

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No: MICT-12-23-R14.1

Date: 2 September 2025

Original: English

IN THE TRIAL CHAMBER

Before: Judge Vagn Joensen, Presiding
Judge Claudia Hoefer
Judge Fatimata Sanou Touré

Registrar: Mr. Abubacarr M. Tambadou

THE PROSECUTOR

v.

FULGENCE KAYISHEMA

PUBLIC

DEFENCE REQUEST FOR ASSIGNMENT OF COUNSEL

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig

Counsel for Fulgence Kayishema:

Mr. Philippe Larochelle
Ms. Kate Gibson

I. INTRODUCTION

1. The Defence of Mr. Fulgence Kayishema (“Defence” and “Mr. Kayishema”, respectively) hereby requests that the Trial Chamber instruct the Registrar of the International Residual Mechanism for Criminal Tribunals (“Registrar” and “the Mechanism” respectively) to assign Counsel renumeralated under the Mechanism’s legal aid system to represent the interests of Mr. Kayishema in the present revocation proceedings in the interests of justice pursuant to Rule 46 of the Rules of Procedure and Evidence of the Mechanism (“Rules”).

II. PROCEDURAL BACKGROUND

2. On 22 February 2012, a Trial Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) referred the case against Mr. Kayishema to the Republic of Rwanda (“Rwanda” and “Referral Decision”, respectively).¹
3. On 24 May 2023, Mr. Kayishema was arrested in South Africa on the basis of a warrant of arrest issued by the Mechanism.²
4. On 1 October 2024, the Defence requested that the Registrar assign Mr. Kayishema counsel pursuant to Rules 43 and 44.³
5. On 23 October, the Registry of the Mechanism (“Registry”) denied the Defence request for the assignment of counsel.⁴
6. On 6 November 2024, the Defence sought review of the Registry Legal Aid Decision before the President of the Mechanism (“President”).⁵

¹ *Prosecutor v. Kayishema*, Case No. ICTR-01-67-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 22 February 2012 (“Referral Decision”).

² *Prosecutor v. Kayishema*, Case No. MICT-12-23-PT, Decision on a Motion to Lift the Confidentiality of an Arrest Warrant, 7 September 2023, p. 2. See *Prosecutor v. Kayishema*, Case No. MICT-12-23-PT, Warrant of Arrest and Order for Transfer Addressed to All States, 8 March 2019.

³ *Prosecutor v. Kayishema*, Case No. MICT-12-23-PT, Defence Request for Review of Decision on Assignment of Counsel, 6 November 2024 (“Defence Request for Review”), Annex B (Letter from Counsel to the Officer-in-Charge of Legal Aid and Defence Matters, Registry, 1 October 2024) (confidential).

⁴ Defence Request for Review, Annex A (Letter from Officer-in-Charge of Legal Aid and Defence Matters, Registry, to Counsel, 23 October 2024) (“Registry Legal Aid Decision”).

⁵ Defence Request for Review.

7. On 16 December 2024, the President denied the Defence Request for Review.⁶
8. On 5 June 2025, the Defence requested that the President assign a Trial Chamber and *inter alia* refer to it a request for the assignment of Counsel.⁷
9. On 4 July 2025, the President denied the Defence motion for the assignment of a Trial Chamber.⁸
10. On 14 August 2025, the Defence filed a request to revoke the Referral Decision (“Revocation Request”).⁹
11. On 22 August 2025, the President assigned the present Trial Chamber to consider the Revocation Request pursuant to Article 6(6) of the Statute of the Mechanism (“Statute”) and Rule 14(C).¹⁰

III. APPLICABLE LAW

12. Article 19(4)(b) of the Statute *inter alia* guarantees the right of the Accused “to have adequate time and facilities for the preparation of his or her defence”.
13. Rule 46 provides that a Trial Chamber “may, if it decides that it is in the interests of justice, instruct the Registrar to assign a Counsel to represent the interests of the accused.”

IV. SUBMISSIONS

A. Rule 46 Permits the Assignment of Counsel in the Present Circumstances

14. In her Decision of 16 December 2024, finding that the Registry had not erred in denying Mr. Kayishema legal aid he had requested under Rules 43 and 44, the President

⁶ *Prosecutor v. Kayishema*, Case No. MICT-12-23-PT, Decision on Defence Request for Review of Decision on Assignment of Counsel, 16 December 2024 (“Decision of 16 December 2024”), p. 4.

⁷ Motion for the Assignment of a Trial Chamber to Consider the Revocation of the Referral Decision and Related Requests, 5 June 2025 (confidential) (“Motion for Assignment of Trial Chamber”). Public redacted version filed the same day.

⁸ Decision on Fulgence Kayishema’s Motion for the Assignment of a Trial Chamber, 4 July 2025 (“Decision of 4 July 2025”), p. 3.

