

**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: IT-95-11-AR73.2  
Date: 14 September 2006  
Original: English

**BEFORE THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Andréia Vaz  
Judge Theodor Meron  
Judge Wolfgang Schomburg

**Registrar:** Mr. Hans Holthuis

**Decision of:** 14 September 2006

**PROSECUTOR**

v.

**MILAN MARTIĆ**

**DECISION ON APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON THE  
EVIDENCE OF WITNESS MILAN BABIĆ**

**Office of the Prosecutor**

Mr. Alex Whiting  
Ms. Christine Dahl  
Mr. Colin Black  
Ms. Nisha Valabhji

**Counsel for the Appellant**

Mr. Predrag Milovančević  
Mr. Nikola Perović

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1. The Appeals 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 (“Appeals Chamber” and “International Tribunal”, respectively), is seized of the “Appeal Against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić” filed by Milan Martić (“Appellant”) on 10 July 2006 (“Interlocutory Appeal”).

## I. PROCEDURAL BACKGROUND

2. On 9 June 2006, the Trial Chamber rendered its “Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, together with Associated Exhibits, from Evidence” (“Impugned Decision”),<sup>1</sup> in which it denied the Appellant’s request that the evidence of Witness Milan Babić proffered by the Prosecution be excluded from the trial record because the cross-examination by Counsel for the Appellant (“Defence”) was interrupted by Witness Milan Babić’s death. The Trial Chamber determined, pursuant to Rule 89(D) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), that in spite of the incomplete cross-examination of the witness, “the need to ensure a fair trial does not outweigh the probative value of the evidence of Milan Babić”.<sup>2</sup> It further stated 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” in accordance with Rule 95.<sup>3</sup>

3. On 20 June 2006, the Trial Chamber granted the Appellant’s application for certification to appeal the Impugned Decision.<sup>4</sup> On 23 June 2006, the Pre-Appeal Judge allowed the Appellant’s motion for enlargement of time to file the interlocutory appeal against the Impugned Decision and ordered that it be filed no later than 7 July 2006.<sup>5</sup>

4. On 10 July 2006, the Appellant filed his Interlocutory Appeal as well as a confidential “Motion to Recognize the Filing of the Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić as Validly Done” (“Motion”).<sup>6</sup>

<sup>1</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Motion to Exclude the Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence, 9 June 2006.

<sup>2</sup> Impugned Decision, para. 77.

<sup>3</sup> Impugned Decision, para. 78.

<sup>4</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence Application for Certification to Appeal Pursuant to Rule 73(B), 20 June 2006.

<sup>5</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Motion for Enlargement of Time, 23 June 2006 (“Decision on Enlargement of Time”).

<sup>6</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Motion to Recognize the Filing of the Appeal Against the Trial Chamber’s Decision on the Evidence of Witness Milan Milan Babić as Validly Done (Confidential), 10 July 2006. The Appeals Chamber grants the Appellant’s Motion to recognize the filing of the Interlocutory Appeal as validly done

5. On 20 July 2006, the Prosecution filed the “Prosecution Response to Defence Interlocutory Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić” (“Response”). The Appellant has filed no reply to the Response.

## II. STANDARD OF REVIEW

6. It is well established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in relation to the admissibility of some types of evidence, as well as in defining the modalities of cross-examination and the exercise of this right by the Defence.<sup>7</sup> The Trial Chamber’s decision in this case to retain the evidence of Witness Milan Babić pursuant to Rule 89(D) following his death was a discretionary decision to which the Appeals Chamber accords deference. Such deference is based on the recognition by the Appeals Chamber of “the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case.”<sup>8</sup>

7. The Appeals Chamber will therefore not conduct a *de novo* review of a Rule 89(D) decision.<sup>9</sup> The question before the Appeals Chamber is not whether it “agrees with that decision” but “whether the Trial Chamber has correctly exercised its discretion in reaching that decision.”<sup>10</sup> For the Appeals Chamber to intervene in a discretionary decision of a Trial Chamber, it must be demonstrated that the Trial Chamber has committed a “discernible error” resulting in prejudice.<sup>11</sup> The Appeals Chamber will overturn a Trial Chamber’s exercise of its discretion where it is found to be “(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s

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pursuant to Rule 127(A)(ii). The Appeals Chamber finds that the Appellant has demonstrated that the sudden illness of a member of the Defence team constitutes good cause in the circumstances. The Appeals Chamber further notes that the Interlocutory Appeal was filed at the start of the business day on Monday, 10 July 2006; a very limited extension of the deadline granted in the Decision on Enlargement of Time.

