

UNITED
NATIONS



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-12-23-PT

Date: 14 February 2025

Original: English

BEFORE THE DUTY JUDGE

Before: **Judge Joseph E. Chiondo Masanche**
Registrar: **Mr. Abubacarr M. Tambadou**
Decision of: **14 February 2025**

PROSECUTOR

v.

FULGENCE KAYISHEMA

CONFIDENTIAL

**DECISION ON FULGENCE KAYISHEMA'S MOTION FOR
PARTIAL AND TEMPORARY STAY OF REFERRAL
DECISION**

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig

Counsel for Mr. Fulgence Kayishema:

Mr. Philippe Larochelle
Ms. Kate Gibson

I, JOSEPH E. CHIONDO MASANCHE, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Duty Judge of the Arusha Branch of the Mechanism assigned to consider this matter;¹

RECALLING that, on 4 July 2001, a Judge of the International Criminal Tribunal for Rwanda (“ICTR”) confirmed the indictment against Mr. Fulgence Kayishema (“Kayishema”), charging him with genocide, complicity in genocide, conspiracy to commit genocide, and extermination as a crime against humanity;² and issued a warrant of arrest requesting all member states of the United Nations to search for, arrest, and transfer Kayishema to the custody of the ICTR at its seat in Arusha, the United Republic of Tanzania;³

RECALLING that, on 22 February 2012, a Trial Chamber of the ICTR referred Kayishema’s case to the authorities of the Republic of Rwanda (“Rwanda”) for trial before the High Court of Rwanda;⁴

RECALLING the warrants of arrest issued by the ICTR and the Mechanism after the referral of Kayishema’s case to Rwanda, which directed all states to search for, arrest, and transfer Kayishema to the Rwandan authorities;⁵

RECALLING that, on 8 March 2019, the Duty Judge of the Arusha Branch of the Mechanism issued an amended warrant of arrest, as an interim measure and to ensure Kayishema’s apprehension, requesting all member states of the United Nations to search for, arrest, and transfer Kayishema to the custody of the Arusha Branch of the Mechanism;⁶

RECALLING that, on 26 September 2019, a Trial Chamber of the Mechanism dismissed without prejudice the Prosecution’s request for revocation of the referral of Kayishema’s case to Rwanda, and affirmed that the conditions set forth in the 2019 Arrest Warrant remain in force until further judicial order;⁷

¹ Order Assigning the Duty Judge for the Arusha Branch to Consider a Motion, 21 January 2025 (confidential), p. 1.

² See *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Indictment, 5 July 2001; *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Decision on the Prosecutor’s *Ex Parte* Request for Search, Seizure Arrest and Transfer, 4 July 2001, p. 4.

³ *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Warrant of Arrest and Order for Transfer, 4 July 2001, pp. 2, 3.

⁴ *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 22 February 2012 (“Referral Decision”), pp. 43, 44.

⁵ See *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-00-67-R11bis, Warrant of Arrest and Order for Transfer, 4 April 2012, pp. 2, 4; Warrant of Arrest and Order for Transfer Addressed to All States, 7 May 2014, pp. 1, 2.

⁶ Warrant of Arrest and Order for Transfer Addressed to All States, 8 March 2019 (“2019 Arrest Warrant”), p. 1; Decision on Urgent Motion for Amendment of Arrest Warrant, 8 March 2019 (confidential and *ex parte*), p. 2; Decision on a Motion to Lift the Confidentiality of an Arrest Warrant, 7 September 2023 (“Decision of 7 September 2023”), pp. 2, 3.

⁷ See Decision on Urgent Motion for Revocation of Referral and Amendment of Arrest Warrant, 26 September 2019 (“Decision of 26 September 2019”), paras. 7, 9, 11, 12.

NOTING that Kayishema was arrested on 24 May 2023 in the Republic of South Africa (“South Africa”) in accordance with the 2019 Arrest Warrant,⁸ and that he remains there pending his transfer to the Arusha Branch of the Mechanism solely for the purpose of his onward transfer to Rwanda;⁹

BEING SEISED OF a confidential motion, filed by Kayishema on 11 January 2025, requesting, *inter alia*, to “partially and temporarily stay the implementation” of the Referral Decision until at least 28 February 2025 in so far as it requires Kayishema’s physical transfer to Rwanda, and to order that no organ of the Mechanism effect his transfer to Rwanda for the duration of the stay;¹⁰

NOTING Kayishema’s submissions, *inter alia*, that in September 2024, he was made aware of information from South African officials about threats to his life by the Government of Rwanda,¹¹ and that therefore the requested stay is “warranted and necessary in the interests of justice”¹² to: (i) preserve the objective of his forthcoming request for revocation of the Referral Decision – namely to prevent his transfer to Rwanda on the basis of human rights concerns and instead to facilitate trial before the Mechanism;¹³ and (ii) allow his defence to investigate allegations of a “plot by the Government of Rwanda [...] to assassinate [him] while detained in South Africa”;¹⁴

