

## Commentary

The concept of early release itself, does not appear in the Statute nor the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (hereafter ICTR). It is considered a commutation of sentence which Article 27 of the Statute of the International Criminal Tribunal for Rwanda (hereafter ICTR Statute) and Part 9 of the Rules of Procedure and Evidence (hereafter ICTR RPE) provide for.<sup>1</sup> No general rules are elaborated as to the eligibility for early release, as it is left dependant on the applicable law of the State in which the convicted person is imprisoned.<sup>2</sup> One can regret this decision as divergence in the national practices on early release<sup>3</sup> possibly compromises the equal treatment of persons convicted by ICTR. However, a similar system is applied in the International Criminal Tribunal for the Former Yugoslavia. A decision on an early release request falls within the exclusive discretion of the President, in consultation with the Judges<sup>4</sup> and after notification to the Government of Rwanda<sup>5</sup>. It 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, as well as any substantial cooperation of the prisoner with the Prosecution”,<sup>6</sup> in light of “the interests of justice and the general principles of law”<sup>7</sup>. The Practice Direction clarifies that the decision of the President is final, and thus no appellate review is provided for.<sup>8</sup> Based on the ICTR Jurisdiction, one could however argue that there is a possibility for reconsideration, when (a) a new fact has been discovered that was not known at the time of the original Decision, (b) there has been a material change in circumstances since the original Decision or (c) there is reason to believe that the original Decision was erroneous or constituted an abuse of power, resulting in an injustice.

Until now, 4 persons convicted by ICTR have requested early release, all with no success.<sup>9</sup> The case at hand here is the request for early release submitted by Vincent Rutaganira, a former *Conseiller* of the Commune of Mubuga. Following an agreement reached with the Office of the Prosecutor, he pleaded guilty of complicity by omission, in return for which the Prosecution pledged to require a reduced sentence of 6 to 8 years imprisonment. On 14 March 2005, Rutaganira was sentenced to 6 years imprisonment, taking into account – as mitigating factors – his voluntary surrender, his guilty plea, the assistance given to some victims, his expression of remorse, the absence of active participation in the killing and lastly, restraint.<sup>10</sup> Considering the credit that he received for the time he served in custody as of his arrest on 4 March 2002, the sentence would be completed on 4 March 2008.

After completing approximately 2/3 of his sentence, Rutaganira filed a request for early release, which was however denied, as the supporting submissions had already been taken

<sup>1</sup> ICTR, Decision on the motion for reconsideration of the denial of early release, *Prosecutor v. Rutaganira*, Case no. ICTR-1995-IC-R73, Office of the President, 13 February 2008, par. 4;

<sup>2</sup> Article 27, Statute of the International Criminal Tribunal for Rwanda (ICTR Statute); Rules of Procedure and Evidence, U.N. Doc, 21 May 2005, Rule 124;

<sup>3</sup> See also: D. ABELS, Commentary underneath ICTY, Order of the President on the Application for the Early Release of Minal Simić, Case no. IT-95-9/2, President of the International Tribunal, 27 October 2003, in KLIP/SLUTER, ALC-XV-797; I. WEINBERG DE ROCA, “Sentencing and incarceration in the ad hoc Tribunals”, *Stanford Journal of International Law*, 2008, p. 1-44;

<sup>4</sup> Article 27, ICTR Statute;

<sup>5</sup> Rules of Procedure and Evidence, U.N. Doc, 21 May 2005, Rule 125;

<sup>6</sup> Rules of Procedure and Evidence, U.N. Doc, 21 May 2005, Rule 126;

<sup>7</sup> Article 27, ICTR Statute;

<sup>8</sup> ICTR, Practice Direction of the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Criminal Tribunal for Rwanda, 10 May 2000, par. 10;

<sup>9</sup> ICTR, Decision relative à la demande de libération anticipée de Samuel Imanishimwe, *Procureur c. Samuel Imanishimwe*, Case no. ICTR-99-46-S, Office du Président, 30 August 2007; ICTR, Decision on Request for Early Release, *Prosecutor v. Rutaganira*, Case no. ICTR-1995-IC-T, Office of the President, 2 June 2006; ICTR, Decision of the President on the application for early release of Georges Ruggiu, *Prosecutor v. Ruggiu*, Case no. ICTR-97-32-S, Office of the President, 12 May 2005; Decision of the President on the application for early release of Omar Serushago, *Prosecutor v. Omar Serushago*, Case no. ICTR-98-39-S, Office of the President, 12 May 2005;

