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UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

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Orig:Eng

**TRIAL CHAMBER II**

Before: Judge Laïty Kama, Presiding  
Judge William H. Sekule  
Judge Pavel Dolenc

Registry: Mr. John Kiyeyeu

Decision of: 10 December 1999

**THE PROSECUTOR  
Versus  
EDOUARD KAREMERA  
Case No. ICTR-98-44-I**

1999 DEC 10 P 2:23  
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CRIMINAL REGISTRY  
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**DECISION ON THE DEFENCE MOTION  
FOR THE RELEASE OF THE ACCUSED**

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Office of the Prosecutor:  
Mr. Don Webster  
Ms. Ifeoma Ojemeni

The Accused appeared *pro se*

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“The Tribunal”)**  
SITTING as Trial Chamber II, composed of Judge Laïty Kama, Presiding, Judge William H. Sekule and Judge Pavel Dolenc (“The Trial Chamber”);

CONSIDERING the application by the Deputy Prosecutor dated 27 May 1998 to the authorities of the Republic of Togo for the arrest and provisional detention of Edouard Karemera (“the Accused”) pursuant to Rule 40 (A) of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING that the Lomé Police in the Republic of Togo arrested the Accused on 5 June 1998 in Togo;

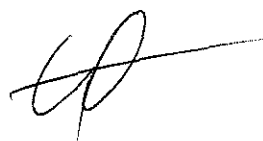
NOTING that on 30 June 1998, Judge Laïty Kama seized of a request from the Prosecutor in accordance with Rule 40 *bis* of the Rules, ordered the transfer and the detention of the Accused, not exceeding thirty days from the day of transfer;

GIVEN that the Accused was transferred to the United Nations Detention Facility (“UNDF”) in Arusha on 11 July 1998;

TAKING INTO ACCOUNT that on 10 August 1998, the Prosecutor requested an extension of the detention for another thirty days pursuant to Rule 40 *bis* (F) of the Rules, and was granted an extension for a further period of twenty days;

CONSIDERING that on 29 August 1998 the Tribunal sitting as Judge Navanethem Pillay confirmed the Indictment submitted by the Prosecutor against the Accused and other persons on 26 August 1998, and authorized that a redacted version of the Indictment be served on the Accused;

TAKING INTO ACCOUNT that on 14 October 1998 the Prosecutor filed a redacted Indictment with the Registry for purposes of the Initial Appearance of the Accused scheduled for 24 November 1998, which was postponed to several dates but finally took place on 7 and 8 April 1999 pursuant to Rule 62 of the Rules;



WHEREAS on 15 November 1999, pursuant to Rule 72 and 73 of the Rules, the Accused filed a motion for the disqualification of Judges Laïty Kama and William H. Sekule under Rule 15 (B) of the Rule on the ground that they had participated in the hearing of some aspects of the case;

CONSIDERING the decision of the Bureau dated 17 November 1999 which determined that the application from the Accused for disqualification of Judge Laïty Kama and Judge William H. Sekule was unfounded and without merit;

WHEREAS the Trial Chamber invited a representative of the Registry, Mr. Alessandro Calderone to explain the situation regarding the assignment of a defence Counsel to the Accused;

TAKING INTO ACCOUNT Mr. Calderone's explanation that the Registrar's Office has, since the time of the transfer of the Accused to the UNDF, made all possible efforts to assign the Accused a Defence Counsel, notably four defence Counsel have successively been assigned to him and withdrawn. Specifically, two of the four Counsel assigned to him were initially accepted but later the Accused refused to co-operate with them thus forcing their withdrawal;

CONSIDERING that since 15 November 1999, the Registry has given the Accused an ultimatum of a week from 15 to 22 November 1999, within which to select the required names or else be assigned any Counsel;

TAKING INTO ACCOUNT a letter from the accused dated 4 November 1999, in which he opted to represent himself for the purposes of this motion, a fact which he confirmed at the hearing of 16 November 1999;