<sup>7</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber’s Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel’s Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 (“*Prlić* Decision on Cross-Examination”), p. 3; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006 (“Decision on Radivoje Miletić’s Interlocutory Appeal”) para. 4; *Prosecutor v. Milošević*, Case Nos.: IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 (“*Milošević* Decision on Joinder”), para. 3.

<sup>8</sup> Decision on Radivoje Miletić’s Interlocutory Appeal, para. 4; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004 (“*Milošević* Decision on Defense Counsel”), para. 9.

<sup>9</sup> Cf. Decision on Radivoje Miletić’s Interlocutory Appeal, para. 6; *Prosecutor v. Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005 (“*Stanišić* Provisional Release Decision”), para. 6.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006 (“*Milutinović* Decision”), para. 6.

discretion.”<sup>12</sup> The Appeals Chamber will also consider whether the Trial Chamber “has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations [ . . . ]” in reaching its discretionary decision.<sup>13</sup>

8. The Appeals Chamber notes that it is seized only of an interlocutory appeal concerning a single procedural matter. Consequently, the substantial assessment of the evidence is for the Trial Chamber, subject to an appeal – if any – against the Trial Chamber’s judgement. Indeed, that would be the appropriate point in time to discuss the evidence and its assessment in its entirety.

### III. DISCUSSION

9. In his Interlocutory Appeal, the Appellant alleges that the Trial Chamber erred (1) “in law by interpreting Articles 20 and 21 of the Statute of the International Tribunal (“Statute”) in such a way as to allow the evidence of Milan Babić to remain part of the trial record”; (2) “by not resolving the issue against the background of the essentially adversarial proceedings before the International Tribunal”; (3) “by not addressing the parties’ arguments on several factors which may be relevant for the determination of the issue at hand”; (4) “by concluding that the Defence had an adequate opportunity to cross-examine Milan Babić”; (5) “by not addressing the circumstances of the death of Milan Babić”; and (6) “by offering a remedy which is [un]ethical, insufficient and impossible to accomplish.”<sup>14</sup>

#### A. Trial Chamber’s Interpretation of Articles 20 and 21 of the Statute

10. The first error alleged by the Appellant is that the Trial Chamber “erred in law by interpreting Articles 20 and 21 of the Statute in such a way as to allow the evidence of Milan Babić to remain part of the trial record.”<sup>15</sup> Specifically, the Appellant takes issue with the Trial Chamber’s qualification of the right of an accused under Article 21(4)(e) “to examine or have examined the witnesses against him” by the need to ensure the fair and expeditious conduct of proceedings pursuant to Article 20(1).<sup>16</sup> The Appellant further argues that the Trial Chamber failed to “address the issue of how the fairness and expeditiousness of the proceedings require the evidence of Milan Babić to remain part of the trial record” when his right to cross-examination “has

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Interlocutory Appeal, pp 4, 5, 7, 11 and 13, respectively.

<sup>15</sup> Interlocutory Appeal, p. 4.

<sup>16</sup> *Ibid.*, paras 7-8.

been drastically infringed”.<sup>17</sup> The Appellant then adds that the “only type of unfairness envisaged by the Statute is unfairness to the Accused”.<sup>18</sup>

11. The Prosecution argues however, that the Trial Chamber “correctly interpreted Articles 20 and 21 to require a balance between the Accused’s right to cross-examination and the need to ensure a trial that is fair to both parties”<sup>19</sup> and rejects the Appellant’s view that “any infringement of an accused’s rights necessarily renders a trial unfair.”<sup>20</sup> The Prosecution further submits that this approach is inconsistent with the Rules and jurisprudence of the International Tribunal and is premised on the Appellant’s mistaken impression that the Statute only envisages unfairness with respect to the Accused.<sup>21</sup>

12. The Appeals Chamber finds that the Appellant fails to demonstrate that the Trial Chamber erred in its interpretation of the governing law. The Appeals Chamber considers that the Trial Chamber was correct in noting that it is settled law before the International Tribunal that the right of an accused to cross-examine a witness is not absolute.<sup>22</sup> The Appeals Chamber recalls that the right to cross-examination may, for instance, be limited in accordance with Rule 92*bis* and that its exercise remains subject to the control of the Trial Chamber pursuant to Rule 90(F).<sup>23</sup>

13. The Appeals Chamber further rejects the Appellant’s claim that the fairness of a trial is uniquely predicated on the fairness accorded to the Accused. The Appeals Chamber has previously observed that the

application of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community) [...] Seen in this way, it is difficult to see how a trial could ever be considered

<sup>17</sup> *Ibid.* para. 9.

