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	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.:	IT-98-34-R
		Date:	19 March 2009
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: **Mr. John Hocking**

Decision of: **19 March 2009**

MLADEN NALETILIĆ, *a.k.a.* "TUTA"

v.

PROSECUTOR

PUBLIC

DECISION ON MLADEN NALETILIĆ'S REQUEST FOR REVIEW

Counsel for Mladen Naletilić:

Mr. Gerhard Zahner

The Office of the Prosecutor:

Mr. Peter Kremer, QC

1. The Appeals 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 ("Appeals Chamber" and "International Tribunal", respectively) is seized of the "Motion to Rehear" of 1 July 2008 ("Application") filed on behalf of Mladen Naletilić ("Applicant").[1]

I. BACKGROUND

2. On 31 March 2003, Trial Chamber I rendered its Judgement in the case of *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, sentencing Mladen Naletilić ("Applicant") to 20 years of imprisonment.[2] On 3 May 2006, following appeals filed by the Office of the Prosecutor ("Prosecution"), the Applicant and Vinko Martinović, the Appeals Chamber confirmed most of the convictions entered against the Appellant and affirmed the above sentence.[3]

3. In his Application, the Applicant alleges the existence of new facts, which were not known to him until 21 December 2006, that demonstrate his innocence in relation to the crimes for which he was convicted.[4] The Applicant further asserts that these facts demonstrate that his right to a fair trial were violated by the Trial and Appeal Judgements rendered in his case.[5] Accordingly, he requests the Appeals Chamber to vacate the Trial and Appeal Judgements, to acquit and release him, and to reopen his case.[6]

4. The Application consists of three letters sent by Mr. Gerhard Zahner to the International Tribunal on 27 April 2007 ("First Letter"), 23 November 2007 ("Second Letter") and 19 June 2008 ("Third Letter"), respectively.[7] In response to the First Letter, the Registry advised Mr. Gerhard Zahner that in order to file submissions before the International Tribunal, he must be formally assigned as counsel to the Applicant so as to meet the qualifications required under Rules 44 and 45 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").[8] Accordingly, Mr. Gerhard Zahner was formally assigned as defence counsel on 18 October 2007.[9] Following receipt

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[1] The Application was filed by the Registry (*see infra*, paras 4, 6). The references to the Application's page numbers in the present Decision are based on the page numbers assigned by the Registry.
[2] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("Trial Judgement"), para. 765.
[3] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Judgement, 3 May 2006 ("Appeal Judgement"), pp. 207-208.
[4] Application, p. 20.
[5] *Ibid.*
[6] Application, pp. 2 and 21.
[7] Application, pp. 21, 26, and 29, respectively.
[8] *See* Letter from Gabrielle McIntyre, Chef de Cabinet, to RA Gerhard Zahner, Counsel for Naletilić, 7 May 2008 ("Letter from Chef de Cabinet"), p. 1.
[9] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Decision by the Registrar re Assignment of counsel, 18 October 2007.

of the Second Letter, the Office of Legal Aid and Detention Matters of the International Tribunal ("OLAD") contacted the Applicant to assist him in the filing process.[10]

5. On 7 May 2008, the Chef de Cabinet of the Office of the President of the International Tribunal ("Chef de Cabinet") responded to an additional letter sent to the President by the Applicant. The Chef de Cabinet reminded the Applicant of the importance of filing submissions in accordance with the Rules and of his obligations under the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal.[11] The Chef de Cabinet also suggested that if the Applicant still had difficulties understanding the process, he should contact OLAD for further guidance.[12]

6. In response to the Letter from the Chef de Cabinet, the Applicant sent the Third Letter, reiterating briefly the arguments presented in the First Letter and Second Letter. The Application was filed by the Registry on 1 July 2008. The Prosecution filed a response to the Application on 29 July 2008.[13] On 12 September 2008, the Registry confidentially filed a number of statements and certificates ("Statements") in relation to the Application that had been in the possession of OLAD for an undetermined period.[14] On 25 September 2008, given that the Prosecution did not have the opportunity to examine the Statements at the time it filed its Response, the Appeals Chamber allowed, *proprio motu*, the Prosecution to file an additional response within 10 days and the Applicant to reply within five days of the filing of the additional response.[15] The Prosecution filed its additional response on 3 October 2008.[16] The Applicant did not reply.