MINDFUL of Article 20 of the Statute of the Tribunal ("the Statute") pertaining to the rights of the Accused as well as Rules 40 (provisional measures), Rule 40 *bis* (provisional detention), Rule 42 (rights of suspects during investigations), 47 (H) and Rule 55 (A);



BEING SEIZED of the motion from the defence for the release of the Accused in the form of an affidavit sworn by the accused, dated 16 October 1998, based on Article 19 of the Statute and Rules 40, 40 *bis*, 55 and 62 of the Rules, filed with the Registry on 20 October 1998;

CONSIDERING the Prosecutor's response to the motion filed on 18 March 1998 and the reply to the affidavit filed by the Prosecutor on 2 November 1998;

HAVING HEARD the arguments of both Parties on 16 November 1999.

## 1. ARGUMENTS BY THE PARTIES

### Submissions by the Accused

1.1 The Accused raises several issues, among which were issues, pertaining to request letter to the Government of Togo, the service upon him of the arrest warrant in accordance with Rule 55 of the Rules, the exact date of transfer to the UNDF and the lawfulness of the extension of his provisional detention. The accused further submits, *inter alia*, that:


1.2 The letter for request for arrest from the Prosecutor to the Togo authorities contained erroneous personal facts on the accused as well as a false statement about instituted proceedings regarding confirmation of the Indictment against the Accused.

1.3 At the time of the arrest in Lomé, the Accused was not shown any arrest documents by the Togo Police or by the investigators of the Prosecutor with whom they were acting in *tandem*;

1.4 The order of transfer as issued by Judge Laity Kama on 30 June 1998 was not served on him thus on 16 July 1998 when he appeared before the Tribunal, he complained about this fact and was served with that order on 16 July 1999 at 3 p.m.;

1.5 He challenges the above mentioned order because it is defective in form and was highly prejudicial to him as a suspect and it creates a confusion between the terminology "suspect" and "accused," which are clearly distinguishable under Rule 40 and 40 *bis*;

1.6 Considering that by 30 June 1999 when the order for arrest and provisional detention was made under Rule 40 *bis*, he was then a "suspect," and should have been detained for



twenty days as provided under rule 40 (D) of the Rules. Thereafter the Prosecutor was obliged to prepare an Indictment before 30 August 1998, which was not done. Further, Rule 40 *bis*, which allows for provisional detention up to 90 days, is a violation of the Statutory provisions in Articles 17 (confirmation of Indictment), 18 (review of Indictments) and 19 (expeditious trials). Consequently, the Accused has been held unlawfully and in contradiction to the provisions of the Rules.

1.7 On 10 August 1998 the accused was brought before the Tribunal again at the instigation of the Prosecutor. On this date the Tribunal granted only twenty days extension from August 1999 and not the thirty days requested by the Prosecutor. Moreover, there were no exceptional circumstances to warrant for the extension of his detention. Additionally, the hearing was not *inter partes* but *ex parte*, based upon a mere affidavit, which was challenged by the duty Counsel.

1.8 Since his rights have been violated, the Trial Chamber should order his immediate release.

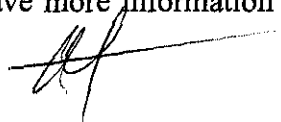
## 2. Submissions by the Prosecutor

The Prosecutor submits, *inter alia*, that:

2.1 Rule 40 (A) of the Rules just refers to a 'request' without stipulating the manner in which it should be done. However, in the instant case, the Prosecutor opted for making a request in writing, a fact not disputed by the Accused;

2.2 The motion for release of the Accused is to be considered under 40 *bis*. The Accused was lawfully arrested and his transfer on 11 July 1999 was properly done under Rule 40 *bis*. Further, by virtue of an Order made by Judge Navanethem Pillay on 10 August 1998, an extension was granted. In accordance with Rule 40 *bis* also an Indictment has to be confirmed within ninety days from the transfer of the accused to the UNDF in Arusha and this was complied with because the Indictment was confirmed on 29 August 1998 and this terminates any discussion on the date of confirmation of the Indictment;

