



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

**Order of:** 13 December 2006

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

**ORDER ON PROSECUTION SUBMISSION PURSUANT TO  
RULE 92 *bis* DECISION ISSUED 12 SEPTEMBER 2006**

**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 “Prosecution’s Submission Pursuant to the Trial Chamber’s 12 September 2006 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 October 2006 (“Submission”);

**NOTING** the “Response on Behalf of Accused Vinko Pandurević to Prosecution Submission Pursuant to the Trial Chamber’s 12 September 2006 Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed *confidentially* on 26 October 2006 (“Pandurević Response”), and the “Response on Behalf of Drago Nikolić to Prosecution’s Submission Pursuant to the Trial Chamber’s 12 September 2006 Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed on 26 October 2006 (“Nikolić Response”), and the “Joint Defence Response by the Accused Radivoje Miletić and Milan Gvero to Prosecution Submission Pursuant to the Trial Chamber 12 September 2006 Decision”, filed *confidentially* on 26 October 2006 (“Miletić/Gvero Response”), and the “*Confidential* Popović Response to Prosecution’s Submission Pursuant to the Trial Chamber’s 12 September 2006 Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence Pursuant to Rule 92 *bis*”, filed on 26 October 2006 (“Popović Response”), and the “Beara Defence Notification on Joining the Response on Behalf of Drago Nikolić to Prosecution’s Submission Pursuant to the Trial Chamber’s 12 September 2006 Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed on 31 October 2006 (“Beara Joinder”), and the “*Confidential* Reply to Responses on Behalf of Accused Miletić, Gvero, Pandurević, Nikolić and Popović to Prosecution’s Submission Pursuant to the Trial Chamber’s 12 September 2006 Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed on 2 November 2006 (“Reply”);

**NOTING** the “Prosecution’s Notice of Disclosure of Expert Witness Statements Under Rule 94 *bis*”, filed *confidentially* on 31 October 2006 (“Prosecution’s Rule 94 *bis* Notice”), and the “Joint Defence Response to the Prosecution’s Notice of Disclosure of Expert Witness Statements Under Rule 94 *bis*”, filed on 14 November 2006, and the “Notice on Behalf of Vinko Pandurević and Drago Nikolić Pursuant to Rule 94 *bis*(B)”, filed *confidentially* on 30 November 2006, and the “Notice on Behalf of Vujadin Popović Joining Notice on Behalf of Vinko Pandurević and Drago Nikolić Pursuant to Rule 94 *bis*(B)”, filed on 1 December 2006;

**RECALLING** the “Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, issued on 12 September 2006 (“12 September 2006 Rule 92 *bis* Decision”), in which the Trial Chamber ordered the Prosecution to “provide the Trial Chamber and the Registry with a list of all exhibits admitted by the Trial Chamber in this Decision, clearly identifying the protective measures in place for each exhibit, including those portions of the transcript testimony which occurred in private session and those exhibits admitted confidentially”;<sup>1</sup>

**NOTING** that in the Submission, the Prosecution requests an Order:

- a) “[A]dmitting the list of exhibits at Annex A”;<sup>2</sup>
- b) “[A]dmitting seven 92 *ter* (or Rule 89(F)) witnesses pursuant to para. 116 of the [12 September 2006 Rule 92 *bis*] Decision”;<sup>3</sup>
- c) “[A]dmitting the filing of expert witness reports under Rule 94 *bis*, pursuant to paras. 33–54 of the [12 September 2006 Rule 92 *bis*] Decision”;<sup>4</sup>
- d) “[A]dmitting under Rule 92 *bis*(A) 18 statements that had been appended to the testimony of Witness 64, pursuant to paras. 92–94 of the [12 September 2006 Rule 92 *bis*] Decision; and”;<sup>5</sup>
- e) “[A]dmitting the exhibits (two reports of Witness 14 and the unredacted transcript of Witness 79) at Annex B and Annex C”;<sup>6</sup>

**NOTING** that the Prosecution seeks leave to reply, and in its Reply appears to withdraw its request to introduce the written evidence of seven witnesses pursuant to Rule 92 *ter* or Rule 89(F),<sup>7</sup> and clarifies that the un-redacted transcript of Witness No. 79 was attached to the Submission in order to rectify its earlier oversight and that it now “intends to call this witness live”<sup>8</sup>, and that, therefore, these requests in the Submission require no further consideration;

**CONSIDERING** that while the Prosecution’s list of exhibits at Annex A of its Submission fails to identify which portions of the admitted transcript testimony occurred in private session, the

<sup>1</sup> 12 September 2006 Rule 92 *bis* Decision, Disposition, p. 39.

<sup>2</sup> Submission, para. 18(i).

<sup>3</sup> Submission, para. 18(ii).

<sup>4</sup> Submission, para. 18(iii).

<sup>5</sup> Submission, para. 18(iv).

<sup>6</sup> Submission, para. 18(v).

<sup>7</sup> Reply, para. 4.