<sup>18</sup> *Ibid.*

<sup>19</sup> Response, para. 16.

<sup>20</sup> *Ibid.*, para. 17.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Prić* Decision on Cross-Examination, p. 3; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 27 (“*Aleksovski* Decision on Admissibility of Evidence”) (finding that the denial of the opportunity to cross-examine occasioned by the admission of hearsay evidence was tempered by the previous cross-examination of the witness in other proceedings and that any residual disadvantage was outweighed by the disadvantage which would be occasioned to the Prosecution by the exclusion of the evidence in the circumstances of the case); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution’s Rule 92*bis* Motion, 4 July 2006, para. 11; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*, 12 June 2003, para. 14 (referring to Rule 92*bis* (E), “the right to cross-examine witnesses is not an absolute right, although the decision to accept evidence without cross-examination is one which the Trial Chamber shall arrive at only after careful consideration”); *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, 24 May 1998 (“*Čelebići* Exclusion Decision”), para. 32; *Impugned* Decision, para. 56.

<sup>23</sup> Decision on Radivoje Milić’s Interlocutory Appeal, para. 29, referring to the Trial Chamber’s discretion pursuant to Rule 90(F) to regulate the examination of witnesses so as to avoid repetitive questioning during cross-examination.

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fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.<sup>24</sup>

Although, proceedings must be conducted with full respect for the rights enumerated in Article 21 of the Statute, restrictions on the right to cross-examination will not necessarily entail a violation of that provision or be inconsistent with a fair trial.

14. The Appeals Chamber considers that the Appellant misconstrues the balance struck by the Trial Chamber when he claims that the Trial Chamber failed to justify the retention of the evidence of Milan Babić as necessary to the fairness and expeditiousness of the proceedings in light of the alleged drastic infringement of his right to cross-examination.<sup>25</sup> The Appeals Chamber agrees with the Trial Chamber that the right to cross-examination is subject to the duty of the Trial Chamber to ensure the fairness and expeditiousness of the proceedings. In addition, when tasked with the decision of whether to exclude evidence, the Trial Chamber is bound more particularly by Rule 89(D) to determine whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial.

15. The Appeals Chamber notes in this respect that the Trial Chamber, in the exercise of its discretion, appropriately considered whether the incompleteness of the cross-examination and the disadvantage to the Appellant emanating from this, substantially outweighed the probative value of the evidence such that it should be removed from the trial record.<sup>26</sup> In reaching the decision that the probative value of the evidence was not substantially outweighed by the need to ensure a fair trial, the Trial Chamber determined that the Appellant had an adequate opportunity to cross-examine Milan Babić<sup>27</sup> and 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.”<sup>28</sup> Furthermore, the Trial Chamber noted that the arguments of the Appellant on credibility and reliability would be taken into consideration when determining the weight to be attached to the evidence of Milan Babić in light of the entire record<sup>29</sup> in addition to the evidence being weighted in light of the fact that Milan Babić was not fully cross-examined.<sup>30</sup> The Trial Chamber further stated that corroboration would be required of evidence – going to the acts and conduct of the Appellant –

<sup>24</sup> *Aleksovski* Decision on Admissibility of Evidence, para. 25, see also *Čelebići* Exclusion Decision, para. 44 (“compliance with the specific rights set out in Article 21 alone may not necessarily guarantee that there has been a fair trial” and that “a fair trial can only be considered within the plenitude of the trial as a whole”).

<sup>25</sup> Interlocutory Appeal, para. 9.

<sup>26</sup> Impugned Decision, para. 55.

<sup>27</sup> *Ibid.*, para. 57.

<sup>28</sup> *Ibid.*, para. 70.

<sup>29</sup> *Ibid.*, para. 72.