2.3 She objects to the manner of presentation of the motion whereby the Accused itemized questions. If the Accused wishes to have more information on the Indictment and



the circumstances of his arrest then he should file a proper motion for discovery and the Prosecutor will willingly answer them. In the circumstances, therefore, all the question raised have no bearing upon these proceedings;

2.4 The Registry actually effected service of the relevant documents upon the Accused in accordance with Rules 47(H), 55 (D) and (C) of the Rules;

2.5 There is procedural impropriety by the Duty Counsel, who never ascertained the status of the proceedings prior to filing this motion. The Counsel lacks diligence and should be made to pay his fees as costs incurred by the Prosecutor;

2.6 In the final analysis, the Trial Chamber should deny the instant motion in all respects.

#### **Reply by the Accused**

3. The Accused replied, *inter alia*, that the Indictment dated 29 August 1999 has been served on him but it was not shown as being authentic.

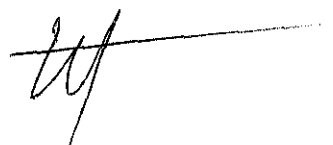
#### **4. AFTER HAVING DELIBERATED**

4.1 The Trial Chamber has considered all the arguments advanced by the Parties and proceeds to make its decision below.

4.2 The Trial Chamber has identified two major legal issues, first, whether the Tribunal should decide on the legality or illegality of the arrest and the custody of the accused. Secondly, the issues pertaining to the transfer and provisional detention of the accused, namely, the rights of the suspect particularly, the lack of notification of the transfer and provisional order and whether the provisional detention falls within the time periods set by the Rules.

#### **4.3 Lawfulness of the Arrest of the Accused**

4.3.1 Pursuant to Rule 40 (A) (i), which states that "in case of urgency, the Prosecutor may request any State to arrest a suspect and place him in custody." Hence a suspect is deprived of his freedom on the request of the Prosecutor but such a request is executed and controlled

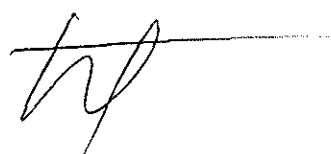


by the State authorities using their law enforcement organs. The Trial Chamber, therefore, considers that it cannot provide any remedy concerning such arrest and custody as these are still matters within the jurisdiction of the requested State.

4.3.2 Regarding the erroneous facts pertaining to the accused as specified in the Prosecutor's letter to the Government of Togo requesting the arrest of the Accused, the Trial Chamber notes that the alleged errors were insignificant and the letter requesting the arrest was clearly intended to bring about the arrest of the Accused and no one else.

4.3.3 In the present case, the Trial Chamber observes that the accused was arrested on 5 June 1998 by the authorities of Togo upon a written request of 28 May 1998 of the Prosecutor, pursuant to Rule 40 (A) of the Rules. Thus the circumstances of the arrest and custody of the accused are matters within the jurisdiction of the Government of Togo. To that extent the Tribunal finds that the legality of the arrest of the accused by the Government of Togo lies within the jurisdiction of Togo and the Trial Chamber cannot interfere. In this regard, the Trial Chamber recalls similar decisions made by the Tribunal such as the decision of 1 December 1997 in the Prosecutor versus Ntagerura, ICTR-96-10-I, para. 37, (Decision on the Preliminary Motion filed by the defence based on defects in the form of indictment) and the decision of 6 October 1999 in the Prosecutor versus Semanza, ICTR-97-20-I, at para. 30, (Decision on the "Motion to set aside the arrest and detention of Laurent Semanza as unlawful"). In the Semanza case, the Trial Chamber held that "an accused, before his transfer to the custody of the Tribunal, has no remedy under the Statute and Rules for the detention and acts by sovereign States over which the Tribunal does not exercise control."

