



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-12-15-ES.1

Date: 2nd October 2024

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Gatti Santana, President

Registrar: Mr. Abubacarr Tambaou

Date: 2nd October 2024

PROSECUTOR

v.

ALFRED MUSEMA

PUBLIC

**URGENT REQUEST TO THE PRESIDENT CONCERNING SEIZURE
OF ELECTRONIC DEVICES OF ICTR PRISONERS AT AKPRO-
MISSERETE PRISON IN BENIN**

The Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for Mr. Alfred Musema:

Mr. Steven Kay QC
Ms. Gillian Higgins

I. Background to Application

1. Mr Alfred Musema has been detained at Akpro-Misséréte Prison in Benin ('Benin Prison') since 19th December 2018. On 27 January 2000, he was convicted of genocide, extermination and rape as crimes against humanity and was sentenced to life imprisonment.¹ On 16 November 2001, a not-guilty verdict was entered before the Appeals Chamber in respect of the count of rape and Mr. Musema's convictions for genocide and extermination were affirmed, as was his sentence of life imprisonment.²
2. On 22 November 2016, the Registry of the Mechanism for International Criminal Tribunals ('MICT') appointed Steven Kay KC and Gillian Higgins to act on behalf of Alfred Musema.
3. On 16th August 2024, a search took place of all MICT prisoners at the Benin Prison. This search was unannounced and occurred during the night.
4. It is understood that police officers instructed by the Regisseur of the prison confiscated *inter alia* laptops, scanners, printers, external hard drives and USBs. In respect of Mr Musema, three laptops, two scanners, three external hard drives and numerous USBs were seized from his cell.
5. It is further understood that the seized items have now been transported 50km from the prison to Cotonou at the Headquarters of the Agence Penitentiaire du Benin.
6. No inventory of the material seized was made or provided to Mr Musema. No reason for the unwarranted search or the apparent dramatic change in prison policy has been provided.
7. The data stored on the electronic equipment includes *inter alia*:
 - (i) Privileged communications with counsel;
 - (ii) Witness statements which belong to Mr Musema, many of which have protected status;
 - (iii) Personal work completed by Mr Musema; and

¹ *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000 ("Trial Chamber Judgement").

- (iv) Personal medical records and correspondence, all of which are confidential.
8. There are no hard copies of these materials available to Mr Musema. It would not be possible to store the document collection in his cell given the size, scope and scale of his casefile.
 9. For many years, it had been an established practice that Mr Musema and all other ICTR detainees were authorised from the point of their detention at the UNDF in Arusha up until 16th August 2024 to have their computers and related electronic documents and data with them in their cells. Moreover, the prison authorities in Benin have actively assisted to date in the repair of their computers as required.
 10. The ICTR and MICT have thereby created a reasonable expectation that this 25-year-old practice would be maintained by the Sentence enforcement States. Moreover, in searching for qualified enforcement States, the ICTR and other UN ad hoc tribunals, specifically focused on the ability of the selected prison to maintain a certain standard of living for their international prisoners. This includes the ability to work and access their case archives.
 11. Given the vast amount of evidential material, motions and correspondence in his case, this practical arrangement has allowed Mr Musema to work on motions, respond to requests for information from Counsel and to keep abreast of developments, post-conviction. He has an intimate knowledge of his own case. Preventing him from accessing this collection amounts to unfair and undue treatment causing extreme hardship and distress. The integrity of the material, given the heat and humidity in Benin, is also at risk.
 12. It is understood that the ICTR prisoners in Senegal have access to their computers. Some prisoners have even written books. As set out above, the treatment of the ICTR prisoners in Benin is an example of unfair and unequal treatment.
 13. The case archives represent Mr Musema's life and his hope of being able to draft and prepare submissions to seek his release. These archives contribute centrally to his

² *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (“Appeal Judgement”).

mental health, his daily routine and provide a focus and purpose during his detention. To be deprived of this archive and his electronic equipment in such a manner is to deprive him of all his remaining legal rights. The fact and timing of this search have been extremely distressing for Mr Musema and have caused deep anxiety, posing a serious risk of violation of confidentiality, privilege, witness protection and a genuine obstruction to his ability to prepare motions in his case. The search took place at an unnecessary time of night that was designed to cause harassment to the detainee and interfered with his entitlement to privacy and rest.

14. Mr Musema's reasonable expectation that he would be permitted to continue to operate in this manner and retain his electronic case files, confidential and privileged communications on his computers, supporting hard drives and USBs has been breached by the Benin Prison Authority, action which now requires urgent intervention by both the Registry and the President of the Mechanism.

