



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-T  
Date: 28 February 2002  
Original: English

---

**BEFORE TRIAL CHAMBER I SECTION A**

**Before:** Judge Liu Daqun, Presiding  
Judge Maureen Harding Clark  
Judge Fatoumata Diarra

**Registrar:** Mr. Hans Holthuis

**Decision of:** 28 February 2002

**PROSECUTOR**

v.

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

---

**DECISION ON MOTIONS FOR ACQUITTAL**

---

**The Office of the Prosecutor:**

**Mr. Kenneth Scott**

**Counsel for the Accused:**

**Mr. Krešimir Krsnik, for Mladen Naletilić  
Mr. Branko Šerić, for Vinko Martinović**

## I. INTRODUCTION

1. Pending before Trial Chamber I, Section A (“the Chamber” or “the Trial Chamber”) 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 (“the Tribunal”) are the motions for acquittal of the accused Mladen Naletilić and Vinko Martinović.

2. On 7 February 2002, the defence for Mladen Naletilić filed confidentially the “Motion for Judgement of Acquittal filed by the Accused Mladen Naletilić aka Tuta pursuant to Rule 98bis” (“the Naletilić Motion”) and on 8 February 2002, the Defence for Vinko Martinović filed confidentially the “Motion for Judgement of Acquittal” (“the Martinović Motion”);

3. In the Martinović Motion it is argued, *inter alia*:

- that there is no or insufficient evidence to show that the accused Martinović had any responsibility for the camps and prisoners of war and commanded forced labour on the confrontation line, nor that he knew about the acts allegedly committed by soldiers from his unit;
- - that in relation to counts 13-17, there is no “evidence presented about the way he [Nenad Harmandžić] was killed, cause of death, perpetrator, place and time of death”;

4. In the Naletilić Motion, arguments are raised in relation to almost every paragraph in the second amended indictment (“the Indictment”).<sup>1</sup> It is submitted, *inter alia*, that there is a lack of evidence regarding the required knowledge under Article 7(3) of the Statute and that there is insufficient evidence of Naletilić’s alleged role as a commander.

5. On 7 February 2002, the Prosecution filed the “Prosecutor’s Submission Concerning Paragraphs 42 and 47 of the Second Amended Indictment” (“the Submission”) whereby it conceded that there was insufficient evidence in relation to certain aspects of paragraphs 42 and 47 of the Indictment. Further, the Prosecution filed two extensive responses, in respect of each motion filed by the accused. On 15 February 2002, it filed the “Prosecutor’s Response to the Motion of the Accused Mladen Naletilić for Judgement of Acquittal” and the “Prosecutor’s Response to the Motion of the Accused Vinko Martinović for Judgement of Acquittal”.

---

<sup>1</sup> Second amended indictment as accepted by the Chamber on 28 September 2001.

6. The Indictment is comprised of twenty-two counts. The accused Naletilić and Martinović are both charged in count 1 with persecutions as a crime against humanity; in count 2 with inhumane acts as a crime against humanity; in count 3 with inhuman treatment as a grave breach of the Geneva Conventions of 1949; in count 4 with cruel treatment as a violation of the laws or customs of war; in count 5 with unlawful labour as a violation of the laws or customs of war; in count 6 with murder as a crime against humanity; in count 7 with wilful killing as a grave breach of the Geneva Conventions of 1949; in count 8 with murder as a violation of the laws or customs of war; in count 11 with cruel treatment as a violation of the laws or customs of war; in count 12 with wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949; in count 18 with unlawful transfer of a civilian as a grave breach of the Geneva Conventions of 1949 and in count 21 with plunder of public or private property as a violation of the laws or customs of war.

7. The accused Naletilić is individually charged in count 9 with torture as a crime against humanity; in count 10 with torture as a grave breach of the Geneva Conventions of 1949; in count 19 with extensive destruction of property as a grave breach of the Geneva Conventions of 1949; in count 20 with wanton destruction not justified by military necessity as a violation of the laws or customs of war and in count 22 with seizure, destruction or wilful damage done to institutions dedicated to religion as a violation of the laws or customs of war.

8. The accused Martinović is further charged in count 13 with murder as a crime against humanity; in count 14 with wilful killing as a grave breach of the Geneva Conventions of 1949; in count 15 with murder as a violation of the laws or customs of war and in the alternative in count 16 with cruel treatment as a violation of the laws or customs of war and count 17 with wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949.

## II. THE APPLICABLE STANDARD OF PROOF UNDER RULE 98BIS

9. Rule 98bis of the Rules provides:

- (A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A) (ii).
- (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges.

10. The Trial Chamber shall acquit under Rule 98bis (B) if "the evidence is insufficient to sustain a conviction" on one or more of the charges in the Indictment. This standard was interpreted in the *Jelisić Appeals Judgement*<sup>2</sup> to mean that:

a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed,<sup>3</sup> is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the *Delalić* appeal judgement, where it said: "[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question".<sup>4</sup> The capacity<sup>5</sup> of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.