<sup>30</sup> *Ibid.*, para. 73.

which had not been cross-examined<sup>31</sup> and offered the Appellant an opportunity to tender other evidence to challenge those portions of Milan Babić's evidence-in-chief which he intended, but was unable, to challenge by way of cross-examination.<sup>32</sup>

16. The Appeals Chamber finds that the Appellant has failed to demonstrate any legal error or abuse of discretion on the part of the Trial Chamber.

#### **B. Resolving the Issue against the Background of the Adversarial Proceedings**

17. The second error alleged by the Appellant is that the Trial Chamber "erred by not resolving the issue against the background of the essentially adversarial proceedings before the International Tribunal".<sup>33</sup> In this respect, the Appellant specifically alleges that the Trial Chamber erred by placing an "unconditional reliance on the jurisprudence of the European Court of Human Rights"<sup>34</sup> in reaching its decision in view of the "essentially adversarial character" of the proceedings before the International Tribunal<sup>35</sup> and the greater emphasis that is placed<sup>35</sup> on the right to cross-examination in adversarial systems.<sup>36</sup>

18. The Appeals Chamber finds this argument to be void of merit. To begin with, the Trial Chamber's reliance on the jurisprudence of the European Court of Human Rights ("ECHR") is not unconditional. Ample reference is made to the jurisprudence of the International Tribunal,<sup>37</sup> as well as to the jurisprudence of national jurisdictions,<sup>38</sup> in order to address a set of circumstances which, as noted by the Trial Chamber and undisputed by the parties, is not provided for by either the Statute or the Rules.<sup>39</sup> In such a case, Rule 89(B) provides that "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." The Appeals Chamber therefore considers that, to the extent that the Trial Chamber relies on the jurisprudence of the ECHR,<sup>40</sup> its reliance is entirely appropriate in the circumstances.

19. The Appeals Chamber recalls in this respect that the right to cross-examination in Article 21(4)(e) of the Statute is in *pari materia* with Article 6(3)(d) of the European Convention on Human Rights and its importance has been repeatedly stressed and its violation sanctioned by the

<sup>31</sup> *Ibid.*, paras 73-75.

<sup>32</sup> *Ibid.*, Section V.

<sup>33</sup> Interlocutory Appeal, p. 5.

<sup>34</sup> *Ibid.*, para. 14.

<sup>35</sup> *Ibid.*, para. 13.

<sup>36</sup> *Ibid.*, para. 11.

<sup>37</sup> Impugned Decision, paras 59-62, 73-74.

<sup>38</sup> *Ibid.*, para. 68.

<sup>39</sup> *Ibid.*, para. 11.

<sup>40</sup> *Ibid.*, see e.g. paras 63-66.

ECHR.<sup>41</sup> The Appeals Chamber considers that the jurisprudence of the ECHR provides a useful source of guidance for the interpretation of the right to cross-examination and the scope of its permissible limitations.

20. The Appeals Chamber observes in any event that the two principles that the Trial Chamber derived from the jurisprudence of the ECHR, namely that (1) a complete absence of, or deficiency in, the cross-examination of a witness will not automatically lead to exclusion of the evidence,<sup>42</sup> and (2) evidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction,<sup>43</sup> are consistent with the jurisprudence of the International Tribunal as well as that of national jurisdictions.<sup>44</sup> The Appeals Chamber finds that the Appellant has failed to demonstrate a discernible error on the part of the Trial Chamber in the reliance it placed on the jurisprudence of the ECHR in reaching its decision to retain the evidence of Milan Babić in the trial record.

### C. Trial Chamber's Consideration of the Parties' Arguments

21. The third error alleged by the Appellant is that the Trial Chamber canvassed, but did not address, the parties' arguments on several factors that were advanced as relevant to determining whether to admit evidence despite an impediment to the Accused's right to cross-examination.<sup>45</sup> The Appellant specifically alleges that the Trial Chamber "dismissed the nature of the evidence and the stage of the cross-examination as important factors but not decisive" in themselves without addressing the parties' arguments on them, and failed to address the parties' arguments concerning the following four factors: (1) the scope of the conducted cross-examination; (2) the areas of the examination-in-chief upon which the Appellant intended, but was unable, to cross-examine Milan Babić; (3) the admissibility of particular portions of previous testimony of Milan Babić; and (4) the alleged inconsistencies between Milan Babić's testimony before the Trial Chamber and his prior testimony.<sup>46</sup>

<sup>41</sup> This point is conceded by the Appellant in his Interlocutory Appeal at paragraph 14.

