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1997 NOV -7 P 2:17 International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

Before : Judge Navanethem Pillay  
Registry: Ms. Prisca M. Nyambe  
Date: 5 November 1997

**PROSECUTOR  
VERSUS  
GRATIEN KABILIGI**

**Case No.: ICTR-97-34-DP**

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**REASONS IN SUPPORT OF THE DECISION ON EXTENSION OF PROVISIONAL  
DETENTION FOR IN TERMS OF RULE 40bis(G)**

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Office of the Prosecutor: Mr. James Stewart

Counsel for the Defence: Mr. Jean Yaovi Degli

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME / NOM: PRISCA M. NYAMBE  
SIGNATURE: *Prisca M. Nyambe* DATE: 10-11-97

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "TRIBUNAL"),**

SITTING in the person of Judge Navanethem Pillay;

CONSIDERING that the suspect Gratién Kabiligi is currently detained at the Detention Facility of the Tribunal, following an order for transfer and provisional detention issued on 16 July 1997 by Judge Kama, pursuant to Rule 40bis(B) of the Rules of Procedure and Evidence of the Tribunal (the 'Rules') and extended on 14 August 1997 by Judge Kama pursuant to Rule 40bis(F) of the Rules for another 30 days beginning on 18 August 1997;

CONSIDERING the request by the Prosecutor, dated 10 September 1997 and filed with the Registry on 11 September 1997, pursuant to the provisions of Rule 40bis(G) of the Rules, seeking the extension of the provisional detention of the suspect for a further period of thirty days;

HAVING HEARD the parties at a hearing on 15 September 1997 held to examine the Prosecutor's said request;

HAVING THEN RENDERED, on 16 September 1997, a Decision extending the provisional detention of the suspect for another 30 days in the Tribunal's Detention Facilities pursuant to Rule 40bis(G) of the Rules, in which Decision it was indicated that the reasons were to be furnished;

**HEREBY PROVIDES THE REASONS ON WHICH ITS DECISION OF 16 SEPTEMBER 1997 WAS BASED:**

**A. Background**

1. During the hearing held on 15 September 1997, the Prosecutor contended that a further provisional detention of the suspect would be justified by the following special circumstances, which in part are outlined in points 6 to 11 of the Affidavit of Commander Øyvind Olsen, filed by the Prosecutor on 13 August 1997:

- a. The complexity of the charges raised against the suspect;
- b. The need for sufficient time to analyse the documents seized by the Kenyan authorities during the arrest of the suspect and also the material to be provided by the Rwandan authorities;
- c. The security situation in Rwanda, which effectively hampers the work of the Tribunal's investigators; and
- d. The need for adequate time to coordinate the completion of the indictment against this suspect with the indictments against certain other suspects and accused in order to move for a joinder of accused under rule 48;
- e. The difficulty in getting access to further documentation of the activities of the suspect from the Rwandan Ministry of Defence in Kigali.

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2. The Defence Counsel, in his oral argument, submitted that the suspect should be released on the grounds that the reasons given by the Prosecutor in justification of a further extension of the provisional detention of the accused, did not amount to "special circumstances" as required in Rule 40bis(G) of the Rules, since they were all in existence and known to the Prosecutor at the last extension ordered under Rule 40bis(F) on 14 August 1997.
3. The Defence Counsel, furthermore, submitted that the suspect's human rights had been violated in contravention of the Rules of Procedure and Evidence and of the UN Covenant on Civil and Political Rights in that he had been held in detention for a considerable period of time without being properly informed of the charges against him, during which he had not been given transcripts of the interviews conducted with him by the Prosecutor's investigators, and also because he was never brought before a Judge to ensure that his rights had been respected.
4. The Defence Counsel, finally, argued that the Judges, in adopting and including Rules 40 and 40bis in the Rules, had acted *ultra vires* in respect of their powers under the Statute, since no provision in the Statute envisions provisional arrests and detention of suspects.
5. The Tribunal will now address each of these issues separately.

