

**UNITED
NATIONS**



International Residual Mechanism for
Criminal Tribunals

Case No. MICT-12-23-PT

Date: 24 October 2024

Original: English

BEFORE THE PRESIDENT OF THE MECHANISM

Before: Judge Graciela Gatti Santana, President

Registrar: Abubacarr Tambadou

PROSECUTOR

v.

FULGENCE KAYISHEMA

PUBLIC

**PROSECUTION RESPONSE TO PUBLIC REDACTED
VERSION OF DEFENCE NOTICE OF INTENTION TO SEEK
REVOCATION OF REFERRAL DECISION AND REQUEST
FOR STATUS CONFERENCE**

The Office of the Prosecutor

Laurel Baig

Counsel for Fulgence Kayishema

Philippe Laroche
Kate Gibson

1. Since his arrest on 24 May 2023, Kayishema has been litigating in South African courts to oppose his transfer to the Mechanism’s custody pursuant to the Arrest Warrant. His latest attempt to instrumentalize the Mechanism’s procedures to further delay his transfer should be rejected. If Kayishema wishes to have more access to his international *pro bono* counsel,¹ then the simple solution is for him to surrender to the Mechanism’s custody.
2. Kayishema has been playing the Mechanism and the South African courts against each other. At the same time that he is claiming before South African courts that the Mechanism cannot ensure a fair trial, he is simultaneously asking the Mechanism to protect his rights in South Africa. In the South African courts, he is seeking to delay his transfer until the Mechanism has decided on a future request for revocation, which he has indicated in connection with the South African proceedings that he intends to file around the end of February 2025. Yet at the Mechanism he is asking for an opportunity to make unprecedented oral submissions as if he were already on trial.
3. In doing so, Kayishema is seeking to achieve a legal stalemate, where South Africa suspends his transfer pending the Mechanism’s determination of his future revocation request, which should not be entertained by the Mechanism until he has submitted to its jurisdiction. The Mechanism should put a stop to these delay tactics and require—as has been consistently done in the past—that Kayishema submit to the jurisdiction of the Mechanism before he can use the Mechanism’s Statute and Rules to ask for relief. Once he has been transferred, he would be able to move for the relief that he seeks, including revocation.

I. KAYISHEMA’S REQUEST FOR AN ORAL HEARING IS UNFOUNDED

4. Kayishema’s request for a new type of status conference is a creative attempt to obtain an unprecedented oral hearing at the Mechanism prior to his surrender. It should be rejected.
5. Rule 69 is not applicable because Kayishema is not in the custody of the Mechanism.² Kayishema himself acknowledges³ that Rule 69 Status Conferences do not begin until after an

¹ Public Redacted Version of Defence Notice of Intention to Seek Revocation of Referral Decision and Request for Status Conference, 11 October 2024 (dated 10 October 2024) (“Public Motion”).

² See *In the Matter of Nzuwonemeye et al.*, Case No.MICT-22-124, Decision on Joint Request for Assignment of Counsel, Extension of Time to File an Appeal, and Scheduling a Status Conference, 15 March 2022, p.4.

³ Public Motion, paras.15, 18.

indictée has had an initial appearance before the Mechanism.⁴ The twin purposes of a Mechanism Status Conference—set out in Rule 69(A)—do not apply to an accused person who is not yet in the Mechanism’s custody and whose case has been referred to a national court.⁵ In any event, the Public Motion does not identify any specific issues related to Kayishema’s mental or physical condition or preparation of his trial.

6. Contrary to his suggestion, Kayishema’s case has not reached the “pre-trial phase.”⁶ Kayishema cites no example of a status conference ever being held at the Mechanism or its predecessors prior to an initial appearance. Instead, he seeks to rely on inapposite decisions issued during the global COVID-19 pandemic, when judges exceptionally used written procedures in the “spirit of Rule 69” to replace required status conferences.⁷ Logically, these cases do not support his proposal to expand oral submissions; they stand for the proposition that written submissions can replace oral ones. Nor can he find any justification for his novel proposal in decisions affirming a judge’s general power to hear oral motions during trial or to convene hearings in the interest of justice.⁸ Each of the examples he cites concern the rights of an accused with full standing who has already appeared before the court.