NOTING the confidential response, filed by the Prosecution on 27 January 2025, arguing, *inter alia*, that: (i) the Motion should be dismissed as premature; or (ii) if the Motion is to be adjudicated on its merits, the Government of South Africa should be invited to inform the Mechanism about any threat to Kayishema and measures taken in response, and the Prosecution should be given access to confidential and *ex parte* Annex A of the Motion (“Annex A”);¹⁵

⁸ 2019 Arrest Warrant, p. 1; Decision of 7 September 2023, p. 2. *See also* Prosecutor v. Fulgence Kayishema, Case No. MICT-12-23-AR53, Decision on Prosecution Appeal of Decision on Reconsideration of Reclassification, 1 October 2024, para. 3; Decision of 26 September 2019, para. 10.

⁹ *See* Decision on Fulgence Kayishema Motion for Disclosure and Reclassification, 28 June 2024, p. 4 and references cited therein.

¹⁰ Motion for Partial and Temporary Stay of Referral Decision, 11 January 2025 (confidential with confidential and *ex parte* Annex A and confidential Annexes B, C, and D) (“Motion”), paras. 1, 21-23, 28. According to Kayishema, the date of 28 February 2025 is requested in light of the schedule of domestic proceedings before the High Court of South Africa. *See* Motion, paras. 22, 23, Annex D.

¹¹ *See* Motion, paras. 2, 8, 10-13, 15, 16, Annex A.

¹² Motion, para. 2.

¹³ *See* Motion, paras. 2, 5-9, 17-20. *See also* Public Redacted Version of Defence Notice of Intention to Seek Revocation of Referral Decision and Request for Status Conference, 11 October 2024, paras. 1, 2, 20. Kayishema argues that his objections to his transfer to Rwanda are not solely related to his right to a fair trial, but particularly concern fears for his safety, security, and fundamental human rights and that, therefore, the objective of his revocation request would be fundamentally confounded if he were to be physically transferred to Rwanda “as it would expose him to the very risks that he will argue invalidate the conditions of his referral under Article 6(6) of the Statute [of the Mechanism]”. *See* Motion, paras. 7-9.

¹⁴ *See* Motion, paras. 2, 14-16, Annexes B, C.

¹⁵ *See* Prosecution Response to Kayishema Motion for Partial and Temporary Stay of Referral Decision, 27 January 2025 (confidential) (“Response”), paras. 1-7. The Prosecution argues that the Motion is premature on the basis that Kayishema

NOTING the confidential reply, filed by Kayishema on 4 February 2025, submitting, *inter alia*, that: (i) the Motion is not premature as he has the right to know the final destination of his transfer before he is transferred from South Africa to the custody of the Mechanism, especially given the alleged threat to his life; (ii) circumstances indicate that he may be barred from seeking revocation before an “immediate transfer to Rwanda is effected”; (iii) he supports the Prosecution’s request seeking submissions from the Government of South Africa; and (iv) given the Prosecution’s close working relationship with the Government of Rwanda, Annex A should not be reclassified while potentially ongoing threats against his physical safety remain;¹⁶

BEING FURTHER SEISED of a confidential request, filed by the Prosecution on 5 February 2025, seeking leave to sur-reply in order to correct misrepresentations and address new issues raised in the Reply;¹⁷

OBSERVING that, in accordance with Rule 153(A) of the Rules of Procedure and Evidence of the Mechanism (“Rules”), a reply to a response may be filed “with leave of the relevant Chamber or Single Judge”, and that Kayishema has not sought leave to file the Reply;

CONSIDERING that, given the lack of opposition from the Prosecution,¹⁸ it is in the interests of justice to accept the Reply as validly filed;

CONSIDERING FURTHER that, as the Reply discusses, *inter alia*, concerns about the logistics of Kayishema’s transfer to the Mechanism for the first time,¹⁹ it is appropriate in these circumstances to grant the Prosecution’s request to file the Sur-Reply;²⁰

must submit to the Mechanism’s jurisdiction to seek relief before it, and that proceedings in South Africa appear to have been postponed on his initiative until 30 July 2025. It also argues that Kayishema’s contention, that his transfer to Rwanda would be immediate upon his transfer to the custody of the Mechanism, is speculative, and further that, if Kayishema surrenders to the Mechanism voluntarily, the Prosecution would not oppose, as a matter of procedure, allowing Kayishema the opportunity to file for any relief to which he is entitled while in the Mechanism’s custody. *See Response*, paras. 2, 4.

