

UNITED  
NATIONS



Mechanism for International Criminal Tribunals

Case No.: MICT-13-37-ES.1

Date: 5 December 2016

Original: English

**THE PRESIDENT OF THE MECHANISM**

**Before:** Judge Theodor Meron, President  
**Registrar:** Mr. John Hocking  
**Decision of:** 5 December 2016

**PROSECUTOR**

v.

**FERDINAND NAHIMANA**

***PUBLIC***

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**PUBLIC REDACTED VERSION OF THE 22 SEPTEMBER 2016  
DECISION OF THE PRESIDENT ON THE  
EARLY RELEASE OF FERDINAND NAHIMANA**

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**The Office of the Prosecutor**

Mr. Serge Brammertz

**Counsel for Mr. Ferdinand Nahimana**

Mr. Jean-Marie Biju-Duval  
Ms. Diana Ellis  
Ms. Joanna Evans

**The Republic of Mali**

Received by the Registry  
Mechanism for International Criminal Tribunals  
05/12/2016 11:22

A handwritten signature in black ink, appearing to read "John Hocking", written over a rectangular stamp box.

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals ("Mechanism"), am seised of an application for the early release of Mr. Ferdinand Nahimana ("Nahimana"), dated 15 February 2016 ("Application") and filed on 16 February 2016.<sup>1</sup> I consider the 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").<sup>2</sup>

## I. BACKGROUND

2. Nahimana was arrested on 27 March 1996 in the Republic of Cameroon and was transferred to the United Nations Detention Facility in Arusha, Tanzania, on 23 January 1997.<sup>3</sup> At his initial appearance on 19 February 1997, Nahimana entered a plea of not guilty to all four counts of the original indictment against him.<sup>4</sup> On 15 November 1999 the Prosecution filed the final amended indictment, which added three additional counts and amended one count.<sup>5</sup> On 25 November 1999, Nahimana pleaded not guilty to the three new counts, in addition to the amended count, as contained in the final amended indictment.<sup>6</sup>

3. On 3 December 2003, Trial Chamber I of the International Criminal Tribunal for Rwanda ("Trial Chamber" and "ICTR", respectively) convicted Nahimana of genocide, conspiracy and direct and public incitement to commit genocide, and persecution and extermination as crimes against humanity.<sup>7</sup> The Trial Chamber sentenced Nahimana to a single sentence of life imprisonment.<sup>8</sup>

4. On 28 November 2007, the Appeals Chamber of the ICTR ("Appeals Chamber") reversed Nahimana's conviction for the crimes of genocide, conspiracy and direct and public incitement to commit genocide, and extermination and persecution as crimes against humanity pursuant to Article 6(1) of the Statute of the ICTR ("ICTR Statute"), upheld Nahimana's conviction for the crimes of direct and public incitement to commit genocide and persecution as a crime against humanity pursuant to Article 6(3) of the ICTR Statute, and reduced Nahimana's sentence to 30 years of

<sup>1</sup> Request for Early Release, 16 February 2016 (with public and confidential annexes). The English translation of the Application was filed on 7 March 2016. All references herein are to the English translation of the Application.

<sup>2</sup> MICT/3, 5 July 2012.

<sup>3</sup> *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement"), para. 13.

<sup>4</sup> Trial Judgement, para. 20.

<sup>5</sup> Trial Judgement, para. 23. *See also* Trial Judgement, para. 22.

<sup>6</sup> Trial Judgement, para. 23.

<sup>7</sup> Trial Judgement, para. 1092. *See also* Trial Judgement, paras. 974, 1033, 1055, 1063, 1081.

imprisonment.<sup>9</sup> Nahimana was transferred to the Republic of Mali ("Mali") on 3 December 2008 to serve the remainder of his sentence.<sup>10</sup>

