



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-05-88-T

Date: 6 October 2008

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 6 October 2008

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON POPOVIĆ'S MOTION FOR DISCLOSURE
PURSUANT TO RULE 66 (B) AND REQUEST TO FILE AN ADDENDUM
TO PROFESSOR STOJKOVIĆ'S EXPERT REPORT**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletic
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

THIS 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 (“Tribunal”) is seised of “Vujadin Popović’s Motion for Disclosure Pursuant to Rule 66 (B) and Request for Leave to File an Addendum to Prof. Stojković Expert Report”, filed on 6 August 2008 (“Motion”) and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. Popović requests the Trial Chamber to order the Prosecution to disclose the results and raw data (“Material”) to permit an independent checking of the DNA identifications results performed by the International Commission on Missing Persons (“ICMP”) between 2001 and 2008.¹ On the basis of this analysis, Popović’s DNA expert, Professor Stojković (“Stojković”), can update his expert report and Popović thus requests leave to file an addendum to Stojković’s report.²

2. Popović submits that:

- a) the Prosecution is obliged to disclose the Material pursuant to Rule 66 (B) of the Rules of Procedure and Evidence (“Rules”) and ICTY and ICTR jurisprudence on Rule 66 (B) and expert reports;³
- b) in an email to the Prosecution dated 23 January 2008, Ms Jelena Nikolić, Counsel for Nikolić, asked the Prosecution, also on behalf of Popović and Beara, for “records on establishing identity of exhumed persons with respective death certificates from the ICMP Archives and Sarajevo and Tuzla Cantonal Court related to Srebrenica case” (“January 2008 Request”);⁴
- c) after Stojković testified, it emerged that each summary report on DNA-based identifications needed to be corroborated by appropriate evidence (blood samples and electropherograms);⁵

¹ Motion, p. 1, paras. 39, 42.

² *Ibid.*, p. 1, paras. 39, 42. The Material is: (a) the database with 21,307 DNA profiles referencing family members, preferably in an Excel file, with barcodes and ID donor numbers for each person. Each DNA profile should be associated with unique missing persons from 1 to 7,789, and the relationship of the tested relative to the missing person (e.g. father, mother, son, etc) should be given; (b) the list of 10,231 unique bone sample identification numbers (barcodes) for which the DNA testing was successful (both main and association cases), together with the date of DNA analysis, and the date of issue of the DNA report; (c) DNA matching reports of the 300 bone samples, preferably in electronic form; (d) copies of the electropherograms (both from bone samples and from relatives) used for each DNA matching report for the 300 bone samples, together with allelic ladders used for each electropherogram. For all the samples analyzed before the end of 2006, for which DNA tests were performed and duplicated, both electropherograms should be provided, preferably in electronic form; (e) statistical reports for the 300 bone samples, preferably in electronic form; (f) an electronic version of the population database for the Srebrenica case. Motion, paras. 19–21, 34. On 5 July 2008, the Defence allegedly also requested “the previous SOP implemented until current SOP were adopted.” Prosecution Response, para. 13.

³ *Ibid.*, paras. 11–15, 36–38.

⁴ *Ibid.*, para. 7. The Motion erroneously gives the date of the email as 23 January 2003.

⁵ *Ibid.*, paras. 8, 28–34, 40.

- d) the testimony of Thomas Parsons, the Prosecution's DNA expert and chief of the ICMP, and the ICMP Report tendered through him, were limited to a description of the procedures adopted in the ICMP's identification process, and no evidence was brought to show how the identifications were actually performed, nor was raw data made available or discussed;⁶ this is especially relevant since (i) the ICMP's ISO accreditation was received only in October 2007 and Popović cannot verify if the testing carried out prior to that was according to the appropriate procedures;⁷ (ii) Stojković found some "shortcomings" in the ICMP's work when he analysed two DNA reports,⁸ and (iii) the data provided to the Prosecution by the BiH Federal Commission for Missing Persons, with whom the ICMP closely cooperates, diverges substantially from the Prosecution's lists prepared by Ewa Tabeau and the ICMP,⁹ and
- e) the Material is in the control of the Prosecution and has been provided in other cases.¹⁰

