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

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**Office of the President  
Bureau de la Présidente**

Before: Judge Navanethem Pillay, Presiding  
Judge Erik Møse  
Judge Asoka de Zoysa Gunawardana

Original: English

Registrar: Mr. Adama Dieng

Decision of: 5 July 2001

**The Prosecutor  
Versus  
Ferdinand NAHIMANA  
ICTR-96-11-T**

JUDICIAL RECORDS ARCHIVES  
ICTR  
2001 JUL -5 P 1:07  
05/07/2001  
APW/gum

**DECISION ON THE DEFENCE MOTION RELATING TO VIOLATIONS OF THE  
WITNESS PROTECTION ORDER BY THE PROSECUTOR**

Office of the Prosecutor:

Mr. William T. Egbe

Defence Counsel:

Mr. Jean-Marie Biju-Duval  
Ms Diana Ellis

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

**CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
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NAME / NOM: **AMINATTA L. R. N'GUM**  
SIGNATURE: **APW/gum** DATE: **05/07/2001**

SITTING AS Trial Chamber I, comprising Judge Navanethem Pillay, presiding, and Judges Erik Møse and Judge Asoka de Zoysa Gunawardana;

HAVING BEEN SEIZED with a motion, dated 26 June 2001, from Defence Counsel for Ferdinand Nahimana;

HAVING HEARD the parties on 28 June 2001;

CONSIDERING the Order of 25 February 2000, granting Protective Measures for Defence witnesses.

#### **Facts of the case**

1. By Order of 25 February 2000, the Chamber granted an Order for Protective Measures for Defence Witnesses in terms of the provisions of Rule 75 of the Tribunal's Rules of Procedure and Evidence (hereinafter referred to as the Protection Order).
2. On 16 October 2000, the Defence filed and served upon the Registry and the Prosecutor, its notice of intention to enter the defence of alibi under Rule 67 A (ii) and disclosed the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses (hereinafter referred to as "the Alibi Notice").
3. In the Alibi Notice, Defence Counsel had stated: "Should the Prosecution seek to interview any of the aforementioned witnesses who can provide evidence for the Defence, the Defence request advance notice and would wish to be present at any such interviews".
4. By letter dated 15 January 2001, the Prosecution sought the assistance of the Belgian Ministry of Justice for an examining judge to conduct an interview of two of the witnesses. The alibi notice formed an attachment to the Prosecutor's request (hereinafter referred to as the "Prosecutor's request").
5. The Prosecutor's request read in part:

"(ix) The Prosecution requests that both witnesses identified for the purpose of this interview be questioned by an Examining Judge on oath, with all guarantees of fairness that the process will entail. Furthermore, the Prosecution team is unlikely to be present during the interview and would therefore not expect Defence Counsel for the Accused to be present."

6. As a consequence of the Prosecutor's Request, a deposition was taken from the two Defence witnesses by Judge Damien Vandermeersch of Brussels on 29 May 2001, and forwarded to the Prosecutor. Neither Prosecution Counsel, nor Defence Counsel was present at the interview.

#### **Submissions of the Parties**

7. Counsel for the Defence argues that the Defence did not have knowledge of the interview of their witnesses until the Accused received a report from one of them. The Prosecution

had not informed Defence Counsel of the steps it had taken to conduct the interview nor had they provided copies of their request, and the deposition taken from the witnesses, to Defence Counsel until the time of the Defence Motion.

8. The Defence does not dispute that the Prosecutor was entitled to interview its alibi witnesses, nor does Defence Counsel impute any wrongdoing on the part of the examining judge, Mr. Damien Vandermeersch. The Defence's complaint against the Prosecutor is that she violated the Protection Order by disclosing protected information of names and identifying particulars to "the public" and by failing to notify the Defence prior to making contact with their alibi witnesses.

Defence Counsel also argued that, by his conduct, Counsel for the Prosecution had frustrated the purpose of the Protection Order, namely to avoid the possible exposure of protected witnesses to intimidation and threats to personal security which ultimately endangered the right of accused persons to a fair trial.

