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Mechanism for International Criminal Tribunals

Case No. MICT-12-28-ES

Date: 13 December 2012

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President
Registrar: Mr. John Hocking
Decision of: 13 December 2012

PROSECUTOR

v.

OMAR SERUSHAGO

**PUBLIC REDACTED VERSION
OF DECISION OF THE PRESIDENT
ON THE EARLY RELEASE OF OMAR SERUSHAGO**

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow

Mr. Omar Serushago

The Republic of Mali

Received by the Registry
Mechanism for International Criminal Tribunals

13/12/2012 16:29

A handwritten signature in black ink, appearing to read 'McLay' followed by a stylized name.

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals ("Mechanism"), am seized of an Application for Early Release ("Application") from Mr. Omar Serushago ("Serushago"), submitted to me by means of a letter from Serushago on 8 August 2012.¹ I consider Serushago's Application pursuant to Article 26 of the Statute of the Mechanism ("Statute"), Rules 150 and 151 of the Rules of Procedure and Evidence of the Mechanism ("Rules"), and paragraph 3 of the 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 ("Practice Direction").²

I. BACKGROUND

2. On 9 June 1998, Serushago voluntarily surrendered himself to the authorities of Côte d'Ivoire in Abidjan, and on 30 June 1998 he was transferred to the United Nations Detention Facility ("UNDF") of the International Criminal Tribunal for Rwanda ("ICTR") in Arusha, Tanzania.³

3. At his initial appearance before Trial Chamber I of the ICTR ("Trial Chamber") on 14 December 1998, Serushago pleaded guilty to four of the five counts in the indictment against him: murder, extermination, and torture as crimes against humanity, and genocide.⁴ The guilty plea was entered pursuant to a plea agreement between Serushago the Office of the Prosecutor of the ICTR ("ICTR Prosecution").⁵ After verifying the validity of his guilty plea,⁶ the Trial Chamber found Serushago guilty on these four counts⁷ and, on 5 February 1999, sentenced him to fifteen years of imprisonment with credit for time served since 9 June 1998.⁸ On 14 February 2000, the Appeals Chamber dismissed Serushago's appeal for a reduction of his sentence and affirmed the Trial Chamber's sentence.⁹

¹ See Internal Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 23 August 2012 ("23 August Memorandum"), transmitting, *inter alia*, Letter by Omar Serushago to the President of the Mechanism for International Criminal Tribunals, dated 8 August 2012 ("Application"). While the Application was originally submitted in French, all references herein are to the Mechanism's certified English translation of this document. The same is true for all other communications between the Mechanism, Serushago, and the authorities of Mali that are cited herein, except as otherwise indicated.

² MICT/3, 5 July 2012.

³ *The Prosecutor v. Omar Serushago*, Case No. ICTR 98-39-S, Sentence, 5 February 1999 ("Trial Judgement"), para. 1.

⁴ Trial Judgement, para. 4.

⁵ Trial Judgement, para. 6.

⁶ Trial Judgement, paras 7-9.

⁷ Trial Judgement, p. 14 (Verdict).

⁸ Trial Judgement, p. 15 (Verdict).

⁹ *Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Judgment (Appeal against Sentence), 14 February 2000, p. 2; *Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgment, 6 April 2000, para. 34.

4. On 3 April 2001, the then-President of the ICTR decided that, in the interests of Serushago's safety and in order to facilitate his co-operation with the ICTR Prosecution under the plea agreement, Serushago would temporarily continue to be incarcerated at the UNDF.¹⁰ On 22 November 2001, the Republic of Mali was designated as the State in which Serushago was to serve his sentence.¹¹

5. On 12 May 2005, the then-President of the ICTR denied Serushago early release, citing the gravity of the crimes for which he was convicted and the limited time of imprisonment then served.¹²

