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UNITED
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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-95-11-T

Date: 9 June 2006

Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Decision of: **9 June 2006**

PROSECUTOR

v.

MILAN MARTIĆ

DECISION ON DEFENCE MOTION TO EXCLUDE THE TESTIMONY OF WITNESS MILAN BABIĆ, TOGETHER WITH ASSOCIATED EXHIBITS, FROM EVIDENCE

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for the Accused:

Mr. Predrag Milovančević
Mr. Nikola Perović

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TRIAL CHAMBER I ("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 seised of the Defence "Motion to exclude testimony of witness Milan Babić, together with associated exhibits, from evidence", filed partly confidentially with two annexes on 2 May 2006;

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions of the Parties,

HEREBY RENDERS ITS DECISION.

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I. PROCEDURAL HISTORY

1. Witness Milan Babić testified for the Prosecution before this Trial Chamber. His evidence also included a written statement, which was admitted pursuant to Rule 89 (F) of the Rules of Procedure and Evidence ("Rules") together with a number of associated documents.[1]

2. Milan Babić's examination-in-chief took place on 15, 16, 17 and 20 February 2006 and briefly on 21 February 2006. His cross-examination commenced on 21 February 2006 and continued through 2 and 3 March 2006. On 3 March 2006, Defence Counsel stated that it intended to conclude the cross-examination on 7 March 2006,[2] which would have amounted to no more than 6.5 hours of further cross-examination.[3] On 5 March 2006, Milan Babić died in his cell at the United Nations Detention Unit, where he was being detained for the duration of his testimony.[4]

3. On 6 March 2006, the trial was adjourned until 8 March 2006.[5] On 8 March 2006, the question of whether Milan Babić's death affected his evidence in any way was raised in court. The Prosecution indicated that they were prepared to file submissions setting forth their position in order to bring the issue before the Trial Chamber in a proper way.[6] The Defence likewise stated that it would file a written motion presenting its views and position within five or six days from that date.[7] The Trial Chamber ordered the Parties to address the matter of Milan Babić's evidence "at an appropriate moment", and that the trial proceed in the meantime.[8]

4. On 6 April 2006, the Prosecution filed the "Prosecution's Submissions Regarding the Evidence of Witness Milan Babić" ("Prosecution Submissions"). On 26 April 2006, the Trial Chamber ordered the Defence to file its submissions no later than 2 May 2006.[9]

5. On 2 May 2006, the Defence filed a "Motion to Exclude Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence" ("Defence Motion"), in which the Defence submits that the evidence of Milan Babić should be excluded from the trial record pursuant to alternative arguments based on Rules 89 (C) and (D) of the Rules. On 8 May 2006, the Prosecution

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[1] *Prosecutor v Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motion for Admission of Statement of Witness Milan Babić Pursuant to Rule 89 (F), 31 Jan 2006.
[2] Milan Babić, 03 Mar 2006, T. 1904.
[3] The Trial Chamber notes that pursuant to the confidential "Decision on Prosecution Motion to Extend the Stay of Witness Milan Babić", dated 24 February 2006, re-examination and judges' questions were scheduled to take place on 7 and 8 March 2006.
[4] An investigation into the circumstances surrounding Milan Babić's death has been ordered by the President of the Tribunal.
[5] Hearing, 06 Mar 2006 T. 1936.
[6] Hearing, 08 Mar 2006, T. 1944.
[7] Hearing, 08 Mar 2006, T. 1946; the Prosecution noted that the Defence privately indicated that it would wait for the Prosecution submission and then respond, Hearing, 26 Apr 2006, T. 3885.
[8] Hearing, 08 Mar 2006, T. 1947-1948, 1950.

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filed the "Prosecution Response to the Defence Motion to Exclude Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence" ("Prosecution Response").

6. On 15 May 2006, the Defence filed its "Reply to Prosecution's Response to Defence Motion to Exclude Testimony of Witness Milan Babić, together with Associated Exhibits, from Evidence" ("Defence Reply"). With respect to this submission, pursuant to Rule 126 *bis* of the Rules, the Trial Chamber hereby grants leave to the Defence to reply to the Prosecution Response.

II. ISSUES TO BE DECIDED

7. The Trial Chamber is faced with two main issues to be decided: (1) the Trial Chamber must assess whether the need to ensure a fair trial substantially outweighs the probative value of the evidence pursuant to Rule 89 (D) of the Rules and therefore should be excluded; and (2) in the event that the answer is in the negative, the Trial Chamber must consider whether any potential unfairness to the Accused can be remedied or ameliorated, including through the admission of other evidence.[10]

III. DETERMINATION OF THE APPLICABLE LAW

8. The Defence submits that in assessing the issue at hand the Trial Chamber should primarily rely on the Statute, Rules and jurisprudence of the Tribunal, even though these do not specifically address the issue before the Trial Chamber.[11] It cites Judge Cassese's Dissenting Opinion in the Appeals Chamber Judgement in *Prosecutor v. Drazen Erdemović,* in which it is said that "legal constructs and terms of art upheld in the national law [...] cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules."[12]

9. The Prosecution submits that the circumstances before the Trial Chamber "to the Prosecution's knowledge, have never been squarely addressed by the jurisprudence of this Tribunal." According to the Prosecution, as the fundamental issues concern the admissibility of

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[9] Hearing, 26 Apr 2006, T. 3887.
[10] In this regard, *see also Prosecutor v. Zdravko Mucić et al.,* Case No. IT-96-21-T, Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, dated 24 May 1998 ("*Čelebići* Exclusion Decision"), para. 42, in which the Trial Chamber held that the Trial Chamber "should exercise its power *proprio motu* to avert any injustice that will result if it did not intervene."
[11] Defence motion, para. 7. The Defence claims that the few decisions made by courts around the world cannot be said to represent a well-established practice.
[12] *Ibid.*, para 7, citing *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, 7 Oct 1997, p. 2.

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evidence, the rights of the Accused and the fairness of the proceedings, several provisions of the Statute and Rules have application to the current circumstances.[13]

10. The Prosecution argues that the jurisprudence of the European Court of Human Rights[14] and domestic practice have dealt more directly with the issue at hand and that this jurisprudence can guide the Trial Chamber in its assessment of the matter before it.[15] According to the Prosecution, the Defence fails to explain why domestic cases directly on point should be totally disregarded.[16] The Trial Chamber notes, however, that while the Defence claims that "the few decisions made by courts around the world cannot be said to represent a well-established practice,"[17] it later relies on jurisprudence of the United States of America[18] and important human rights instruments[19] in support of some of its arguments.

11. The Trial Chamber notes that neither the Statute nor the Rules provide for the set of circumstances with which the Trial Chamber is faced. In particular, Rule 90 of the Rules, which deals with testimony of witnesses in court, does not regulate any possible consequences of an incomplete examination of a witness, whether the testimony becomes incomplete at the time of examination-in-chief or during cross-examination. Hence, in assessing the matter at hand, the Trial Chamber will revert to the general rule as expressed in Rule 89 (B) of the Rules. The Trial Chamber also notes its Guidelines on the Standards Governing the Admission of Evidence, holding that the practice will be in favour of admission of evidence.[20]

12. While being mindful of Rule 89 (A) of the Rules, the Trial Chamber nonetheless seeks guidance in other international and national jurisdictions. In this respect, the Trial Chamber notes that it is settled jurisprudence of the Tribunal that the provisions of the European Convention of Human Rights ("ECHR") may be relevant for the interpretation of the rights of the accused, including their right to cross-examine witnesses.[21]

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[13] Prosecution Submissions, para. 7.
[14] Prosecution Response, para. 11. The Prosecution submits that the Defence misinterprets the case of *Lüdi v. Switzerland*.
[15] Prosecution Submissions, para. 19, Prosecution Response para 6. The Prosecution refers to jurisprudence from the European Court of Human Rights, England, Wales, Canada, the United States of America, Germany and the Czech Republic, Prosecution Submissions, paras 21-27.
[16] Prosecution Reply, para. 6.
[17] Defence motion, para. 7.
[18] *Ibid.*, para. 11.
[19] *Ibid.*, paras 9 and 16-17. For example, in para 16, the Defence relies on the jurisprudence of the European Court of Human Rights relating to Article 6 of the European Convention of Human Rights, which, the Defence claims, "is almost identically phrased as Article 21(4) of the Statute".
[20] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, dated 19 Jan 2006, with Annex, para. 2.
[21] *See, e.g.*, *Čelebići* Exclusion Decision, paras 19 and 33; *Prosecutor v. Zdravko Mucić et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 Feb 2001 (*Čelebići* Appeal Judgement), para. 538.