II. PRELIMINARY MATTERS

7. The Appeals Chamber notes the Applicant's failure to comply with the formal requirements for filings before the International Tribunal and to follow the instructions provided by the Registry and reminds the Applicant of the importance of respecting these requirements. The Appeals Chamber is further compelled to observe that the three letters of submission from the Applicant fall far below the average standard for motions to the International Tribunal. Finally, the Appeals

[10] *See* Letter from Chef de Cabinet, p. 1.
[11] *Ibid.*, p. 1, citing IT/125/Rev.2, 29 June 2006 ("Code of Professional Conduct").
[12] *Ibid.*, p. 2.
[13] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-R, Prosecution Response to Naletilić's Motions for Review and "Examination of the Records", 29 July 2008 ("Response").
[14] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-R, Statement, 12 September 2008 ("Statements").
[15] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-R, Order for Additional Response from the Prosecution, 25 September 2008.
[16] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-R, Prosecution Additional Response Regarding Statements Filed on 12 September 2008, 3 October 2008 ("Additional Response").

Chamber notes the poor language of the Application and reminds the Applicant that it may lodge submissions in any of the official languages of the International Tribunal.

8. Nevertheless, in the interests of justice and specifically in order to avoid prejudice arising to the Applicant from the poor diligence of Counsel, the Appeals Chamber decided to examine the merits of the Application.

III. APPLICABLE LAW

9. The Appeals Chamber recalls that pursuant to Article 26 of the Statute:

> [w]here a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Rule 119(A) of the Rules governs the filing of an application for review of a judgement by a party and stipulates, in relevant part, that:

> [w]here a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.

Rule 120 of the Rules provides that, upon preliminary examination of a party's Rule 119(A) motion for review, "[i]f a majority of Judges of the Chamber constituted pursuant to Rule 199 agree that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties".

10. The combined effect of Article 26 of the Statute and Rules 119 and 120 of the Rules is such that for a moving party to succeed in persuading a Chamber to review its judgement, the party must show that: (1) there is a new fact; (2) the new fact was not known to the moving party at the time of the original proceedings; (3) the lack of discovery of that new fact was not the result of a lack of due diligence by the moving party; and (4) the new fact could have been a decisive factor in reaching the original decision.[17] In wholly exceptional circumstances, review may still be permitted

[17] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration (Public Redacted Version), 23 November 2006 ("*Blaškić* Review Decision"), para. 7; *Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-R.1, Decision on Defence Request for Review (Public Redacted Version), 31 October 2006 ("*Radić* Review Decision"), paras 9-10; *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-R.2, Decision on Zoran Žigić's Request for Review under Rule 119, 25 August 2006, para. 8; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Request for Review, 30 July 2002 (French), 8 August 2002 (English) ("*Tadić* Review Decision"), para. 20. *See also George A. N. Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 ("*Rutaganda* Review Decision"), para. 8; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on Aloys

even though the new fact was known to the moving party at the time of the original proceedings or was discoverable by it through the exercise of due diligence, if ignoring such new fact would result in a miscarriage of justice.[18] Review of a final judgement is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal.[19]

11. The Appeals Chamber recalls that the term "new fact" refers to new evidentiary information supporting a fact that was not at issue during the trial or appeal proceedings.[20] The requirement that the fact was not at issue during the proceedings means that "it must not have been among the factors that the deciding body could have taken into account in reaching its verdict."[21] Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.[22]

IV. DISCUSSION

A. Alleged New Facts Related to the Naletilić's Participation in the Crimes for Which He Was Convicted

1. Arguments of the Parties

12. The Applicant asserts that the findings of the International Tribunal relating to Naletilić's responsibility for crimes committed in the areas of Sovići, Doljani, Široki Brijeg and Mostar between April and September 1993 are based on the false testimony of Falk Simang ("Simang"), which he was induced to provide by the Prosecution through "[o]utright tampering and promises of preferential treatment".[23] The Applicant argues that Simang's testimony was "absolutely crucial to the Prosecution's attempt to prove [that he] was a criminal perpetrator, had superior responsibility

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Simba's Requests for Suspension of Appeal Proceedings and Review, 9 January 2007, para. 8; *Eliezer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008 ("*Niyitegeka* Review Decision"), para. 13.

[18] *Blaškić* Review Decision, para. 8; *Radić* Review Decision, para. 11; *Tadić* Review Decision, paras 26-27. *See also Rutaganda* Review Decision, para. 8; *Niyitegeka* Review Decision, para. 13.

