



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: 31 August 2009

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. John Hocking

Decision of: 31 August 2009

PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

CONFIDENTIAL

**DECISION ON BOROVIČANIN MOTION FOR DISCLOSURE
OF EXCULPATORY INFORMATION**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Zoran Živanović and Mira Tapušковиć for Vujadin Popović
John Ostojić and Predrag Nikolić for Ljubiša Beara
Aleksandar Lazarević and Christopher Gosnell for Ljubomir Borovčanin
Jelena Nikolić and Stéphane Bourgon for Drago Nikolić
Natacha Fauveau Ivanović and Nenad Petrušić for Radivoje Miletić
Dragan Krgović and David Josse for Milan Gvero
Peter Haynes and Simon Davis 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”):

BEING SEISED OF the “Borovčanin Motion for Disclosure of Exculpatory Information,” filed confidentially on 10 August 2009 (“Motion”), in which Borovčanin, referring to excerpts of an interview that Prosecution investigator Bruce Bursik (“Bursik”) conducted with Nikola Gajić (“Gajić”), a Bratunac Brigade soldier, submits that *prima facie* Bursik’s questions indicate that Bursik had information prior to the interview that Gajić was the person seen on the Petrović video of the Kravica Warehouse on 13 July 1995, contrary to what the Prosecution’s Final Brief is inviting the Trial Chamber to infer from the uniforms worn by the three men visible on that video;¹

NOTING that Borovčanin requests the Trial Chamber:

- (i) to order the Prosecution to review and disclose all Bursik’s notes with regard to the presence and filming of Gajić at the Kravica Warehouse on 13 July 1995;²
- (ii) to conduct real inquiries to determine the source of Bursik’s information about Gajić and to disclose documentary evidence describing that information;³ and
- (iii) to disclose any information on the presence of soldiers from any unit other than the Special Police Brigade at the Kravica Warehouse on 13 July 1995, which in the light of the Prosecution’s Final Brief, has become highly exculpatory;⁴

NOTING the “Prosecution’s Response to the Borovčanin Motion for Disclosure of Exculpatory Information,” filed confidentially on 24 August 2009 (“Response”), in which the Prosecution opposes the Motion, arguing that it is based on a misreading or misrepresentation of the interview with Gajić conducted by Bursik as:

- (i) the Prosecution has no information to indicate that Gajić is one of the individuals on the Petrović video and Bursik never indicated to Gajić that he was identifiable in the Petrović video taken at the Kravica Warehouse on 13 July 1995;⁵

¹ Motion, paras. 2–3, 6, 8–9.

² Motion, paras. 11, 14.

³ Motion, paras. 12, 14.

⁴ Motion, paras. 9, 14.

⁵ Response, para. 4.

- (ii) at no stage has the Prosecution asked the Trial Chamber to make the unqualified inference that anyone wearing camouflage was a member of the Special Police Brigade but that the uniforms of the three men on the Petrović video are the same as those known to have been worn by members of the Special Police Brigade;⁶
- (iii) in its Final Brief and throughout the proceedings, the Prosecution acknowledged the presence of soldiers from units other than the Special Police Brigade at the Kravica Warehouse on 13 July 1995 and has disclosed all relevant material as to their identity to Borovčanin;⁷

NOTING the “Borovčanin Reply to Prosecution Response to Motion for Disclosure of Exculpatory Information,” filed confidentially on 26 August 2009 (“Reply”), in which Borovčanin requests leave to file a reply and *inter alia* submits that:

- (i) he is giving the Prosecution specific information about the likely existence of Rule 68 material and that due diligence requires the Prosecution to focus its inquiries accordingly;⁸
- (ii) good faith and due diligence require the Prosecution to make specific inquiries followed by a declaration that those focused inquiries have been undertaken;⁹

NOTING that Rule 68(i) of the Rules of Procedure and Evidence (“Rules”) provides that “the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or otherwise mitigate the guilt of the accused or affect the credibility of Prosecution evidence”;

CONSIDERING that the Prosecution’s duty under Rule 68(i) is continuous and extends to the post-trial phase, including appeals;¹⁰

⁶ Response, para. 6.

⁷ *Ibid.*

⁸ Reply, para. 11.

⁹ Reply, paras. 15–16.

¹⁰ *Prosecutor v. Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 29; *Prosecutor v. Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, Case No. ICTR-98-41-AR73(B), 6 October 2005, para. 44; *Prosecutor v. Brdanin*, Case No. IT-99-36A, Decision on the Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, paras. 31-32, 42.

CONSIDERING that the Trial Chamber can issue an order for disclosure only upon a showing that the Prosecution failed to discharge its obligations and that the request for disclosure is sufficiently specific;¹¹

NOTING the Prosecution's statements that it "[...] has no information to indicate that Gajić is one of the individuals" on the Petrović video and that it "[...] has, to the best of its knowledge and ability, disclosed to the Borovčanin Defence all relevant material regarding the identity of persons/units present at the Warehouse on 13 July 1995";¹²

CONSIDERING that the Trial Chamber accepts that the Prosecution's statement is made in good faith¹³ and thus it has no additional material containing information on Gajić's appearance on the Petrović video, or on the presence of units and/or members of units other than the Special Police Brigade, which has not yet been disclosed and which may be exculpatory to Borovčanin;

CONSIDERING that there is nothing before the Trial Chamber to suggest that the Prosecution is in breach of any of its disclosure obligations and thus an order for disclosure is not warranted;

CONSIDERING that the Trial Chamber is satisfied the Prosecution will continue to abide by its responsibilities under Rule 68 on an ongoing basis;

PURSUANT TO Rules 68(i) and 126 *bis* of the Rules,

HEREBY GRANTS Borovčanin leave to file the Reply,

DENIES the Motion.

¹¹ *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002, p. 3; *Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Defence Motion under Rule 68 Requesting the Appeals Chamber to order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeals, 18 May 2001, p. 4; *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, Decision sur la Requête de la Défense en Communication de Moyens de Preuve a Décharge, 7 October 2003, para. 12.

¹² See Response, paras. 4, 6.

¹³ *Prosecutor v. Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 30; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 17 (stating that the Trial Chamber "[...] is entitled to assume that the Prosecution is acting in good faith").

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



O-Gon Kwon
Judge

Dated this thirty-first day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]