#### **B. On the Test of "Special Circumstances" in Rule 40bis(G)**

6. Rule 40bis(B) establishes that a Judge may order the transfer and provisional detention of a suspect when:
  - (i) the Prosecutor has requested a State to arrest this suspect provisionally, or the suspect is already detained by a State;
  - (ii) the Judge "considers that there is a consistent and reliable body of material which tends to show that the suspect may have committed a crime" within the Tribunal's jurisdiction; and
  - (iii) the Judge considers it necessary to detain the suspect provisionally in order to prevent escape of the suspect, injury to victims or witnesses, or destruction of evidence.

If these conditions are met, the Judge may order the transfer and provisional detention of the suspect for a period not exceeding 30 days after the transfer, see Rule 40bis(C).
7. Rule 40bis(F) then stipulates that the Judge who made the order for transfer and provisional detention of a suspect or another Judge of the same Trial Chamber may extend the first period of detention for another period not exceeding 30 days "if warranted by the needs of investigation"
8. Rule 40bis(G) of the Rules, finally, provides for a second extension of the order providing for a third and final period of provisional detention of a suspect after his transfer, "if warranted by *special circumstances*".
9. If, by the end of these three periods of provisional detention, the total of which shall not exceed 90 days, an indictment has not been produced and confirmed, the suspect shall be released and may be returned to the authorities of the State to whom the original request for surrender was

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made, as provided in Rule 40bis(H).

10. Read together in context, these provisions in the Rules envisage that the Prosecutor, at the time of the original request for arrest under Rule 40, is in possession of sufficient material to substantiate the request. The Prosecutor, in other words, is not necessarily required to have completed her investigations against the suspect, but should at least be in the preparatory stage of producing an indictment for confirmation within 30 days or, ultimately, 90 days of the transfer.

11. The first period of 30 days of provisional detention of the suspect after his transfer comes automatically with the first order made under Rule 40bis(B) and (C). As already indicated, the second period of detention under Rule 40bis(F) requires that the Prosecutor demonstrates that this extension is “warranted by *the needs of the investigation*”. To meet this requirement, the Prosecutor has so far referred to the deterioration of the security situation in Rwanda and to the need for further analysis of recently seized documents or witness statements, and the Judge has accepted these reasons for extension into the second period of detention.

12. Further extension under Rule 40bis(G) into the third period of detention, however, obliges the Prosecutor to establish that such extension is “warranted by *special circumstances*”, but the provision is silent as to what constitutes “special circumstances” and what test should be applied in assessing the criteria in comparison with “the needs of the investigation”. Each case, thus, is to be assessed on its own particular merits.

13. In case No. ICTR-96-7-DP, *the Prosecutor vs Théoneste Bagosora*, the Judge extended on 15 July 1996 the provisional detention of the suspect for a third and final period of 30 days on the grounds that the *security situation in Rwanda was gradually deteriorating* at the time and that some potential witnesses against the suspect allegedly had been *subjected to pressure or threats*. The Judge also took into consideration that *investigations against the suspect were continuously being conducted* and *witnesses still sought* throughout Europe, the US and the African Continent, and he further stressed that the *files requested from Belgium had not yet been received*. Finally, the Judge accepted that there were sufficient reasons to expect that *the suspect would escape or intimidate witnesses or destroy evidence* if he were released. The Judge concluded that these reasons altogether constituted “special circumstances” as required in Rule 40bis(G) and hence granted the extension. A similar reasoning was applied in the simultaneous Decision in the Case No. ICTR-96-11-DP, *the Prosecutor vs Ferdinand Nahimana*.

14. In the present case, the Defence Counsel raised the objection that the reasons brought forward by the Prosecutor in support of the request for a second and last extension of the provisional detention could not amount to “special circumstances”, since they had prevailed all along. The question is, therefore, whether the “special circumstances” in Rule 40bis(G) must have occurred subsequent to the first extension.

15. It transpires from the two Decisions mentioned above that none of the reasons advanced therein were unique or new in the sense that they arose only *after* the first extension of the provisional detention of the suspect 30 days earlier; in fact, all the factors considered by the Judge in

his reasoning prevailed at the time of the original order for transfer and were also addressed by the Judge who granted the first extension.

