



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: 5 June 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: 5 June 2002

PROSECUTOR

v.

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

PARTLY CONFIDENTIAL

**DECISION ON "NALETILIĆ MOTION TO TAKE DEPOSITIONS FOR USE AT THE
TRIAL PER RULE 71 OF THE RULES OF PROCEDURE AND EVIDENCE"**

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, SECTION A (“the 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”):

BEING SEISED OF the “Response of Accused Naletilić to Trial Chamber’s Scheduling Order Dated 05 February 2002”, filed confidentially on 1 March 2002, whereby the Defence for the accused Naletilić (“the Naletilić Defence”) submitted among a provisional list of Defence witnesses (*List A*) a provisional list of 29 proposed deposition witnesses (*List B*);

NOTING the “Prosecution’s Response to The Defence Rule 65 *ter* (G) Filings”, filed on 5 March 2002, whereby the Prosecution submitted that the filings do not comply with Rule 65 *ter* of the Rules of Procedure and Evidence (“the Rules”), because the witness lists do not provide any names and dates of birth and the summaries do not provide sufficient information;

NOTING the “Order in respect of Pre-Defence Filings”, issued on 12 March 2002, whereby the Chamber ordered the confidential filing of the names and dates of birth, if available, of all witnesses the Naletilić Defence intended to call, no later than 15 March 2002 and to provide additional information about the witnesses;

BEING SEISED OF the “Naletilić Pre-Defence Supplemental Rule 65 *ter* Filings”, filed confidentially on 15 March 2002, whereby the Defence submitted a new *List A* and a new *List B* of 22 proposed deposition witnesses providing the names and dates of birth of the witnesses;

BEING SEISED OF the “Naletilić Motion to Take Depositions For Use at The Trial Per Rule 71 of The Rules of Procedure And Evidence”, filed on 19 March 2002 (“the Motion”), whereby the Naletilić Defence states, (i) that it would be in the interests of justice to take depositions of some of the Defence witnesses in Mostar, “as any efforts to expedite the trial proceedings are most consistent with the mandate of Article 20 (1)”; (ii) that “many witnesses will give testimony concerning events which the Trial Chamber has heretofore heard evidence, albeit it from a completely different perspective”; (iii) that many of the proposed deposition witnesses are reluctant to testify in the Hague, because they fear that their absence would be quickly noticed by the Muslim neighbourhood; (iv) that the depositions should be taken in closed session; and (v) that the accused Naletilić has “specifically given consent” to take depositions in Mostar;

NOTING the arguments of the parties submitted orally during the Pre-Defence Conference on 20 March 2002;

NOTING the “Prosecution’s Response to Accused Naletilić’s Motion to Take Rule 71 Depositions And also Concerning Rule 92 *bis* Statements”, filed on 21 March 2002 (“the Response”), whereby the Prosecution objects to the taking of depositions for the witnesses on *List B* and specifically to their being taken in Mostar;

NOTING that the Response argues (i) that “the Naletilić Defence has still not provided: (a) fair and adequate summaries of the witnesses proposed testimony; or (b) the showings as to why the witnesses are appropriate for taking depositions”; (ii) that taking depositions would not save time; that (iii) Prosecution and Defence should be treated equally, but taking depositions in Mostar would provide the Defence with the “advantage in calling witnesses who are not willing or able to come to The Hague”; (iv) that “there is also the danger that taking evidence away from The Hague courtroom lowers the seriousness which must attend the taking and giving of evidence”; and (v) that depositions being taken in Mostar would not save money and rather have impacts on the security concerning Court Staff;

BEING SEISED OF the “List of Defence Witnesses And Order of Testimony Per Trial Chamber Order And Supplement to Provisional Rule 65 *ter* Filing”, filed confidentially on 4 April 2002, and the “Accused Naletilić’s Revised Rule 65 *ter* Filings”, filed confidentially on 16 April 2002, whereby the Naletilić Defence submitted additional information about the *List A* witnesses;

NOTING the “Decision on Naletilić Motion For Order Allowing The Late Disclosure of Witnesses Per Trial Chamber Order 12 March 2002 And Accused Naletilić’s Renewed Motion For Special Protective Measures For Six (6) Witnesses”, filed confidentially on 16 April 2002;

NOTING “Prosecutor’s Motion For Clarification of The Scheduling of Deposition Hearings in The Latest Courtroom Calendar”, filed on 26 April 2002, whereby the Prosecution by referring to the courtroom schedule issued on 18 April 2002 by the Registry requests the Chamber “to clarify the scheduling of deposition hearings in Mostar during the week of 8 to 12 July 2002”; and “also hopes that such scheduling does not indicate that the matter is prejudged or a *fait accompli*”; and further restates its objections to the depositions;

NOTING the “Prosecution Submission Regarding The Accused’s Rule 65 *ter* Filings”, filed confidentially on 26 April 2002, arguing “that a substantial number of the witnesses proposed for depositions are eyewitnesses to events potentially implicating the accused Mladen Naletilić” and therefore should be heard as live witnesses;

NOTING “Accused Naletilić’s Reply to Prosecution *Submission* and *Motion*, Both Filed 26 April 2002”, filed on 3 May 2002, whereby the Defence argues that “the amended Rule 71 clearly allows for depositions to be taken away from the Tribunal and nothing contained in the Rule 71 states that depositions are only for non-eyewitness evidence, or that deposition evidence must be repetitive in nature”;

BEING SEISED OF the “Naletilić List of Trial Witnesses in The Order of Their Expected Testimony”, filed confidentially on 8 May 2002 and the “Naletilić List of Witnesses Subject to Trial Chamber Order Concerning Extreme Protective Measures”, filed confidentially and *ex parte* on 8 May 2002;