⁹ Request for Revocation of Referral to the Republic of Rwanda, 14 August 2025 (confidential) (“Revocation Request”). Public redacted version filed 26 August 2025.

¹⁰ Decision Assigning a Trial Chamber to Consider Fulgence Kayishema’s Request for Revocation of Referral to the Republic of Rwanda, 22 August 2025.

considered that Mr. Kayishema “is not in the custody of the Mechanism and does not have a case pending before it”.¹¹ These factors do not bar the assignment of Counsel by judicial order under Rule 46 of the Rules.

15. The Appeals Chamber and the President have previously instructed the Registry to assign Counsel through judicial order to represent persons who were not in custody of the Mechanism and who did not have a case pending before the Mechanism.¹² Examples include where the assigned Counsel had previously represented the individual in question *pro bono* and indeed had themselves filed the request for legal aid on behalf of their client.¹³ While review proceedings are the most common context for such assignments, the assignment of legal aid to persons not in the Mechanism’s custody and who do not have a case before the Mechanism is not restricted to review proceedings.¹⁴ The Appeals Chamber and the President have similarly instructed the Registry to assign Counsel through judicial order to represent individuals who, while remaining under the authority of the Mechanism, have no case pending before it.¹⁵
16. Moreover, in the context of the ICTR Prosecutor’s first attempt to refer Mr. Kayishema’s case to Rwanda, the ICTR Trial Chamber assigned Counsel to represent Mr. Kayishema’s interests, considering that “there is no requirement for the accused to be in the custody of the Tribunal for Rule 45 *quarter* [of the ICTR Rules] to apply”.¹⁶ Other ICTR Trial Chambers, including that seized of the ICTR Prosecutor’s second request to refer Mr. Kayishema’s case, similarly affirmed that they could instruct the Registry to assign Counsel to represent an accused in the interests of justice under this

¹¹ Decision of 16 December 2024, p. 3. *See also* Registry Legal Aid Decision, Registry Pagination (“RP.”) 632.

¹² *See Niyitegeka v. Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka’s Request for Review and Assignment of Counsel, 13 July 2015, para. 8; *Prosecutor v. Ntakirutimana*, Case No. MICT-12-17-R, Decision on a Request for Assignment of Counsel, 4 July 2018 (“*Ntakirutimana* Decision”), paras 5-9; *In the Case against Hartman*, Case No. MICT-15-87-ES, Decision on the Urgent Request for Legal Aid, 29 March 2016 (“*Hartman* Decision”), paras. 15, 16; *Prosecutor v. Ntawukulilyayo*, Case No. MICT-13-34-ES, Decision on Dominique Ntawukulilyayo’s Request For Legal Aid, 12 June 2018 (“*Ntawukulilyayo* Decision”), paras 11-15.

¹³ *Ntakirutimana* Decision, paras. 4, 8-9; *Ntawukulilyayo* Decision, paras. 7, 12-15.

¹⁴ *Ntawukulilyayo* Decision, paras. 10-11. *See also Hartman* Decision, para. 15.

¹⁵ *See Prosecutor v. Ndirabatware*, Case No. MICT-12-29, Decision on Prosecution’s Motion Regarding Protected Witnesses and Ndirabatware’s Motion for Assignment of Counsel, 5 May 2016, paras. 20-22; *Prosecutor v. Nzuwonemeye*, Case No. MICT-13-43, Decision on a Motion for the Assignment of Counsel and for an Extension of Time, 13 December 2018, pp. 2-3.

¹⁶ *Prosecutor v. Kayishema*, Case No. ICTR-01-67-R11bis, Decision on the Referral of the Application to Appoint Defence Counsel, 2 May 2008, para. 8.

same provision, which functions *mutandis mutatis* to Rule 46, even when they were not in the custody of the ICTR.¹⁷

17. Prior to the filing of the Revocation Request, the Registry had argued that the precedent in *Uwinkindi* was distinguishable as the assignment of Counsel in that case “was in direct response to a revocation request lodged by Mr. Uwinkindi”.¹⁸ As Mr. Kayishema has now submitted his Revocation Request, the assignment of Counsel in *Uwinkindi* is no longer distinguishable on these grounds.