7. As an indictée who has not yet surrendered to the Mechanism’s jurisdiction, Kayishema is not yet a party to any Mechanism proceedings, so his standing is limited. The ICTY was firm in rejecting similar attempts by Radovan Karadžić to file motions prior to his transfer to its jurisdiction, holding:

[P]ursuant to the Statute and the Rules, the accused is entitled to appear before the Tribunal accompanied by his counsel; that in such a case the nature of the proceedings changes and becomes *inter partes* with all the guarantees inherent in a fair trial, including the right, pursuant to Rules 72 and 73 of the Rules, to file preliminary motions.⁹

⁴ See *Prosecutor v. Ngirabware*, MICT-12-29-R, Decision on Request for Status Conference, 3 October 2017, p.1.

⁵ *Contra* Public Motion, para.6.

⁶ Public Motion, para.4.

⁷ Public Motion, para.4 and references cited at fns.4, 7.

⁸ Public Motion, para.4 and references cited at fns.5, 6, 8.

⁹ See *Prosecutor v. Karadžić & Mladić*, Case Nos.IT-95-5-R61 & IT-95-18-R61, Decision Rejecting the Application Presented by Messrs Medvene and Hanley Seeking Leave to File Briefs Challenging the Fairness of the Statute and the Rules of Procedure and Evidence, 24 July 1996 (“*Karadžić* 24 July 1996 Decision”), p.1; *Prosecutor v. Karadžić & Mladić*, Case Nos.IT-95-5-R61 & IT-95-18-R61, Decision Rejecting the Request Submitted by Mr. Medvene and Mr. Hanley III Defence Counsels for Radovan Karadžić, 5 July 1996 (“*Karadžić & Mladić* 5 July 1996 Decision”), Registry Pagination (“RP”) D1368/2bis. Also *Prosecutor v. Karadžić & Mladić*, Case Nos.IT-95-5-R61 & IT-95-18-R61, Decision Partially Rejecting the Request Submitted by Mr. Igor Pantelić, Counsel for Radovan Karadžić, 27 June 1996 (“*Karadžić & Mladić* 27 June 1996 Decision”), RP.D1349/2bis.

These same limitations should apply to Kayishema.

8. Further, the Mechanism Detention Rules do not apply to Kayishema because he is not presently “detained on the authority of the Mechanism”.¹⁰ The Mechanism has not ordered South Africa to detain Kayishema. On the contrary, it has ordered South Africa to promptly and with all due diligence transfer him to the Mechanism’s custody in Arusha. Kayishema cannot seek the protection of the Mechanism’s Detention Rules while simultaneously refusing to submit to the Mechanism’s authority.

II. KAYISHEMA FAILS TO SHOW ANY RIGHTS VIOLATIONS

9. Kayishema should not be granted an exceptional oral hearing on the basis of the arguments set out in his Public Motion. Kayishema fails to show that there is any problem with his conditions of detention that warrant Mechanism attention or intervention. Any detention-related concerns will be resolved when South Africa complies with its obligation to surrender Kayishema to the Mechanism, pursuant to the Arrest Warrant.¹¹

10. The Mechanism has already ordered South Africa to transfer Kayishema to Arusha. He remains in a South African detention facility because he is opposing his transfer. If Kayishema has any concerns about his present conditions of detention, then it is open to him to voluntarily surrender to the Mechanism’s custody.