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13. The relevant provisions of the Statute and the Rules for this decision are:

Article 20 (1) of the Statute, which reads:

> The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses;

Article 21 (4)(e) of the Statute, which provides for the right of the Accused to:

> [E]xamine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

Rule 85 (B) of the Rules, which reads:

> Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness;

Rule 89 of the Rules, which reads, in its relevant parts:

> (A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
>
> (C) A Chamber may admit any relevant evidence which it deems to have probative value.
>
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
>
> [...]
>
> (F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form;

Rule 90 of the Rules, which reads, in its relevant parts:

> [...]
>
> (F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to
>
> (i) make the interrogation and presentation effective for the ascertainment of the truth; and
> (ii) avoid needless consumption of time.
>
> [...]
>
> (H) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matter affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.
>
> [...];

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Rule 92 *bis* of the Rules, which reads, in its relevant parts:

> (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
>
> (i) Factors in favour of admitting evidence in the form of a written statement include but are not limited to circumstances in which the evidence in question:
>
> (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
> (b) relates to relevant historical, political or military background;
> (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
> (d) concerns the impact of crimes upon victims;
> (e) relates to issues of the character of the accused; or
> (f) relates to factors to be taken into account in determining sentence.
>
> (ii) Factors against admitting evidence in the form of a written statement include whether:
>
> (a) there is an overriding public interest in the evidence in question being presented orally;
> (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
> (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.
>
> [...]
>
> (C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:
>
> (i) is so satisfied on a balance of probabilities; and
>
> (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.
>
> (D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.
>
> [...];

Rule 95, which reads:

> No evidence shall be admissible if obtained by methods which cast substantial doubts on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

IV. EXCLUSION OF EVIDENCE OF MILAN BABIĆ

A. <u>Preliminary matter</u>

14. The Trial Chamber notes that the Parties have in part based their arguments regarding exclusion of the evidence of Milan Babić, explicitly or implicitly, on Rule 89 (C) of the Rules. In this regard, the Trial Chamber finds that the Parties have misinterpreted the law, as Rule 89 (C) does not govern exclusion of evidence. Rather, Rule 89 (C) concerns the admission of evidence.

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However, the arguments of the Parties made in relation to Rule 89 (C) are relevant to the assessment by the Trial Chamber regarding possible exclusion under the Rules and will be addressed as such in this decision.

15. In its Motion, the Defence submits that the evidence of Milan Babić should be excluded from evidence as it is so lacking in indicia of reliability that it has no probative value.[22]

16. The Prosecution submits that before declaring evidence inadmissible pursuant to Rule 89 (C) of the Rules, the Trial Chamber needs to find that the evidence is so lacking in terms of the indicia of reliability as to be devoid of any probative value.[23] In the view of the Prosecution this is not the case as the evidence of Milan Babić bears numerous indicia of reliability. These indicia include the fact that the testimony was given under oath, in open session, in the presence of the Accused, was subject to three days of cross-examination and is in large part corroborated by other evidence, both documentary and testimonial.[24] As such, the Prosecution submits that the evidence is highly probative and is presumptively admissible.[25]

17. The Appeals Chamber has held that a piece of evidence may be so lacking in terms of indicia of reliability that it is not probative, and thus is inadmissible.[26] The Appeals Chamber enumerated a number of indicia of reliability, including whether the evidence is given under oath, whether the evidence is given in court with professional, double-checked simultaneous translation and whether the evidence is corroborated by other evidence. The Appeals Chamber also included as an indication of reliability whether the evidence was subject to any cross-examination.[27] As a principal matter, the Trial Chamber finds that an irregularity in one of several indicia of reliability does not necessitate a conclusion that the evidence has no probative value so as to render it inadmissible.

18. The Trial Chamber notes that the evidence of Milan Babić is already part of the trial record as a result of him testifying as a witness before this Trial Chamber. At the time of Milan Babić's testimony, the indicia for admission of the evidence had been duly considered and the Trial Chamber found that those indicia were sufficiently satisfied. In this regard, the Trial Chamber notes

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[22] Defence Motion, paras 1 and 44.
[23] Prosecution Submissions, para. 8, citing *Prosecutor v. Jean Paul Akayesu,* Appeal Judgement, Case No. ICTR-96-4-A, 1 Jun 2001, para. 286.
[24] *Ibid.*, para. 10; Prosecution Response, paras 7-8, The Prosecution further mentions as possible indicia of reliability that Milan Babić and the Accused were high-level members of the same government during virtually the entire indictment period, *id.*
[25] Prosecution Response, para. 3; *see also*, Prosecution Submissions, para. 10.
[26] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Decision on Appeal Regarding Statement of a Deceased Witness, 21 Jul 2000 (*Kordić* Appeal Decision), para. 24.
[27] *Kordić* Appeal Decision, paras 26-27.

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that the evidence of Milan Babić was given in court, under oath, in the presence of the Accused, assisted by professional interpretation and was subjected to 2.5 days of cross-examination.

B. Arguments of the Parties concerning exclusion pursuant to Rule 89 (D)

19. In the alternative to the argument of the Defence pertaining to the evidence of Milan Babić lacking indicia of reliability, the Defence submits that the evidence of Milan Babić should be excluded because its probative value is substantially outweighed by the need to ensure a fair trial.[28] The Trial Chamber interprets this to be a reference by the Defence to Rule 89 (D) of the Rules.

20. The Prosecution argues that pursuant to Rule 89 (D) of the Rules, the Trial Chamber needs to assess whether any unfairness to the Accused, caused by the interruption of Milan Babić's cross-examination after three days, substantially outweighs the probative value of the evidence.[29] According to the Prosecution, exclusion of the evidence of Milan Babić is "a radical measure completely disproportionate to the restriction of cross-examination which occurred in this case."[30]

Right to cross-examine in general

21. The Defence contends that while the right to cross-examination in proceedings before the Tribunal is not absolute, it is considered an important part of an accused's right to a fair trial.[31] As such, the limitations on cross-examination are carefully set out within the Tribunal's Rules and jurisprudence and are allowed only in accordance with the requirements set out in respect of Rule 92 *bis* of the Rules.[32] The Defence subsequently argues that the evidence of Milan Babić cannot be admitted in the proceedings as it does *not* meet the requirements for admission without cross-examination.[33]

[28] Defence Motion, paras 1 and 44.
[29] Prosecution Submissions, para. 12.
[30] Prosecution Response, para. 28.
[31] Defence Motion, para. 14, citing Article 21(1) of the Statute.
[32] *Ibid*. The Defence submitted that cross-examination can only be limited with respect to a) evidence that does not go to proof of acts and conduct of the Accused as charged in the Indictment; b) evidence concerning acts and conduct which are not proximate to the Accused; c) evidence that does not relate to a live and important issue between the parties; d) evidence that was adequately and extensively cross-examined in previous proceedings by an accused with a common interest. The Trial Chamber notes that these are requirements set out in the jurisprudence pertaining to Rule 92 *bis* of the Rules. The Defence further submits that evidence that goes to the acts and conduct of the accused, or that concerns the acts and conduct which are proximate to the accused, or that relates to a live and important issue between the Parties was never admitted without giving the accused an opportunity to challenge it by means of cross-examination, Defence Motion, para. 15.
[33] Defence Motion, para. 18.