B. The Interests of Justice Require the Assignment of Counsel

18. The Defence submits that the interests of justice now require the assignment of Counsel for Mr. Kayishema Counsel, remunerated under the Mechanism’s legal system. The proceedings concerning the Revocation Request have a fundamental bearing on Mr. Kayishema’s fair trial rights, ultimately seeking to ascertain whether the conditions for Mr. Kayishema to enjoy a fair trial in Rwanda exist.¹⁹ Mr. Kayishema must be offered a fair chance to present in full the grounds for revocation outlined in a preliminary manner in the Revocation Request to the Chamber with the benefit of remunerated Counsel. If the assignment of legal aid is in the interests of justice, its assignment is mandatory, not discretionary, pursuant to an accused’s right under Article 19(4)(b) of the Statute.²⁰
19. The Referral Decision was issued more than 13 years ago. The task of making submissions, in sufficient detail, on how the conditions in Rwanda have changed to the

¹⁷ See *Prosecutor v. Kayishema*, Case No. ICTR-01-67-R11bis, Order for the Assignment of Counsel, 27 July 2011, para. 6; *Prosecutor v. Sikubwabo*, Case No. ICTR-95-1D-R11bis, Order for the Assignment of Counsel, 27 July 2011, paras. 6-7.

¹⁸ *Prosecutor v. Kayishema*, Case No. MICT-12-23-PT, Registrar’s Submission on the “Defence Request for Review of Decision on Assignment of Counsel”, 21 November 2024, para. 33. See also Decision of 16 December 2024, fn. 22. Cf. Registry Legal Aid Decision, RP.632 (finding that legal aid requests in proceedings concerning “the operative Indictment against Mr. Kayishema” should be submitted to the relevant Rwandan authorities; this reasoning does not apply to revocation proceedings, which do not concern the substantive charges against Mr. Kayishema).

¹⁹ *Prosecutor v. Uwinkindi*, Case No. MICT-12-25-AR14.1, Decision on an Appeal Concerning a Request for Revocation of a Referral, 4 October 2016, para. 12. See also *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 8 October 2008, para. 4; *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution’s Appeal against Decision on Referral under Rule 11bis, 30 October 2008, para. 4.

²⁰ *Benham v. United Kingdom*, App. No. 19380/92, Judgment, European Court of Human Rights (“ECtHR”) (Grand Chamber), 10 June 1996, paras 60-64; *Quaranta v. Switzerland*, App. No. 12744/87, Judgment, ECtHR, 24 May 1991, paras 27-38. See also UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187, Annex, 20 December 2012, para. 21 (Principle 3).

detriment of Mr Kayishema’s prospects for a fair trial in this period is one of considerable complexity. It involves an analysis of Rwandan domestic criminal law and procedure in practice, consultation with relevant experts on the Rwandan justice system, the profiling of the experiences of other cases that have been referred from the ICTR to and tried in Rwanda, the collection of affidavits from experts, past defendants in transferred cases, and potential witnesses in the present case, and many hours of work by the Defence. Furthermore, the Defence must further investigate the serious threats to Mr. Kayishema’s life.

20. Mr. Kayishema currently benefits from the representation of *pro bono* Counsel.²¹ These Counsel cannot be expected to continue to undertake their representation of Mr. Kayishema in matters as complex as proceedings concerning the revocation of the over-a-decade-old Referral Decision without resources.²² Not permitting Mr. Kayishema to supplement his Revocation Request with the benefit of the work of remunerated Counsel infringes on Mr. Kayishema’s right to adequate resources in the preparation of his defence and is antithetical to the principle of equality of arms.
21. In her Decision of 16 December 2024, finding that the Registry had not erred in denying Mr. Kayishema legal aid he had requested under Rules 43 and 44, the President observed that her decision does not preclude Mr. Kayishema “from, at the appropriate juncture, seeking legal aid in the interest of justice pursuant to Rule 46 of the Rules”.²³ Furthermore, in her Decision of 4 July 2025, the President added that Mr. Kayishema “may seek all appropriate relief, including the assignment of Counsel under Rule 46 of the Rules, in conjunction with or following any request for revocation of the Referral Decision that may be assigned to a Trial Chamber pursuant to Rule 14(C) of the Rules”.²⁴
22. The Defence submits that the proceedings have now reached the “appropriate juncture” for the assignment of Counsel by judicial order under Rule 46.

²¹ *Prosecutor v. Kayishema*, Case No. MICT-12-23, Registrar’s Notice of Recognition of *Pro Bono* Counsel, 9 May 2024.

²² *See also* Motion for Assignment of Trial Chamber, paras. 47-49.

²³ Decision of 16 December 2024, p. 4.

²⁴ Decision of 4 July 2025, p. 3.

