



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations  
of International Humanitarian Law  
Committed in the Territory of the  
Former Yugoslavia since 1991

Case No.: IT-99-37-PT  
Date: 7 June 2002  
Original: English

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**IN THE TRIAL CHAMBER**

**Before:** Judge Richard May, Presiding  
Judge Patrick Robinson  
Judge O-Gon Kwon

**Registrar:** Mr. Hans Holthuis

**Order of:** 7 June 2002

**PROSECUTOR**

**v.**

**NIKOLA ŠAINOVIĆ**

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**DECISION ON EX PARTE AND CONFIDENTIAL PROSECUTION'S  
MOTION FOR WITNESS PROTECTION MEASURES**

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**The Office of the Prosecutor**

**Ms. Carla Del Ponte**

**Counsel for the Accused**

**Mr. Toma Fila  
Mr. Zoran Jovanović**

## **I. BACKGROUND**

1. The Office of the Prosecutor (“Prosecution”) filed an “Ex Parte and Confidential Prosecution’s Motion for Witnesses Protection Measures” on 7 May 2002 (“the instant Motion”). The Motion seeks protective measures in the same manner as those granted in the Milosevic proceedings for witnesses identified in those proceedings as K1 to K30. Whilst noting that these protective measures have been varied or waived for some witnesses who appeared in the Milosevic proceedings, the Prosecution submits that those changes were motivated by “intensely considered decisions on the part of the witness in the specific context of the case against the accused Milosevic” and that it is the original pre-trial orders that should be made in respect of these witnesses.

## II. THE LAW

1. The Prosecution purports to rely upon Articles 20, 21(2) and 22 of the Statute of the Tribunal ("Statute") and Rules 54, 69, 75 and 79 of the Rules of Procedure and Evidence of the Tribunal ("Rules").
2. In fact, the Motion is one properly dealing with Rule 69 of the Rules, concerning provisional protective measures. Rule 69 (A) provides that non-disclosure to the Defence of the identity of a victim or witness who may be in danger or at risk may "in exceptional circumstances" be ordered until such person is brought under the protection of the Tribunal. This Trial Chamber has in previous decisions set out the criteria that would need to be considered in respect of applications made under Rule 69 (A) for specific protective measures for witnesses, including:
  - (a) the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not the public (fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk; what is required to interfere with the rights of the accused in this respect is something more);
  - (b) the extent to which the power to make protective orders can be used to protect individual victims or witnesses in the particular trial, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future; and
  - (c) the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused (the time allowed for preparation must be a time *before trial commences* rather than before the witness gives evidence).<sup>1</sup>
3. Protective measures sought with respect to matters falling outside of Rule 69 (A) are, for reasons set out below, inappropriate at this time and so the legal test concerning these provisions will not be explored here.

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<sup>1</sup> See, for example, *Prosecutor v. Milosevic*, "Decision on Prosecution Motion for Provisional Protective Measures" issued on 19 February 2002; "Decision on Prosecution Motion for Protective Measures for Victims and Witnesses" issued on 19 March 2002, and *Prosecutor v. Plavsic and Krajisnik*, "First Decision on Prosecution's Motion for Protective Measures for Sensitive Source Witnesses" issued on 24 May 2002.