[19] *Vidoje Blagojević v. Prosecutor*, Case No. IT-02-60-R, Decision on Vidoje Blagojević's Request for Review, 15 July 2008, para. 4; *Rutaganda* Review Decision, para. 8. *See also Niyitegeka* Review Decision, para. 13; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 43.

[20] *Blaškić* Review Decision, paras 14-15; *Tadić* Review Decision, para. 25. *See also Rutaganda* Review Decision, para. 9; *Niyitegeka* Review Decision, para. 14.

[21] *Blaškić* Review Decision, para. 14; *Tadić* Review Decision, para. 25. *See also Rutaganda* Review Decision, para. 9; *Niyitegeka* Review Decision, para. 14.

[22] *Blaškić* Review Decision, para. 14. *See also Rutaganda* Review Decision, para. 9; *Niyitegeka* Review Decision, para. 14.

[23] Application, p. 20.

and performed certain acts at the stated locations during the stated period"[24] and "form[ed] a key component of the Tribunal's opinion".[25]

13. The Applicant claims that he identified the alleged new facts after meeting with Simang, who had been convicted for murder by a court in Germany, in the fall of 2006.[26] The Applicant then met with Ralf Mrachacz ("Mrachacz"), who had also testified before the International Tribunal in this case and been convicted of murder in Germany.[27] The Applicant asserts that Mrachacz informed him that sometime between 1997 and 1999, when he and Simang were serving time together in Germany, the Prosecution visited them and offered to assist them in having their cases reheard before German courts and securing their transfer to another correctional facility in exchange for their testimony against the Applicant.[28] He claims that Mrachacz's testimony shows that "promises were used" in the Applicant's case and "that their existence was deliberately and disingenuously withheld from the Tribunal", which "constitutes grounds for a retrial and violates the principle of a fair trial".[29]

14. The Applicant argues that in light of the foregoing, "[e]very statement made during the trial must be examined to determine the extent to which it was motivated by manipulation, promises, dismissals or omissions, and thus produced a conviction by illegal means".[30] The Applicant submits that, if the promises made by the Prosecution would have been known during the trial, the defence strategy would have been different, Simang's testimony would not have been regarded as credible and the Applicant would thus have been acquitted on all major counts related to his role and involvement in violent acts committed in 1993.[31] Finally, it submits that all of the evidence presented by the Prosecution would have been regarded as suspicious and accordingly disallowed.[32]

15. The Applicant further alleges the existence of new facts showing that "although Simang claimed to have personally witnessed Naletilic [*sic*] beating prisoners and commanding troops in Sovici [*sic*] and Siroki [*sic*] Brijeg, he could not possibly have had any such knowledge".[33] This claim is based on evidence consisting of: (1) statements by Mrachacz; (2) a written declaration from

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[24] Application, p. 17.
[25] Application, p. 2.
[26] Application, pp. 17-18. The Applicant claims that, during the meeting, Simang allegedly asked for documents that would exonerate him and help him to reopen his own case "in exchange for providing the whole story". The Applicant asserts that after responding that "the only thing [it] had to offer Simang was the truth", Simang "lost all interest in pursuing the matter further" (Application, p. 16).
[27] Application, pp. 15 and 18. *See also* Letter of Counsel for Naletilić dated 29 November 2005, included in the Statements, p. 49.
[28] Application, pp. 14-15 and 28-29.
[29] Application, p. 12.
[30] Application, p. 14.
[31] *Ibid.*
[32] *Ibid.*

Mrachacz;[34] (3) records from the Memmingen Court in Germany;[35] (4) seven written declarations of former combatants in Doljani and Sovići between 17 April 2003 and 21 April 2003;[36] (5) a written statement by a woman claiming to be Simang's former fiancée;[37] and (6) a receipt of payment made to Simang in October 1993.[38]

16. The Applicant first relies on statements allegedly given to him by Mrachacz, indicating, *inter alia*, that Mrachacz had stated to OTP investigators that Simang could not possibly have had any knowledge about Naletilić's role in combat operations in 1993 and 1994 because Simang had not participated in these operations.[39] According to Mrachacz's alleged statements, "[e]verything Simang said was a lie told for the sole purpose of obtaining evidence to reopen his own case, as promised".[40] The Applicant contends that these statements "were deliberately covered up in order to make Simang's claims appear truthful".[41]