## II. THE APPLICATION

5. On 29 August 2016, I received a memorandum from the Registry of the Mechanism ("Registry") conveying information collected in accordance with paragraphs 3, 4, and 5 of the Practice Direction,<sup>11</sup> including: (i) a letter from the Ministry of Justice and Human Rights of Mali, dated 13 July 2016 ("Minister of Justice" and "Ministry of Justice Letter", respectively); (ii) a letter from Lieutenant Ahmadou Maiga, former warden of Koulikoro Prison, dated 11 April 2016<sup>12</sup> ("Letter of Former Warden") transmitting: (a) a report on the status of incarceration, dated 11 April 2016 ("Status of Incarceration Report"); (b) a psycho-social report, dated 11 April 2016 ("Psycho-Social Report"); and (c) a psychiatric examination report from Polyclinique Pasteur, dated 28 December 2015 ("Psychiatric Report"); (iii) a letter from Lieutenant Abdoulaye Fofana, warden of Koulikoro Prison, dated 3 August 2016 ("Warden Letter"); and (iv) a memorandum from the Office of the Prosecutor of the Mechanism ("Prosecution"), dated 25 August 2016 ("Prosecution Memorandum").

6. The Registry informed me on 8 September 2016 that the material had been forwarded to Nahimana pursuant to paragraph 5 of the Practice Direction on that same day,<sup>13</sup> and on 21 September 2016, the Registry confirmed that it received a notification of proof of service signed by Nahimana on 8 September 2016. In accordance with paragraph 6 of the Practice Direction, Nahimana was entitled to 10 days to examine the information and to submit a response. On 22 September 2016, Nahimana filed a response.<sup>14</sup>

<sup>8</sup> Trial Judgement, para. 1105.

<sup>9</sup> *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("Appeal Judgement"), paras. 1051-1052, p. 345.

<sup>10</sup> Application, Annex A, p. 11, Annex B, p. 15.

<sup>11</sup> Internal Memorandum from Mr. Saidou Guindo, Special Advisor on Enforcement of Sentences, For: Mr. Samuel Akorimo, Head of Office, Registry, Arusha Branch, to Judge Theodor Meron, President, dated 29 August 2016 ("29 August 2016 Memorandum"). All references to the attachments are to the English translations thereof.

<sup>12</sup> I note that the Registry informed that Lieutenant Maiga is no longer the warden of Koulikoro Prison. See 29 August 2016 Memorandum, paras. 2 (b-d).

<sup>13</sup> Internal Memorandum from Mr. Samuel Akorimo, Head of Registry, Arusha Branch, to Judge Theodor Meron, President, dated 8 September 2016, para. 3.

<sup>14</sup> *Observations sur les documents transmis par le Greffe dans le cadre de l'instruction de la demande de liberation anticipée déposée par Monsieur Ferdinand Nahimana*, 22 September 2016 ("Observations"). I note that pursuant to paragraph 6 of the Practice Direction, Nahimana had 10 days from 8 September 2016 to file any submissions in relation to the collated documents provided to him, which deadline expired on 19 September 2016. The Observations were filed on 22 September 2016. Nevertheless, I have decided to proceed accordingly to consider the Observations in the interests of justice.

### III. DISCUSSION

#### A. Applicable Law

7. Under Article 26 of the Statute, if, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. Article 26 of the Statute further provides that there shall only be pardon or commutation of sentence if the President of the Mechanism ("President") so decides on the basis of the interests of justice and the general principles of law.

8. 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 for pardon, commutation of sentence, or early release under the enforcing State's laws. Rule 150 of the Rules provides that the President 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.<sup>15</sup> Pursuant to Rule 151 of the Rules, 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.

9. Paragraph 2 of the Practice Direction provides that upon a convicted person becoming eligible for pardon, commutation of sentence, or early release under the law of the enforcing State, the enforcing State shall, in accordance with Article 26 of the Statute and with its agreement with the United Nations on the enforcement of sentences and, where practicable, at least 45 days prior to the date of eligibility, notify the Mechanism accordingly.

10. Article 3(2) of the 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 ("Enforcement Agreement"), as amended, provides that the conditions of imprisonment shall be governed by the law of Mali, subject to the supervision of the Mechanism. Article 8 of the Enforcement Agreement provides, *inter alia*, that, following notification of eligibility for early release under Malian law, the President shall determine whether early release is appropriate on the basis of the interests of justice and the general principles of law, and the

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<sup>15</sup> Other than myself, none of the Judges of the sentencing Chamber are Judges of the Mechanism. On that basis, no consultations with other Judges of the Mechanism pursuant to Rule 150 of the Rules are required in determining this Application.

Registrar shall transmit the decision of the President to Mali, which shall execute the terms of the decision promptly.