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22. The Prosecution submits that the right to cross-examine a witness is not absolute[34] and that this right must be balanced against the important interest in adjudicating responsibility for serious violations of international humanitarian law on the basis of all available evidence.[35]

Factors found in international and domestic practice

23. The Prosecution refers to domestic and international practice and submits that this practice shows that "there are several factors relevant to determining whether to admit evidence despite an impediment to the Accused's right to cross-examination."[36] These factors include:[37] a) the importance of the evidence;[38] b) whether there was an adequate opportunity for cross-examination, and the stage in cross-examination that was reached;[39] c) whether the completed cross-examination was sufficient to fairly judge the witness' credibility;[40] d) whether the interruption of cross-examination could reasonably have been avoided or evidence of the same value was reasonably available in some other way;[41] e) the presence of the witness before the accused and the court;[42] f) Defence counsel's opportunity to put prior inconsistent statements before the trier of fact;[43] g) Defence counsel's submissions on any areas of cross-examination that were not pursued due to the interruption;[44] h) a common sense and realistic assessment of the likely impact which the cross-examination would have if completed;[45] i) whether the limitations on cross-examination could be remedied or ameliorated, such as by admitting prior testimony;[46] j) the existence of evidence

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[34] Prosecution Submissions, paras 13-18, referring to several decisions of this Tribunal.
[35] *Ibid.*, paras 13 and 19; Prosecution Response, para. 25. In support of that submission, the Prosecution refers to a decision of the Appeals Chamber in *Prosecutor v. Zlatko Aleksovski* as well as the Decision on Interlocutory Appeal, of the Appeals Chamber in *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-AR 73.9, 11 Dec 2002, para. 46. The Prosecution argues that the Defence misinterpreted both cases, Prosecution Submissions, para. 12. The Trial Chamber evaluates this factor in para. 56 of this decision.
[36] Prosecution Submissions, para. 20.
[37] *Ibid.*, para. 32.
[38] *Ibid.* (referring to the English cases *R v. Lawless and Basford* (1994), 98 Crim. App. R. 342 (C.A.) ("*R v. Lawless and Basford*") and *R v. Hart* (1999) 135 C.C.C. (3rd) 377 ("*R v. Hart*"); and to *Lucà v. Italy,* European Court of Human Rights, Judgement of 27 Feb 2001 ("*Lucà v Italy*")). The Trial Chamber evaluates this factor in paras 60-69 of this decision.
[39] *Ibid.* (referring to the English cases *R v. Stretton and McCallion* (1988) 86 Cr. App. R. 7 (C.A.) ("*R v. Stretton and McCallion*"); *R v. Lawless and Basford*; *R v. Hart*; to *Luca v. Italy*; and to the American case *Delaware v. Fensterer*, 474 U.S. 15, at p. 20 (1985) ("*Delaware v. Fensterer*")). The Trial Chamber evaluates this factor in paras 57 and 69 of this decision.
[40] *Ibid.*, (referring to the English cases *R v. Stretton and McCallion* and *R v. Wyatt* (1990) Crim. L.R. 343 ("*R v. Wyatt*")). The Trial Chamber evaluates this factor in paras 70-71 of this decision.
[41] *Ibid.*, (referring to *R v. Hart*). The Trial Chamber evaluates this factor in para. 58 of this decision.
[42] *Ibid.* (referring to *R v. Hart*; *Delaware v. Fensterer*; and another American case *State v. Shearer* , 164 Ariz. 329, 337-38, 793 P. 2d 86, 94-95 (Ariz. CT APP. 1989) ("*State v. Shearer*")). The Trial Chamber evaluates this factor in para. 70 of this decision.
[43] *Ibid.* (referring to *R v. Hart* and *State v. Shearer*). The Trial Chamber evaluates this factor in paras 71 and Section V of this decision.
[44] *Ibid.* (referring to *R v. Hart*). The Trial Chamber evaluates this factor in paras 57 and 69, as well as para. 84 of this decision.
[45] *Ibid.* (referring to *R v. Hart*). The Trial Chamber evaluates this factor in para. 71 of this decision.
[46] *Ibid.* (referring to *R v. Hart*; and the Canadian case *R v. Ellard*, (2004), 2004 BCSC 899 ("*R v. Ellard*")). The Trial Chamber evaluates this factor in para. 71 and Section V of this decision.

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corroborating the witness' testimony.[47] The Trial Chamber notes most of these factors have also been referred to as being relevant for the Trial Chamber's decision by the Defence. The Trial Chamber will therefore address the arguments on these factors below.

(a) Importance of evidence

24. The Defence relies on jurisprudence of the European Court of Human Rights on Article 6 of the ECHR, which, the Defence claims, "is almost identically phrased as Article 21(4) of the Statute".[48] The Defence interprets this jurisprudence as showing that in cases where the defence was not given a proper opportunity to challenge the evidence of a witness, a violation of the article was found when the conviction was based solely or mainly on such evidence, or when this evidence "played a part in establishing the facts which led to conviction."[49]

25. Concerning the importance of the evidence, the Prosecution submits that the jurisprudence of the Tribunal and domestic practice show that the importance of the evidence becomes most significant either when the evidence is the sole evidence of the accused's guilt or when its acceptance or rejection is essentially determinative of guilt.[50] The Prosecution argues that while the evidence of Milan Babić is important, "it cannot possibly be said that his evidence is the *sole evidence* of Martić's guilt."[51] The Prosecution further notes that Milan Babić's evidence cannot "reasonably be compared with completely un-cross-examined and essentially decisive evidence in [the] ECHR cases."[52]

(b) Adequate opportunity to cross-examine and stage in cross-examination

26. The Prosecution argues that the Defence has cross-examined Milan Babić for 629 minutes in the course of three days.[53] The Prosecution submits that the Defence has asked "numerous questions surrounding what appears to be the main theme of the Defence", relating to allegations of the existence of a joint criminal enterprise and whether the Serbs were acting defensively in response to Croatian aggression.[54] However, according to the Prosecution, the Defence wasted significant amounts of time by questioning Milan Babić on irrelevant matters, reading out long documents into the record and repeating questions.[55] The Prosecution notes that the Trial Chamber on several

[47] *Ibid.* The Trial Chamber evaluates this factor in para. 75 of this decision.
[48] Defence Motion, para. 16.
[49] *Ibid.*, para. 17, citing *Lüdi v. Switzerland*, European Court of Human Rights, Judgement of 15 Jun 1992 ("*Lüdi v. Switzerland*").
[50] Prosecution Submissions, para. 35.
[51] *Ibid.*, para. 37.
[52] Prosecution Response, para. 11.
[53] Prosecution Submissions, para. 38.
[54] *Ibid.*, para. 39. The Prosecution identifies the portions upon which Milan Babić was cross-examined in paras 39-42.
[55] Prosecution Submissions, para. 38, Prosecution Response, para. 8.

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occasions warned Counsel to focus his cross-examination.[56] According to the Prosecution, the Defence was able to challenge Milan Babić on the major theme of its defence,[57] on the major topics of Milan Babić's evidence[58] and on all the subjects addressed in the cross-examination of other witnesses.[59]

27. The Defence identifies topics on which Milan Babić was cross-examined as well as the areas in respect of which it intended to cross-examine him, but was prevented from so doing in the two further days of cross-examination.[60] The Defence argues that it was not able to cross-examine Milan Babić on his evidence regarding the Accused's "responsibility under both Article 7(1) and 7(3), the crimes underpinning the charges against him and the joint criminal enterprise for which he is charged."[61] The Defence further argues that "[i]t is evident that a substantial part of [Milan] Babić's evidence (both in terms of quantity and importance) was left unchallenged and untested by cross-examination."[62]

28. Concerning areas upon which the Defence alleges it was unable to cross-examine, the Prosecution submits that the Defence should list those areas in detail, including all documents that it planned to use.[63] This allows the Trial Chamber to assess whether the cross-examination insofar as it was completed was adequate and thus ensure a fair trial. In addition, according to the Prosecution, the Trial Chamber can consider whether the Defence's submissions on this point should affect the weight to be accorded to Milan Babić's evidence.[64]

29. Further, with respect to the areas intended for cross-examination which were identified by the Defence, the Prosecution submits that these do not require further cross-examination. It argues that some of those areas are part of the Agreed Facts or the public record, that others were addressed in the cross-examination of Milan Babić, and that the Defence did not pursue some of these areas during the cross-examination of other witnesses who testified on those specific topics.[65] In addition, the Prosecution submits that, with the exception of one topic, all the identified areas which the Defence claims to have been prevented from cross-examining upon are corroborated by other evidence.[66] According to the Prosecution, "it is clear that only a small part of [Milan] Babić's

[56] Prosecution Submissions, para. 38
[57] *Ibid.*, paras 38-39.
[58] *Ibid.*, paras 40-41.
[59] *Ibid.*, para. 42-43.
[60] Defence Motion, para. 19.
[61] *Ibid.*, para. 20.
[62] *Id.*
[63] Prosecution Submission, para. 55.
[64] *Id.*
[65] Prosecution Response, paras 16-18. In para. 19 of its Response, the Prosecution further submits that many of the topics identified by the Defence were touched upon only very briefly during examination-in-chief of Milan Babić.
[66] *Ibid.*, para. 20.