A. Kayishema fails to substantiate his access to counsel claims

11. In his Public Motion, Kayishema fails to substantiate his claims of impediments or “insufficient opportunity” faced by his counsel.¹² He does not even claim that he has been denied access to his international counsel; only that it does not happen “regularly” or is not sufficiently “prompt”.¹³ With his case stalled pending his transfer to the Mechanism, Kayishema fails to explain what “developments” or “updates in proceedings concerning him”¹⁴ he would be expecting from his international *pro bono* counsel at this time. Nor has he explained why he cannot get access to the information he needs, including about the Mechanism, *via* his primary South African counsel.

¹⁰ *Contra* Public Motion, para.11.

¹¹ *Prosecutor v. Kayishema*, Case No.MICT-12-23-PT, Warrant of Arrest and Order for Transfer Addressed to All States, 8 March 2019 (made public on 7 September 2023) (“Arrest Warrant”).

¹² Public Motion, para.10.

¹³ Public Motion, para.10.

¹⁴ Public Motion, para.10.

12. His announced intention to file a request for revocation¹⁵ does not create any immediate urgency. Kayishema’s case was referred to Rwanda in February 2012.¹⁶ Should he now wish to seek revocation, the Mechanism can ensure that he has the opportunity to do so after he surrenders.

B. Kayishema’s rights are not violated by every restriction on access to counsel

13. International human rights law guarantees access to legal assistance. It does not guarantee unlimited access to an unlimited number of legal representatives.¹⁷ Nor does it require domestic authorities to facilitate communication with foreign lawyers located in other countries. None of the cases Kayishema relies on suggest that South Africa would be required to give him access to his domestic South African counsel, plus facilitate communication with an additional team of foreign *pro bono* lawyers.¹⁸

14. Kayishema’s attempts to equate his situation with human rights decisions concerning persons facing the death penalty¹⁹ or being held incommunicado²⁰ are unpersuasive. All of the authorities that he cites involve situations where the accused was denied counsel (or chosen counsel) altogether,²¹ and/or where they had extremely limited access to legal assistance concerning the substance of criminal charges.²² None of these decisions address access to

¹⁵ See Public Motion paras.2, 3.

¹⁶ *Prosecutor v. Kayishema*, Case No.ICTR-01-67-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 22 February 2012.

¹⁷ *E.g. Ensslin, Baader and Raspe v. The Federal Republic of Germany*, App. Nos.7572/76, 7586/76 and 7587/76 (joined), Decision on the admissibility of the applications, European Commission of Human Rights, 8 July 1978, 14 D & R (1979) 64, p.114, para.19 (Article 6(3)(c) of the European Convention on Human Rights (ECHR) “does not secure the right to an unlimited number of defence lawyers”); *Shabelnik v. Ukraine*, App. No.16404/03, Judgment, ECtHR, 19 February 2009, para.39 (holding that the “legal requirement for the defence counsel to hold a law degree is not in violation” of ECHR Article 6(3)).

¹⁸ In the only case relied on by Kayishema addressing both domestic and international counsel, the detained person was denied the right to self-represent and forced to accept a court-appointed domestic lawyer, while she was also unable to access her international lawyer because she was denied telephone access and her international counsel was barred from entering the country. See *Seng v. Cambodia*, Op. No.5/2023, UN Doc. A/HRC/WGAD/2023/5, 15 June 2023, paras.40, 49, 74.

¹⁹ *E.g. Rayos v. Philippines*, Comm. No.1167/2003, UN Doc. CCPR/C/81/D/1167/2003, 27 July 2004, para.7.3; *Sultanova v. Uzbekistan*, Comm. No. 915/2000, UN Doc. CCPR/C/86/D/915/2000, 30 March 2006, para.7.4.

²⁰ *E.g. Alkhawaja v. Bahrain*, Op. No.06/2012, UN Doc. A/HRC/WGAD/2012/6, 2 May 2012, para.37; *Shareef v. Egypt and Sudan*, Op. No.77/2019, UN Doc. A/HRC/WGAD/2019/77, 20 February 2020, para.48; *African Commission on Human and Peoples’ Rights v. Libya*, App. No.002/2012, Judgment, AfrCtHPR, 3 June 2016, para.94.