<sup>42</sup> Impugned Decision, para. 66.

<sup>43</sup> *Ibid.*, para. 67.

<sup>44</sup> Impugned Decision, para. 69. With respect to the first principle the Trial Chamber notes the decision in *Brđanin*, in which the testimony of a witness who was unable to appear for cross-examination was retained in the trial record (*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Oral Decision, 24 February 2004, T.25083). With regard to the second principle, the Trial Chamber refers to the Appeals Chamber's decision in *Galić* in which it states 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" (*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis, 7 June 2002, fn.34, referring to Judgements of the ECHR).

<sup>45</sup> Interlocutory Appeal, para. 15.

<sup>46</sup> *Ibid.*, para. 16.



22. The Appeals Chamber considers that the Appellant has misunderstood the Trial Chamber's reasoning in this regard. With respect to the nature of the evidence and the stage of cross-examination, the Trial Chamber substantiated its conclusion that these factors, while important, were not decisive to the issue of exclusion on the basis of the two principles it had drawn from the International Tribunal's practice, the jurisprudence of the ECHR and the jurisprudence of national jurisdictions, these being: (1) that a complete absence of, or deficiency in, the cross-examination of a witness will not automatically lead to exclusion of the evidence; and (2) that evidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction. The Trial Chamber further substantiated the retention of the evidence, finding with specific reference to the parties' arguments 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"<sup>47</sup> and that the "arguments of the Parties regarding the importance of the evidence are reflected in the Tribunal's practice" of requiring corroboration for evidence which has not been cross-examined.<sup>48</sup>

23. The Appeals Chamber further observes that the Trial Chamber explicitly noted the arguments of the parties in respect of the four factors listed above<sup>49</sup> before providing that "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" in accordance with the procedure afforded to the Appellant in Section V of the Impugned Decision to further challenge the evidence of Milan Babić.<sup>50</sup> The fact that the Trial Chamber decides to reserve its right to consider these arguments in relation to the admission of this further evidence in no way undermines its consideration of the parties' arguments in deciding to retain the evidence of Milan Babić as part of the trial record. As well, it is entirely appropriate that arguments concerning the credibility and reliability of Milan Babić's testimony, although not deemed sufficient to merit its exclusion, be considered when assessing the weight, if any, to be attached to the evidence of Milan Babić in light of the entire trial record.<sup>51</sup>

24. The Appeals Chamber finds that the Appellant has failed to demonstrate a discernible error on the part of the Trial Chamber in this regard. The Trial Chamber clearly took account of the parties' arguments with respect to the various listed factors. In particular, in concluding that the need to ensure a fair trial does not outweigh the probative value of the evidence of Milan Babić, the

<sup>47</sup> Impugned Decision, para. 70.

<sup>48</sup> *Ibid.*, para. 75.

<sup>49</sup> *Supra*. para. 21.

<sup>50</sup> Impugned Decision, para. 84.

<sup>51</sup> *Ibid.*, para. 71 (referring to the alleged inconsistencies submitted by the Appellant challenging the reliability of Milan Babić's evidence and the effect of the remaining portion of the cross-examination on his credibility as a witness).

Trial Chamber stated that it reached this conclusion by “taking into account all of the factors put forward by the Parties [...] whether the factors are taken individually or taken in conjunction with one another”.<sup>52</sup>

**D. Trial Chamber’s Conclusion that the Appellant had an Adequate Opportunity to Cross-Examine Milan Babić**

25. The fourth error alleged by the Appellant is that the Trial Chamber erred by concluding that the Appellant had an adequate opportunity to cross-examine Milan Babić.<sup>53</sup> The Appellant challenges this finding on the basis that the Trial Chamber calculated the time remaining for cross-examination at 6.5 hours rather than the 7.5 hours the Appellant claims remained.<sup>54</sup> The Appellant further contests the Trial Chamber’s statement that, despite repeated warnings to focus the cross-examination and stop wasting time, the Appellant “continued to address several irrelevant issues and went far outside the temporal and geographic scope of the Indictment.”<sup>55</sup> These observations, together with the finding that the Defence had already cross-examined Milan Babić for 10.5 hours, led the Trial Chamber to conclude that it could not but find that the Appellant had an adequate opportunity to cross-examine Milan Babić.<sup>56</sup> Lastly, the Appellant maintains that having had no reason to suspect that he would not be able to complete the cross-examination, “[m]any important topics were left for those two last days of cross-examination.”<sup>57</sup>