23. In *Uwinkindi*, following the referral of the accused's revocation request to a Trial Chamber by the President,²⁵ the accused was assigned Counsel by the Registry pursuant to an instruction to this effect by the Trial Chamber.²⁶ Accordingly, the Defence submits that, as in *Uwinkindi*, "it is in the interests of justice to consider the Revocation Request only after counsel has been assigned to [Mr. Kayishema] and his counsel [have] been given an opportunity to submit a brief in support of the Revocation Request".²⁷
24. The present proceedings would be devoid of genuine purpose if Mr. Kayishema is unable to articulate to this Chamber why the conditions do not exist for his fair trial in Rwanda with the benefit of remunerated Counsel. Mr. Kayishema's *pro bono* Counsel are committed to their mandate to represent Mr. Kayishema's interests, as demonstrated by their extensive activity to date, and over an extended period. However, they are legal professionals who, like any other, cannot fairly or reasonably be expected to devote extensive time and energy to a matter as complex as that *sub judice* without resources.
25. While the principle of equality of arms "does not necessarily amount to the material equality of possessing the same financial and/or personal resources",²⁸ it does provide that "each party must have a reasonable opportunity to defend its interests under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent".²⁹ Equality of arms simply cannot be realized if Mr. Kayishema's Counsel are not remunerated for their representation in the present proceedings as any legal professional would reasonably expect to be. The European Court of Human Rights has, in this regard, found that the principle of equality of arms can be breached even where a party benefits from *pro bono* legal assistance.³⁰

²⁵ *Prosecutor v. Uwinkindi*, Case No. MICT-12-25-R14.1, Decision on Request for Revocation of an Order Referring a Case to the Republic of Rwanda and Assigning a Trial Chamber, 13 May 2015, pp. 2-3.

²⁶ See *Prosecutor v. Uwinkindi*, Case No. MICT-12-25-R14.1, Scheduling Order, 22 May 2015 ("*Uwinkindi* Scheduling Order"), p. 1; *Prosecutor v. Uwinkindi*, Case No. MICT-12-25-R14.1, Decision, 22 June 2015, p. 2.

²⁷ *Uwinkindi* Scheduling Order, p. 1.

²⁸ *Prosecutor v. Clément Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgment (Reasons), 1 June 2001, para. 69. See also *Prosecutor v. Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7.

²⁹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.9, Decision on Slobodan Praljak's Appeal against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents, 4 September 2008, para. 29, and references cited therein. See also *Foucher v. France*, App. No. 22209/93, Judgment, ECtHR, 18 March 1997, para. 34; *Bulut v. Austria*, App. No. 17358/90, Judgment, ECtHR, 22 February 1996, para. 56; *Klimentyev v. Russia*, App. No. 46503/99, Judgment, ECtHR, 16 November 2006, para. 95.

³⁰ See *Steel and Morris v. United Kingdom*, App. No. 68416/01, ECtHR, 15 February 2005, paras 68-72.

26. The current reality is that Mr. Kayishema’s Counsel are acting on a *pro bono* basis while the Office of the Prosecutor of the Mechanism (“Prosecution”) operates on an annual budget of over \$11 million³¹ and has no other outstanding core crimes cases within its mandate.³² Adjudicating the Revocation Request against the backdrop of such an egregious inequality of arms would be antithetical to the interests of justice. It would not merely place Mr. Kayishema at a “substantial disadvantage” *vis-à-vis* the Prosecution but would render the equality of arms principle entirely illusory by denying Counsel a genuine opportunity to defend their client’s interests on an even playing field.
27. The interests of justice, therefore, dictate that Mr. Kayishema must be assigned Counsel for the purpose of the present revocation proceedings pursuant to Rule 46 of the Rules. This request is limited to legal aid in the context of proceedings arising out of the Revocation Request. It is not an attempt to “implement a parallel legal aid regime which would prove duplicative to what Mr. Kayishema is or may be entitled to in Rwanda”, as the Registry has previously suggested,³³ but simply a procedural necessity to safeguard the integrity and fairness of the present proceedings under Rule 14(C).

V. REQUEST FOR RELIEF

28. On the basis of the foregoing, the Defence respectfully requests that the Trial Chamber, pursuant to Rule 46 of the Rules:

INSTRUCT the Registrar to assign Mr. Kayishema counsel in the interests of justice for the purpose of the proceedings concerning the Revocation Request.

Word Count: 2,865 words

³¹ *Proposed Budget for the International Residual Mechanism for Criminal Tribunals for 2025: Report of the Secretary-General*, UN Doc. A/79/555, 25 October 2024, para. 76, adopted by UN General Assembly Resolution 79/255, 24 December 2024.

³² See Address of Mr. Serge Brammertz, Prosecutor, to the UN Security Council, UN Doc. S/PV.9934, 11 June 2025, p. 6 (discussing *Kabuga* and *Kayishema* as the only outstanding core crimes cases in which the Prosecution is actively involved; proceedings in *Kabuga* were indefinitely stayed in 2023: *Prosecutor v. Kabuga*, Case No. MICT-13-38-T, Decision Imposing an Indefinite Stay of Proceedings, 8 September 2023, p. 5).

³³ Registry Legal Aid Decision, RP.631.



Mr. Philippe Larochelle
Counsel for Fulgence Kayishema

Respectfully submitted this 2 September 2025,
At Montréal, Canada



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