9. Counsel for the Prosecution contends that the Defence witnesses who were interviewed were not protected witnesses and were not covered by the Protection Order. There was therefore no violation of the Order, by the Prosecutor. He asserts that the Prosecutor had a duty to investigate alibi witnesses in order to discharge the onus borne by the Prosecution to prove its case beyond a reasonable doubt. Rule 67 (A) which requires the Defence to disclose details of alibi witnesses was intended precisely for this purpose, namely, to facilitate the Prosecution's investigation of the defence of alibi.

### Deliberations

10. The issues for decision is whether the two Defence witnesses were protected by the Protection Order; or whether they were simply alibi witnesses falling under Rule 67 (A) (ii); and the propriety of the Prosecutor's conduct in relation thereto.

11. Para. 1 of the Protection Order reads:

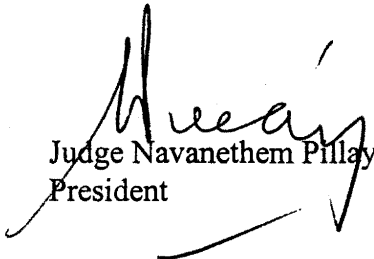
"The names, addresses and other identifying information concerning all Defence witnesses shall be forwarded by Defence, to the Registry, in confidence and shall be kept under seal by the Registry and not be included in any public records of the Tribunal."

12. If the witnesses were known to the Defence at the time of the Order, then it was incumbent upon them to have brought the witnesses within the purview of the Protection Order by filing their names with the Registry, as provided in para. 1 cited above. By such action, the Defence would have communicated to the Prosecution, Registry and Chambers, the protected status of its witnesses. The Defence did not file such a list with the Registry.
13. If the witnesses in question were not known to the Defence at the date of the Order but only subsequent to it, and the Defence believed that protective measures envisaged under Rule 75 were necessary, then it was their responsibility to have applied to the Chamber for protective measures in terms of Rule 69 (A). The Defence did not make such an application.

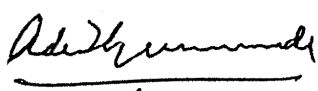
14. It follows from Rule 69(A) that Orders for the non-disclosure of the identity of a witness are exceptional measures and not blanket protection for all witnesses, assumed automatically. Indeed, it was on this very basis that Counsel for Ferdinand Nahimana objected to the protected status of Prosecution witnesses AGR and DAD whose statements post-dated the Protection Order granted for witnesses for the Prosecution.<sup>1</sup>
15. The Notice of Alibi was filed by Defence Counsel under Rule 67, in fulfillment of their obligation to divulge details of the defence of alibi to the Prosecution. It is noted that in the said notice, apart from inserting what purports to be a pseudonym for one of the two witnesses, the Defence do not describe them as protected witnesses; nor do they make any cross-reference to the Protection Order or in any other way notify the Prosecutor that the names and identities of the witnesses are not to be disclosed to anyone.
16. Consequently, the witnesses in question were not protected by the Protection Order of 25 February 2000.
17. Counsel for the Prosecution acted within his powers when he instituted an investigation of the defence of alibi and caused an interview of the witnesses to be undertaken by an independent judicial officer, outside the presence of both Prosecution and Defence Counsel.
18. It is clear that contact with protected witnesses is governed by the Protection Order. However, for contact with other witnesses, it is advisable that parties exercise sound professional judgment and follow the well-established tradition of one party obtaining the prior consent of the other party, before communicating with the witnesses of the other party. This will obviate any suggestion of interference or unfairness and will ensure that justice is seen to be done.

### Decision

For the reasons stated, the motion is dismissed.

  
Judge Navanethem Pillay  
President

  
Judge Erik Møse

  
Judge Asoka de Zoysa Gunawardana

Seal of the Tribunal



<sup>1</sup> Transcripts dated 19 February 2001 and 12 March 2001