26. The Appeals Chamber finds that the Appellant fails to demonstrate that the exercise of the Trial Chamber’s discretion in reaching this conclusion was based on one or more patently incorrect conclusions of fact or was so unfair or unreasonable as to constitute an abuse of its discretion. The Trial Chamber’s factual findings are supported by the record and are entitled to deference by the Appeals Chamber. A difference of one hour in the estimated time remaining for cross-examination, even if true, does not amount to discernible error capable of undermining the conclusion reached, taking into account that the Appellant was already entitled to cross-examine the witness for approximately 10.5 hours.<sup>58</sup> Further, the Appellant fails to demonstrate, by addressing but one of the examples given by the Trial Chamber of the lack of focus and relevance the cross-examination assumed, that the Trial Chamber misunderstood the purpose of the Appellant’s line of questioning relating to Kosovo on 21 February 2006.<sup>59</sup> Finally, the Appeals Chamber observes that while some

<sup>52</sup> *Ibid.*, para. 77.

<sup>53</sup> Interlocutory Appeal, p. 8.

<sup>54</sup> *Ibid.*, para. 18.

<sup>55</sup> Interlocutory Appeal, para. 22, *citing* Impugned Decision, para. 57.

<sup>56</sup> Impugned Decision, para. 57.

<sup>57</sup> Interlocutory Appeal, para. 23.

<sup>58</sup> Impugned Decision, para. 57.

<sup>59</sup> *Ibid.*, para. 22.

matters may have been left to the last two days of cross-examination, it was within the Trial Chamber's discretion to conclude that the opportunity for cross-examination up to the date of Milan Babić's death was adequate.<sup>60</sup>

#### E. Trial Chamber's Consideration of the Circumstances of the Death of Milan Babić

27. The fifth error alleged by the Appellant is that the "Trial Chamber has erred by not addressing the circumstances of the death of Milan Babić".<sup>61</sup> In this respect, the Appellant argues that the Trial Chamber should have waited for, and taken into account, the results of the Inquiry conducted by the Vice-President of the International Tribunal into the circumstances surrounding the death of Milan Babić prior to issuing the Impugned Decision.<sup>62</sup> The Appellant claims that the Report<sup>63</sup> contains the following relevant findings: (1) that Milan Babić committed suicide; (2) that the Prosecution was put on notice that Milan Babić was prone to suicide "years before he actually did commit it" and; (3) that the Prosecution failed to act upon this information.<sup>64</sup> Relying on Wigmore's *Evidence in Trials at Common Law*,<sup>65</sup> the Appellant concludes that because Milan Babić's death, which resulted in the prevention or curtailment of the cross-examination of his evidence, was caused by "the voluntary act of the witness himself," namely his suicide, the examination-in-chief must be struck out.<sup>66</sup>

28. The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in stating that the death of Milan Babić "could not reasonably have been foreseen or avoided".<sup>67</sup> Despite the fact that the Trial Chamber does not refer to the Report on Milan Babić's death in the Impugned Decision, the Trial Chamber's conclusion, which it was entitled to reach on the basis of the parties' submissions alone, is nonetheless supported by the Report's findings.<sup>68</sup> Furthermore, the Appeals Chamber notes that the foreseeability or the possibility of preventing Milan Babić's death was but one of several factors considered by the Trial Chamber in determining whether to retain his evidence in spite of the

<sup>60</sup> Furthermore, as discussed later in this Decision, the Trial Chamber provides an opportunity for the Defence to further challenge Milan Babić's evidence by way of tendering other evidence to remedy or ameliorate any potential fairness caused to the Accused as a result of the time lost in the remaining two days.

<sup>61</sup> Interlocutory Appeal, p.11.

<sup>62</sup> *Ibid.*, paras 26-27.

<sup>63</sup> Report to the President, Death of Milan Babić, by Vice-President Judge Kevin Parker, 8 June 2006.

