio-Behavioral Report, p. 2.

⁸⁹ Socio-Behavioral Report, p. 2.

sufficiently demonstrate that he has been rehabilitated. I would therefore encourage Bagosora to engage in a serious and sustained period of self-reflection, and to commit himself to undertaking sincere efforts to rehabilitate himself in the coming years.

4. Substantial Cooperation with the Prosecutor

53. The Prosecution submits that Bagosora has never provided it with any cooperation.⁹⁰ Bagosora does not dispute this.⁹¹ Accordingly, I note that Bagosora did not cooperate with the Prosecution and as such this has no bearing in my consideration of the Application.

C. Other Considerations

1. Views of the Prosecutor

54. I have previously explained that I will use my discretion to receive and consider general comments from the Prosecution with regard to early release applications.⁹² In doing so, I will exercise caution to avoid any unreasonable imbalance to the detriment of the convicted person, and will carefully assess on a case-by-case basis which submissions are of actual relevance in a given case, mindful of the rights of the convicted person.⁹³

55. The Prosecution submits that Bagosora has not demonstrated that early release is warranted. It emphasises the gravity of his crimes, his key leadership role during the genocide, and his “apparent lack of remorse demonstrated throughout his trial”.⁹⁴ Further, the Prosecution submits that the security situation in Mali is not conducive for Bagosora to be released early there.⁹⁵ Finally, should I nevertheless be inclined to grant the Application, the Prosecution urges that appropriate conditions be imposed upon Bagosora’s release.⁹⁶

56. In his response, Bagosora disputes the Prosecution’s assertions regarding his role during the genocide.⁹⁷ He submits that he did not order or authorise the commission of any crimes, was acquitted of all the allegations except for failing in his duty to prevent the acts committed by his

⁹⁰ Prosecution’s Submission, para. 7.

⁹¹ See Bagosora’s Response, paras. 9-9.3.1.

⁹² *Kunarac* Decision, para. 76; *Semanza* Decision, para. 75; *Brđanin* Decision, para. 83.

⁹³ *Kunarac* Decision, para. 76; *Semanza* Decision, para. 75; *Brđanin* Decision, para. 83.

⁹⁴ Prosecution’s Submission, para. 2. See Prosecution’s Submission, paras. 5-8, 15.

⁹⁵ Prosecution’s Submission, paras. 3, 9. In addition, the Prosecution submits that Bagosora should be directed to provide proof that the Government of Mali has authorised him to remain in its territory. Prosecution’s Submission, para. 10.

⁹⁶ Prosecution’s Submission, paras. 11-14.

⁹⁷ Bagosora’s Response, para. 9.1. Bagosora states that rather than re-litigating his trial, he is “simply asking the President to consider the trial and appeal judgements”. Bagosora’s Response, para. 9.1.1.

subordinates, and that the failures attributed to him cover a period of only 65 hours.⁹⁸ Bagosora also argues that he does not represent any danger to others if he is released in Mali.⁹⁹ Finally, Bagosora questions the necessity of the conditions proposed by the Prosecution should his release be granted.¹⁰⁰

2. Views of Rwanda

57. As I have indicated, I consider that the views of Rwanda may be of relevance to my determination of the Application.¹⁰¹ As with submissions by the Prosecution, I will ensure that comments received from Rwanda are given appropriate weight where they are relevant to the matter before me, while exercising the necessary caution to ensure that they do not unreasonably impact my consideration of the Application to the detriment of the convicted person.

58. Rwanda opposes Bagosora’s petition for early release in light of the gravity of Bagosora’s many offences.¹⁰² It points out that Bagosora’s crimes were grave in the extreme, not only because of their heinousness, but because of the devastation they precipitated.¹⁰³ It emphasises that were it not for his actions, the worst might well have been avoided.¹⁰⁴ Rwanda further submits that granting the Application would cause irreparable harm to the victims of Bagosora’s crimes.¹⁰⁵ It emphasises that “[j]ust as Rwandans find solace in the knowledge that the [Mechanism] continues to hold the chief perpetrators of the genocide accountable for their actions, they are deeply unsettled by the prospect of inappropriate early release”.¹⁰⁶ Rwanda concludes that Bagosora would need to show exceptional and compelling circumstances to warrant early release.¹⁰⁷

59. Bagosora responds by emphasising that he was acquitted on appeal of all counts under Article 6(1) of the ICTR Statute and his remaining convictions related to failing in his duty to prevent the acts committed by his subordinates.¹⁰⁸ He further submits that the failures attributed to him covered a period of 65 hours only.¹⁰⁹ Consequently, he opposes the assertion of Rwanda that he

⁹⁸ Bagosora’s Response, paras. 9.1.3, 12-13.