17. The Applicant next submits a statement by Mrachacz from 17 January 2007, made in response to a letter from the Applicant, in which Mrachacz addresses Simang's whereabouts in May 1993.[42] Mrachacz declares that sometime between mid-to-late May, Simang had been planning to return to Germany to obtain papers for a marriage, that he did not return until four weeks later, and that "[h]e was therefore definitely in Herzegovina at the time in question".[43]

18. The Applicant also makes reference to a page from Simang's criminal records at the Memmingen Court, asserting that he did not obtain this document until November 2006.[44] The Applicant claims that according to this record, Simang travelled to Bosnia in 1993 to fight in the war, remained there until March 1994, and made several trips to Germany during that period; that on 1 June 1993, he was arrested at the German border while on his way back to Yugoslavia; and that he served a sentence in Germany until 16 June 1993.[45] The Applicant contends that "[t]his one

[33] Application, p. 11.
[34] Statements, p. 48.
[35] Statements, pp. 46-47.
[36] Statements, pp. 56, 62, 67, 77, 82, 87 and 93.
[37] Statements, p. 73.
[38] Statements, p. 45.
[39] Application, p. 11.
[40] Application, p. 10. *See also* Application, p. 5 (referring to the testimony of Snježana Bubalo).
[41] Application, p. 11.
[42] Application, p. 48.
[43] Statements, p. 48. *See also* Application, pp. 7 (stating that according to Mrachacz, "Simang returned to Germany around May 1993 in order to take care of something related to his marriage") and p. 9.
[44] Application, p. 7.
[45] Application, pp. 7-9.

fact proves that Simang could not possibly have known about activities in April and May 1993 since he was out of the country until mid-June 1993".[46]

19. The Applicant further submits evidence from a number of witnesses, claiming that they were in a position to know Simang's whereabouts from April to May 1993.[47] This evidence includes statements from seven former soldiers who claim to have taken part in combat operations in Doljani and Sovići between 17 April and 21 April 1993,[48] and who declare that they knew Simang, that he did not take part in these combat operations, and that he did not become a member of the KB until the summer of 1993.[49] The evidence also includes a statement from Snježana Bubalo, who claims that Simang came to Široki Brijeg in early 1993, disappeared in mid-February 1993, and reappeared again in late June or July 1993.[50] The Applicant claims that this evidence constitutes new facts that justify the reopening of his case because it proves that Simang was lying on the witness stand and corroborates Mrachacz's claim that Simang only testified in order to receive benefits offered to him by the OTP.[51]

20. Finally, the Applicant submits a receipt of a payment to Simang, which allegedly indicates that Simang joined the Croatian army and the KB on 5 July 1993.[52] The Applicant asserts that this evidence proves that "Simang had never officially signed up for the KB or any other army prior to July 5, 1993, as he had claimed" and thus, "he could not have had any information about the chain of command or [...] Naletilic's [*sic*] position in the overall organization".[53]

21. In response, the Prosecution asserts that the Application should be summarily dismissed.[54] It argues that the Applicant fails to specify why the facts he alleges are new and notes that the allegations regarding Simang's credibility and promises made to him by the Prosecution were already raised at trial and on appeal.[55] The Prosecution adds that the Applicant does not indicate why he neither knew these new facts at the time of the proceedings nor discovered them through due diligence,[56] given, in particular, that the Statements are from his former subordinates, and thus "it appears logical that Naletilić would have known of their potential evidence during the trial and

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[46] Application, p. 9.
[47] Application, pp. 3-5.
[48] *See* declaration of Željko Ivanković, Statements, p. 93; declaration of Denis Bjelica, Statements, p. 87; declaration of Emil Ćorić, Statements, p. 82; declaration of Oliver Knezović, Statements, p. 77; declaration of Pero Zelenika, Statements, p. 67; declaration of Fabijan Bošnjak, Statements, p. 62; declaration of Tihomir Čužić, Statements, p. 56.
[49] Application, pp. 3-5.
[50] Application, p. 5; Statements, p. 73.
[51] Application, p. 3.
[52] Application, p. 6. *See also* Statements, p. 45.
[53] Application, p. 6.
[54] Response, para. 1. Note that the Prosecution refers to the First Letter "Motion for Review" and to the Second Letter as "motion for 'examination of the records'". *See also* Additional Response, paras 2, 10.
[55] Response, para. 5; Additional Response, para. 5.
[56] Response, para. 6.