### B. Eligibility under Malian Law

11. According to the provisions of Article 35 of Law No. 01-003 of 27 February 2001 on the prison system and supervised education, “detainees who have provided sufficient proof of their improvement could be eligible for parole or semi-custodial treatment”.<sup>16</sup> The Malian authorities state that Nahimana “meets the conditions set out in Malian legislation for parole or semi-custodial treatment”.<sup>17</sup>

12. I note, however, that even if Nahimana is eligible for early release under the domestic law of Mali, 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.

### C. Gravity of Crimes

13. Rule 151 of the Rules provides that, in making a determination on early release, the President shall take into account the gravity of the crime or crimes for which the prisoner was convicted.

14. The crimes for which Nahimana has been convicted are of a high gravity. In this regard, the Trial Chamber considered that “[t]he power of the media to create and destroy fundamental human values comes with great responsibility” and that “[t]hose who control such media are accountable for its consequences”.<sup>18</sup> The Trial Chamber found that both before and after 6 April 1994, the broadcasts of *Radio Télévision Libre des Mille Collines* (“RTLM”) promoted contempt for the Tutsi population and explicitly called for the extermination of Tutsis, which led to the killing of individuals belonging to this ethnic group.<sup>19</sup> The Trial Chamber recognised that the shooting down of President Juvenal Habyarimana’s plane on 6 April 1994 was the “trigger” for the killings that followed, that the RTLM, *inter alia*, was “the bullet[...] in the gun”, and that the killings resulted in part from its effectively disseminated messages,<sup>20</sup> which provided “conclusive evidence” of genocidal intent.<sup>21</sup>

<sup>16</sup> Ministry of Justice Letter.

<sup>17</sup> Ministry of Justice Letter.

<sup>18</sup> Trial Judgement, para. 945.

<sup>19</sup> Trial Judgement, para. 949.

<sup>20</sup> Trial Judgement, para. 953.

<sup>21</sup> Trial Judgement, para. 965.

15. As the “mastermind” of RTLM, the Trial Chamber described how Nahimana expressed his satisfaction that RTLM had been “instrumental in awakening the [...] Hutu population [...] with a view to halting the enemy. [...] [and] associated the enemy with the Tutsi ethnic group” in a broadcast on 25 April 1994, at a time when mass killings “in which RTLM broadcasts were playing a significant part” had been ongoing for three weeks.<sup>22</sup> The Trial Chamber determined that an article written by Nahimana entitled “Current Problems and Solutions”, published in February 1993 and recirculated in March 1994, “referred repeatedly to what [Nahimana] termed as the ‘Tutsi league’, a veiled reference to the Tutsi population as a whole and associated this group with the enemy of democracy in Rwanda”.<sup>23</sup> The Trial Chamber determined that Nahimana “set in motion the communications weaponry that fought the žwar of media, words, newspapers and radio stations’ [which Nahimana] described in in his Radio Rwanda broadcast of 25 April [1994] as a complement to bullets”.<sup>24</sup>

16. The Trial Chamber considered that Nahimana was “fully aware of the power of words” and used “the radio – the medium of communication with the widest reach – to disseminate hatred and violence”.<sup>25</sup> The Trial Chamber found that Nahimana was “motivated by his sense of patriotism and the need he perceived for equity for the Hutu population”, and in so doing “betrayed the trust placed in him as an intellectual and a leader”.<sup>26</sup> The Trial Chamber determined that “[w]ithout a firearm, machete or any physical weapon, [Nahimana] caused the deaths of thousands of innocent civilians”.<sup>27</sup> The Trial Chamber considered that Nahimana thereby acted “in a manner contrary to the duty imposed upon [him] by [his] position[...]”.<sup>28</sup> Accordingly, the Trial Chamber found that Nahimana had superior responsibility for the broadcasts of RTLM because he knew what was occurring at RTLM and failed to use his *de facto* power and authority to prevent the “genocidal harm” caused by the broadcasts.<sup>29</sup>

17. In these circumstances, I am of the view that the high gravity of Nahimana’s offences weighs against his early release.

#### **D. Eligibility and Treatment of Similarly-Situated Prisoners**

18. Rule 151 of the Rules requires the President to consider, as a separate factor, the need for equal treatment of similarly-situated prisoners when deciding early release applications.