### III. DISCUSSION OF THE APPLICATION AND DECISION

4. The Prosecution seeks the same protective measures granted to the 30 witnesses in the Milosevic proceedings in the Trial Chamber's Orders of 4 January 2002<sup>2</sup> and 1 February 2002<sup>3</sup>, which included the use of pseudonyms for those witnesses and liberty to apply for specific protective measures for individual witnesses when they come to testify.
5. Since the granting of provisional measures for these 30 witnesses, some of them have testified in the Milosevic proceedings, whilst others have either refused to testify or testified without any protection whatever. Whilst noting that these protective measures have been varied or waived for some witnesses who appeared in the Milosevic proceedings, the Prosecution submits that those changes were motivated by "intensely considered decisions on the part of the witness in the specific context of the case against the accused Milosevic" and that it is the original pre-trial orders that should be made in respect of these witnesses. The Trial Chamber does not consider this to be an appropriate or logical approach to the question of protective measures for these witnesses. Victims and witnesses are granted these protective measures on the basis of exceptional circumstances and it is acknowledged that whilst the imposition of such measures may not be inconsistent with the right of an accused to a fair trial, they inevitably infringe on the convenience of the accused in preparing his defence and the public nature of trial proceedings. Where witnesses have been granted protective measures in other proceedings but have subsequently waived those measures, or the Chamber has removed those measures on the basis that they are no longer considered appropriate, the Chamber does not see any reason for reverting to those measures.
6. Furthermore, the Prosecution has asked for protective measures for thirty witnesses, whilst acknowledging that only sixteen of these are witnesses who form part of the supporting material under Rule 66 (A)(i) concerning the accused in these proceedings. As stated above, the Chamber considers the Motion to be properly formulated at this stage as a Rule 69 (A) application, seeking to disclose the statements of these witnesses to the accused in redacted form. Witnesses selected pursuant to Rule 66 (A)(ii) should be the subject of a separate application at a time after the disclosure under Rule 66 (A)(i) is complete and a disclosure timetable is set under Rule 66 (A)(ii). The Trial Chamber will accordingly only deal at this stage with the 16 relevant witnesses.

7. The Trial Chamber will therefore consider protective measures for witnesses identified as K6, K8, K9, K11, K13, K14, K15, K16, K18, K20, K21, K23, K24, K26, K27 and K29. The other 14 witnesses in the K1 to K30 range may be dealt with in an application at the appropriate time. As stated above, the Prosecution satisfied the Chamber of the exceptional circumstances which attaches to these witnesses such that provisional protective measures sought under Rule 69 (A) would be appropriate. However, on the basis of the withdrawal of protective measures for two of these witnesses during the Milosevic trial, the Chamber will order provisional protective measures for the following witnesses: K6, K8, K9, K11, K13, K14, K15, K16, K18, K23, K24, K26, K27 and K29. K20 and K 21 should be the subject of unredacted disclosure. Furthermore, where protective measures for any of the 14 witnesses are waived or varied during other proceedings, and at a time subsequent to the issuance of this Decision, the Prosecution shall disclose the statements of those witnesses to the Defence in these proceedings in unredacted form immediately, and shall notify the Chamber of this change in status.
8. Finally, the Trial Chamber will follow its own practice and that of other Chambers of the Tribunal with respect to the time at which unredacted disclosure of these witnesses should be made to the Defence. A period of 30 days prior to a timetabled trial date is an appropriate time within which the Prosecution must disclose the statements of witnesses granted protective measures under Rule 69 (A).

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<sup>2</sup> "Decision on Prosecution Motion for Protective Measures".

<sup>3</sup> "Decision on Prosecution Confidential and Ex Parte Second Motion for Protective Measures".

#### IV. DISPOSITION

9. For the foregoing reasons, the Trial Chamber **ORDERS**, pursuant to Rule 69 (A) of the Rules as follows:

(a) The Prosecution may disclose the statements of the following witnesses (as identified in the Milosevic proceedings) to the Defence with any identifying information about the witness redacted;

**K6, K8, K9, K11, K13, K14, K15, K16, K18, K23, K24, K26, K27 and K29**

(b) The Prosecution shall disclose the statements of the following witnesses (as identified in the Milosevic proceedings) to the Defence in unredacted form forthwith;

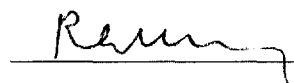
**K20 and K21**

(c) The Prosecution may apply for protective measures for the remaining 14 witnesses identified in this Motion in the K1 to K30 range (as identified in the Milosevic proceedings) at the appropriate time;

(d) The statements of all witnesses for whom protective measures are granted pursuant to Rule 69 (A) shall be disclosed to the accused in unredacted form by 30 days prior to the timetabled trial date, unless otherwise ordered by the Trial Chamber; and

(e) where protective measures for any of the 14 witnesses in paragraph (a) above are waived or varied during the Milosevic proceedings, and at a time subsequent to the issuance of this Decision, the Prosecution shall disclose the statements of those witnesses to the Defence in these proceedings in unredacted form immediately, and shall notify the Chamber of this change in status.

Done in English and French, the English text being authoritative.



Richard May  
Presiding

Dated this seventh day of June 2002  
At The Hague  
The Netherlands

[Seal of the Tribunal]

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