11. The Trial Chamber is of the opinion that this standard allows the entry of a judgement of acquittal with regard to a particular factual event contained in a numbered paragraph supporting an offence charged in the Indictment. The Chamber directs its attention primary to the specific counts in the Indictment. An acquittal on a numbered paragraph does not necessary affect the integrity of the count.<sup>6</sup>

<sup>2</sup> *Prosecutor v. Goran Jelisić*, Case No.: IT-95-10-A, Judgement, 5 July, para. 37, p. 14.

<sup>3</sup> Footnote in original judgement: "As to the permissibility of drawing inferences at the close of the case for the prosecution, see *Monteleone v. The Queen* [1987] 2 S.C.R. 154, in which McIntyre J., for the court, said: 'It is not for the trial judge to draw inferences of fact from the evidence before him'. And see the reference to 'inferences' in *Her Majesty v. Al Megrahi and Another*, *infra*. Cf. *Kvočka* decision, para. 12, p. 5, in which the Trial Chamber said: 'The Chamber prefers an objective standard, under which it is entitled at this stage to apply any reasonable inferences and presumption or legal theories when reviewing the Prosecution evidence'. The issue thus posed is not passed upon here."

<sup>4</sup> Footnote in original judgement: "*Delalić* appeal judgement, para. 434, p. 148 (emphasis in original). Or, as it was correctly put by Trial Chamber II in the *Kunarac* decision, para. 10, p. 6, the 'prosecution needs only to show that there is evidence upon which a reasonable tribunal of fact could convict, not that the Trial Chamber itself *should* convict'" (emphasis in original).

<sup>5</sup> Footnote omitted.

<sup>6</sup> See *Prosecutor v. Kvočka et al*, Case No.: IT 98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, paras 6-9, *Prosecutor v. Kunarac et al*, Case No.: IT 96-23-T, IT 96-23/1-T, Decision on Motion for Acquittal, 3 July 2000, para 26, *Prosecution v. Kordić and Čerkez*, Case No.: IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, paras 29-36.

### III. THE SUBSTANCE OF THE MOTIONS TO ACQUIT

12. The Motions and Submission both raise specific and general issues. These will now be addressed in the following paragraphs.

#### A. Specific Issues

##### 1. Witness B in the Indictment

13. It is submitted in the Naletilić Motion that there is “no evidence in the record of the identity of this witness B”.<sup>7</sup> The Prosecution concedes that the evidence does not specifically establish that Naletilić and his subordinates tortured witness “B” causing severe injuries.<sup>8</sup>

14. The Trial Chamber finds that there is no or insufficient evidence upon which a reasonable tribunal of fact *could* sustain a conviction in relation to the factual events regarding witness “B” as described in paragraph 47 of the Indictment.

##### 2. Paragraph 42 of the Indictment

15. Paragraph 42 of the Indictment provides that:

On the same day [17 September 1993] and about the same time, approximately fifteen prisoners and detainees were deployed as human shields in an adjacent section of the Bulevar front line under the command of VINKO MARTINOVIĆ in order to protect attacking HVO soldiers. Approximately ten detainees were killed as a result of their use as human shields, including the following:

1. Čolaković Aziz
2. Čolaković Hamdija
3. Pajo Enis

16. The defence for the accused Martinović argues that the allegations of “setting prisoners into a human shield, in which, allegedly, Aziz Čolaković, Hamdija Čolaković, and Enic [sic] Pajo were killed” have not been proved.<sup>9</sup> The Prosecution states that “the evidence does not sufficiently establish that the three men [Aziz Čolaković, Hamdija Čolaković, and Enis Pajo] were killed ‘as a result of their use as human shields’”.<sup>10</sup>

---

<sup>7</sup> Naletilić Motion, p. 9.

<sup>8</sup> Submission, para. 18.

<sup>9</sup> Martinović Motion, p. 7.

<sup>10</sup> Submission, para. 4.

17. The Chamber considers that there is insufficient evidence that Aziz Čolaković, Hamdija Čolaković, Enis Pajo died as a direct result of being used as human shields. The Chamber is of the opinion that their deaths are relevant to the allegations that prisoners were taken to the section of the Bulevar front line under the command of Vinko Martinović and in relation to the more general allegations set out in paragraphs 35-41 of the Indictment.

### 3. Conclusion

18. The findings of the Chamber of no case to answer in paragraphs 42 and 47 do not affect the integrity of counts 2-8 and counts 9-12 respectively.

## B. General Issues

### 1. Reliability and credibility of witnesses

19. Several of the arguments raised would require the Chamber to assess the reliability and credibility of witnesses. For example, in the Martinović Motion, in relation to counts 2-8 it is submitted that “[m]ost of the witnesses are of dubious credibility since they are active servicemen of the BIH army”, and with regard to counts 13-17 it is submitted that the basis of the evidence comes from only one witness who is “without credibility”.

20. The Chamber would like to stress that the determination of the reliability and credibility of the witnesses cannot be made until after the presentation of all the evidence except in instances, when a witness is obviously unreliable and not credible.<sup>11</sup> In this case, there is no such situation as where the Prosecution’s case has completely broken down for reasons of lack of reliability and credibility of witnesses.

