



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-09-92-T
Date: 7 September 2015
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orié, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 7 September 2015

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION TO ADMIT THE
EVIDENCE OF ŽELJKA MALINOVIĆ
PURSUANT TO RULE 92BIS**

Office of the Prosecutor

Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 20 July 2015, the Defence filed a motion (“Motion”) pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) requesting the provisional admission into evidence of the written statement of Željka Malinović.¹ It submits that the witness’s statement is relevant and of probative value, in particular as it relates to Counts 9 to 11 of the Indictment.² The Defence further submits that the witness’s statement is admissible under Rule 92 *bis* because it contains supporting evidence relating to circumstances preceding the war and adding a context to acts charged in the Indictment, none of which go to proof of the acts and conduct of the Accused.³

2. On 3 August 2015, the Prosecution filed its response (“Response”).⁴ The Prosecution does not oppose the Motion, provided that excerpts from the testimony of Željka Malinović in the case of *Prosecutor v. Radovan Karadžić* (“Karadžić case”), and two exhibits associated with that testimony, are also admitted into evidence.⁵ It submits that the admission of the transcript excerpts and associated exhibits is necessary for the proper understanding of Željka Malinović’s evidence.⁶

II. APPLICABLE LAW

3. The Chamber recalls and refers to the applicable law governing the admission of evidence pursuant to Rule 92 *bis* of the Rules, as set out in a previous decision.⁷ With regard to the applicable law related to the admission of associated exhibits, the Chamber recalls and refers to one of its previous decisions dealing with this matter.⁸

¹ Defense Motion to Admit the Evidence of Malinović Željka Pursuant to Rule 92*bis*, 20 July 2015.

² Motion, paras 2, 13.

³ Motion, paras 1, 17, 21, 26-27.

⁴ Prosecution Response to Defense Motion to Admit the Evidence of Željka Malinović Pursuant to Rule 92*bis*, 3 August 2015.

⁵ Response, paras 1, 3-7.

⁶ Response, paras 2-3, 5.

⁷ Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92*bis*: Sarajevo Witnesses (“Decision on Third 92*bis* Motion”), 19 October 2012, paras 5-7.

⁸ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater* (“Decision on First 92 *quater* Motion”), 23 July 2012, para. 13.

III. DISCUSSION

A. Attestation and Declaration

4. The witness's statement has no corresponding attestation or declaration as required by Rule 92 *bis* (B) of the Rules. Unattested witness statements have previously been conditionally admitted by this Chamber pending a formal attestation.⁹ In line with this practice, provided that all other admissibility requirements are met, the Chamber will conditionally admit the unattested statement pending the filing of the required attestation and declaration.

B. Admissibility Pursuant to Rule 89 (C) of the Rules

5. The witness's statement relates to circumstances in Sarajevo before and during the war, in particular to the setting up of barricades, the location of (firing) positions of Serb and Muslim forces, and more generally to Counts 9 and 10 of the Indictment. The Chamber therefore finds that the evidence is relevant pursuant to Rule 89 (C) of the Rules.

6. The Prosecution does not object to the admission of the witness's statement, and the Chamber finds the Witness's evidence to be of probative value. In relation to any opinions or conclusions expressed by Malinović, the Chamber recalls the approach it has taken with opinions or conclusions in the evidence of fact witnesses.¹⁰ Based on the foregoing, the Chamber concludes that the witness's statement has met the requirements of Rule 89 (C) of the Rules.

C. Admissibility Pursuant to Rule 92 *bis* of the Rules

7. The Chamber, having reviewed the witness's statement, does not find, and the Prosecution does not argue, that it relates to the acts and conduct of the Accused.

8. With regard to factors weighing in favour of admitting evidence in the form of a written statement, the Chamber especially considers that the witness's statement provides a historical, political, and military background; and contains a description of the ethnic composition of the population in places to which the Indictment relates. The Chamber finds these factors, which are relevant pursuant to Rule 92 *bis* (A)(i) of the Rules, to weigh in favour of admission. There are no factors under Rule 92 *bis* (A)(ii) weighing against admitting the evidence in written form. In light of the above, the Chamber finds that the statement is admissible pursuant to Rule 92 *bis* of the Rules.

⁹ Decision on Third 92*bis* Motion, para. 27 and references cited therein.

¹⁰ Decision with regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents, 3 July 2012, para. 8.

D. Transcript Portions and Exhibits Tendered by the Prosecution

9. The Prosecution tenders portions of the transcript from the *Karadžić* case, as well as two associated exhibits used during that testimony. The Defence did not respond to this request. The Chamber recalls its guidance on tendering redacted transcripts and statements pursuant to Rule 92 *bis*, namely that the tendering party should only tender such portions of evidence upon which it seeks to rely, and that the other party in its response should include any segments of evidence which it deems necessary for contextualising or clarifying those portions.¹¹ The Chamber now adopts the same approach in relation to the current circumstances, where a tendering party only tenders a witness statement. In line with the aforementioned guidance, the Chamber accepts that a responding party, in order to contextualise or clarify a witness statement, tenders any transcript portions from previous cases, and, if appropriate, associated exhibits used during that testimony.

10. The Chamber considers the proffered transcript portions central to the understanding of Željka Malinović's evidence as a whole, and finds that the transcript pages are admissible pursuant to Rule 92 *bis* of the Rules. Concerning the admission of the associated exhibits, the Chamber is of the view that the two photographs are an inseparable and indispensable part of Željka Malinović's prior testimony; and without these documents the transcript would be incomprehensible and therefore of lesser probative value. In light of this, the Chamber finds that the requirements for admission have been met with respect to the associated exhibits.

IV. DISPOSITION

11. For the foregoing reasons, pursuant to Rules 73, 89, and 92 *bis* of the Rules, the Chamber

GRANTS the Motion;

CONDITIONALLY ADMITS into evidence, pending the filing of an attestation and declaration in compliance with the requirements of Rule 92 *bis* (B) of the Rules,

- a) the statement of witness Željka Malinović, dated 28 May 2014, bearing ERNs 1D18-0458-1D18-0467 and 1D18-0468-1D18-0478;
- b) excerpts of the testimony of Željka Malinović, dated 15 November 2012, in the *Karadžić* case, bearing Rule 65 *ter* no. 32837;

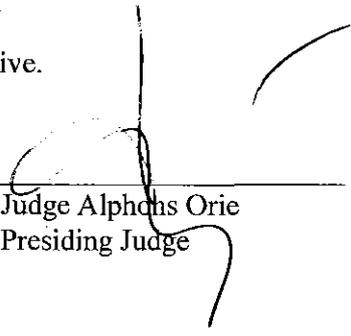
¹¹ T. 5406-5407; *see also* Decision on First 92 *quater* Motion, para. 14.

c) the two photographs discussed by witness Željka Malinović in the *Karadžić* case, bearing Rule 65 *ter* nos 32838 and 32839;

INSTRUCTS the Defence to file the corresponding attestation and declaration to the statement of Željka Malinović within six weeks of the filing of this decision;

REQUESTS the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the numbers so assigned.

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



Judge Alphons Orié
Presiding Judge

Dated this seventh day of September 2015
At The Hague
The Netherlands

[Seal of the Tribunal]