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evidence was unchallenged and, more importantly, that all of the significant parts of his testimony were cross-examined."[67]

30. The Defence disputes the Prosecution arguments on the scope of the conducted cross-examination, submitting that the fact "some of these issues were briefly touched upon by [Milan] Babić or by Defence Counsel during cross-examination concerning other areas of his testimony does not mean that they were effectively cross-examined."[68] As for the Prosecution arguments on areas of the examination-in-chief the Defence intended to cross-examine on, the Defence submits that every witness gives his own evidence and that the evidence of Milan Babić differs from the evidence of other witnesses.[69] In addition, the Defence submits that a witness' evidence "cannot be judged by how many pages of transcript it occupies."[70]

(c) Was the completed cross-examination sufficient to fairly judge the witness' credibility?

31. The Defence argues that, due to the interruption of cross-examination, the Trial Chamber "did not have the opportunity to observe the demeanour of [Milan] Babić when confronted with drastic inconsistencies between his various statements and to fairly judge his credibility."[71]

32. The Prosecution does not raise explicit arguments in respect of this factor.

(d) Whether the interruption of the cross-examination could reasonably have been avoided or evidence of the same value was reasonably available some other way

33. The Defence argues that there was "no indication whatsoever" that it would not be able to pursue the areas on which it intended to cross-examine Milan Babić, but was prevented from so doing.[72]

34. The Prosecution states that "[t]he interruption of [Milan] Babić's testimony was completely unforeseen" and that "there was no basis [...] for seeking alternative means of presenting [Milan] Babić's evidence".[73] It further claims that "there is no alternative source for [Milan] Babić's testimony" and that there is no other witness who was in Milan Babić's position who was available or willing to provide the same evidence.[74]

[67] *Ibid.*, para. 21.
[68] Defence Reply, para. 6.
[69] *Ibid.*, paras 5, 7 and 8.
[70] *Ibid.*, para. 8.
[71] Defence Motion, para. 31.
[72] *Ibid.*, para. 20.
[73] Prosecution Submissions, paras 45-47.
[74] *Ibid.*, paras 45-47.

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(e) Presence of the witness before the Accused and in court

35. The Prosecution submits it is well established that the presence of the witness in the courtroom is of significant value to the Trial Chamber in evaluating the witness's evidence.[75] It submits that Milan Babić testified in full knowledge of the possible consequences of his testimony for the Accused, as he himself was serving a sentence for his participation in the same joint criminal enterprise in which the Accused is charged with participating.[76] Further, Milan Babić testified under oath and in the presence of the Accused, allowing the Trial Chamber to observe his demeanour first-hand. According to the Prosecution, Milan Babić showed impressive memory of detail and was at all times respectful and responsive to the questions of the Defence, Prosecution and Trial Chamber. The Prosecution submits that this demeanour strongly supports the reliability of Milan Babić's evidence.[77]

36. The Defence does not submit arguments specifically addressing the argument of the Prosecution regarding the presence of the witness before the Accused and in court.

(f) Opportunity of the Defence to put prior inconsistent statements before the trier of fact

37. The Defence provided the Trial Chamber with "the most apparent" inconsistencies in the evidence of Milan Babić,[78] with the proviso that it "brings these inconsistencies before the Trial Chamber only for it to assess the reliability of [Milan] Babić's evidence and the effect of the remaining portion of cross-examination on [Milan] Babić's credibility as a witness."[79] As noted earlier, it is argued that, due to the interruption of cross-examination, the Trial Chamber "did not have the opportunity to observe the demeanour of [Milan] Babić when confronted with drastic inconsistencies between his various statements and to fairly judge his credibility."[80]

38. In respect of confronting a witness with prior inconsistencies, the Prosecution submits that the Defence did not confront Milan Babić with prior testimony or a prior statement, but rather chose to read out a statement that Milan Babić made in 1991 in connection with a peace conference in The Hague.[81] As for the alleged inconsistencies between Milan Babić's evidence in this case and his prior statements which the Defence identified in its Motion, the Prosecution submits that the Defence is not prevented from showing these prior statements to the Trial Chamber and having

[75] Prosecution Submissions, para. 51.
[76] *Ibid.*, para. 52.
[77] *Ibid.*, para. 51.
[78] Defence Motion, paras 22-30.
[79] *Ibid.*, para. 21.
[80] *Ibid.*, para. 31.
[81] Prosecution Submissions, para. 53.

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them considered by the Trial Chamber when assessing the weight of the evidence of Milan Babić.[82] In addition, the Prosecution does not consider that the alleged inconsistencies undermine the "almost entirely consistent" testimony of Milan Babić.[83]

39. In its Reply, the Defence submits that the Prosecution "tries to diminish the contradictions between [Milan] Babić's testimony and his OTP interview" and invites the Trial Chamber "to judge for itself [...] whether the contradictions are non-existent or minor and whether they can be attributed to natural imperfectness of witness' memory."[84]

(g) Submissions on any areas of cross-examination that were not pursued due to the interruption.

40. The Trial Chamber notes that the arguments raised by the Parties in relation to the factors IV. B.(b) and IV. B.(g) are closely related. The arguments regarding both factors have been mentioned together under IV. B.(b).

(h) A common sense and realistic assessment of the likely impact which cross-examination would have if completed

41. According to the Prosecution, it is extremely difficult, "to believe that anything would have happened in the remaining portion of the cross-examination that would have significantly changed how the Trial Chamber should assess [Milan] Babić's evidence."[85] The Prosecution submits that the Trial Chamber should consider which questions were asked during cross-examinations of other witnesses and in particular which areas of evidence have not been challenged during those cross-examinations. The Prosecution sees no reason to believe that the Defence, during the remaining days of cross-examination of Milan Babić, would have adopted a strategy that differs from the strategy of the Defence in cross-examining other witnesses.[86] In sum, the Prosecution submits that, in light of the topics that the Defence covered during its cross-examination of Milan Babić and the way it generally conducted its cross-examinations, "it is plain that additional cross-examination by the Defence would not have changed the ability of the Trial Chamber to assess properly Milan Babić's testimony, and it would not be unfair for the Trial Chamber to consider and weigh Milan Babić's testimony even though the cross-examination was not completed."[87]

[82] Prosecution Response, para. 24; Prosecution Submissions, para. 54.
[83] Prosecution Response, paras 23-24.
[84] Defence Reply, para. 9.
[85] Prosecution Submissions, para. 56.
[86] *Ibid.*, para. 57. The Prosecution indicates which areas the Defence left unchallenged during cross-examination of other witnesses in paras 58-62 of the Prosecution Submissions.
[87] *Ibid.*, para. 63.

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42. The Defence does not raise arguments explicitly addressing this factor.