II. Legal Framework and Submissions

(i) Agreement on Enforcement of Sentences

15. The Mechanism has legal jurisdiction in respect of the Mechanism's detainees post-conviction and has a legal duty to ensure that the conditions of their detention accord with the Agreement on Enforcement with Benin, the Rules of the Mechanism and the Mandela Rules set out below. The Mechanism also has legal jurisdiction over the detainees concerning applications for release and review proceedings.
16. On 12th May 2017, the Agreement between the United Nations and the government of the Republic of Benin on the Enforcement of Sentences Pronounced by the International Criminal Tribunal for Rwanda or The International Residual Mechanism for Criminal Tribunals was signed by the United Nations and the Republic of Benin ('Agreement on Enforcement of Sentences').
17. Pursuant to the Agreement on Enforcement of Sentences, Articles 2 and 3 provide the following:

“2. The Conditions of imprisonment shall be governed by the law of the requested State, **subject to the supervision of the Tribunal.**”

3. Conditions of imprisonment **shall be compatible** with the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, and the Basic Principles for the Treatment of Prisoners, while also adhering to best practices in prison management aimed at ensuring, *inter alia*, the security of the detention facility and the convicted persons.”

18. The Tribunal’s supervisory role of the conditions of imprisonment is clear and requires the Mechanism to take immediate action to demand the return of all equipment seized by the Benin Prison Authorities to the detainees. Failure to do so renders the current conditions of imprisonment fundamentally unfair and in breach of the Agreement on Enforcement of Sentences.

19. Failure of Benin Prison to restore the status quo would require the Mechanism to terminate the Agreement on Enforcement of Sentences with Benin and seek other law-abiding detention centres to host the detainees where they could continue to access their case files, which must be returned to them.

(ii) Rules Governing Detention

20. Rule 86 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Mechanism or Otherwise Detained on the Authority of the Mechanism, provides as follows:

“Detainees shall be permitted to keep in their possession documents relating to their legal proceedings. Privileged legal documents may be subject to cursory inspection during cell searches but shall not be read by Staff of the Detention Unit.”

21. Immediate intervention by the Registry and the President to obtain the return of all seized items is therefore required in order to ensure compliance with Rule 86.

(iii) The Mandela Rules

22. The current conditions of detention are also in breach of the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners (known as the ‘Mandela Rules’). Conditions of imprisonment in Benin’s Prison “shall” be compatible with the Mandela Rules pursuant to Article 3 of the Agreement on Enforcement of Sentences.³

23. Rules 51 and 53 of the Mandela Rules provides that:

“Searches shall not be used to harass, intimidate or unnecessarily intrude upon a prisoner’s privacy. For the purpose of accountability, the prison administration shall keep appropriate records of searches...as well as the reasons for the searches, the identities of those who conducted them and any results of the searches.”

“Prisoners shall have access to or be allowed to keep in their possession without access by the prison administration, documents relating to their legal proceedings.”

24. Where these fundamental rights are not respected by the prison, the Mechanism must order or require the prison authorities to do so immediately. Failure to respect and uphold these rights should require transfer to another Host State with all the belongings of those detained.

(iv) Breach of Rights – Transfer from Enforcement State Detention Facility

25. A detainee has standing to request a transfer from an enforcement State where he has already been transferred to that State and alleges that the enforcement State is violating the person’s rights.⁴

³ Article 3 of the Agreement between The Government of the Republic of Benin and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda dated 26th August 1999: 3. Conditions of imprisonment shall be compatible with the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners. [known as the Mandela Rules]

⁴ *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision of the President on Request for Pardon or Transfer to Another Enforcement State* (7 September 2016) at para. 46; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer to Another Enforcement State* (23 January 2018) at para. 13; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Requests for Transfer* (3 December 2020) at para. 12; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer* (19 January 2022) at para. 17; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer* (23 September 2022) at p. 3; *Prosecutor v Martić*, No. MICT-14-82-ES, *Decision on Request to Transfer to Another Enforcement State* (19 December 2017) at para. 12; *Prosecutor v Martić*, No. MICT-14-82-ES, *Decision on Request for Transfer* (12 February 2021) at para. 14; *Prosecutor v Dragomir Milošević*, No. MICT-16-98-ES, *Decision on Request to Transfer to Another*

26. The threshold that must be met before the enforcement State where a convicted person is serving his sentence will be changed is high.⁵
27. Requests for change in the enforcement State will only be granted in the most serious of circumstances, where there is a direct and continuing threat to the rights of an individual which cannot be cured through coordination with relevant national authorities.⁶
28. National authorities must ensure that the continuing needs of persons serving their sentences under the supervision of the Mechanism are met, even if it results in disparities with national prisoners. Should the State be unable to adequately address these specific needs, it should inform the Mechanism that it is unable to enforce the sentence.⁷
29. It is therefore the legal responsibility of the Mechanism to ensure that all items seized in the 16th August search are returned to the detainees.

