UNITED NATIONS

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-95-5/18-T

Date: 8 September 2010

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **8 September 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION CONCERNING THE ADMISSION OF EVIDENCE OF WITNESS KDZ216 PURSUANT TO RULE 92*BIS*

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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") is seized of the "Prosecution Motion concerning the Admission of Evidence of Witness KDZ216 pursuant to Rule 92 *bis*", filed on 26 August 2010 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 29 May 2009, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities)" ("First Rule 92 *bis* Motion"), in which it requested, pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), the admission into evidence in this case of *inter alia* the transcripts of KDZ216's testimony in *Prosecutor v. Kunarac et al.*, as well as a number of associated exhibits.[1]

2. On 10 November 2009, the Chamber issued the "Decision on Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities)" ("Decision on First Rule 92 *bis* Motion"), in which it granted the First Rule 92 *bis* Motion in part, admitting into evidence, *inter alia*, the written statement of KDZ216, as well as the transcript corresponding to the first day of the witness's testimony in the *Kunarac* case, as tendered by the Prosecution in the First Rule 92 *bis* Motion.[2]

3. In the Motion, the Prosecution informs the Chamber that in the First Rule 92 *bis* Motion it "intended to seek the admission of both the first and the second day of testimony of witness KDZ216" in the *Kunarac* case, but that the specifics concerning the parts of the transcript to be tendered were incorrectly identified in confidential Appendix A.[3] The Prosecution further states that the transcript of the second day of KDZ216's testimony in the *Kunarac* case (T. 3341–3460, 17 May 2000) has already been provided in its entirety to the Chamber in confidential Appendix A to the "Prosecution Motion and Submission concerning Further Decision on Prosecution's First

[1] First Rule 92 *bis* Motion, paras. 1, 4–5, Appendix A.

[2] Decision on First Rule 92 *bis* Motion, paras. 35, 47. The Chamber also noted that the portion of KDZ216's testimony in the *Kunarac* case containing the witness's cross-examination had not been tendered by the Prosecution, *see* Decision on First Rule 92 *bis* Motion, para. 32.

[3] Motion, para. 2.

Rule 92 *bis* Motion (Witnesses for Eleven Municipalities)", filed on 12 February 2010,[4] and requests the Chamber to admit it into evidence.[5]

4. On 30 August 2010, the Accused filed the "Response to Motion to Admit Witness KDZ216 Evidence", stating that he does not object to the Motion.

II. Applicable Law

5. The law applicable to motions made pursuant to Rule 92 *bis* has already been outlined by the Chamber in its "Decision on the Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality)", issued on 15 October 2009 ("Decision on Third Rule 92 *bis* Motion"). The Chamber will therefore not discuss the applicable law again here, but refers to the relevant paragraphs of the Decision on Third Rule 92 *bis* Motion.[6]

III. Discussion

6. In the First Rule 92 *bis* Decision, the Chamber analysed in detail the portion of the written evidence tendered by the Prosecution in relation to witness KDZ216, as well as the associated exhibits related to that proposed evidence, on the basis of the standards and criteria outlined in the Decision on Third Rule 92 *bis* Motion. The Chamber was satisfied that the proposed evidence is relevant to a number of charges against the Accused, is crime base evidence, and does not pertain to the acts and conduct of the Accused, or any acts which go to the Accused's participation in a joint criminal enterprise as charged in the Indictment, or shared with the person or persons who actually committed the crimes charged in the Indictment the requisite intent for those crimes. The Chamber also considered that the evidence does not bear directly upon the Accused's responsibility as alleged in the Indictment or represents a "critical" or "pivotal" element of the Prosecution's case, and that the identification by KDZ216 of individuals who held positions in the Bosnian Serb political and/or military structures did not, by itself, render her evidence inadmissible under Rule 92 *bis*.[7]

[4] The Chamber notes that it previously dealt with KDZ216's second day of testimony in the *Kunarac* case, which is the subject of this Decision, when determining the admission of the associated exhibit with Rule 65 *ter* number 40568 in its "Decision on Prosecution Motion and Submission concerning further Decision on Prosecution's First Rule 92 *bis* Motion (Witnesses of Eleven Municipalities)" of 18 March 2010 ("Further Decision on First Rule 92 *bis* Motion").

[5] Motion, paras. 3–4.

[6] Decision on Third Rule 92 *bis* Motion, paras. 4–11.

[7] Decision on First Rule 92 *bis* Motion, paras. 21, 23, 25–31, 35.

7. Having analysed the transcript of the second day of KDZ216's testimony in the *Kunarac* case, which the Prosecution now tenders for admission in the Motion, the Chamber considers that an identical analysis to that followed in the First Rule 92 *bis* Decision is applicable, and refers to the relevant paragraphs therein.[8] Consequently, the Chamber will admit the relevant portion of KDZ216's transcript of prior testimony in the *Kunarac* case (T. 3341–3460, 17 May 2000) pursuant to Rule 92 *bis*, without the need for KDZ216 to appear for cross-examination. Given that KDZ216 enjoys a number of protective measures in this case, the transcript of her second day of testimony in the *Kunarac* case shall be admitted under seal. The Chamber further notes that the Prosecution does not tender any exhibits associated to KDZ216's second day of testimony, but that an associated exhibit discussed during that portion of the testimony has already been admitted by the Chamber in the Further Decision on First Rule 92 *bis* Motion.[9]

IV. Disposition

8. For the above stated reasons, the Trial Chamber, pursuant to Rules 54 and 92 *bis* of the Rules, hereby **GRANTS** the Motion and **ORDERS** that:

a) the transcript of KDZ216's second day of testimony in the *Kunarac* case be admitted into evidence under seal; and

b) the content of P69 be replaced with the full transcript of KDZ216's testimony in the *Kunarac* case.

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

Judge O-Gon Kwon,
Presiding

Dated this eighth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

[8] *See* Decision on First Rule 92 *bis* Motion, paras. 21, 23, 25–31, 35.

[9] Further Decision on First Rule 92 *bis* Motion, paras. 8, 11, referring to the associated exhibit with Rule 65 *ter* number 40568, which is now exhibit P502.