(i) Whether the limitations on cross-examination could be remedied or ameliorated

43. The Defence submits that the inability to complete the cross-examination cannot be remedied or ameliorated by admitting prior testimony of Milan Babić, since the prior testimony that the Prosecution suggests as a remedy does not meet the requirements of Rules 89 (F) or 92 *bis* of the Rules.[88] It contends that the Prosecution "misinterprets the jurisprudence" by stating that in several cases, including *Prosecutor v. Zlatko Aleksovski*, it was recognised as an important factor whether the interruption of cross-examination could be remedied or ameliorated. It further contends that the Prosecution "misinterprets the jurisprudence" by stating that the Appeals Chamber in the *Aleksovski* case identified the admission of the witness' prior testimony as a means of amelioration.[89] The Defence notes that this decision of the Appeals Chamber preceded the adoption of Rule 92 *bis* of the Rules.[90]

44. The Defence argues that the Prosecution submission to use Milan Babić's testimony in *Prosecutor v. Slobodan Milošević* pursuant to Rule 89 (F) of the Rules cannot hold. It submits that the jurisprudence of the Tribunal requires that the witness is present in court and available for cross-examination.[91] It further submits, referring to the Appeal Chamber decision on Rule 89 (F) in *Prosecutor v. Slobodan Milošević*, that "a factor that a Trial Chamber may take into account in determining whether to admit, [...] written evidence under Rule 89 (F)" is whether the evidence goes to the acts and conduct of the accused and that, in fact, this Trial Chamber has referred to only this factor when deciding upon the admission of the Rule 89 (F) statement of Milan Babić.[92]

45. With respect to the application of Rule 89 (F) of the Rules, the Defence finally argues that the Rule does not cover a situation in which written evidence is offered "as an aide to the evaluation of oral evidence" of a deceased witness.[93] Since the evidence will not be attested by Milan Babić in court and because the evidence largely goes to proof of acts and conduct of the accused, the Defence submits the evidence Milan Babić gave in *Prosecutor v. Slobodan Milošević* may not be admitted in this case.[94]

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[88] Defence Motion, paras 32-41. In paras 67 and 68 of the Prosecution Submissions, the Prosecution submits that the incomplete testimony of Milan Babić in this case can be remedied by admission of his prior testimony in the case of *Prosecutor v. Slobodan Milošević*, pursuant to Rule 89 (F) of the Rules.
[89] *Ibid.*, para. 32, referring to *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR 73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999.
[90] *Id.*
[91] Defence Motion, paras 33-36.
[92] *Ibid.*, para. 37.
[93] *Ibid.*, para. 39.
[94] *Ibid.*, para. 40.

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46. The Prosecution argues that the prior testimony of Milan Babić could be used as a remedy for any disadvantage caused by an incomplete cross-examination.[95] The Prosecution sees the admission of prior evidence as advantageous in that it provides "yet another tool with which the Trial Chamber can assess the witness's credibility and the reliability of his testimony."[96] According to the Prosecution, "it is in the interests of justice that [the prior testimony of Milan Babić] be admitted for the limited purpose of assisting the Trial Chamber to evaluate [Milan Babić's] oral evidence in this case."[97] The Prosecution submits that the prior testimony of Milan Babić is admissible pursuant to Rule 89 (F) of the Rules.[98] It submits that "although [Milan] Babić was not specifically asked to attest to the accuracy of his *Milošević* testimony, as is the usual practice under Rule 89 (F) of the Rules, that testimony was given under oath and given in the presence of the accused and the Trial Chamber in the *Milošević* case."[99] According to the Prosecution, Slobodan Milošević cross-examined Milan Babić on many of the areas that the Defence claims it was unable to cross-examine him on. It submits that "consideration of that cross-examination by the Trial Chamber will further cure any harm suffered by the Defence because its own cross-examination of Milan Babić was cut short."[100]

47. The Prosecution submits that the Defence misstates the applicable law by its suggestions that Rule 92 *bis* of the Rules "somehow determines the admissibility of [Milan] Babić's evidence."[101] It submits that Rule 92 *bis* is not applicable for the *viva voce* evidence of Milan Babić. In addition, it argues that the prior testimony of Milan Babić could also be admitted pursuant to Rule 89 (C) of the Rules.[102]

48. Further, the Prosecution submits that "to the extent the interruption of Milan Babić's cross-examination has in fact disadvantaged the Defence this should be taken into account when determining the weight of the evidence."[103] According to the Prosecution, the Trial Chamber "is fully capable to properly consider the interruption of cross-examination when determining the weight to be given to [Milan] Babić's evidence."[104]

49. The Prosecution notes that since it has become impossible for Milan Babić to complete his testimony, the Trial Chamber should weigh in favour of admitting the evidence without cross-

[95] Prosecution Response, para. 12; Prosecution Submissions, para. 65.
[96] Prosecution Submissions, para. 66.
[97] *Ibid.*, para. 67.
[98] *Ibid.*, para. 67, Prosecution Response, paras 13-14.
[99] Prosecution Submissions, para. 67.
[100] *Ibid.*, para. 68.
[101] Prosecution Response, para. 9.
[102] *Ibid.*, para. 9 and13, referring to *Prosecutor v. Fatmir Limaj,* Case No. IT-03-66-T Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras 15-16.
[103] *Ibid.*, para. 26.

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examination. According to the Prosecution this approach, as found in legislation in the United Kingdom, Germany and the Czech Republic, "recognises the interest of justice in presenting the trier of fact with relevant evidence of crimes, even when the witness is unable to give that evidence in person due to death or other incapacity."[105]

50. In its Reply, the Defence submits that it "stands by its Motion in its entirety and that the arguments from the Prosecution Response should be dismissed as unfounded."[106] The Defence disputes the Prosecutions arguments on the applicable law, submitting that it refers to Rule 92 *bis* of the Rules only in the context of limitations of cross-examination in the proceedings before the Tribunal. It further submits that it does not consider the decision of the Trial Chamber in *Prosecutor v. Fatmir Limaj* to be relevant, because that decision concerns statements upon which the witnesses were in fact fully cross-examined.[107]

(j) Existence of evidence corroborating the witness' evidence

51. The Prosecution submits that the evidence of Milan Babić is "thoroughly corroborated, both by documents and by testimony provided by other witnesses".[108]

52. The Defence does not raise arguments specifically addressing this factor.

Further arguments regarding reliability and credibility of the witness

53. The Defence argues that the fact that Milan Babić "committed suicide in the middle of his cross-examination" negatively affects his reliability as a witness.[109] Finally, the Defence challenges the reliability of Milan Babić's evidence, based on the fact that he testified pursuant to a plea agreement with the Prosecution.[110]

54. The Prosecution, in its response, submits that "[t]here is no evidence whatsoever that [Milan] Babić's suicide was connected to these proceedings, much less that it was done to avoid further cross-examination."[111] With regard to the Defence argument that the reliability of Milan

[104] Prosecution Submisions, para. 69.
[105] *Ibid.*, para. 48.
[106] Defence Reply, para. 2.
[107] *Ibid.*, para. 4.
[108] *Ibid.*, para. 70.
[109] Defence Motion, para. 42. The Defence submits that since "it is clear that threats from the outside were not the reason" for Milan Babić's suicide, "the focus can reasonably turn to a theory that, by committing such a tragic act, Mr. Babić wanted to evade further cross-examination and confrontation with the Accused in this trial."
[110] *Ibid.*, para. 43. The Defence argues that "Mr. Babić tried to build himself a favourable position in face of charges before the Tribunal" and, while recognising that Milan Babić was currently serving his sentence "the presence of his lawyer during the testimony suggests that he was still hoping for a more favourable outcome of his cooperation with the Prosecution."
[111] Prosecution Response, para. 27.

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Babić's evidence is affected by the fact that he testified before the Trial Chamber as a result of a plea bargain, the Prosecution submits that this is a factor which goes to the weight of the evidence, irrespective of whether the cross-examination of the witness was completed.[112]

C. Evaluation by the Trial Chamber concerning exclusion pursuant to Rule 89 (D)

55. The question before the Trial Chamber is whether maintaining the evidence as part of the trial record, in spite of the incomplete cross-examination of the witness, causes such unfairness to the Accused that the need to ensure a fair trial outweighs the probative value of the evidence and thus necessitates removal of the evidence from the trial record.

56. The Trial Chamber recognises that the right to cross-examine a witness is of fundamental importance to a fair trial. However, it is settled jurisprudence before this Tribunal that this right is not absolute, but is subject to the duty of Trial Chambers to ensure a fair and expeditious trial pursuant to Article 20 (1) of the Statute.[113]

57. The Trial Chamber notes that the length of the Prosecution examination-in-chief was approximately 15 hours. The Defence cross-examined Milan Babić for approximately 10.5 hours. The Trial Chamber recalls its Decision on Prosecution Motion to Extend the Stay of Witness Milan Babić, dated 24 February 2006, following which the Defence was given an additional two days to complete its cross-examination. The Trial Chamber also recalls that on Friday 3 March 2006, the Defence indicated that it would finish its cross-examination on Tuesday 7 March 2006, which would effectively have amounted to no more than 6.5 hours of further cross-examination. The Trial Chamber finally recalls that it repeatedly admonished the Defence to focus its cross-examination to relevant topics in order to stop wasting time.[114] In spite of these warnings, the Defence continued to address several irrelevant issues and went far outside the temporal and geographical scope of the

[112] *Id.* The Trial Chamber evaluates these two factors in paras 72 and 76 respectively.