Enforcement State (21 July 2016) at para. 7; *Prosecutor v Dragomir Milosevic*, No.. MICT-16-98-ES, *Decision on Renewed Request to Transfer to Another Enforcement State* (12 June 2017) at para. 12; *Prosecutor v Dragomir Milosevic*, No.. MICT-16-98-ES, *Decision on Request for Transfer* (24 December 2020) at para. 12.⁵ *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision of the President on Motion for Reconsideration and Review of Sentence of Milan Lukic* (28 January 2016) at para. 19; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer to Other Enforcement State* (21 January 2016) at p. 3; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision of the President on Request for Pardon or Transfer to Another Enforcement State* (7 September 2016) at para. 47; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer to Another Enforcement State* (23 January 2018) at para. 14; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Requests for Transfer* (3 December 2020) at para. 13; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer* (19 January 2022) at para. 18; *Prosecutor v Martić*, No. MICT-14-82-ES, *Decision on Request to Transfer to Another Enforcement State* (19 December 2017) at para. 13; *Prosecutor v Martić*, No. MICT-14-82-ES, *Decision on Request for Transfer* (12 February 2021) at para. 15; *Prosecutor v Dragomir Milosevic*, No.. MICT-16-98-ES, *Decision on Request to Transfer to Another Enforcement State* (21 July 2016) at para. 8; *Prosecutor v Dragomir Milosevic*, No.. MICT-16-98-ES, *Decision on Renewed Request to Transfer to Another Enforcement State* (12 June 2017) at para. 13; *Prosecutor v Dragomir Milosevic*, No.. MICT-16-98-ES, *Decision on Request for Transfer* (24 December 2020) at para. 13.

⁶ *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision of the President on Motion for Reconsideration and Review of Sentence of Milan Lukic* (28 January 2016) at para. 19; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision of the President on Request for Pardon or Transfer to Another Enforcement State* (7 September 2016) at para. 47; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer to Another Enforcement State* (23 January 2018) at para. 14; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Requests for Transfer* (3 December 2020) at para. 13; *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer* (19 January 2022) at para. 18; *Prosecutor v Martić*, No. MICT-14-82-ES, *Decision on Request to Transfer to Another Enforcement State* (19 December 2017) at para. 13; *Prosecutor v Martić*, No. MICT-14-82-ES, *Decision on Request for Transfer* (12 February 2021) at para. 15; *Prosecutor v Dragomir Milosevic*, No.. MICT-16-98-ES, *Decision on Request to Transfer to Another Enforcement State* (21 July 2016) at para. 8; *Prosecutor v Dragomir Milosevic*, No.. MICT-16-98-ES, *Decision on Renewed Request to Transfer to Another Enforcement State* (12 June 2017) at para. 13; *Prosecutor v Dragomir Milosevic*, No.. MICT-16-98-ES, *Decision on Request for Transfer* (24 December 2020) at para. 13.

⁷ *Prosecutor v Lukic*, No. MICT-13-52-ES.1, *Decision on Request for Transfer to Another Enforcement State* (23 January 2018) at para. 44; *Prosecutor v Martić*, No. MICT-14-82-ES, *Decision on Request to Transfer to Another Enforcement State* (19 December 2017) at para. 22.

30. To date, those whose rights have been impacted have been diligent in writing to the Registrar and to the Benin Authorities. To date, the latter has not yet responded.
31. On behalf of Mr Musema, Counsel have in addition written a letter to the President and Registrar of the Mechanism and the Director General of the Agence Pénitentiaire du Benin, Mr Francois Hounkpe.

III. Relief Requested

32. The President is requested to order the Registrar of the Mechanism to require the Authorities to return all the equipment belonging to the detainees in the next few days.
33. If the Benin authorities do not respect the requests of the Registrar, as a last resort, Mr Musema requests an immediate transfer to another host country such as Senegal with all his electronic equipment and personal belongings.

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Respectfully submitted on this 2nd October 2024

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