



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-98-34-PT

Date : 5 June 2001

Original: English

IN THE TRIAL CHAMBER

Before: Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar: Mr Hans Holthuis

Decision of: 5 June 2001

THE PROSECUTOR

v.

**MLADEN NALETILIĆ aka "TUTA"
and
VINKO MARTINOVIĆ aka "ŠTELA"**

**DECISION ON PROSECUTOR'S MOTION TO TAKE ADDITIONAL
DEPOSITIONS FOR USE AT TRIAL (Rule 71)**

The Office of the Prosecutor:

Mr. Kenneth Scott

Counsel for the Accused:

Mr. Krešimir Krsnik, for Mladen NALETILIĆ
Mr. Branko Šerić, for Vinko MARTINOVIĆ

TRIAL CHAMBER I of the 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 (hereafter “Tribunal”):

BEING SEISED of the “Prosecutor’s Motion to Take Additional Depositions for Use at Trial (Rule 71)” dated 11 April 2001 (hereafter “Motion”);

RECALLING that, pursuant to its “Decision on Prosecutor’s Motion to Take Depositions For Use at Trial (Rule 71) dated 10 November 2000 (hereafter “November Depositions Decision”), Trial Chamber I authorised depositions for 23 named Prosecution witnesses for use at trial, and noted that these 23 witnesses either would not give eyewitness evidence directly implicating the accused in the crimes charged, or that their evidence would be of a repetitive nature, in the sense that many witnesses would give evidence of similar facts;

NOTING that, pursuant to the Motion, the Prosecutor seeks an order for eleven additional witnesses, who are named in Confidential Annex A to the Motion (hereafter “Annex A”), to give evidence by way of deposition;

NOTING the Prosecutor’s argument that the witnesses are suitable for depositions because one of the eleven witnesses proposed for deposition will not give any evidence directly implicating either of the accused in the crimes charged and the remaining ten witnesses will give evidence of a repetitive nature;

NOTING that the Prosecutor proposed depositions for the eleven additional witnesses as a measure to expedite the proceedings;

NOTING “The Defence’s Response to the Prosecutor’s Motion to Take Additional Depositions for Use at Trial (Rule 71)” dated 25 April 2001, filed by the accused Naletilić;

NOTING FURTHER that, in his response, the accused Naletilić objected to the 1st-5th named witnesses in Annex A giving evidence by way of deposition but, while maintaining his “in principle” objection to the use of depositions at trial, agreed that the 6th-11th named witnesses in Annex A could give evidence by way of deposition;

NOTING the “Declaration With Respect To Prosecutor’s Motion to Take Additional Depositions for Use at Trial (Rule 71)” dated 26 April 2001, filed by the accused Martinović;

NOTING FURTHER that, in his response, the accused Martinović objected to the 1st-5th named witnesses in Annex A giving evidence by way of deposition, but agreed to the 6th – 11th named witness in Annex A giving evidence by way of deposition;

RECALLING that, on 4 May 2001, the Trial Chamber issued its “Order for Clarification Regarding Prosecutor’s Motion to Take Additional Depositions for Use at Trial (Rule 71)” seeking information from the Prosecution as to why, in view of the multiple other witnesses potentially testifying about the same parts of the Indictment, as indicated in the Prosecutor’s List of Witnesses filed on 11 October 2000 (hereafter “Witness List”), the witnesses proposed for deposition should not be removed from the Witness List, or be placed onto an alternative, or substitute, witness list;

NOTING the “Prosecutor’s Clarification of Motion to Take Additional Depositions for Use at Trial (Rule 71)” dated 18 May 2001 (hereafter “Clarification”);

NOTING that, in her Clarification, the Prosecutor withdrew the 2nd named witness in Annex A on the grounds that the witness is no longer willing to testify;