II. THE APPLICATION

6. Serushago filed the Application on 8 August 2012. On 13 August 2012, the Registrar of the Mechanism ("Registrar") forwarded to me a letter from the Malian authorities, informing me that Serushago has served more than 14 years of his 15-year sentence (*i.e.*, more than three-quarters of his sentence) and recommending him for early release.¹³ On 23 August 2012, the Registrar transmitted to me a letter from the director of the Koulikoro prison in Mali, dated 9 August 2012, stating that the prison authorities do not object to Serushago's early release request.¹⁴ On 18 September 2012, I received a further report from the Koulikoro prison in Mali.¹⁵ On 4 October 2012, the Registrar informed me that no additional psychiatric or psychological evaluations of Serushago were available. The Registrar also forwarded a memorandum from Mr. Hassan B. Jallow, the Mechanism's Prosecutor ("Prosecution"), detailing the extent of Serushago's cooperation with the ICTR Prosecution.¹⁶

¹⁰ *The Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-A, Order for the Continued Detention of Omar Serushago in the ICTR Detention Facility in Arusha, 3 April 2001, p. 3.

¹¹ *The Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Order Designating the State in which Omar Serushago is to Serve his Prison Sentence, 23 November 2001 (confidential), p. 3.

¹² *The Prosecutor v. Omar Serushago*, Case No. ICTR 98-39-S, Decision of the President on the Application for Early Release of Omar Serushago, 12 May 2005, p. 2.

¹³ See Internal Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 13 August 2012 ("13 August Memorandum"), transmitting Letter from the Director of Prison Services and Surveilled Education, Koulikoro Prison, dated 19 July 2012 ("19 July Letter").

¹⁴ See 23 August Memorandum, transmitting, *inter alia*, Letter from the Director of Koulikoro Prison and Correctional Facility, dated 9 August 2012 ("9 August Letter").

¹⁵ See Internal Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 18 September 2012 ("18 September Memorandum"), transmitting, *inter alia*, a Letter from the Director of Koulikoro Prison, dated 9 September 2012 (in French) ("9 September Letter").

¹⁶ See Internal Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 4 October 2012 ("4 October Memorandum"), transmitting Memorandum from Hassan B. Jallow, Prosecutor, to John Hocking, Registrar, dated 24 September 2012 ("Prosecution Memorandum").

III. DISCUSSION

7. None of the Judges of the sentencing Chambers are Judges of the Mechanism. On that basis, no consultations with other Judges of the Mechanism are required in determining this Application. Pursuant to Rule 150 of the Rules, determinations on early release fall within my discretion as President of the Mechanism.

A. Applicable Law

8. Pursuant to Article 25(2) of the Statute, the Mechanism has "the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States".

9. Under Article 26 of the Statute, if, pursuant to the applicable law of the State in which the person convicted by the ICTY, the ICTR, or the Mechanism is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. According to Article 26, there shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law.

10. Rule 149 of the Rules echoes Article 26 of the Statute and provides that the enforcing State shall notify the Mechanism of a convicted person's eligibility, under the enforcing State's laws, "for pardon, commutation of sentence, or early release". Rule 150 of the Rules provides that the President of the Mechanism shall, upon such notice, 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.

11. Rule 151 of the Rules 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.

12. Paragraph 3 of the Practice Direction provides that "[a] convicted person may directly petition the President for pardon, commutation of sentence, or early release, if he or she believes that he or she is eligible."

13. Article 3(2) of the Agreement between the Government of the Republic of Mali and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, dated 12 February 1999 ("Enforcement Agreement") provides that the conditions of

imprisonment shall be governed by the law of Mali, subject to the supervision of the ICTR. Article 8(2) of the Enforcement Agreement provides that the President of the ICTR shall determine, in consultation with the Judges of the ICTR, whether "any form of early release is appropriate", and the Registrar of the ICTR shall inform the Malian authorities of the ICTR President's determination accordingly. I note that the Mechanism is bound by the Enforcement Agreement, even though it was concluded between Mali and the ICTR, in accordance with Article 25, paragraph 2 of the Statute, and the Mechanism's founding document, Security Council Resolution 1966 of 22 December 2010.¹⁷

B. Gravity of Crimes

14. The crimes for which Serushago was convicted are of high gravity. Serushago pleaded guilty to four of the five counts in the indictment against him, namely murder, extermination, torture as crimes against humanity, and genocide.¹⁸ In determining his sentence, the Trial Chamber found:

The offences with which the accused Omar Serushago is charged are, irrefutably, of extreme gravity, as the Trial Chamber already pointed out when it described genocide as the "crime of crimes". Omar Serushago personally murdered four Tutsi, while thirty-three other people were killed by militiamen placed under his authority. [...] At the time of commission of the offences for which he is held responsible, Omar Serushago enjoyed definite authority in his region. He participated in several meetings during which the fate of the Tutsi was decided. [...] Omar Serushago admitted that several victims were executed on his orders while he was manning a roadblock erected near the border between Rwanda and the Democratic Republic of Congo. [...] Omar Serushago committed the crimes knowingly and with premeditation.¹⁹

15. Taking the above into consideration, I am of the view that the high gravity of Serushago's offences weighs against his early release.

C. Treatment of Similarly-Situated Prisoners

16. All prisoners whose sentences are currently or will ultimately be supervised by the Mechanism shall be treated equally for purposes of early release determinations under Rule 151 of the Rules.²⁰ Therefore, ICTR convicts, like Serushago, shall be considered "similarly-situated" to all other prisoners under the Mechanism's supervision, irrespective of whether they were convicted or sentenced by the ICTR, the ICTY, or the Mechanism itself.

¹⁷ See U.N. Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010 ("Resolution 1966"), para. 4 ("the Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR, respectively, subject to the provisions of this resolution and the Statute of the Mechanism, and all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force *mutatis mutandis* in relation to the Mechanism").

¹⁸ Trial Judgement, para. 4.

¹⁹ Trial Judgement, paras 27-30.

²⁰ *The Prosecutor v. Paul Bisengimana*, Case No. MICT-12-07 (ICTR-00-60), Decision on Early Release of Paul Bisengimana, 11 December 2012 (public redacted version) ("*Bisengimana* Decision"), para. 17.

17. I recently determined that, in the interests of fairness and justice (which must guide my decision under Article 26 of the Statute²¹), all convicts supervised by the Mechanism are to be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the Tribunal that convicted them.²² I also determined that, although the two-thirds practice originates from the ICTY, it shall apply to all the prisoners within the jurisdiction of the Mechanism, given the need for equal treatment of all convicted persons supervised by the Mechanism and the need for a uniform eligibility threshold applicable to both of the Mechanism's branches.²³ I further note that applying the two-thirds eligibility threshold to all convicts supervised by the Mechanism upholds notions of fundamental fairness and the *lex mitior* principle, which is recognized in the ICTY's jurisprudence.²⁴

18. I note, however, that consideration of an application for early release at the two-thirds mark does not guarantee that release will be granted, nor does it preclude considering every application on its merits in a manner consistent with the practice of both the ICTY and the ICTR.²⁵ A convicted person having served two-thirds of his sentence shall be merely eligible for early release and not entitled to such release, which may only be granted by the President of the Mechanism as a matter of discretion.²⁶

19. As of the date of this Decision, Serushago has completed more than two-thirds of his 15-year sentence, as he has been detained since 9 June 1998.²⁷ In fact, Serushago has already served more than 14 years of his 15-year sentence, and he is set to be released in June 2013.²⁸ For the foregoing reasons, I believe that the equal treatment factor weighs in favour of Serushago's request for early release.

D. Demonstration of Rehabilitation

20. Rule 151 of the Rules provides that the President of the Mechanism shall take into account a "prisoner's demonstration of rehabilitation" in determining whether early release is appropriate. To allow the President of the Mechanism to reach an informed decision as to a convicted person's rehabilitation, Paragraph 4(b) of the Practice Direction states that the Registrar shall

[r]equest reports and observations from the relevant authorities in the enforcing State as to the behavior of the convicted person during his or her period of incarceration and the general conditions under which he or she was imprisoned, and request from such authorities any

²¹ See Article 26 of the Statute ("There shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law.").

²² *Bisengimana* Decision, para. 20.

²³ *Bisengimana* Decision, para. 20, and authorities referenced therein.

