



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-05-88/2-PT

Date: 4 June 2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Kimberly Prost, Pre-Trial Judge
Registrar: Mr. John Hocking
Decision of: 4 June 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON TOLIMIR'S REQUEST TO PROHIBIT
PROSECUTION'S CONTACT WITH WITNESSES PROPOSED
IN PROSECUTION'S 92 *BIS* AND 92 *TER* MOTIONS**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

I, KIMBERLY PROST, Judge 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 “Submission Requesting that Prosecution Officials be Prohibited From Contacting Witnesses who are the Subject of Motions for the Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* or the Admission of Evidence Pursuant to Rule 92 *ter*”, submitted by the Accused Zdravko Tolimir on 6 May 2009 and filed in the English version on 8 May 2009 (“Motion”);

RECALLING that the Prosecution seeks the admission into evidence of the testimonies of 121 witnesses pursuant to Rule 92 *bis* of Procedure and Evidence (“Rules”) (“Prosecution’s 92 *bis* Motion”)¹ and of 42 witnesses pursuant to Rule 92 *ter* (“Prosecution 92 *ter* Motion”);² and that of 11 witnesses whose expert reports have been disclosed by the Prosecution (“Prosecution’s 94 *bis* Notice”), ten are also the subject of either motion;³

NOTING that in the Motion, the Accused requests that the Prosecution staff members and “other persons acting on behalf of the Prosecution”⁴ be barred from contacting witnesses who are the subject of the Prosecution’s 92 *bis* Motion and the Prosecution 92 *ter* Motion on the grounds that his responses to these motions and the Prosecution’s 94 *bis* Notice will enable the Prosecution “to prepare witnesses in advance, before the cross-examination, particularly in view of [his] remarks that identify the basic purpose of cross-examination, and this would not be in the interests of justice and would not make the interrogation and presentation of evidence effective in ascertaining the truth”;⁵

NOTING the “Prosecution’s Response to Accused’s Submission Requesting that Prosecution Officials be Prohibited From Contacting Witnesses who are the Subject of Motions for the Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *BIS* or the Admission of Evidence Pursuant to Rule 92 *TER*”, filed on 12 May 2009 (“Response”), in which the Prosecution argues that neither the Rules nor the jurisprudence of the Tribunal supports the Accused’s submissions that the Prosecution should be prevented from having contact with Rules 92*bis*, 92*ter*, and 94*bis* witnesses; that the jurisprudence of the Tribunal allows witness proofing

¹ Prosecution’s Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Attached Appendix A, confidential, 13 February 2009.

² Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A-C, confidential, 18 March 2009.

³ Prosecution’s Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94 *bis* and Attached Appendices A and B, 13 March 2009.

⁴ Motion, para. 10. *See also ibid.*, para. 1.

⁵ *Ibid.*, paras. 1–10 (quotation at para. 5 and footnote omitted).

regardless of the type of witnesses; and that the impact of the Accused's cross-examination will not be diminished if Rules 92*bis*, 92*ter* and 94*bis* witnesses are proofed by the Prosecution;⁶

NOTING that the Accused is to submit a response to the Prosecution's 92's *bis* Motion in accordance with the time limit prescribed by the Trial Chamber⁷ and to the Prosecution's 92 *ter* Motion by no later than 11 June 2009;⁸

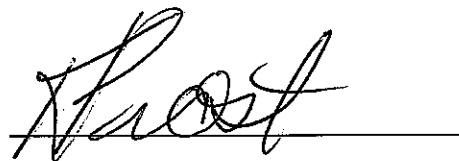
CONSIDERING that the jurisprudence of the Tribunal dictates that there is no property in witnesses on the part of either the Prosecution or the Defence and thus both parties have an equal right to approach them;⁹

CONSIDERING that the Accused's assertion that the Prosecution's contact with its witnesses subsequent to the filing of his responses would render the upcoming trial unfair is therefore unsubstantiated;

PURSUANT TO Rule 54 of the Rules;

HEREBY DISMISS the Motion.

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



Kimberly Prost
Pre-Trial Judge

Dated this fourth day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

⁶ Response, paras. 2, 7.

⁷ Decision on Tolimir's Requests Regarding Setting Time Limits for Filing Responses to Prosecution Motions under Rules 92 *BIS* and 94 *BIS*, 24 April 2009; Decision on Tolimir's Request for Extension of Time Limit for Filing a Response to the Prosecution Motion under Rule 92 *bis*, 29 May 2009. The Accused submitted his response to the Prosecution's 94 *bis* Notice on 22 May 2009. Its English version is to be filed.

⁸ The BCS version of the Prosecution's 92 *ter* Motion was filed on 28 May 2009.

⁹ *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposing Party, 30 July 2003, para. 15; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić Request for Certification to Appeal Oral Decision on PW-165 and Request for Variation of the Time-Limits, 12 July 2007, p. 1.