### 2. Superior responsibility

21. In the Martinović Motion, it is submitted that there is no evidence that on 9 May 1993 the ATG “Mrmak” and ATG “Vinko Škrobo” existed. The Prosecution argues that whether or not it existed is not relevant since the accused Martinović is charged with crimes after 9 May 1993 and, in addition, there is evidence of the unit being formed as early as April 1993. On this latter point the Chamber agrees with the Prosecution.

---

<sup>11</sup> See also, *Prosecutor v. Kordić and Čerkez*, Case No.: IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, para. 28, and *Prosecutor v. Kvočka et al*, Case No.: IT-98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, para. 17, where the respective Chambers stated that the credibility of witnesses only becomes an issue when the Prosecution’s case has “completely broken down”.

22. The accused Naletilić submitted that “it is uncertain who had command authority of the ATG’s”. In the Naletilić Motion several arguments are raised relating to the lack of evidence of Naletilić’s superior responsibility, *inter alia*, that he had the overall command of the attack on Sovići, that he had authority over Heliodrom, that he gave any orders for transfer of prisoners from detention facilities to the confrontation line. Further, it is argued that there is no evidence of the knowledge of Naletilić that his subordinates, if any, had committed the alleged crimes. The Prosecution disagreed and submitted an extensive response.

23. The Chamber is of the view that the Prosecution has presented sufficient evidence to meet the standard under Rule 98bis regarding the internal structure of the Convicts Battalion and regarding Naletilić’s role as commander of military units, such as the Convicts Battalion in the area relevant to the Indictment.

### 3. The international character of the conflict

24. With regard to the international character of the conflict, it is submitted in the Naletilić Motion, *inter alia*, that there was evidence of the presence of individual Croatian Army (HV) soldiers but that “there was no evidence presented showing ‘units’ of HV being deployed in the area of Bosnia and Herzegovina” and the evidence regarding the HV units called “Tigers” and “Thunder” relate to these units being stationed at the Heliodrom and not of them participating in any “action or conflict in Mostar or Rašrani”.<sup>12</sup> Further, it was submitted in the Martinović Motion that “the Prosecutor has in his case presented not one relevant piece of evidence supporting his thesis about the existence of an international conflict in Mostar and Bosnia & Herzegovina”.<sup>13</sup>

25. The Chamber has heard a large number of witnesses giving testimony confirming the presence of the Croatian Army (HV) in Bosnia and Herzegovina and more specifically in the area relevant to the present Indictment. In addition, this testimony is supported by a large number of documents. The Chamber is therefore satisfied that the Prosecution has presented sufficient evidence on this issue to meet the standard under Rule 98bis of the Rules.

26. Further, the accused Martinović raises the argument that there is no evidence of his knowledge of the international character of the armed conflict.<sup>14</sup>

27. The Chamber is of the view that the current jurisprudence of the Tribunal does not require the Prosecution to prove the accused’s knowledge of the international character of the conflict he or

---

<sup>12</sup> Naletilić Motion, pp. 11-12.

<sup>13</sup> Martinović Motion p. 3.

<sup>14</sup> Martinović Motion, p. 4.

she is participating in. It is a matter of fact and a matter of law, in the jurisprudence of the Tribunal ignorance of the law is no excuse, *ignorantia iuris neminem excusat*.

### C. Conclusion

28. After a careful consideration of the arguments raised and subsequent to an extensive review of all the evidence presented, both testimonial and documentary, the Chamber concludes that the Prosecution has presented sufficient evidence to meet the standard under Rule 98*bis* of the Rules on all the counts the accused are charged with. However, the Chamber notes the extensive submissions made by all parties, which also raise issues that will be duly taken into account at the final judgement phase in this case.



#### IV. DISPOSITION

##### FOR THE FOREGOING REASONS

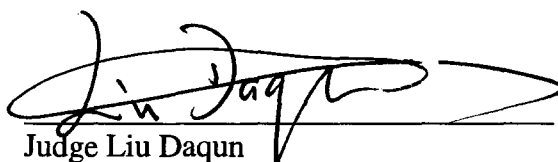
PURSUANT TO Rule 98*bis* of the Rules,

##### The Trial Chamber

- (1) **DETERMINES** that there is no or insufficient evidence presented under counts 9, 10, 11 and 12 in the Indictment in relation to the incident involving witness "B" as described in paragraph 47 of the Indictment;
- (2) **DETERMINES** that there is insufficient evidence in relation to detainees being killed as a result of being used as human shields as described in paragraph 42 of the Indictment. However, the evidence presented with regard to the incident described in paragraph 42 may serve as a basis for the Chamber's findings in relation to the allegations set out in paragraphs 35-41 in the Indictment;
- (3) **DISMISSES FURTHER** the Naletilić Motion and Martinović's Motion.

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

Dated this twenty-eighth day of February 2002,  
At The Hague,  
The Netherlands



Judge Liu Daqun  
Presiding Judge

[seal of the Tribunal]