²¹ *E.g., Saidov v. Tajikistan*, Comm. No.2680/2015, UN Doc. CCPR/C/122/D/2680/2015, 4 April 2018, para. 9.5; *African Commission on Human and Peoples’ Rights v. Libya*, App. No.002/2012, Judgment, AfrCtHPR, 3 June 2016, para.94.

²² *E.g. Saidov v. Tajikistan*, Comm. No.2680/2015, UN Doc. CCPR/C/122/D/2680/2015, 4 April 2018, para.9.5; *Taran v. Ukraine*, Comm. No.2368/2014, UN Doc. CCPR/C/128/D/2368/2014, 12 March 2020, para.7.7; *J. v. Peru*, Judgment, Inter-American Court of Human Rights Series C, No.275, 27 November 2013, para.207; *Öcalan v. Turkey*, App. No.46221/99, Judgment, ECtHR (Grand Chamber), 12 May 2005, para.135.

specialised counsel, in addition to a local defence team, on a matter concerning the location of an eventual criminal trial.

C. No remedy is necessary

15. In any event, even if the redacted parts of the Public Motion reveal any access or other concerns, the remedy that Kayishema seeks is unnecessary. The obvious solution to Kayishema’s detention-related complaints is for South Africa to transfer Kayishema to the Mechanism in accordance with the Mechanism Arrest Warrant. No further Mechanism orders are required to ensure that Kayishema’s fundamental rights are respected.

III. KAYISHEMA’S *EX PARTE* MOTION SHOULD BE REVIEWED

16. The Appeals Chamber has recently held that *ex parte* filings should be made public unless exceptional reasons require keeping them confidential.²³ The Prosecution therefore requests the *ex parte* version of the Public Motion be reviewed for such “exceptional reasons”. Absent a showing of exceptional reasons, the *ex parte* filing should be made public. At a minimum, it should be carefully reviewed to determine whether a confidential version could be made available to the Prosecution with fewer redactions. The Prosecution reserves the right to respond to any new arguments.

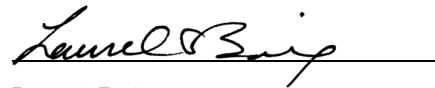
²³ See *Prosecutor v. Kayishema*, Case No.MICT-12-23-AR53, Decision on Prosecution Appeal of Decision on Reconsideration of Reclassification, 1 October 2024, para.13.

IV. REMEDY

17. Kayishema's request for a status conference or any other type of oral hearing should be denied.

18. Kayishema's transfer cannot be indefinitely delayed. In light of Kayishema's announcement that he intends to file a revocation motion, the President (or Single Judge/Chamber assigned to adjudicate this matter) should set an ambitious deadline for any initial revocation request that he wishes to file prior to being turned over to Rwandan authorities. For this purpose, South Africa should be urgently ordered to transfer Kayishema to Arusha, where he will enjoy better access to his international *pro bono* counsel.