16. The two possible successive extensions of the provisional detention under Rule 40bis(F) and Rule 40bis(G), it seems, are incontestably subject to certain qualifications. However, there is nothing to suggest that these preconditions must be different and progressive in the sense that the reasons for the first extension cannot also trigger the second extension, provided they too were "special" in character. Distinguishing between "the needs of the investigation" as required under Rule 40bis(F) from "special circumstances" under Rule 40bis(G), in other words, is not always possible since these two requirements may sometimes be congruent.

Furthermore, given the short time-span of the periods of provisional detention, it would seem unlikely in most cases that such entirely novel circumstances would emerge to justify, on their own, a second and final extension of the provisional detention. Indeed, an interpretation of Rule 40bis(G) to this effect could induce an almost preventive constraint into the application of this rule, for which no basis can be found in the provision itself or its context. The special circumstances which must sustain the second extension may well have been predominating all along and whenever this is the case, these circumstances may justify the second extension. The Tribunal recalls in support of this reading that the wording of Rule 40bis(G) does not require any degree of novelty in setting out the conditions for the second extension. The Tribunal, therefore, is of the view that "special circumstances" within the meaning of Rule 40bis(G) need not necessarily be new circumstances.

A proper approach to adopt for the assessment of "special circumstances" warranting a second extension of the provisional detention entails an examination of the situation as a whole, taking cognisance of the realities at investigation level, and weighing both pre-existing and fresh grounds as they apply to each individual suspect.

17. Turning then to the test to be made under Rule 40bis(G), the Tribunal finds that it must be one of balancing the rights of the suspect, on the one hand, with the pursuit of justice and the interests of victims and witnesses on the other. The Prosecutor, thus, must be able to expose elements of fact or information which indicate that the suspect may seek to escape justice before the Tribunal, or that victims or witnesses may suffer intimidation, or that evidence may be destroyed, if the suspect is released. In order to determine whether or not continued detention on remand is really necessary, furthermore, the Judge may take into consideration the gravity as well as the complexity of the crimes which the suspect is alleged to have committed, and also the need to ensure the suspect's attendance before this Tribunal during the investigation and after an indictment has eventually been confirmed.

18. The Tribunal emphasises, however, that the provisions in Rule 40bis do not require factual proof of these elements. The context of provisional detention of a suspect is still that the Prosecutor has not yet brought the investigation to a stage where an indictment can be presented for confirmation, and any question relating to the verification of the elements or the charges brought forward by the Prosecutor against the suspect remains a matter for examination during trial, provided the indictment is confirmed.

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19. The Tribunal recalls, furthermore, that the basis for provisional detention is to be found in Rule 40bis(B)(ii), which requires that the Judge shall *consider that there is a reliable and consistent body of material which tends to show* that the suspect may have committed a crime within the Tribunal's jurisdiction. However, this is far from a *prima-facie* test; there is no requirement that the Judge must be *convinced* of the existence of sufficient evidence, or that it is necessary for the Prosecutor at this stage to further substantiate the material by producing a copy of the draft indictment.

20. In the Tribunal's view, the Prosecutor has demonstrated sufficient material in the present case to sustain a suspicion that the suspect has committed crimes falling within the Tribunal's jurisdiction, which by their very nature are extremely serious, and that the conditions under which the suspect was apprehended abroad do indicate a risk of his absconding or interfering with the investigation if he is set at large. The Tribunal, furthermore, recognizes the difficulties for both parties in conducting investigations under the present security conditions in Rwanda. For these reasons, the Tribunal finds that there are special circumstances which justify a second and final extension of the detention on remand, of the suspect without prejudice to his rights.

### **C. On the Alleged Violation of the Rights of the Suspect**

21. The Defence Counsel further contended during his oral submission that the human rights of the suspect had been violated by the long provisional detention without being brought swiftly before a judge, and without access to review of the Tribunal's Decisions to order and extend the provisional detention. The Defence Counsel pointed in particular to Rule 40bis(J) of the Rules, which requires that the suspect, assisted by his counsel, be brought before a Judge without delay in order to ensure that the suspect's rights have been respected.