<sup>22</sup> Trial Judgement, para. 966.

<sup>23</sup> Trial Judgement, para. 966.

<sup>24</sup> Trial Judgement, para. 966.

<sup>25</sup> Trial Judgement, para. 1099.

<sup>26</sup> Trial Judgement, para. 1099.

<sup>27</sup> Trial Judgement, para. 1099.

19. In this respect, I recall that ICTR convicts, like Nahimana, are considered “similarly-situated” to all other prisoners under the Mechanism’s supervision and that 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.<sup>30</sup> However, I note that 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.<sup>31</sup>

20. As of the date of this decision, and based on my own calculation, Nahimana served two-thirds of his sentence on 27 March 2016.

### E. Demonstration of Rehabilitation

21. Rule 151 of the Rules provides that the President shall take into account a “prisoner’s demonstration of rehabilitation” in determining whether early release is appropriate. In addressing the 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 psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration[.]

22. According to the Psycho-Social Report, Nahimana is consistently ready to assist his fellow inmates to complete tasks required by the prison authorities, and he lives “in perfect harmony” with both the prison inmates and the prison administration.<sup>32</sup> [REDACTED].<sup>33</sup>

23. [REDACTED].<sup>34</sup> [REDACTED].<sup>35</sup> [REDACTED].<sup>36</sup> [REDACTED].<sup>37</sup> [REDACTED].<sup>38</sup>

24. The Ministry of Justice Letter states that, as the representative of the Rwandan detainees from 2009 to 2013 at Koulikoro Prison, Nahimana was “polite, disciplined and [...] respected

<sup>28</sup> Trial Judgement, para. 1102.

<sup>29</sup> Trial Judgement, para. 972. See also Appeal Judgement, para. 996.

<sup>30</sup> See *Prosecutor v. Ljubomir Borovčanin*, Case No. MICT-15-85-ES.6, Public Redacted Version of the 14 July 2016 Decision of the President on the Early Release of Ljubomir Borovčanin, 2 August 2016 (“*Borovčanin Decision*”), para. 18; See also *Prosecutor v. Paul Bisengimana*, Case No. MICT-12-07, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012 (public redacted version) (“*Bisengimana Decision*”), paras. 17, 20.

<sup>31</sup> See *Borovčanin Decision*, para. 18; *Bisengimana Decision*, paras. 21, 35.

<sup>32</sup> Psycho-Social Report.

<sup>33</sup> Psycho-Social Report.

<sup>34</sup> Psychiatric Report.

<sup>35</sup> Psychiatric Report.

<sup>36</sup> Psychiatric Report.

<sup>37</sup> Psychiatric Report.

prison rules”, which allowed him to resolve many issues for both detainees and prison officials alike.<sup>39</sup> In addition, according to the former warden, Nahimana adapted easily to the prison and contributed to the smooth running of the unit,<sup>40</sup> complying with the prison rules, and “significantly helped to restrain and keep his compatriots in check [...]” thereby reducing incidents with the prison officials, which is “quite an achievement among a group of intellectuals in which each member is intent on promoting his own ideas”.<sup>41</sup> The former and current warden both agree that Nahimana would reintegrate into society with ease as he is “humble and courteous” and describe his behaviour as “exemplary”.<sup>42</sup> The current warden adds that Nahimana is always willing to listen to his co-detainees and “has contributed to ensuring a good social atmosphere” at the prison.<sup>43</sup>

25. Nahimana submits that he has never “questioned or minimised the genocide” or the “criminal nature of numerous broadcasts of the RTLM” during that time.<sup>44</sup> Rather, he has disputed his own responsibility for these crimes.<sup>45</sup> In addition, he avers that his conduct in detention and the quality of the ties he has maintained with his family attest to his capacity for reintegration into society upon release, and that his family have confirmed their willingness to assume responsibility for him at that time.<sup>46</sup> He further expresses his “profound regret” for the crimes committed in Rwanda and asserts his wish “to work for peace and reconciliation in Rwanda”.<sup>47</sup>

26. The Psycho-Social Report, the Psychiatric Report, the Ministry of Justice Letter, as well as the former and current wardens’ description of Nahimana’s behaviour while in prison, suggest that Nahimana is capable of reintegrating into society if he is released. In this context, I am of the view that Nahimana has demonstrated some signs of rehabilitation, and I am therefore inclined to weigh this factor in favour of his early release.