appeal process".[57] The Prosecution also submits that the Applicant fails to specify how these new facts could have been a decisive factor in reaching the verdict or why a miscarriage of justice would result from ignoring them.[58] In addition, the Prosecution asserts that the Application fails to identify precisely which findings in the Judgements are affected by which alleged facts and how this impacts on any specific part of the verdict.[59]

22. The Prosecution also avers that the Applicant's "claim that he should be acquitted because Simang lied ignores the huge body of other evidence upon which the conviction rest[s]".[60] In this regard, the Prosecution notes that

> other witnesses and documentary evidence support the findings regarding the crimes at Sovići and Doljani. For example, Naletilić's command position regarding the attacks on Sovići and Doljani is based on evidence from three witnesses – in addition to Simang – and documentary evidence. Naletilić's responsibility for the mistreatments at Doljani was based on the evidence from four witnesses (including the victims of the mistreatment) – in addition to Simang.[61]

23. Finally, the Prosecution claims that the statements made by Snježana Bubalo and Mrachacz with respect to Simang's presence are contradictory.[62]

2. Analysis

24. The Appeals Chamber is not satisfied that any of the alleged new facts presented by the Applicant constitute new facts that would justify review of the Trial or Appeal Judgements. In this regard, the Appeals Chamber first notes that the Applicant's allegations regarding the promises made by the Prosecution to Simang and Mrachacz, as well as Simang's credibility, were raised and disposed of at both the trial and appellate levels.[63] Specifically, the Trial Chamber noted that the Applicant alleged that Mrachacz and Simang were "'bought and paid'" and found that "[t]he fact that Falk Simnag [*sic*] expressed hope that his case in Germany would be reopened following these proceedings does not in the view of the Chamber make his testimony less reliable and credible".[64]

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[57] Response, para. 6; Additional Response, para. 5.
[58] Response, para. 7.
[59] *Ibid.*
[60] *Ibid.* (footnote omitted); *see also* Additional Response, para. 7, which notes by way of example that Simang is not mentioned in findings leading to convictions for mistreatment in Mostar, the Široki Brijeg MUP Station and the Heliodrom camp.
[61] Additional Response, para. 8 (footnotes omitted).
[62] Additional Response, para. 9.
[63] Trial Judgement, para. 26, fn. 48; Appeal Judgement, paras 172-176, 243-249. *See also Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, *Confidential* Decision on the Accused Naletilić's Reply to Prosecutor's Motion on Defence Witness Issues and Renewed and New Requests for Relief, and Request for Issuance of Subpoena Pursuant to Rule 54, 4 June 2002, pp. 2-3.
[64] Trial Judgement, para. 26, fn. 48.

The Appeals Chamber confirmed this finding.[65] The Appeals Chamber reiterates that review proceedings are not an opportunity to re-litigate arguments that failed at trial or on appeal.[66]

25. The Appeals Chamber further recalls that the term "new fact" for the purposes of review refers to new evidentiary information supporting a fact that was not in issue or considered in the original proceedings.[67] Accordingly, as the issue of Simang's credibility was considered during the trial and appeal proceedings in light of allegations regarding the promises made by the Prosecution to Simang and Mrachaz, the Appeals Chamber finds that the Applicant has failed to demonstrate that the evidence submitted in the Application regarding Simang's credibility constitutes a new fact for the purposes of review.[68]

26. With respect to the allegation that Simang was not present during the events that took place in the areas of Sovići, Doljani, Široki Brijeg and Mostar from April to September 1993 and thus could not have known about the level and nature of the Applicant's involvement in these events, the Appeals Chamber first notes that the Applicant fails to demonstrate that the evidence provided could not have been discovered through the exercise of due diligence and presented at trial. In particular, the Appeals Chamber notes that Mrachacz already testified at trial,[69] and that the receipt of payment to Simang dates from 1993,[70] that is, well before the proceedings. The Appeals Chamber also observes that the Memmingen Court records state that Simang was arrested in Germany on 1 June 1993 and served a sentence in Germany until 16 June 1993, which does not exclude that Simang could have been present during the events that led to the Applicant's convictions, which took place in April and May 1993.[71]