Word Count: 2127



Laurel Baig
Senior Appeals Counsel

Dated this 24th day October 2024
The Hague, Netherlands



I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

To/ À :	IRMCT Registry/ <i>Greffé du MIFRTP</i>	<input checked="" type="checkbox"/> Arusha/ <i>Arusha</i>	<input type="checkbox"/> The Hague/ <i>La Haye</i>
From/ De :	<input type="checkbox"/> President / <i>Président</i>	<input type="checkbox"/> Chambers / <i>Chambre</i>	<input checked="" type="checkbox"/> Prosecution/ <i>Bureau du Procureur</i>
	<input type="checkbox"/> Registrar / <i>Greffier</i>	<input type="checkbox"/> Other/ <i>Autre</i>	<input type="checkbox"/> Defence / <i>Défense</i>
Case Name/ Affaire :	Prosecutor v. KAYISHEMA	Case Number/ Affaire n° :	MICT-12-23-PT
Date Created/ Daté du :	24 October 2024	Date transmitted/ Transmis le :	24 October 2024
			No. of Pages/ Nombre de pages : 7
Original Language / Langue de l'original :	<input checked="" type="checkbox"/> English/ <i>Anglais</i>	<input type="checkbox"/> French/ <i>Français</i>	<input type="checkbox"/> Other/Autre (specify/préciser) :
		<input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S	
Title of Document/ Titre du document :	PROSECUTION RESPONSE TO PUBLIC REDACTED VERSION OF DEFENCE NOTICE OF INTENTION TO SEEK REVOCATION OF REFERRAL DECISION AND REQUEST FOR STATUS CONFERENCE		
Classification Level/ Catégories de classification :	<input checked="" type="checkbox"/> Unclassified/ <i>Non classifié</i>	<input type="checkbox"/> Ex Parte Defence excluded/ <i>Défense exclu</i>	<input type="checkbox"/> Ex Parte Prosecution excluded/ <i>Bureau du Procureur exclu</i>
	<input type="checkbox"/> Confidential/ <i>Confidentiel</i>	<input type="checkbox"/> Ex Parte R86(H) applicant excluded/ <i>Art. 86 H) requérant exclu</i>	<input type="checkbox"/> Ex Parte Amicus Curiae excluded/ <i>Amicus curiae exclu</i>
	<input type="checkbox"/> Strictly Confidential/ <i>Strictement confidentiel</i>	<input type="checkbox"/> Ex Parte other exclusion/ <i>autre(s) partie(s) exclue(s)</i> (specify/préciser) :	
Document type/ Type de document :			
<input type="checkbox"/> Motion/ <i>Requête</i>	<input type="checkbox"/> Judgement/ <i>Jugement/Arrêt</i>	<input type="checkbox"/> Book of Authorities/ <i>Recueil de sources</i>	<input type="checkbox"/> Warrant/ <i>Mandat</i>
<input type="checkbox"/> Decision/ <i>Décision</i>	<input checked="" type="checkbox"/> Submission from parties/ <i>Écritures déposées par des parties</i>	<input type="checkbox"/> Affidavit/ <i>Déclaration sous serment</i>	<input type="checkbox"/> Notice of Appeal/ <i>Acte d'appel</i>
<input type="checkbox"/> Order/ <i>Ordonnance</i>	<input type="checkbox"/> Submission from non-parties/ <i>Écritures déposées par des tiers</i>	<input type="checkbox"/> Indictment/ <i>Acte d'accusation</i>	

II - TRANSLATION STATUS ON THE FILING DATE/ ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT

<input type="checkbox"/> Translation not required/ <i>La traduction n'est pas requise</i>
<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and requests the Registry to translate/ <i>La partie déposante ne soumet que l'original et sollicite que le Greffé prenne en charge la traduction :</i> (Word version of the document is attached/ <i>La version Word est jointe</i>)
<input type="checkbox"/> English/ <i>Anglais</i> <input checked="" type="checkbox"/> French/ <i>Français</i> <input checked="" type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/Autre(specify/préciser) :
<input type="checkbox"/> Filing Party hereby submits both the original and the translated version for filing, as follows/ <i>La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :</i>
Original/ Original en <input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda <input type="checkbox"/> Other/Autre (specify/préciser) :
Translation/ Traduction en <input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda <input type="checkbox"/> Other/Autre (specify/préciser) :
<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s)/ <i>La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :</i>
<input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/Autre (specify/préciser) :

Send completed transmission sheet to/ *Veillez soumettre cette fiche dûment remplie à :*

JudicialFilingsArusha@un.org OR/ OU JudicialFilingsHague@un.org

Rev: August 2019/ *Rév. : Août 2019*