3. The partly confidential "Prosecution Response to 'Vujadin Popović's Motion for Disclosure Pursuant to Rule 66(B) and Request for Leave to File an Addendum to Prof. Stojković Expert Report'" was filed on 20 August 2008 ("Prosecution Response"). The Prosecution argues that the Motion should be denied because:

- a) it is unnecessary, overly burdensome, unreasonable, and made in "bad faith";¹¹
- b) it is "extremely untimely";¹²
- c) the request falls outside the Prosecution's obligations since Rule 66 (B) does not require the Prosecution to obtain and disclose the Material;¹³
- d) Stojković himself, when testifying before the Belgrade District Court as a forensic expert, "grounds" the reliability of his laboratory's results in its reputation and affiliation to the ICMP;¹⁴ and
- e) none of the reasons given by Popović justify the extraordinary relief sought in the Motion since the non-accreditation of the ICMP prior to 2007 does not undermine the reliability of

⁶ *Ibid.*, para. 17.

⁷ *Ibid.*, para. 25–26.

⁸ *Ibid.*, paras. 28–30.

⁹ *Ibid.*, paras. 31–33.

¹⁰ *Ibid.*, para. 35.

¹¹ Prosecution Response, paras. 1, 17–23.

¹² *Ibid.*, paras. 1, 24–29.

¹³ *Ibid.*, paras. 1, 30–36.

¹⁴ *Ibid.*, para. 18.

its results, nor do the alleged “shortcomings” in the DNA match imply that the underlying DNA analysis or the resulting match were unreliable, but as Stojković himself describes them, the “shortcomings” are differences “in format.”¹⁵

II. PRELIMINARY MATTERS

4. The confidential “Request for Leave to Reply and Reply to the Prosecution’s Response to Vujadin Popović’s Motion for Disclosure Pursuant to Rule 66 (B) and Request for Leave to File an Addendum to Prof. Stojković Expert Report” was filed on 28 August 2008 (“Reply”). Popović requests leave to file a reply and to exceed the word limit, and in fact filed the Reply on 28 August 2008.¹⁶ The Trial Chamber notes however that the Reply was not filed within the time period laid down in Rule 126 *bis*, that no request was made for an extension of time to file the Reply a day later, and therefore denies leave to file the Reply.

5. The Prosecution also requests permission to exceed the word limit in the Prosecution Response, which the Trial Chamber hereby grants.¹⁷

III. DISCUSSION

6. The Trial Chamber notes that Stojković had not asked for more DNA reports and electropherograms from Popović when he first found out that they had not been provided.¹⁸ Stojković did mention in his report that he would need DNA reports of several cases as well as electropherograms to be able to reach a conclusion.¹⁹ Indeed, in his report, Stojković offers to

¹⁵ *Ibid.*, paras. 19–21; Ex. 1D01069, “Analysis of the Documents related to the DNA identification of post-mortem remains from Srebrenica performed by ICMP prepared by Oliver Stojković,” para. 3.1.

¹⁶ Reply, p. 1, para. 46.

¹⁷ *Ibid.*, para. 1.

¹⁸ T. 22992–22993 (27 June 2008).

¹⁹ T. 22993, 22997–22998 (27 June 2008). Stojković’s expert report states that he “[...] was not able to find the corresponding parameters in them [the documents supplied to him by Popović] which would enable me to assess and test the correctness of the findings of the ICMP in respect of the names, matching them up with the names of people on the list that I was provided with.” T. 22981 (27 June 2008); Ex. 1D01069, “Analysis of the Documents related to the DNA identification of post-mortem remains from Srebrenica performed by ICMP prepared by Oliver Stojković,” Opinion, paras. 1–4. Stojković repeated in court what he said in his report that “the standard operational procedures shown to me are to the- are mostly in conformity with the standards of the profession. However, I was not convinced that in specific cases [...] these SOPs were respected. At least in the reports that I was provided with, these standard operational procedures were not respected. So for me to be able to state whether the entire process of the DNA analysis is professionally valid, and based on the rules of science and the profession, I would have to be given a certain number of reports or all the reports obtained for the identification of persons when it comes to a specific crime, the crimes that are being tried at this court.” T. 23023–23024 (30 June 2008).