27. The Appeals Chamber also finds that the Applicant fails to demonstrate that these alleged new facts could have been a decisive factor in the Trial or Appeal Judgements or that ignoring them would result in a miscarriage of justice. The Appeals Chamber notes in this respect that all of the

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[65] Appeal Judgement, paras 172-176.
[66] *See supra*, para. 10, fn. 19.
[67] *See supra*, para. 11, fn. 20.
[68] *See Prosecutor v. Tholimir Blaškić*, Case No. IT-95-14-R, *Confidential* Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006, paras 15-17, 60-61. *See also, Rutaganda* Review Decision, paras 15-17, where the Appeals Chamber found that some information concerning the credibility of two witnesses constituted new facts, notwithstanding the circumstance that those witnesses' credibility was already litigated throughout the case. In the *Rutaganda* Decision, the Appeals Chamber based its finding on the circumstance that, in contrast to the present case, the allegations presented by the moving party in relation to witness credibility were not in issue during the original proceedings and amounted to new facts.
[69] The Appeals Chamber also notes that the only evidence submitted by the Applicant to support his assertions about Mrachacz's alleged new evidence, is a short declaration dated 17 January 2007 (Statements, p. 46). However, this partially contradicts his allegations, since Mrachacz indicates that Simang "was [...] definitely in Herzegovina at the time in question" (*Ibid.*). Furthermore, Mrachacz states that Simang "wanted to go to Germany" in May, not that he actually went to Germany (*Ibid.*).
[70] *See* Statements, p. 45.
[71] *See* Statements, pp. 45-46.

evidence based on Simang's testimony which was relied upon by the Trial Chamber to reach its findings on the Applicant's individual criminal responsibility was corroborated by other evidence.[72]

B. Naletilić's Detention in Croatia Prior to his Transfer to the International Tribunal

1. Arguments of the Parties

28. The Applicant contends that he spent three years unlawfully detained in Croatia before being brought before the International Tribunal,[73] and that the offence for which he was convicted in Croatia was constructed as a means of justifying his arrest and extradition to the International Tribunal.[74] The Applicant claims that this illegal deprivation of his liberty should have been taken into account as a mitigating factor in his trial before the International Tribunal and that the International Tribunal's failure to do so violated his rights, including his right to a fair trial.[75]

29. In support of its argument, the Applicant submits that in similar cases in Croatia, the alleged offence for which he was arrested was either dismissed or resulted in an acquittal, which demonstrates that his detention was unjustified.[76] He also argues that this long period of detention violated Article 5(3) of the European Convention on Human Rights ("ECHR"), his right to a fair trial under Article 6 of the ECHR and his right to a presumption of innocence.[77] The Applicant further submits that two months after he was detained in Croatia, Damir Kos, the Judge who presided over the criminal proceedings against him in Croatia, "went ... to The Hague to discuss" his case.[78] On the foregoing basis, the Applicant requests "an examination of the records" since 1997 ("Records") in his case "[t]o find out in the trial if the served detention pending trial in Croatia is to be charged on the imprisonment".[79] Additionally, the Applicant appears to request that Damir Kos be summoned to testify before the International Tribunal.[80]

30. The Prosecution submits that the Applicant appears to be requesting two subpoenas, including "[o]ne for a subpoena for the records 'in the case of Mladen Naletilić a.k.a. Tuta since the year 1997', and one for a subpoena of a witness: the Croatian Judge Damir Kos".[81] The Prosecution

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[72] *See, e.g.*, Trial Judgement, paras 89-94, relying on evidence from Simang, Mrachacz, witnesses Q and T; paras 125, 353-369, 438, 453, relying on evidence by Simang, Mrachacz, witnesses TT, B, RR and Salko Osmić; paras 596-597, relying on Simang's evidence and the Radoš Diary; and paras 619 and 631, relying on evidence from witnesses U, WW, Simang and Q.
[73] Application, p. 25.
[74] Application, p. 23.
[75] Application, pp. 22 and 23.
[76] Application, p. 25.
[77] Application, p. 23.
[78] Application, p. 25.
[79] Application, p. 26.
[80] Application, p. 25 (stating "Proof: Damir Kos, judge in Croatia to be summoned through the tribunal").
[81] Response, para. 11.

argues that "[b]oth types of subpoenas require a showing of previous steps that were taken in order to obtain the cooperation of the state that possesses the documents or the witness", that the Applicant fails to provide any related submissions,[82] and that the Application should therefore be dismissed.[83]