4.3.4 Concerning the issue of arrest of the Accused, although the matter is a prerogative of the concerned State, nonetheless, the Trial Chamber is not estopped from making some observations about the process of arrest. The Trial Chamber notes that by arresting the Accused, the actions of Government of Togo were consonant with Article 28 of the Statute, which enjoins States to co-operate with the Tribunal. Further, the arrest was based upon a request made under Rule 40 of the Rules and is therefore legal. At that stage of the process, what is necessary is the request under Rule 40 of the Rules. There is no requirement for a warrant of arrest from the Tribunal since the arrest is within the jurisdiction of States.



4.3.5 The Trial Chamber notes that a warrant of arrest of the Tribunal is usually sent to the States upon confirmation of the Indictment under Rule 47 (G) of the Rules, which makes reference to Rule 55 (A). In the present case, the suspect was first transferred to the UNDF upon an Order of Judge Laïty Kama on 30 June 1998 in accordance with Rule 40 *bis* of the Rules. In compliance with the said Order, the Accused was transferred on 11 July 1998 and was to be provisionally detained for a period not exceeding thirty days from the day of transfer. By virtue of an Order by Judge Laïty Kama issued on 10 August 1998, the period of provisional detention of the Accused was extended by another twenty days from the date of the Order. Later, the Accused was indicted on 29 August when Judge Navanethem Pillay confirmed an Indictment against him.

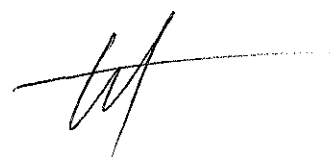
4.3.6 The Trial Chamber, therefore, considers that the arrest and custody of the Accused as well as the transfer and provisional detention of the Accused were all lawful.

#### 4.4 Issues Pertaining to the Rights of the Accused

4.4.1 With respect to the notification of the Order of transfer and provisional detention of the accused, the accused stated that he was not informed about the transfer and provisional detention order of 30 June 1998 until 16 July 1998, a period of about two weeks delay. Concerning information of the charges, the Trial Chamber bears in mind the right of the Accused to be informed promptly of the nature and cause of the charge against him, pursuant to Article 20 of the Statute, which is partially reflected in Rule 40 *bis* (E). This right corresponds literally to Article 14 (3) (a) of the International Covenant on Civil and Political Rights ("ICCPR"), which requires that information must be provided with the lodging of charge or directly thereafter.

4.4.2 It is the view of the Trial Chamber that in accordance with Rule 40 *bis* (E), copies of the order and the request by the Prosecutor must be served upon the suspect and his Counsel by the Registrar as soon as possible. Therefore, the accused should have been informed at the time of his transfer and provisional detention.

4.4.3 The Trial Chamber notes that on 14 October 1998, the Prosecutor filed with the Registry a redacted Indictment, in accordance with an order dated 29 August 1998 by the confirming Judge Navanethem Pillay. This should have put the accused upon notice of the





charges preferred against him. There is also the assertion by the Prosecutor that the Registry effected service of the Indictment on the accused.

4.4.4 However, the Trial Chamber finds that the right to be promptly informed has not been violated and therefore, in the instant case, although the delay existed, it was not unreasonable so as to occasion a miscarriage of justice under Rule 5 of the Rules.

#### **4.5. With Regard to the time period of the Provisional Detention**

4.5.1 There are two pertinent matters to be discussed, namely, the transfer of a suspect under Rule 40 and his/her transfer under Rule 40 *bis* of the Rules. Pursuant to Rule 40 (B) of the Rules, the Prosecutor applies to a Judge designated by the President for an order to transfer a suspect to the Seat of the Tribunal or to such other place as the Bureau may decide and to detain him personally. This application is based upon showing that a major impediment exists which does not allow the state to keep a suspect in custody or to take all necessary measures to prevent his escape. The transfer at this stage is arranged between the State, the host country of the Tribunal and the Registrar although in the process, both the Prosecutor and the Registrar are consulted. A suspect transferred under this scheme must have an Indictment issued against him within twenty days in terms of Rule 40 (D) of the Rules.