[113] *See, e.g., Čelebići* Exclusion Decision, para. 32-33. The Trial Chamber also notes that both the Prosecution and the Defence have relied upon a decision of the Appeals Chamber in *Prosecutor v. Zlatko Aleksovski* in support of their arguments on limitations of cross-examination. The Prosecution further relied on this decision in *Aleksovski* in support of its arguments that there are means of ameliorating possible unfairness to the Accused as a result of maintaining evidence without a complete cross-examination as part of the record. The Trial Chamber will not fully discuss these arguments in this discussion, because it is settled jurisprudence that the right to cross-examination can be limited. As it concerns the Prosecution argument that this decision in *Aleksovski* allows the Trial Chamber to find means of amelioration, the Trial Chamber notes that it has an inherent duty to find means of ameliorating any possible unfairness, *see Čelebići* Exclusion Decision, para. 42, in which the Trial Chamber held that the Trial Chamber "should exercise its power *proprio motu* to avert any injustice that will result if it did not intervene."

[114] Milan Babić, 21 Feb 2006, T. 1701, 1734; Milan Babić, 2 Mar 2006, T. 1847-48; Milan Babić, 3 Mar 2006, T. 1909-10.

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Indictment.[115] In light of these circumstances the Trial Chamber cannot but find that the Defence had an adequate opportunity to cross-examine Milan Babić.

58. The Trial Chamber finds that the death of Milan Babić could not reasonably have been foreseen or avoided. Nor does the Trial Chamber have reason to assume that the Prosecution had or has evidence of the same value available to it.

59. In assessing the matter at hand, the Trial Chamber notes the decision in *Prosecutor v. Radoslav Brđanin*, concerning the evidence of a witness who was unable to appear for cross-examination. The Defence for Radoslav Brđanin requested that the evidence of the witness be stricken "as if he had never come in the first place." In an oral decision, the Trial Chamber decided to:

> have the testimony of this person remain in the records, and of course I am making it abundantly clear, I hope, that we will, as we come to examine what weight to give to this testimony, if at all, give all due consideration to the fact that you have been unable to cross-examine this witness, Mr. Ackerman, due to no fault of your own or of your client.[116]

60. The Trial Chamber finds further guidance in the well established jurisprudence of Rule 92 *bis* of the Rules. While the Trial Chamber emphasises that the question of maintaining evidence as part of the trial record is not identical to admission of written evidence *in lieu* of oral testimony, the jurisprudence on Rule 92 *bis* of the Rules can be used, by way of analogy, as guidance for determining which evidence, in spite of not being tested through cross-examination, can be admitted without infringing upon the Accused's right to a fair trial.[117]

61. Written evidence of a witness which does not go to the acts and conduct of an accused, which is not pivotal to the Prosecution case, or which does not concern a person whose acts and conduct are so proximate to the accused that the evidence should be excluded, can be admitted pursuant to Rule 92 *bis* of the Rules. There is nothing to suggest that those portions of the evidence

[115] For example, on 21 February 2006, after having been warned to focus its case on matters relevant to the Indictment, the Defence questioned Milan Babić on the constitutional status of Kosovo and Vojvodina under the constitution of the SFRY of 1974, 21 Feb 2006, T. 1730. On 3 March 2006, the Defence read out large portions of the text of Ex. 238, a book by Zdravko Tomac, followed by the question whether the text read out in court was the text appearing in the document just read out, Milan Babić, 3 Mar 2006, T. 1892-1908. On 21 February 2006, the Defence questioned Milan Babić about Kosovo in the 1980s, 21 Feb 2006, T. 1730.

[116] *Prosecutor v. Radislav Brđanin,* Case No. IT-99-36, Oral Decision, 24 Feb 2004, T. 25083. The Trial Chamber eventually decided not to use the evidence of this witness, *see infra*, para. 70. *See also, Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze,* Case No. ICTR-99-52-T, Decision on the Ngeze Defence's Motion to Strike the Testimony of Witness FS, 16 Sep 2002, at the International Criminal Tribunal for Rwanda, where a witness refused to return to complete cross-examination. The Chamber denied the defence motion to have the entire evidence struck from the record, stating that this was "a matter to be taken into account by the Chamber when weighing the probative value of [the witness'] testimony." Similarly, with respect to evidence written on a piece of paper by the witness and later tendered into evidence by defence counsel, "the veracity or otherwise of the information contained therein is ... a matter for judicial consideration when evaluating the evidence."

[117] For the relevant law and jurisprudence on Rule 92 *bis*, *see* the Trial Chamber's Decision on Prosecution's Motion for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, of 16 Jan 2006.

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of Milan Babić which meet the substantive requirements of this Rule cannot remain part of the trial record. Maintaining this evidence will not infringe upon the rights of the Accused to a fair trial.

62. The Trial Chamber has to consider whether evidence which does not meet the requirements of Rule 92 *bis* of the Rules may also remain part of the trial record without infringing upon the right to a fair trial.

63. The European Court of Human Rights has repeatedly held in cases concerning possible violations of the right to a fair trial that, as a rule, the right to examine witnesses requires that the accused be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statement or at a later stage of the proceedings.[118]

64. The Trial Chamber notes that the Defence refers to the judgement of the European Court of Human Rights in *Lüdi v. Switzerland* in support of their assertion that a violation of article 6 of the ECHR is present where written statements "played a part in establishing the facts which led to conviction." The Trial Chamber notes that the European Court of Human Rights did not indicate to which extent the unchallenged evidence played a part in establishing those facts. It did note that the conviction of the accused was not based solely on that evidence. The Trial Chamber finds that the most important aspect of the judgement of European Court of Human Rights in *Lüdi v. Switzerland* is that the Court found a violation of article 6 of the ECHR because the rights of the accused to challenge the evidence of a witness were unduly restricted in order to protect the witness' identity. The Court found that it would have been possible to allow the Defence to challenge this witness' evidence, while still maintaining the anonymity of the witness.[119] As a result, the Court found that the rights of the defence were restricted to such an extent that the applicant did not have a fair trial."[120]

65. The jurisprudence of the European Court of Human Rights was explained clearly in *Lucà v. Italy,*[121] where it was found that:

> if the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to

[118] *Kostovski v. The Netherlands*, Judgement of 20 Nov 1989, para. 41; *Asch v. Austria,* Judgement of 26 Apr 1991, para. 27; *Isgrò v. Italy,* Judgement of 19 Feb 1991, para. 34; *Ferrantelli and Santangelo v. Italy,* Judgement of 26 Jun 1996, para. 51.
[119] *Lüdi v. Switzerland*, para. 49.
[120] *Ibid.*, para. 50.
[121] In *Lucà v. Italy,* the accused was convicted solely based on a statement of N. N was called to give evidence, but used his right to remain silent, which right was afforded to him as an accused in connected proceedings. As a result and in accordance with Italian law, N's statements were read out in court and the complainant was deprived of any opportunity of examining that person or of having him examined, *Lucà v. Italy*, citing *Unterpertinger v. Austria*, Judgement of 24 Nov 1986, paras 31-33; *Saïdi v. France*, Judgement of 20 Sep 1993, paras 43-44 and other cases.

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have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.[122]

66. The European Court of Human Rights has reiterated its approach in *Solakov v. the Former Yugoslav Republic of Macedonia.*[123] The jurisprudence of the Court shows that a complete absence of, or deficiency in, the cross-examination of a witness will not automatically lead to exclusion of the evidence.