2. Analysis

31. The Appeals Chamber finds that none of these alleged new facts presented by the Applicant would justify review of the Trial and Appeals Chambers' determination of his sentence. In this regard, the Appeals Chamber notes that the Records requested by the Applicant date from 1997 and were thus available during the time of the trial and appeal proceedings, which commenced on 10 September 2001[84] and 29 April 2003,[85] respectively. The Appeals Chamber further notes that the actions alleged by the Applicant with respect to Damir Kos, namely, his involvement in the criminal proceedings against the Applicant in Croatia as well as his trip to The Hague to discuss the Applicant's case, occurred long before the commencement of the trial proceedings in this case. The Applicant has failed to show that these new facts were not known by him at the time of the original proceedings, and if such is the case, that their lack of discovery was not the result of a lack of due diligence. Furthermore, the issue of the Applicant's detention in Croatia prior to his transfer to the International Tribunal was already raised and considered in his trial proceedings.[86] The Appeals Chamber reiterates that the term "new fact" for the purposes of review refers to new evidentiary information supporting a fact that was not in issue or considered in the original proceedings. In light of the foregoing, the Applicant has failed to demonstrate how such information constitutes new facts for the purposes of review.

32. Neither does the Appeals Chamber consider that ignoring the alleged new facts submitted by the Applicant would result in a miscarriage of justice. The Appeals Chamber finds that none of the alleged new facts submitted by the Applicant demonstrate that his detention by the Croatian authorities prior to 18 October 1999 should be impugned to the International Tribunal. The Trial

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[82] Response, para. 12.
[83] *Ibid.*
[84] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34, Public Transcript of hearing 10 September 2001, 10 September 2001, p. 1778.
[85] *See Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Notice of Appeal of Mladen Naletilic [*sic*] a.k.a. Tuta, 29 April 2003; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Notice of Appeal Against Judgement No. IT-98-34-T of 31 March 2003 in the Case: Prosecutor vs. Vinko Martinović, 29 April 2003.
[86] Trial Judgement, para. 748. *See also Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Prosecution's Additional Sentencing Submissions, 21 February 2003, paras 19-21 (noting that "According to information received from the Croatian Office for Co-operation with the International Tribunal, Mladen NALETILIĆ was arrested by the Croatian authorities on 24 February 1997, and an indictment was issued against him on 20 August 1997 [...]" and "[b]ecause of NALETILIĆ's transfer to the Tribunal's jurisdiction, the trial proceedings against [him] before the District Court in Zagreb never came to a conclusion").

Chamber was thus not under the obligation to take that detention into account as a mitigating factor in sentencing. In this regard, the Appeals Chamber notes that in a letter dated 21 May 1999, the Croatian authorities informed the International Tribunal that the Applicant had been detained in Croatia on the basis of serious charges unrelated to the crimes over which the International Tribunal has jurisdiction.[87] The Appeals Chamber considers that the Applicant has failed to substantiate his claims to the contrary.

33. With respect to the request to have access to all correspondence prior to 1997, the Appeals Chamber also notes that any request to order a State to produce documents or information is subject to the provisions of Rule 54 *bis* of the Rules and that the Applicant fails to indicate whether any reasonable steps were previously taken to obtain the documents or information from Croatia.[88] The request to summon Mr. Damir Kos before the International Tribunal lacks specificity and fails to meet the required evidentiary threshold of demonstrating a reasonable basis for the belief that Mr. Kos will likely give information that will be of assistance in these proceedings.[89]

V. DISPOSITION

For the foregoing reasons, the Appeals Chamber,

DISMISSES the Application.

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

Judge Fausto Pocar
Presiding

Dated this 19th day of March 2009,
at The Hague, The Netherlands.

[Seal of the International Tribunal]

[87] Letter, Prof. Zvonimir Šeparović, President of the Council for the Cooperation with ICTY, Republic of Croatia Ministry of Justice, to Ms. Dorothee de Sampayo-Garrido Nijgh, Registrar, International Tribunal, 21 May 1999.
[88] Rule 54 *bis* of the Rules provides, in part: "(A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall: (i) identify as far as possible the documents or information to which the application relates; (ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and (iii) explain the steps that have been taken by the applicant to secure the State's assistance."
[89] *See, e.g., Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, paras 6, 8.