¹⁶ *See Kayishema Reply to Prosecution Response to Motion for Partial and Temporary Stay of Referral Decision*, 4 February 2025 (confidential) (“Reply”), paras. 1-12.

¹⁷ *See Prosecution Sur-Reply to Kayishema Reply Re: Motion for Partial and Temporary Stay of Referral Decision*, 5 February 2025 (confidential) (“Sur-Reply”), paras. 1-6.

¹⁸ *See Sur-Reply*, para. 1.

¹⁹ *See Reply*, para. 6.

²⁰ I recall that, while the Rules do not address the permissibility of sur-replies, leave may be granted where the reply raises new issues to which the respondent has not already had the opportunity to respond. *See Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R, Decision on Gérard Ntakirutimana’s Motion for Reconsideration of “Decision on Request for Review”, 18 September 2024, p. 4 and references cited therein.

OBSERVING that stays may be granted when it is in the interests of justice to do so,²¹ as well as when the execution of an order or decision would significantly impair the objective of a request, whether forthcoming or filed,²² or would result in potential harm to a legally protected interest;²³

OBSERVING FURTHER that, where the transfer of an accused to a referral state is not imminent, staying such a transfer has been considered premature and accordingly not granted;²⁴

CONSIDERING that Kayishema does not demonstrate through submissions in the Motion²⁵ that his transfer to Rwanda is imminent or that, consequently, the objective of his forthcoming request for revocation of the referral of his case to Rwanda would be significantly impaired at this time;

CONSIDERING that, in light of the outcome of this Decision, it is presently not necessary to address the Prosecution's requests to invite submissions from the Government of South Africa and to access Annex A;

FOR THE FOREGOING REASONS,

HEREBY RECOGNISE the Reply as validly filed;

²¹ See *Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11bis, Interim Order Relating to Bernard Munyagishari's Motion to Reconsider the Decision on Appeals Against Referral Decision, 17 June 2013, pp. 2, 3 (wherein the accused's transfer to Rwanda was stayed in the interests of justice pending resolution of a motion for reconsideration); *Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11bis, Decision on Bernard Munyagishari's Motion for a Stay of his Transfer to Rwanda, 30 May 2013, pp. 2, 3 (wherein the accused's transfer to Rwanda was stayed in the interests of justice until three days after an ICTR Appeals Chamber decision, denying the referral of his case, was translated into a language he understood).

²² Decision on Urgent Motion for Stay of Decision on Fulgence Kayishema Motion for Disclosure and Reclassification, 2 July 2024, p. 2 (wherein a stay was granted to preserve the objective of a potential appeal or request for reconsideration), referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide upon Evidence Tendered Pursuant to Rule 92bis, 1 July 2010 ("Prlić et al. Decision of 1 July 2010"), para. 47, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Motion for Stay of Decision on Contact with Prosecution Witnesses, 24 June 2009, para. 2; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-AR108bis.4, Order Suspending the Execution of the Trial Chamber's Decision of 15 February 2010 Pursuant to Rule 108bis of the Rules, 23 March 2010 (confidential), p. 1 (wherein a "suspension of the execution" of the relevant decision was granted as the objective of a filed request would have otherwise been "significantly impaired").

²³ See *Prlić et al.* Decision of 1 July 2010, para. 47, referring to *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Urgent Motions to Remove or Redact Documents Pertaining to Protected Witnesses, 16 December 2009 (confidential), p. 4 (wherein, when determining whether to stay the enforcement of an order, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia balanced the potential of harm to the accused by enforcement of the order with the potential of harm to a legally protected interest by suspension of that order).

²⁴ Compare *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion, 23 February 2012, para. 17, n. 47, referring to *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-R11bis, Decision on the Registrar's Request for Stay of Transfer of Jean Uwinkindi to Rwanda, 20 January 2012, paras. 6, 7 (discussing that a request to stay a transfer to the referral state was premature and not granted as an amended indictment had not been filed), with *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Interim Order on Uwinkindi's Motion for Review or Reconsideration of the Decision of 16 December 2011, 26 January 2012, p. 1 (noting that, as an amended indictment had been filed, the accused's transfer to the referral state was "imminent").

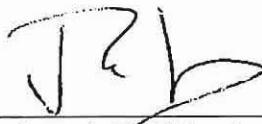
²⁵ See Motion, paras. 22, 23, Annex D.

GRANT the Prosecution request to file the Sur-Reply; and

DISMISS the Motion in its entirety.

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

Done this 14th day of February 2025,
At Arusha,
Tanzania



Judge Joseph E. Chiondo Masanche
Duty Judge

[Seal of the Mechanism]



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