<sup>64</sup> Appeal, para. 27, citing paras 34, 60(c) of the Report.

<sup>65</sup> John Henry Wigmore, *Evidence in Trials at Common Law* (Boston: Little Brown, 1974) Vol. 5 §1390, p. 134, citing *Kemble v. Lyons*, 184 Iowa 804, 169 N.W. 117 (1918); *Sperry v. Moore's Estate*, 42 Mich. 353, 361, 4 N.W. 13, 19 (1880); *Forrest v. Kissam*, 7 Hill 470 (N.Y. 1844) ("Wigmore").

<sup>66</sup> Interlocutory Appeal, para. 30.

<sup>67</sup> Impugned Decision, para. 58.

<sup>68</sup> Report, at paragraph (K) of its "Findings and Recommendations" concludes that Milan Babić's risk of suicide was unforeseen at the United Nations Detention Unit ("UNDU") where no reason for concern had been identified by the

incomplete cross-examination.<sup>69</sup> Therefore, even if it could be said that the Trial Chamber committed a discernible error in not considering the circumstances of Milan Babić's death as presented in the Report, the Appellant nonetheless fails to demonstrate how he was prejudiced by this error.

29. The Appeals Chamber considers the Appellant's reliance on Wigmore to be unpersuasive. The Appellant's argument before the Trial Chamber was that "Milan Babić took his life because he wanted to evade further cross-examination and confrontation with the Accused" and that this fact "should negatively affect his reliability as a witness".<sup>70</sup> The Trial Chamber correctly rejected this argument, noting that it would not and could not "enter into speculations as [to] whether Milan Babić took his own life and any reasons therefor."<sup>71</sup> In his appeal, armed with the Report's finding that Milan Babić did in fact commit suicide, the Appellant attempts to rely on Wigmore for the general principle that evidence given by a witness in direct examination who commits suicide prior to, or during his cross-examination, should be excluded.

30. The Appeals Chamber concludes that the International Tribunal need not adopt this approach and finds that, despite Milan Babić's death having been ruled a suicide, it remained within the Trial Chamber's discretion to retain the evidence of Milan Babić on the basis that the interruption of his cross-examination, the majority of which had been completed, was unforeseeable and unavoidable.

#### **F. The Remedy Offered by the Trial Chamber**

31. The sixth error alleged by the Appellant is that the "Trial Chamber erred by offering a remedy which is [un]ethical, insufficient and impossible to accomplish".<sup>72</sup> The Appellant's central contention is that the procedure offered "essentially, boils down to the cross-examination and re-examination of the deceased witness" and that, without the witness present, the "proposed procedure would include an obvious speculation, as nobody knows how Mr. Babić would answer and generally react to questions asked in cross-examination."<sup>73</sup>

32. The Appeals Chamber finds the Appellant's argument to be completely void of merit. The Appeals Chamber considers that the opportunity to tender any documents the Appellant planned to use to challenge those portions of Milan Babić's evidence-in-chief upon which the Appellant

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medical officers and other staff's assessments of Milan Babić. This is also reinforced by the records of the prison in the third country where Milan Babić was serving his sentence as well as by his lawyer and family members.

<sup>69</sup> Impugned Decision, p. 9.

<sup>70</sup> *Ibid.*, para. 72.

<sup>71</sup> *Ibid.*

<sup>72</sup> Interlocutory Appeal, p. 13.

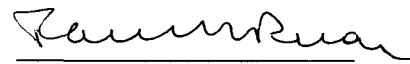
intended, but was unable, to cross-examine Milan Babić, provides the best possible alternative to a complete cross-examination in the circumstances. The Appeals Chamber agrees with the Trial Chamber that the proposed procedure will benefit the fairness of the proceedings by assisting the Trial Chamber to further assess the evidence of Milan Babić and by offering a reasonable means to “remedy or ameliorate any potential unfairness to the [Appellant]”.<sup>74</sup>

#### IV. DISPOSITION

33. On the basis of the foregoing, this Interlocutory Appeal is hereby **DISMISSED**.

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

Dated this 14th day of September 2006,  
At The Hague,  
The Netherlands.

  
Judge Fausto Pocar  
Presiding Judge

[Seal of the International Tribunal]

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<sup>73</sup> *Ibid.*

<sup>74</sup> Impugned Decision, para. 79.