He further pointed to Article 9(3) of the UN 1966 International Covenant on Civil and Political Rights (the "ICCPR") and to Principle 37 of the UN 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the "BOP"), both of which establish that a detainee is entitled to be brought before a judicial authority promptly after his arrest, and notably that pre-trial detention should be the exception rather than the rule.

22. Judicial control over invasions of the individual's right to liberty is indeed an essential feature of the rights enshrined in the Tribunal's Statute. The Tribunal, being anxious to ensure the rights of the suspects detained under its authority, recalls however that it was never the intention of these and other Human Rights provisions to completely prohibit or prevent provisional detention. These measures, in the Tribunal's view, were rather designed to ensure that individuals are not arbitrarily deprived of their liberty, and that such detention is safeguarded with sufficient legal guarantees and judicial control whenever it is deemed necessary to detain a suspect provisionally.

23. The Tribunal notes that the suspect was in fact brought before a Judge 26 days after his transfer to the Tribunal's Detention Facilities in Arusha for the principal purpose of extending his provisional detention, and that the issue of a possible violation of Rule 40bis(J) was not raised by

the Defence at that occasion. The hearing was *inter partes*, the suspect being represented by his present Defence Counsel and the rights of the suspect were duly safeguarded. As far as the Defence Counsel's request for provisional release of the suspect is concerned, the Tribunal recalls that release of the suspect, in any case, can only be ordered by a Trial Chamber and not by a single Judge.

Whether or not the suspect, assisted by his Defence Counsel, should have been brought before a Judge at an earlier point of time after his transfer to ensure that his rights had been properly respected, however, remains a question to be addressed and exclusively examined by Trial Chamber 1 pursuant to Rule 40bis(K). The Tribunal, in other words, sitting as a single Judge acting under Rule 40bis(F) and (G), has no authority to exercise the judicial power entrusted to the Trial Chamber. The Tribunal, therefore, is unable at this stage to entertain the complaint raised by the Defence Counsel on the issues that the suspect was not brought before a Judge to verify that his rights had been ensured, and that his rights had in fact been violated subsequently.

**D. On the Competence of the Tribunal to Order Arrest and Transfer of Suspects**

24. The Defence Counsel finally submitted that the Tribunal had acted *ultra vires* in adopting Rules 40 and 40bis of the Rules of Procedure and Evidence, since the Tribunal's Statute as endorsed by the UN Security Council does not include any authority for the Tribunal to order arrest and transfer of suspects. The arrest and transfer of the suspect, in the Defence Counsel's submission, was legally unfounded and should be declared null and void.

25. The Prosecutor responded that Articles 14 and 17 of the Statute did indeed contain sufficient authorisation for the Judges of the Tribunal to adopt the necessary rules and regulations to carry out its mandate and that the Judges, therefore, had acted within their authority.

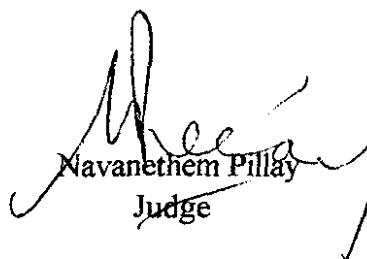
26. Article 14 of the Statute provides authority for the Judges of the Tribunal to adopt, for the purpose of the proceedings before the Tribunal, the same Rules of Procedure and Evidence for the conduct of *pre-trial* and trial proceedings, appeals, admission of evidence, protection of victims and witnesses and *other appropriate matters*, as those applicable to the International Criminal Tribunal for the Former Yugoslavia, with *such changes as they deem necessary* (emphasis added). The Tribunal notes that Rules 40 and 40bis in the ICTY Rules have been reproduced in the ICTR's Rules of Procedure and Evidence and adapted to the particular features of the ICTR and finds, therefore, that inclusion of these provisions into the ICTR Rules was perfectly legitimate and provides the Tribunal with sufficient authority to order the arrest, transfer and provisional detention of suspects.

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**FOR THESE REASONS,**

The Tribunal rendered its Decision on 16 September 1997.

Arusha, 5 November 1997

  
Navanethem Pillay  
Judge