²⁴ *Bisengimana* Decision, para. 20, and authorities referenced therein.

²⁵ *Bisengimana* Decision, para. 21.

²⁶ See Article 26 of the Statute; Rule 150 of the Rules.

²⁷ Trial Judgement, para. 1 and p. 15 (Verdict).

²⁸ 13 August Memorandum, 19 July Letter.

psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration[.]

21. In the Application, Serushago claims that his "behaviour in prison has been exemplary" and that he has "no previous convictions".²⁹ Serushago declares that it is his wish "once again to serve society."³⁰ In his 9 August Letter to me, the director of the Koulikoro prison, where Serushago is serving his sentence, informed me that Serushago "is a prisoner who respects the rules in effect at the Koulikoro Prison", "lives in perfect harmony with his co-detainees and is involved in all the activities related to rehabilitation and community life at the Prison".³¹ The prison director urges me to grant Serushago early release "so that he may live with his family".³² This information from the prison authorities appears to corroborate Serushago's rehabilitation claims. I note that Serushago has not been evaluated by an independent psychiatrist or psychologist during his incarceration in Mali.³³ However, as the availability of these types of services to prisoners held in Mali is unclear, I do not consider this a factor to be accorded any negative weight.

22. Based on the foregoing, I am of the view that there is evidence of Serushago's rehabilitation and that this factor weighs in favour of Serushago's early release.

E. Substantial Cooperation with the Prosecution

23. Rule 151 of the Rules states that the President shall take into account any "substantial cooperation" of the prisoner with the Prosecution.³⁴ Paragraph 4(c) of the Practice Direction states that the Registry shall request the Prosecution "to submit a detailed report of any co-operation that the convicted person has provided to the Office of the Prosecutor and the significance thereof".

24. In his Application, Serushago claims that he has "substantially cooperated with the [ICTR] Prosecutor" by "voluntarily surrender[ing] to the Ivory Coast police to answer before the ICTR for the crimes [he] committed in Rwanda in 1994" and by his "admission of guilt."³⁵

25. The Prosecution disagrees, contending that although Serushago testified as a prosecution witness in two cases before the ICTR, he "refused to cooperate, as expected" in three other cases, despite his plea agreement with the Prosecution, "which took into account his [...] anticipated cooperation by way of testifying on behalf of the prosecution in future trials".³⁶ The Prosecution also notes that the ICTR Prosecution had, "in anticipation of such cooperation" from Serushago,

²⁹ Application, para. 7.

³⁰ Application, para. 7.

³¹ 23 August Memorandum, 9 August Letter, p. 1.

³² 23 August Memorandum, 9 August Letter, p. 1.

³³ See 4 October Memorandum, para. 5.

³⁴ Although the term "Prosecution", as used in Rule 151 of the Rules, means the Mechanism's Prosecution, I think it fair to interpret it as allowing me to consider an early release applicant's cooperation with the ICTY or the ICTR Prosecution as well.

³⁵ Application, para. 5.

"fulfilled its part of the [plea] agreement by facilitating the relocation of his family to New Zealand", but Serushago still "releged upon his undertaking to testify in" three additional cases.³⁷ Finally, the Prosecution points out that Serushago's cooperation with the Prosecution has already been taken into account both by the Trial Chamber and the Appeals Chamber of the ICTR in sentencing Serushago and, thus, it should not be counted in favour of his early release at this stage.³⁸

26. I note that Serushago has been provided with the Prosecution Memorandum,³⁹ but he did not respond to it within the 10-day period afforded to him under paragraph 6 of the Practice Direction.

27. I observe that the Prosecution concedes that Serushago cooperated with the ICTR Prosecution through his guilty plea and his subsequent testimony as a prosecution witness in at least two cases.⁴⁰ However, the Prosecution submits that (i) based on his plea agreement, Serushago should have provided additional cooperation in another three cases, and that (ii) in any case, Serushago's cooperation has already been considered at the sentencing stage.