NOTING the “Decision on Prosecutor’s Motion For Clarification of The Scheduling of Deposition Hearings in The Latest Courtroom Calendar”, issued on 9 May 2002, whereby the Chamber, by stating “that the scheduling in the courtroom calendar does not in anyway prejudice the Chamber’s decision on the taking of depositions in Mostar”, informed “the parties that the Chamber will decide on the issue of deposition as soon as it is seized with the revised list of deposition witnesses”;

BEING SEISED OF the “Accused Naletilić Proposed Deposition Witnesses Pursuant to Trial Chamber Request”, filed confidentially on 8 May 2002 (“the Final Filing”) and the “Revised Deposition Witness Summaries Per Rule 65 *ter* And Pursuant to Trial Chamber Request”, filed confidentially on 13 May 2002 (“the revised deposition witness summaries”), whereby the Defence finally proposes 18 witnesses for depositions and provides additional information about them;

NOTING “Prosecution’s Response to Deposition Witnesses Proposed by Mladen Naletilić”, filed confidentially on 17 May 2002, whereby the Prosecution expresses again its general objections and in particular objects to the taking of a deposition of witnesses A, K, F, and AE by assessing them as “too directly related to the facts in issue and too closely related to the accused”;

NOTING “Accused Naletilić’s Revised List of The Estimate Time For Direct Examination of Deposition Witnesses Pursuant to The Trial Chamber Request”, filed confidentially on 21 May 2002;

CONSIDERING the “Decision on Prosecutor’s Motion to Take Depositions For Use at Trial (Rule71)”, issued on 10 November 2000, whereby the Chamber set out the criteria that have to be met with regard to Rule 71 of the Rules. The Chamber stated (i) “that Rule 71 (A) gives a broad discretion to the Chamber to permit evidence by way of deposition ‘where it is in the interests of

justice to do so”; (ii) “that Rule 71 contains no requirement that a witness be unable to travel to the Tribunal”; (iii) “that deposition evidence taken at a location away from the seat of the Tribunal is specifically envisaged in Rule 71”; (iv) “that the witnesses proposed for deposition will not present eyewitness evidence directly implicating the accused in the crimes charged, or alternatively, their evidence will be of a repetitive nature in the sense that many witnesses will give evidence of similar facts”; (v) “that the subsidiary nature of the witnesses ... mitigates any disadvantages to the Trial Chamber of being unable to directly observe the demeanour of the witness or to ask questions”; (vi) “that, as with other forms of indirect evidence, deposition evidence may be accorded less weight than evidence given directly in the courtroom”; and (vii) “that, in specifying that depositions may be taken away from the seat of the Tribunal, Rule 71 contemplates the possibility that the accused may be absent, given that most accused are detained in the Hague”;

CONSIDERING that the revised deposition witness summaries meet the requirements of Rule 65 *ter* (G) of the Rules;

CONSIDERING that the witnesses proposed for depositions in the final filing will not present eyewitness evidence directly implicating the accused in the crimes charged or that their evidence will be of a repetitive nature, except witnesses A, F, Q and K, who therefore are only appropriate to be heard as live witnesses;

CONSIDERING that witnesses AH, Y, R, U and AE proposed for depositions in the Final Filing will not provide any further evidence as their evidence is of repetitive nature or irrelevant to the case;

CONSIDERING that pursuant to Rule 73 *ter* (C) of the Rules the Chamber has the power to set the number of witnesses the defence may call, which implies the discretion not to hear all the witnesses proposed for testimony;

CONSIDERING that three of the proposed live witnesses, who are named in the attached list, are more suitable as deposition witnesses as they will not present eyewitness evidence directly implicating the accused in the crimes charged;

CONSIDERING that the Chamber is of the view that depositions would expedite the trial proceedings;

CONSIDERING FURTHER that for the purpose of transparency and outreach of the Tribunal's work, the Chamber is in favour of depositions being taken in Mostar;

CONSIDERING that the accused Naletilić and Martinović have agreed to the taking of depositions in Mostar in their absence;

CONSIDERING that the Registry confirmed the feasibility of depositions in Mostar after studying premises, facilities, security, etc, following an on-site visit; and noting with appreciation the attitude of co-operation displayed in this occasion by the local authorities;

CONSIDERING that the Chamber will decide on protective measures at a later stage;

⤵ **FOR THE FOREGOING REASONS**

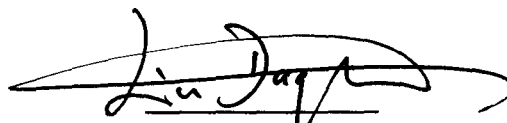
PURSUANT TO Article 29 of the Statute and Rules 54, 71 and 73 *ter* of the Rules

- 1) **GRANTS** the **MOTION** in part;
- 2) **ORDERS** that depositions be taken of the witnesses named in the attached confidential list in Mostar (Bosnia Herzegovina) during the period of 7 to 15 July 2002;
- 3) **APPOINTS** Senior Legal Officer Olivier Fourmy as Presiding Officer for that purpose;
- ⤵ 4) **STATES** that the accused shall not attend the depositions;
- 5) **REQUESTS** the Registrar to make all necessary arrangements with all appropriate local, national or international authorities in order for the depositions to be taken in Mostar; and **AUTHORISES** the Registrar to disclose, as and where strictly necessary all or part of the attached witness list to the appropriate authorities;

6) **THANKS** all authorities involved for their assistance and co-operation in this instance;

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

Dated this fifth day of June 2002,
At The Hague,
The Netherlands



Judge Liu Daqun
Presiding Judge

[Seal of the Tribunal]