67. The Trial Chamber further notes that the fact that the evidence which has not been cross-examined goes to the acts and conduct of the Accused or is pivotal to the Prosecution case is not per se a reason to exclude such evidence. Rather, in order to protect the accused's right to a fair trial, the Court requires that such evidence be corroborated if used to establish a conviction.

68. Moreover, an examination of domestic jurisdictions with regard to this issue reveals a body of jurisprudence from both common law and civil law countries which is largely in line with the jurisprudence of the European Court of Human Rights. In this respect, the Trial Chamber notes case law and legislation from England and Wales,[124] Canada,[125] the United States,[126] France [127] and

[122] *Lucà* v. *Italy*, para. 40. In that case, the Court notes that the domestic courts convicted the applicant solely on the basis of statements made by N before the trial and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him, *ibid*, para. 43.

[123] *Solakov v. the Former Yugoslav Republic of Macedonia,* Judgement of 31 Oct 2001, para. 57; In this case, the Court found no violation for a number of reasons, including the circumstance that the domestic court also examined "other items of evidence corroborating the witnesses' statements."

[124] *See, e.g, Randall v. Atkinson (1899),* 30 O.R. 242 (H.C.), affd. 30 O.R. 620 (C.A.) an English case where the court adopted the rule set out in an old Irish criminal case, *R v. Doolie* (1832) Jebb C.C. 123, that evidence that was uncross-examined on could be received and the absence of cross-examination was considered in relation to the weight of the evidence. In *R v. Stretton and McCallion*, the complainant completed evidence-in-chief, but after about three and one-half hours of cross-examination, became medically incapable of continuing to give evidence. The Trial Judge allowed the trial to continue but directed the Jury concerning the proper approach in weighing the evidence of this witness in these circumstances. On Appeal, the Court of Appeal identified important considerations to take into account. It found that there was a need to consider both fairness to the accused and the pursuit of truth. The court also examined the effect of the cross-examination that was conducted and considered the submissions of counsel concerning the areas of cross-examination which defence counsel had intended to, but was prevented from pursuing. It also stressed that, in its view, the key issue was whether there was any "real chance" that more concessions from the witness might have resulted from further cross-examination. The court also considered whether there was sufficient evidence before the court to enable it to fairly and properly assess the witness' credibility. Another English case which is in line with ECHR jurisprudence is *R v. Lawless and Basford.* In that case, after the conclusion of the examination-in-chief, a witness became unable to continue, so that no cross-examination was possible. The Trial Judge decided to proceed with the trial and convictions were entered. The Court of Appeal set aside the convictions. The court noted that the witness' evidence was "damning" and was "wholly unchallenged and untested by cross-examination". Moreover, it appeared doubtful to the court that the accused's right could be protected through other means (such as through a jury instruction and the fact that crafting a correct instruction was made more difficult by the differential effect of the evidence on the two accused). In the English case *R v. Al-Khawaja,* (2006) 1 Cr. App. R.9, at 25-28, one of two complainants accusing the defendant of sexual assault committed suicide before the commencement of the trial. Her statement was read out at trial. The accused appealed his conviction on the basis that his rights under Art. 6 (3)(d) of the ECHR had been violated. The Court dismissed the appeal, holding that Art. 6 (3)(d) was only one aspect of a fair trial and that his rights were sufficiently protected. The proceedings as a whole were not rendered unfair in the circumstances of the case because he had been able to explore inconsistencies between the statement and the other witnesses and the weight given to the statement was adequately adjusted to take account of the difficulties which the admission of the statement might have provided for the accused.

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Germany.[128] The Trial Chamber finds that the above approach in international and national jurisdictions underscores the general practice of admission of evidence at the Tribunal.

69. In light of the jurisprudence of the Tribunal, as well as the jurisprudence of international and national jurisdictions, the Trial Chamber finds that the fact that the Defence was unable to complete its cross-examination of Milan Babić does not lead to the conclusion that the evidence should be excluded. In this respect, while an important factor, the nature of the evidence which has not been cross-examined, including whether the evidence goes to the acts and conduct of the Accused or is pivotal to the Prosecution case, is not of itself a decisive factor for the issue of exclusion. Nor is the stage of the cross-examination in itself a decisive factor for the issue of exclusion.

70. The Trial Chamber notes that Milan Babić testified for approximately 25 hours in court, under oath, in the presence of the Accused. His cross-examination lasted approximately 10.5 hours. The Trial Chamber finds that the completed cross-examination up to the date of death was sufficient for the Trial Chamber to fairly judge the credibility and reliability of Milan Babić as a witness.

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[125] Canadian authorities on the subject are *R v. Hart* and *R v. Yu* (2002) A.J. No. 1552. In *R v. Hart*, it was held that the Trial Judge should consider what other bases there may be to evaluate the untested evidence of a witness. Such considerations included the presence of the witness, the opportunity of cross-examining counsel to put prior inconsistent statements before the trier of fact and the extent to which there are other bases to evaluate the evidence of the witness. This was affirmed in *R v. R.B.* (2004) O.J. No. 4065. In *R v. Yu*, a complainant could not finish cross-examination due to illness and subsequent death. The court affirmed that if counsel outline the existence of unexplored areas of potential cross-examination which were foreclosed by the complainant's death, the Judge may find them answerable from other admitted or available evidence. For example, where the effect of the cross-examination has been limited but not entirely negated, any inconsistencies between the evidence-in-chief and prior statements that could have been led from other sources and put before the trier of fact may be sufficient.

[126] On the right of cross-examination, *Delaware v. Fensterer*, a leading U.S. Supreme Court decision, has held that the Confrontation Clause as found in the US Constitution "... guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent, the defence might wish." *Commonwealth v. Kirouac* (1989), 542 N.E.2d 270 (Mass. S.C.) subsequently held that "in deciding whether a defendant's constitutional right to cross-examine and thus confront a witness against him has been denied because of an unreasonable limitation of cross-examination, a court must weigh the materiality of the witness's direct testimony and the degree of the restriction on cross-examination. [...] Cross-examination that is somewhat impeded, but not totally foreclosed, presents a weaker case for finding a denial of rights than a complete absence of cross-examination." *See also Kennedy v. Stincer*, 482 U.S. 730, 744; 107 S. Ct. 2658, 2667; 96 L.Ed.2d 631 (1987).

[127] One of the first cases in Europe on the right to cross-examine a witness was the French case *Randhawa*, 1989 Bull. Crim. No. 13 (Jan. 12). In that case, the accused Randhawa cited two adverse witnesses to attend his trial *de novo* in the Court of Appeals, and formally requested the Court to hear them. However, the Court refused the request stating that "it would not be useful to the manifestation of the truth" to hear these witnesses because they had already been heard during pre-trial proceedings and their statements had been handed to the defence. The conviction had been based entirely on the statements of these two witnesses. The Court of Cassation reversed the decision, basing its reasoning on Art. 6 (3)(d) of the ECHR (and on the general "fair trial" concept of the Art. 6. (1)).

[128] As per the German Federal Court of Appeal (BGHSt 24, 131), the ECHR forms part of the German Federal Law and contains fundamental procedural guarantees directly applicable by German courts. The right to a fair trial enshrined in Art. 6(1) of the ECHR is the overriding principle of criminal procedure. *See, e.g.*, the German Code of Criminal Procedure, Section 251 and a German decision from 31 March 1989, BHGSt 36, 159, at 160-1, 164-66, in which the German Federal Court of Appeal, held that a judgement of guilt cannot rest on hearsay statements alone where the accused has no ability to confront the witness. On the facts of that case, the hearsay testimony was corroborated by other incriminating evidence against the accused.

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71. The Trial Chamber recalls that the Defence submitted alleged inconsistencies for the purpose of assessing "the reliability of [Milan] Babić's evidence and the effect of the remaining portion of cross-examination on [Milan] Babić's credibility as a witness."[129] The Trial Chamber finds that the inconsistencies referred to by the Defence do not affect the credibility of Milan Babić or the reliability of his evidence to such an extent that the probative value of his testimony is substantially outweighed by the need to ensure a fair trial. The Trial Chamber will, however, take these alleged inconsistencies, and possible other alleged inconsistencies brought to the attention of the Trial Chamber,[130] into consideration when assessing the weight to be attached to the evidence of Milan Babić in light of the entire trial record at the time of consideration of Judgement on the substantive charges in the Indictment.