⁹⁹ Bagosora’s Response, paras. 9.2-9.2.2. *See* Bagosora’s Response, para. 14.

¹⁰⁰ Bagosora’s Response, paras. 9.3-9.3.1.

¹⁰¹ Invitation to Rwanda, p. 2.

¹⁰² Rwanda’s Submission, RP 701-698, 694.

¹⁰³ Rwanda’s Submission, RP 701-699.

¹⁰⁴ Rwanda’s Submission, RP 701-700, 698.

¹⁰⁵ Rwanda’s Submission, RP 698.

¹⁰⁶ Rwanda’s Submission, RP 698.

¹⁰⁷ Rwanda’s Submission, RP 695.

¹⁰⁸ Response to Rwanda’s Submission, paras. 11, 13.

¹⁰⁹ Response to Rwanda’s Submission, para. 11.

set the genocide in motion.¹¹⁰ He asks that I merely “consider the trial and appeal judgements” in his case,¹¹¹ which I have done above when discussing the gravity of his crimes.

3. Health of the Convicted Person

60. Previous decisions on early release have determined that the state of the convicted person’s health may be taken into account in the context of an application for early release, especially when the seriousness of the condition makes it inappropriate for the convicted person to remain in prison any longer.¹¹²

61. At the outset, I note that Bagosora submits that his “health is not, in itself, a ground in his application for release”.¹¹³

62. [REDACTED].¹¹⁴ [REDACTED].¹¹⁵ [REDACTED].¹¹⁶ [REDACTED].¹¹⁷
[REDACTED].¹¹⁸

63. [REDACTED].¹¹⁹ [REDACTED].

64. [REDACTED].¹²⁰

65. Therefore, in light of the information before me, I consider that there is no indication that Bagosora’s health may be an impediment to his continued detention. Consequently, there are no sufficiently compelling humanitarian grounds which would warrant granting early release notwithstanding the overall negative assessment above.

4. Consultation

66. In coming to my decision on whether to grant the Application I have consulted with two other Judges of the Mechanism.¹²¹ Judge Meron and Judge Liu have both indicated that they agree

¹¹⁰ Response to Rwanda’s Submission, para. 14.

¹¹¹ Response to Rwanda’s Submissions, para. 9.

¹¹² *Kumarac* Decision, para. 79; *Semanza* Decision, para. 90; *Brđanin* Decision, para. 92.

¹¹³ Response to Rwanda’s Submission, para. 16. Bagosora also alleges that he has been affected by “a number of medical errors”, which he indicated he would address in a later submission. Response to Rwanda’s Submission, para. 16. His later submission, however, did not address this allegation, which is therefore unsubstantiated. See Bagosora’s Response, paras. 8.1.-8.2.

¹¹⁴ November 2019 Medical Report, p. 1. See Socio-Behavioral Report, p. 2. See also Bagosora’s Response, para. 8.2.

¹¹⁵ November 2019 Medical Report, p. 1.

¹¹⁶ November 2019 Medical Report, p. 1. See Socio-Behavioral Report, p. 2.

¹¹⁷ November 2019 Medical Report, p. 1.

¹¹⁸ November 2019 Medical Report, p. 1.

¹¹⁹ November 2019 Medical Report, p. 1.

¹²⁰ Psychological Evaluation, p. 1.

¹²¹ See *supra*, para. 19.

that the Application should be denied in light of the exceptional gravity of the crimes Bagosora was convicted of and an absence of sufficient demonstration of his rehabilitation.

67. I am grateful for my Colleagues' views on these matters, and have taken them into account in my ultimate assessment of the Application.

V. CONCLUSION

68. I consider that the Application should be denied. Although Bagosora is eligible to be considered for early release, a number of factors militate against this. In particular, the extremely high gravity of Bagosora's crimes weighs very heavily against his early release. I also consider his failure to sufficiently demonstrate rehabilitation as militating against granting the Application. Finally, there is no evidence before me that demonstrates the existence of compelling humanitarian grounds which would warrant overriding this negative assessment.

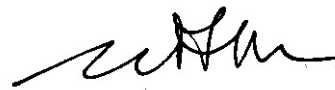
VI. DISPOSITION

69. For the foregoing reasons, and pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules, I hereby **DENY** the Application.

70. The Registrar is hereby **DIRECTED** to provide the authorities of Rwanda, as well as the authorities of the Netherlands, with the public redacted version of this decision as soon as practicable.

Done in English and French, the English version being authoritative.

Done this 1st day of April 2021,
At The Hague,
The Netherlands.



Judge Carmel Agius
President

[Seal of the Mechanism]



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