devote 150 hours of work to a detailed analysis of 300 main cases to determine the statistical significance of the ICMP's results.²⁰

7. The Trial Chamber notes the parties' disagreement as to which documents were included in the January 2008 Request, and in particular raw materials, including electropherograms.²¹ It also notes that the Prosecution provided Popović with all documentation it had readily available following the January 2008 Request.²² The Trial Chamber is of the opinion that a natural construction of the language of the January 2008 Request does not support Popović's view that it included a request for the Material.

8. Furthermore, the Trial Chamber agrees with the Prosecution that Popović's argument that "[w]hen Prof. Stojković completed his testimony on 30 June 2008, it emerged that each summary report on DNA-based identifications needed corroboration by appropriate evidence (blood samples and electropherograms)" in fact implies that the January 2008 Request had not included a request for the Materials (or at least some of them).²³

9. The Trial Chamber is concerned that the request for the Material was made after Stojković's testimony, late into the Popović case, when it is clear from how events unfolded that Popović could have requested the Material at least when he first received Stojković's expert report.

10. Moreover, the Trial Chamber notes Rule 66 (B) and the relevant jurisprudence and considers that for a Trial Chamber to order inspection of documents considered material to the preparation of the defence case, the defence must (i) demonstrate that the material requested is in the custody or control of the Prosecution; (ii) establish *prima facie* the materiality of the material requested to the preparation of the defence case; and (iii) specifically identify the requested material.²⁴

²⁰ Ex. 1D01069, "Analysis of the Documents related to the DNA identification of post-mortem remains from Srebrenica performed by ICMP prepared by Oliver Stojković," Opinion, paras. 3–4.

²¹ Prosecution Response, para. 10; T. 23006–23008 (30 June 2008).

²² *Ibid.*, para. 24; T. 23007 (30 June 2008).

²³ See Prosecution Response, para. 27; Motion, para. 8.

²⁴ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal concerning Disclosure Obligations, 23 January 2008, para. 12; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, paras. 7–11; *Prosecutor v. Boškoski et al.*, Case No. IT-04-82-T, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66 (B), 31 January 2008, para. 7; *Prosecutor v. Naletilić et al.*, Case No. IT-98-34-T, Decision on Joint Motions for Order Allowing Defence Counsel to Inspect Documents in the Possession of the Prosecution, 16 September 2002, p. 3; *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001, para. 11; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence, 26 September 1996, paras. 5–9.

11. The Trial Chamber finds that the Motion fails to meet the first criterion as the Material is not in the Prosecution's "custody or control." While the Appeals Chamber has construed the Prosecution's disclosure obligations under the Rules broadly, according to their "plain meaning",²⁵ material held by a third party independent from the Prosecution, cannot be said to be within the "custody or control" of the Prosecution on any reading. The fact that the Prosecution has a good relationship with the third party is not relevant unless it can be established that the Prosecution has some ability to direct and control the relevant person or organization. With respect to the ICMP no evidence to that effect has been adduced. While previously the ICMP may have cooperated in disclosing material to the Prosecution on a voluntary basis this does not mean that the Prosecution has "custody" or "control" over the ICMP data. As a primary requirement for the application of the obligations under Rule 66(B) is not present, no order for inspection can be made.

IV. DISPOSITION

12. For these reasons, pursuant to Rules 54, 66 (B), and 126 *bis* of the Rules, the Trial Chamber hereby:

GRANTS the Prosecution leave to exceed the word limit;

DENIES leave to file the Reply, and

DENIES the Motion.

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



Carmel Agius
Presiding

Dated this sixth day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁵ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 8.