4.5.2 On the other hand, the transfer of a suspect to the UNDF under Rule 40 *bis* (B) of the Rules is ordered by a Judge of the Tribunal after hearing the Prosecutor and only upon satisfaction of certain conditions. For instance, the Judge must decide whether there exists a reliable and consistent body of material, which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction. Pursuant to Rule 40 *bis* (C) provisional detention of the suspect may be ordered for a period not exceeding thirty days from the day after the transfer of the suspect to the UNDF.

4.5.3 The period of detention may be extended. Rule 40 *bis* (F) provides that upon the Prosecutor's request indicating the grounds on which it is made and if warranted by the needs of the investigation, a Judge, who made the initial Order or another Judge of the same Trial Chamber, may decide subsequent to an *inter partes* hearing, to extend the provisional detention for a period not exceeding thirty days. After this extension, under Rule 40 *bis* (G) upon following the same procedure as stipulated in the previous Rule but only if warranted



by special circumstances. The period of the provisional detention may be again extended for a further period not exceeding thirty days. Within the framework of these Rules, a Judge may grant a lesser provisional detention period thus requiring the Prosecutor to prepare an Indictment before the expiry of thirty days.

4.5.4 This interpretation also accords with that of the Appeals Chamber in the case of *Jean Bosco Barayagwiza*, ICTR-97-19-AR72. The Appeals Chamber stated that the time limits under which the Prosecutor should issue an Indictment is dependent upon the Rule in which an accused is transferred to the Tribunal.

4.5.5 The Trial Chamber is also mindful of other decisions by the Tribunal such as *The Prosecutor v. Aloys Ntabakuze*, ICTR-97-34-T and *The Prosecutor v. Gratien Kabiligi*, ICTR-97-34-DP, in which Rules 40 and 40 *bis* have been interpreted. The accused persons, although jointly charged, individually challenged the legality of their arrest by the Government of Kenya, upon the Prosecutor's request. In the *Ntabakuze* case, Trial Chamber II (as then constituted), in its decision of 25 September 1998, decided that the arrest and provisional detention as well as the extended provisional detention were authorized by judicial orders. Similarly, in the *Kabiligi* case, the same Trial Chamber, in its decision of 4 November 1999, found that the accused was provisionally detained in accordance with the Rules since he had been transferred under Rule 40 *bis* and provisionally detained thereunder for a period of less than ninety days. In both cases, the motions for the release of the accused were denied.

4.5.6 Considering the present case, the accused at the time of transfer was a suspect, who was transferred to the UNDF under Rule 40 *bis* on 11 July 1998 and was provisionally detained initially for thirty days as ordered by Judge Laïty Kama on 30 June 1998. However, on the 10 August 1998, the Tribunal ordered an extension of the provisional detention for another twenty days, a total period of fifty days and on 29 August Judge Navanethem Pillay confirmed the Indictment, which was well within the stipulated period under Rule 40 *bis*. Hence the Trial Chamber finds that the time period set by the Rules has been respected and there is no violation of Rule 40 *bis*.

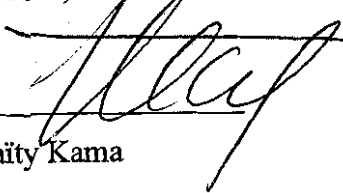


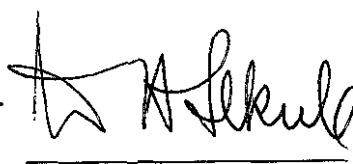
4.5.7 The Trial Chamber reiterates its finding that the arrest and custody of the accused by the State of Togo as well as his transfer under Rule 40 bis and provisional detention were not in violation of the Statute and the Rules.


**5. FOR THESE REASONS, THE TRIBUNAL**

**DISMISSES** the Motion filed by the accused for his release.

Arusha, 10 December 1999.

  
\_\_\_\_\_  
Laity Kama  
Presiding Judge

  
\_\_\_\_\_  
William H. Sekule  
Judge

  
\_\_\_\_\_  
Pavel Dolenc  
Judge

Seal of the Tribunal

