



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-05-88-T  
Date: 13 December 2006  
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:** 13 December 2006

**PROSECUTOR**

v.

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

**DECISION ON *CONFIDENTIAL* PROSECUTION'S MOTION  
FOR LEAVE TO CONVERT TWO 92 *bis* WITNESSES TO  
RULE 92 *ter***

**The Office of the Prosecutor:**

Mr. Peter McCloskey

**Counsel for the Accused:**

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović  
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić  
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin  
Ms. Natacha Fauveau Ivanović for Radivoje Miletić  
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”):

**BEING SEISED OF** the “*Confidential* Prosecution’s Motion for Leave to Convert Two 92 *bis* Intercept Operator Witnesses to 92 *ter* Witnesses”, filed on 21 November 2006 (“Motion”), in which the Prosecution proposes to introduce the evidence of Witness No. 77 and Witness No. 81 pursuant to Rule 92 *ter*;

**NOTING** that on 22 November 2006, the Miletić Defence orally responded that it has no objection to the Motion;<sup>1</sup>

**NOTING** the “Defence Response on Behalf of Drago Nikolić to Prosecution’s Motion for Leave to Convert Two 92 *bis* Intercept Operator Witnesses to 92 *ter* Witnesses”, filed on 28 November 2006 (“Nikolić Response”), in which the Nikolić Defence partly opposes the Motion;

**NOTING** the “Notice on Behalf of Vujadin Popović Joining ‘Defence Response on Behalf of Drago Nikolić to Prosecution’s Motion for Leave to Convert Two 92 *bis* Witnesses to 92 *ter* Witnesses’”, filed on 29 November 2006 (“Popović Notice”), in which the Popović Defence joins the Nikolić Response “in its entirety”<sup>2</sup>, and the “Bera Defence Notification on Joining the Defence Response on Behalf of Drago Nikolić to Prosecution’s Motion for Leave to Convert Two 92 *bis* Intercept Operator Witnesses to 92 *ter* Witnesses”, filed on 30 November 2006 (“Bera Notification”), in which the Bera Defence joins the Nikolić Response;

**RECALLING** the “Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed on 12 September 2006 (“12 September 2006 Rule 92 *bis* Decision”), in which the prior transcript of Witness No. 77 was admitted pursuant to Rule 92 *bis*(D) without requiring the witness to appear for cross-examination,<sup>4</sup> and the written statement of Witness No. 81 was conditionally admitted in part,<sup>5</sup> pending receipt of the statement in a form that fully complies with the requirements of Rule 92 *bis*(B);<sup>6</sup>

**NOTING** that in the Motion, the Prosecution requests that these two witnesses “be allowed to testify live pursuant to Rule 92 *ter*”<sup>7</sup> because the Prosecution has now “identified that a number of

<sup>1</sup> T. 4329 (22 November 2006).

<sup>2</sup> Popović Notice, p. 2.

<sup>4</sup> 12 September 2006 Rule 92 *bis* Decision, para. 101.

<sup>5</sup> Subject to redaction of the last paragraph of the statement. 12 September 2006 Rule 92 *bis* Decision, para. 98.

<sup>6</sup> 12 September 2006 Rule 92 *bis* Decision, para. 98.

<sup>7</sup> Motion, para. 1.

intercepts concerning, involving or mentioning one or more of the Accused have been recorded by Witnesses 77 and 81”;<sup>8</sup>

**NOTING** that the Prosecution lists eleven such intercepts recorded by Witness No. 77 and four such intercepts recorded by Witness No. 81,<sup>9</sup> and asserts that these intercepts “contain evidence which cannot be introduced if the witnesses’ testimony is introduced through Rule 92 *bis*”;<sup>10</sup>

**NOTING** that the Prosecution argues that the Accused will not be prejudiced if the Motion is granted “since testifying under Rule 92 *ter* actually provides the Defence with an opportunity for a meaningful cross-examination of the witnesses which would be precluded under Rule 92 *bis*”,<sup>11</sup> and further asserts that all the listed intercepts “but for one, were already a part of the Prosecution’s 65 *ter* exhibit list provided to the Defence”;<sup>12</sup>

**NOTING** that the Prosecution has failed to identify precisely which written evidence of Witness Nos. 77 and 81 it proposes to introduce pursuant to Rule 92 *ter*, and that the Prosecution has not specified whether it is now seeking to introduce the un-redacted written statement of Witness No. 81;

**NOTING** that the Nikolić Defence does not oppose “the conversion of the status of witnesses 77 and 81 from 92*bis* into 92*ter*”, but does request the Trial Chamber to deny the Motion “with respect to the introduction of intercept No. 1, Annex A”;<sup>14</sup>