EMPHASISING that in exercising its discretion pursuant to Rule 71 of the Rules of Procedure and Evidence of the Tribunal (hereafter “Rules”), a balance must be struck between permitting a reasonable degree of repetitive testimony to be given by way of deposition where it covers similar facts to testimony presented by a reasonable number of witnesses appearing live before the Trial Chamber, and testimony that is unduly repetitive, and therefore unnecessary; and that in the former case, depositions perform the useful function of expediting the proceedings without infringing the rights of the accused, and in the latter case, they prolong the proceedings;

ACKNOWLEDGING the difficulties the Prosecution faces in attempting to predict which witnesses will ultimately be available to testify, and that the Prosecutor should not be unduly restricted in determining how many witnesses should present evidence at trial;

REITERATING, however, that pursuant to Rule 73 *bis* (c), the Trial Chamber is now mandated to set the number of witnesses the Prosecutor may call, and that at the Pre-Trial Conference held on 7 December 2000, the Pre-Trial Judge foreshadowed that a reasonable number of witnesses for this case would be approximately 50;¹

NOTING that, in her Clarification, the Prosecutor states that, although the Witness List makes reference to all potentially relevant parts of the witness testimony, the scope of each witness's testimony will in fact often be more limited than is indicated in the Witness List;

NOTING that, in her Clarification, the Prosecutor states that she anticipates calling only 65 of the more than 100 witnesses mentioned in the Witness List, but has failed to provide any guidance to the Trial Chamber as to which witnesses she considers to be substitute or alternative witnesses to be called only in the event that a primary witness was unable to testify;

FINDING that, if the Witness List does not realistically reflect the areas to be covered in the testimony of each of the witnesses listed, or how many witnesses the Prosecutor anticipates will testify about a given aspect of the indictment, the Trial Chamber is left with no guidance to assess the Prosecutor's claim that the 3rd, 4th, and 5th named witnesses in Annex A are suitable witnesses for deposition on the grounds that they will give repetitive testimony;

FINDING that the Prosecution has failed to provide any clear information about the relationship between the testimony to be given by the 3rd, 4th, and 5th named witnesses in Annex A, and the testimony to be given by the witnesses appearing live before the Trial Chamber;

FINDING further that, in the absence of such information, the Trial Chamber is unable to determine first, whether the 3rd, 4th, and 5th named witnesses in Annex A are in fact repetitive, to an acceptable degree, of testimony to be given by live witnesses, and second, whether they are so unduly repetitive that allowing them to present evidence by way of deposition would unreasonably prolong the proceedings;

¹ Transcript at p. 397.

FINDING that, although she may be unable to predict with certainty which live witnesses will ultimately be called at trial, the Prosecutor is required to make a genuine effort to give the Trial Chamber information upon which to assess her claim that the witnesses are appropriate for deposition because their testimony is repetitive;

FINDING that, as the Prosecutor has stated in the Motion that the 1st named witness in Annex A will not present eyewitness evidence directly implicating either of the accused in the crimes charged, this witness accords with the criteria set out by the Trial Chamber in its November Depositions Decision and is a suitable deposition witness;

FOR THE FOREGOING REASONS

HEREBY ORDERS


1. That depositions may be taken for the witnesses for whom the accused maintained no objection, namely the 6th-11th named witnesses in Annex A;
2. That depositions may be taken for the 1st named witness in Annex A;
3. That, within seven days of the date of this decision, the Prosecutor may resubmit her motion for depositions regarding the 3rd, 4th, and 5th named witnesses in Annex A, clearly stating which anticipated live witnesses each of the depositions witnesses is repetitive of, and providing information as to the nature of the repetition, so that the Trial Chamber can assess whether these witnesses are appropriate deposition witnesses, in accordance with the criteria set out above; and
4. That, should the Prosecutor file an additional motion as set out in Order 3 above, the accused may file a response to that motion within seven days of the date of that additional motion.

Done in both French and English, the English version being authoritative.

Done this 5th day of June 2001,

At The Hague,

The Netherlands.



Patricia M. Wald

Pre-Trial Judge, Trial Chamber I

[Seal of the Tribunal]