72. The Defence argument that Milan Babić took his life because he wanted to evade further cross-examination and confrontation with the Accused and that this should negatively affect his reliability as a witness is rejected. The Trial Chamber cannot and will not enter into speculations as whether Milan Babić took his own life and any reasons therefor. Nor does the circumstance that Milan Babić testified following a plea agreement in itself affect his credibility or reliability to such extent that his testimony should be excluded. The Trial Chamber notes that the arguments of the Defence on credibility and reliability of Milan Babić will also be taken into consideration when determining the weight that is to be attached to his evidence in light of the entire trial record.

73. In the event that the evidence of Milan Babić is not excluded, the Trial Chamber would ultimately have to weigh the evidence in light of the fact that Milan Babić was not cross-examined fully. In this respect, the Trial Chamber recalls the decision of the Appeals Chamber in the *Galić* case wherein it was observed that "where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement".[131] The Trial Chamber further notes that the Trial Chamber in *Brđanin* held the following with respect to the evidence of the witness who did not appear for cross-examination:

> [b]ecause the Defence has not had an opportunity to cross-examine the witness on these events, and there being absolutely no other evidence on them, the Trial Chamber has not considered it safe to rely on his evidence.[132]

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[129] Defence Motion, para. 21.
[130] *See*, in this regard, section V of this decision.
[131] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92 *bis*, 7 Jun 2002, fn. 34, *referring* to Judgements of the ECHR.
[132] *Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-T, Trial Judgement, 1 Sep 2004, footnote 944.

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74. The Trial Chamber in *Halilović* noted that such 'other evidence' as mentioned in the *Galić* case "may include other witnesses' testimony, documentary evidence or video evidence."[133]

75. This Trial Chamber notes that the practice of the Tribunal requiring corroboration of evidence which has not been cross-examined is in line both with the jurisprudence of the European Court of Human Rights and with national jurisprudence. Therefore, the arguments of the Parties regarding the importance of the evidence are reflected in the Tribunal's practice. The Trial Chamber notes that there is ample evidence on the trial record capable of corroborating the evidence of Milan Babić.

76. The Trial Chamber is aware of the full range of circumstances surrounding Milan Babić's testimony. As such, it will be mindful of relevant factors, including, but not limited to the fact that he testified as part of a plea agreement with the Office of the Prosecutor, that some charges against Milan Babić were dismissed without prejudice and that the Appeals Chamber had decided upon his appeal against his sentence at the time he appeared before this Trial Chamber.[134]

77. In the instant case, taking into consideration all of the factors put forward by the Parties, the Trial Chamber finds that the need to ensure a fair trial does not outweigh the probative value of the evidence of Milan Babić. The Trial Chamber finds that this is the case whether the factors are taken individually or taken in conjunction with one another. The Trial Chamber therefore rejects the Defence argument that this evidence should be excluded pursuant to Rule 89 (D) of the Rules.

78. In light of the above, the Trial Chamber further finds that there is no reason to find, *proprio motu*, that maintaining the evidence as part of the trial record is antithetical to and would seriously damage the proceedings.

V. OPTIONS OPEN TO THE PARTIES

79. The Trial Chamber finds that it will be beneficial for the fairness of the proceedings that the Defence be allowed to further challenge the evidence of Milan Babić by way of tendering other evidence. The Trial Chamber is convinced that this will help to remedy or ameliorate any potential unfairness to the Accused and that this will also assist the Trial Chamber in further assessing the evidence of Milan Babić, in particular the reliability thereof.

[133] *See, Prosecutor v. Sefer Halilović,* Case No. IT-01-48-T, Trial Judgement, 16 Nov 2005, para. 19 .
[134] *See, Prosecutor v. Vidoje Blagojević and Dragan Jokić,* Case No. IT-02-60, Trial Judgement, 17 Jan 2005, para. 24, for factors taken into account in assessing the weight to be attached to evidence provided by witnesses testifying as part of a plea agreement.

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80. In setting the procedure open to the Parties, the Trial Chamber will follow the general procedure of examination of witnesses. The Trial Chamber notes in this regard Rule 90 (H)(i) of the Rules and the Trial Chamber's Revised Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court.[135] The Trial Chamber notes that this other evidence to be tendered by the parties may be admissible pursuant to one of the general rules governing the admission of evidence, such as Rules 89 (C), 89 (F) and 92 *bis* of the Rules.

81. If the Defence chooses to avail itself of this option – which it may indicate in court – it shall file a list of the exact portions of the evidence-in-chief of Milan Babić upon which it intended, but was unable, to cross-examine him on as a result of his death. In such case, the Defence shall also tender any documents it intended to use in order to challenge those specific portions of Milan Babić's evidence-in-chief. If, among those documents, the Defence intends to file any prior testimony or statements of Milan Babić, the Defence shall identify the exact portions of the prior testimony or statements which it considers to be inconsistent with the evidence-in-chief of Milan Babić before this Trial Chamber. Moreover, the Trial Chamber advises the Defence that, in the process of proving such inconsistencies, the Defence, may tender statements of witnesses they will call in the course of their Defence case or statements of witnesses who appear on the Prosecution 65 *ter* witness list.

82. Upon receipt of the above-mentioned list and accompanying documents, the Prosecution may file documents, if any, which it wishes to tender by way of re-examination. The general rules for re-examination apply to these documents. The Prosecution may raise any objections it might have to the admission of the documents tendered by the Defence.

83. The Defence may choose to respond to the objections of the Prosecution, if any, and may articulate its own objections to the documents tendered by the Prosecution.

84. Finally, the Trial Chamber notes the arguments of the Parties detailing the scope of the conducted cross-examination, the areas of the examination-in-chief upon which the Defence intended, but was unable, to cross-examine Milan Babić, the admissibility of particular portions of previous testimony of Milan Babić, and the alleged inconsistencies between Milan Babić's testimony before the Trial Chamber and his prior testimony.[136] Insofar as these detailed arguments have not been addressed in this decision, the Trial Chamber will take them into consideration when deciding upon the admission of the documents tendered by the Parties.

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[135] *Prosecutor v. Milan Martić,* Case No.. IT-95-11-T, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, 19 May 2006.
[136] The arguments of the Parties are raised in the Defence Motion, the Prosecution Submissions, the Prosecution Response and the Defence Reply.

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VI. DISPOSITION

PURSUANT TO Articles 20 and 21 of the Statute and Rules 54, 85, 89 and 90 of the Rules, the Trial Chamber:

DENIES the Defence Motion, and

in the event the Defence elects to avail itself of the options set out above, **ORDERS**

1. the Defence to submit, within seven days of this decision:

    a. a list, containing precise page and line references to the transcript, of the exact portions of the evidence-in-chief of Milan Babić upon which it intended, but was unable, to cross-examine as a result of his death;

    b. any documents it intended to use in order to challenge those specific portions of Milan Babić's evidence-in-chief, filed under 1, a of this disposition; and that if among those documents, the Defence intends to file any prior testimony or statements of Milan Babić, the Defence shall identify the exact portions of the prior testimony or statements which it considers to be inconsistent with the testimony of Milan Babić before this Trial Chamber;

2. the Prosecution, if it chooses to do so, to submit within seven days of the Defence submission under 1, a of this disposition list of documents, if any, which it wishes to tender by way of re-examination, and any objections it may have to the admission of the documents tendered by the Defence;

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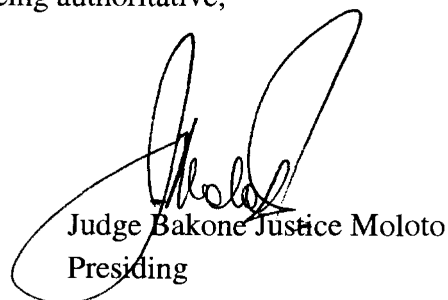
3. the Defence, if it chooses to do so, to file a response to the objections of the Prosecution under 2 of this disposition, if any, and to file its own objections, if any, to the documents tendered by the Prosecution under 2, within three days of the Prosecution submission under 2.

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



Judge Bakone Justice Moloto
Presiding

Dated this ninth day of June 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

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