**NOTING** that the Nikolić Defence opposes the introduction of this single intercept with Witness No. 77 as 1) it was not listed on the Prosecution’s Rule 65 *ter* Exhibit List, 2) it was not included in the Prosecution’s motions for leave to amend the Rule 65 *ter* Exhibit List, filed on 18 August 2006, 13 September 2006, or 3 November 2006, 3) “conversion of the status of a witness should not be the ‘shortcut’ for the introduction of new material”, and 4) the Accused will be prejudiced because he has not had sufficient notice to adequately prepare a defence;<sup>15</sup>

**NOTING** that the Popović Notice and the Beara Notification raise no additional arguments or objections;

**NOTING** the “*Confidential* Prosecution’s Reply to Defence Response on Behalf of Drago Nikolić to Prosecution’s Motion for Leave to Convert Two 92 *bis* Intercept Operator Witnesses to 92 *ter*

<sup>8</sup> Motion, para. 3.

<sup>9</sup> Motion, paras. 6, 8.

<sup>10</sup> Motion, para. 12.

<sup>11</sup> Motion, para. 10.

<sup>12</sup> Motion, para. 11.

<sup>14</sup> Nikolić Response, para. 2.

<sup>15</sup> Nikolić Response, para. 3.

Witnesses”, filed on 5 December 2006” (“Reply”), in which the Prosecution seeks leave to reply and asserts that “given the recent change in the trial schedule, Witnesses 77 and 81 will now testify after the winter recess, giving ample additional time for the Defence to prepare and analyse this intercept”;<sup>16</sup>

**CONSIDERING** that the Prosecution has identified a reasonable basis for requesting the live testimony of Witness Nos. 77 and 81 pursuant to Rule 92 *ter*, and that the Defence does not oppose the live testimony of these witnesses pursuant to Rule 92 *ter*, but objects only to the introduction of one of the eleven listed intercepts of Witness No. 77;

**CONSIDERING** that the Trial Chamber has decided “to defer any ruling on the admissibility of intercepted communications until such time as the issue can be addressed in a comprehensive fashion”,<sup>17</sup> and that, as reiterated by the Trial Chamber orally on 27 November 2006, all tendered intercept exhibits in this trial are not admitted but, rather, marked for identification pending the Trial Chamber’s decision on the admissibility of intercept evidence;<sup>18</sup>

**CONSIDERING** that the Defence objection to the introduction of one of the intercepts recorded by Witness No. 77 is not directly related to whether either witness should be permitted to testify pursuant to Rule 92 *ter*, and that any such objection would not be prejudiced by a decision permitting the witnesses to testify pursuant to Rule 92 *ter*;

**CONSIDERING** that Witness Nos. 77 and 81 are now not expected to testify before the winter recess;

**CONSIDERING** that the Trial Chamber is persuaded that admitting the testimony of Witness Nos. 77 and 81 pursuant to Rule 92 *ter* will not prejudice the Accused;

#### **FOR THE FOREGOING REASONS**

**PURSUANT TO** Rules 54, 92 *ter* and 126 *bis* of the Rules of Procedure and Evidence;

**HEREBY GRANTS** the Motion and **ORDERS** that:

- a) The Prosecution is granted leave to file a reply;
- b) The Prosecution shall promptly identify for the Trial Chamber and the Defence the specific written evidence of Witness Nos. 77 and 81 which it proposes for admission pursuant to

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<sup>16</sup> Reply, para. 3.


<sup>17</sup> 12 September 2006 Rule 92 *bis* Decision, para. 103.

<sup>18</sup> T. 4556 (27 November 2006).

Rule 92 *ter*, including whether it proposes to admit in un-redacted form the written statement of Witness No. 81 which was conditionally admitted in part in the 12 September 2006 Rule 92 *bis* Decision;

- c) Without prejudice to the Accused being permitted to challenge the admissibility of any intercepted communications recorded by Witness Nos. 77 and 81, the written evidence of Witness Nos. 77 and 81, as identified by the Prosecution pursuant to paragraph (b) above, may be admitted pursuant to Rule 92 *ter* under the conditions set forth in Rule 92 *ter*(A);
- d) The Prosecution may only offer intercept 1 in Annex A of the Motion with the evidence of Witness No. 77 if it shows good cause for its addition to the Rule 65 *ter* Exhibit List.

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



**Carmel Agius**  
**Presiding Judge**

Dated this 13<sup>th</sup> day of December 2006,  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**