#### **F. Substantial Cooperation with the Prosecution**

27. Rule 151 of the Rules states that the President shall take into account any “substantial cooperation” of the prisoner with the Prosecution. Paragraph 4(c) of the Practice Direction states that the Registrar 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”.

<sup>38</sup> Psychiatric Report.

<sup>39</sup> Ministry of Justice Letter. *See also* Letter of Former Warden, p. 1.

<sup>40</sup> Letter of Former Warden, p. 1.

<sup>41</sup> Letter of Former Warden, p. 2.

<sup>42</sup> Letter of Former Warden, p. 2; Status of Incarceration Report; Warden Letter.

<sup>43</sup> Warden Letter.

<sup>44</sup> Application, para. 4.

<sup>45</sup> Application, para. 4.

<sup>46</sup> Application, paras. 10, 13, Annex D.

<sup>47</sup> Application, para. 17.

28. According to the Prosecution, Nahimana has at no time cooperated with it or the Office of the Prosecutor of the ICTR ("ICTR Prosecution") in the course of his trial, appeal, or at any point while serving his sentence.<sup>48</sup>

29. Nahimana submits that the Prosecution and the ICTR Prosecution have never solicited his cooperation, and that his behaviour during the trial and appeal stages was "beyond reproach", as he did not disturb or delay proceedings and testified before the Trial Chamber.<sup>49</sup>

30. I note that an accused person is under no obligation to plead guilty or, in the absence of a plea agreement, to cooperate with the Prosecution.<sup>50</sup> I therefore consider that Nahimana's lack of cooperation with the Prosecution or the ICTR Prosecution is a neutral factor in determining whether or not to grant him early release.

### **G. 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" to supplement 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 person to remain in prison any longer.<sup>51</sup>

32. Nahimana contends that his age and ill health are grounds for early release.<sup>52</sup> In particular, Nahimana asserts that he suffers from "a number of serious conditions" [REDACTED].<sup>53</sup>

33. The Ministry of Justice states that Nahimana has been "of frail health" [REDACTED].<sup>54</sup> The Psycho-Social Report also describes Nahimana as "often ill".<sup>55</sup>

34. While there are some indications that Nahimana suffers from certain health ailments, I am not convinced, based on the information before me, that his health condition is so serious as to constitute an exceptional circumstance that warrants his early release. Nor do I believe that, in

<sup>48</sup> Prosecution Memorandum, para. 2.

<sup>49</sup> Application, paras. 15-16. *See also* Observations, para. 4.

<sup>50</sup> *Borovčanin* Decision, para. 29; *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-ES, Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana, 24 April 2014 ("*Ntakirutimana* Decision"), para. 20.

<sup>51</sup> *See, e.g., Ntakirutimana* Decision, para. 21; *Prosecutor v. Obed Ruzindana*, Case No. MICT-12-10-ES, Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014 (public redacted version), para. 22.

<sup>52</sup> Application, paras. 19-20.

<sup>53</sup> Application, para. 19, Annex E.

<sup>54</sup> Ministry of Justice Letter. *See also* Psychiatric Report.

<sup>55</sup> Psycho-Social Report. *See also* Letter of Former Warden, p. 1.

context, his current age plays such a role. I therefore consider these to be neutral factors in determining whether or not to grant Nahimana early release.

#### H. Conclusion

35. In light of the above, and having carefully considered the factors identified in Rule 151 of the Rules, as well as all the relevant information on the record, I am inclined to grant Nahimana's Application, effective as soon as practically possible following the issuance of the decision on the Application. **While the crimes of which Nahimana was convicted are very grave,** the fact that Nahimana already completed two-thirds of his sentence as of 27 March 2016, and the fact that he has demonstrated **some signs of rehabilitation weigh in favour of his early release.**


#### IV. DISPOSITION

36. 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, as soon as practically possible following the issuance of this Decision.

37. The Registrar is hereby **DIRECTED** to inform the authorities of Mali 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 5th day of December 2016,  
At The Hague,  
The Netherlands.

  
Judge Theodor Meron  
President

[Seal of the Mechanism]



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