Prosecution has provided copies of the transcripts for the public record from which all private session testimony has been redacted such that the list generally meets the requirements outlined in the 12 September 2006 Rule 92 *bis* Decision, and that because the exhibits listed at Annex A were admitted in the 12 September 2006 Rule 92 *bis* Decision there is no basis for “admitting” the list itself and that, therefore, this request in the Submission requires no further consideration;

**CONSIDERING** that it is not clear what the Prosecution intends by its request in the Submission to “[admit] the filing of expert witness reports under Rule 94 *bis*”,<sup>9</sup> but that any issues regarding expert witnesses other than those directly addressed in the 12 September 2006 Rule 92 *bis* Decision are more appropriately considered separately from the other issues outlined in the Submission and in conjunction with the Prosecution’s Rule 94 *bis* Notice and the related Defence responses;

**CONSIDERING** that each of the Accused opposes the Prosecution’s request in the Submission to admit eighteen written statements pursuant to Rule 92 *bis* that were originally appended as exhibits to the transcript of Witness No. 64 with the “*Confidential* Prosecution’s Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed on 12 May 2006 (“Prosecution’s Rule 92 *bis* Motion”), that Nikolić argues the Prosecution should file a new motion which outlines precisely how the eighteen proffered statements fulfil the requirements of Rule 92 *bis* and why the statements should be admitted in this trial,<sup>10</sup> and that Miletić and Gvero argue the Prosecution has failed its burden of demonstrating why the statements should be admitted under Rule 92 *bis*(A),<sup>11</sup> and that Popović and Pandurević assert that the Prosecution should have included these eighteen witnesses on its witness list, and should first move to amend the list by adding these witnesses;<sup>12</sup>

**RECALLING** that in the 12 September 2006 Rule 92 *bis* Decision, the Trial Chamber denied the Prosecution’s request to admit the transcript of Witness No. 14 because the Prosecution had failed to provide two reports prepared by this expert and, thus, the Trial Chamber did not have the information necessary to evaluate whether admission of the transcript was appropriate, and that the denial was “without prejudice to the Prosecution making a new request which includes the necessary exhibits”;<sup>13</sup>

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<sup>8</sup> Reply, para. 11.

<sup>9</sup> Submission, para. 18(iii).

<sup>10</sup> Nikolić Response, para. 18(b).

<sup>11</sup> Miletić/Gvero Response, paras. 8–9.

<sup>12</sup> Popović Response, paras. 21–22; Pandurević Response, para. 10.

<sup>13</sup> 12 September 2006 Rule 92 *bis* Decision, para. 33.

**CONSIDERING** that the Prosecution appends the missing reports of Witness No. 14 to the Submission and seeks admission of the reports as exhibits,<sup>14</sup> and that the Prosecution's request in the Submission should be construed as a formal renewal of the Prosecution's earlier request to admit the transcript of Witness No. 14 pursuant to Rule 92 *bis*(D), with the reports appended to the Submission admitted as exhibits with the transcript;

**CONSIDERING** that the parties have already had the opportunity to argue the merits of introducing the transcript of Witness No. 14 pursuant to Rule 92 *bis*(D), and that the Trial Chamber dealt with the admission of expert transcripts extensively in the 12 September 2006 Rule 92 *bis* Decision;<sup>15</sup>

**CONSIDERING** that the Accused in this case have not accepted the written evidence of Witness No. 14 pursuant to Rule 94 *bis*(C) and, therefore, "the evidence may not be admitted against the Accused without permitting the Defence to cross-examine [Witness No. 14] at trial";<sup>16</sup>

**CONSIDERING** that because Witness No. 14 will appear at trial "and the Accused will have the same opportunity to cross-examine [the witness] regarding any aspects of [his] reports as they would be accorded by the direct application of Rule 94 *bis*, the Trial Chamber is satisfied that it is appropriate in this case to admit [this expert's] reports";<sup>17</sup>

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

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

**HEREBY GRANTS** the Submission requests **IN PART** and **ORDERS** that:

- a) The Prosecution is granted leave to file a reply;
- b) If the Prosecution wishes to introduce the eighteen written statements at issue in the Submission pursuant to Rule 92 *bis* it shall, in a single motion: 1) move to amend its witness list by adding each of the eighteen witnesses, and 2) file a new request to introduce the statements pursuant to Rule 92 *bis*, including an analysis of each statement detailing how it fulfils the requirements of Rule 92 *bis* and why it should be admitted in this trial;

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<sup>14</sup> Submission, paras. 11, 18(v).

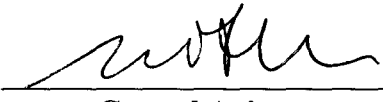
<sup>15</sup> 12 September 2006 Rule 92 *bis* Decision, paras. 33–54.

<sup>16</sup> 12 September 2006 Rule 92 *bis* Decision, para. 52.

<sup>17</sup> 12 September 2006 Rule 92 *bis* Decision, para. 54.

- c) Pursuant to Rule 92 *bis*(D), the transcript of Witness No. 14 attached to the Prosecution's Rule 92 *bis* Motion is admitted in whole provided Witness No. 14 appears for cross-examination at trial;
- d) The exhibits for Witness No. 14 attached to the Submission and to the Prosecution's Rule 92 *bis* Motion are admitted provided Witness No. 14 appears for cross-examination at trial;
- e) The Submission requests not subsequently withdrawn by the Prosecution are dismissed in all other respects.

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



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

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

**[Seal of the Tribunal]**