<sup>10</sup> ICTR, Judgment and sentence, *Prosecutor v. Rutaganira*, Case no. ICTR-95-IC-T, Trial Chamber III, 14 March 2005, par. 144;

into consideration by the Trial Chamber when he was sentenced.<sup>11</sup> The Office of the President correctly decided that the appellant could not benefit from these submissions twice. The subsequent appeal to that decision was dismissed because the Appeal Chamber considered it lacked jurisdiction, as it could not identify any legal basis for the consideration of such an appeal.<sup>12</sup> Indeed Article 27 of the Statute – as explained above – places the ultimate decision on requests for early release at the discretion of the President, without providing the possibility of an appellate review of such a decision. Moreover, the Practice Direction clearly states that “the decision of the President shall be final and is thus not subject to appeal”.<sup>13</sup> Finally, Rutaganira turned back to the President to reconsider the initial decision rejecting the request for early release. During the deliberations the President considered that – even though neither the ICTR Statute or the ICTR RPE provided for a possibility for reconsideration – the ICTR Jurisprudence has established that a Chamber has an inherent power to reconsider its own decisions.<sup>14</sup> However, in the case at hand, as no new fact had been discovered, there had not been a material change in circumstances, and Rutaganira failed to convince the President that the official decision resulted in an injustice, the motion was denied.<sup>15</sup> Rutaganira was released – only 18 days after the denial of the reconsideration – on 2 March 2008, after completing his sentence.

In June 2006 – at the time the Office of the President was first seized by the request for early release in the Rutaganira case – the Trial Chamber was seized in the Serugendo case by an extremely urgent motion for partial enforcement of sentence at the premises of a specialised treatment facility in France. This motion was filed pursuant to Article 26 ICTR Statute and Rule 104 ICTR RPE, which stipulate that the Tribunal is responsible for the enforcement of sentences and the supervision of imprisonment.

Serugendo was a member of RTLM and Radio Rwanda. Following an agreement reached with the Office of the Prosecutor, he produced a 200 page confession, in return for which the charges were reduced. On 2 June 2006 he was sentenced to 6 years imprisonment, taking into account – amongst other mitigating factors – his ill health.<sup>16</sup> Only 10 days after the delivery of the judgment, a motion to transfer him to a specialised treatment facility in France was filed. It was however denied because the allegation that the ICTR medical personnel were in neglect of their professional duty and obligations to provide Serugendo with a modified regime of detention, was considered to be unsubstantial. No information was provided to indicate that a medical evacuation to France was likely to benefit him, given his terminal illness. Serugendo died two months later, on 22 August 2006.<sup>17</sup>

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<sup>11</sup> ICTR, Decision on Request for Early Release, *Prosecutor v. Rutaganira*, Case no. ICTR-1995-IC-T, Office of the President, 2 June 2006;

<sup>12</sup> ICTR, Decision on Appeal of a Decision of the President on Early Release, *Prosecutor v. Rutaganira*, Case no. ICTR-95-IC-AR, Appeals Chamber, 24 August 2006;

<sup>13</sup> ICTR, Practice Direction of the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Criminal Tribunal for Rwanda, 10 May 2000, par. 10;

<sup>14</sup> ICTR, Decision on the Motion for Reconsideration of the Denial of Early Release, *Prosecutor v. Rutaganira*, Case no. ICTR-95-IC-R73 Office of the President, 13 February 2008, par. 4;

<sup>15</sup> ICTR, Decision on the Motion for Reconsideration of the Denial of Early Release, *Prosecutor v. Rutaganira*, Case no. ICTR-95-IC-R73, Office of the President, 13 February 2008;

<sup>16</sup> ICTR, Judgment and Sentence, *Prosecutor v. Serugendo*, Case no. ICTR-2005-84-I, Trial Chamber I, 12 June 2006, par. 89-92;

<sup>17</sup> ICTR Press Release, ICTR/INFO-9-2-488 of 22 August 2006;

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