28. [REDACTED]⁴¹ However, it is not clear from the submissions before me whether Serushago violated his obligations under the Plea Agreement by not testifying in the three cases mentioned in the Prosecution Memorandum. The Prosecution Memorandum only states that Serushago's testimony in these cases was "expected" and "anticipated",⁴² without specifying whether the ICTR Prosecution requested Serushago to testify in those three cases. Rejecting specific requests by the ICTR Prosecution for testimony could possibly amount to a violation of the Plea Agreement. Nevertheless, even assuming that such violation occurred, there is no dispute that Serushago has provided *some* cooperation to the ICTR Prosecution both before and after his arrest by, *inter alia*, entering a guilty plea, testifying in at least two cases, and providing other information to the Prosecution in its investigations [REDACTED].⁴³

³⁶ 4 October Memorandum, Prosecution Memorandum.

³⁷ 4 October Memorandum, Prosecution Memorandum.

³⁸ 4 October Memorandum, Prosecution Memorandum.

³⁹ 4 October Memorandum, para. 7.

⁴⁰ 4 October Memorandum, Prosecution Memorandum.

⁴¹ [REDACTED]

⁴² 4 October Memorandum, Prosecution Memorandum.

⁴³ [REDACTED].

29. As to the Prosecution's argument that Serushago's cooperation may not be counted in his favour again at this stage, I note that a convict's guilty plea and other substantial cooperation with the Prosecution may be taken into account in considering an early release application even though these factors may also have been taken into account at the sentencing stage.⁴⁴

30. Considering the evidence of Serushago's substantial cooperation with the Prosecution, and notwithstanding the Prosecution's alleged expectations of Serushago's further cooperation, I am of the view that this factor weighs in favour of Serushago's release.

F. Other Factors: Humanitarian Concerns

31. Paragraph 9 of the Practice Direction provides that the President may consider "any other information" that the President believes to be "relevant" in addition to the criteria specified in Rule 151 of the Rules. Previous decisions on early release have determined that the condition of a 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 convict to remain in prison any longer.⁴⁵

32. [REDACTED]⁴⁶ [REDACTED]⁴⁷

33. The record before me contains sufficient evidence that Serushago suffers from certain serious illnesses. Accordingly, I am of the view that Serushago's health weighs in favour of his early release.

G. Conclusion

34. Having carefully considered the factors identified in Rule 151 of the Rules, as well as the particular circumstances of Serushago's case, I am of the view that Serushago should be granted early release, effective immediately. Serushago has already completed more than 14 years of his 15-year sentence, and there is evidence of rehabilitation, cooperation with the Prosecution, [REDACTED], all of which I find counsel in favour of his early release.

⁴⁴ Compare, e.g., *Prosecutor v. Dragan Obrenović*, IT-02-60/2-ES, Public Redacted Decision of President on Early Release of Dragan Obrenović, 29 February 2012, paras 26-28 (granting early release to Obrenović, who had pleaded guilty and collaborated with the prosecution, because of, *inter alia*, his exceptional cooperation with the prosecution), with *Prosecutor v. Dragan Obrenović*, IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para. 153 (taking into account as factors mitigating Obrenović's sentence "the unqualified acceptance of his responsibility and his guilt, his sincere remorse, his substantial co-operation with the Prosecution, and his character").

⁴⁵ See, e.g., *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010, para. 10, n. 25.

⁴⁶ [REDACTED]

⁴⁷ [REDACTED]

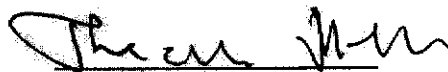
IV. DISPOSITION

35. For the foregoing reasons and pursuant to Article 26 of the Statute, Rules 150 and 151 of the Rules, paragraph 9 of the Practice Direction, and Article 8 of the Enforcement Agreement, I hereby **GRANT** the Application.

36. The Registrar is hereby **DIRECTED** to inform the Malian authorities of this decision as soon as practicable, as prescribed in paragraph 13 of the Practice Direction.

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

Done this 12th day of December 2012,
At The Hague,
The Netherlands.


Judge Theodor Meron
President

[Seal of the Mechanism]





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