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**UNITED
NATIONS**



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: 30 September 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: 30 September 2006

PROSECUTOR

v.

MILAN MARTIĆ

**DECISION ON DEFENCE MOTION FOR
RECONSIDERATION AND MODIFICATION OF THE
TRIAL CHAMBER'S ORDER OF 9 JUNE 2006**

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

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;

BEING SEISED of the “Defence Motion for Reconsideration and Modification of the Trial Chamber’s Order of 9 June 2006”, filed on 24 September 2006 (“Motion”), in which the Defence requests the Trial Chamber to review and modify its “Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, Together with Associated Exhibits, From Evidence”, of 9 June 2006 (“Decision of 9 June 2006”);

NOTING that the Defence argues that a Trial Chamber may reconsider a decision if it finds that there has been a change of circumstances, when it has realised that a previous decision was erroneous or has caused injustice;

NOTING that this is the first time that the Defence explicitly challenges the procedure set out in the Decision of 9 June 2006;

NOTING the arguments of the Defence that the Decision of 9 June 2006 “does not provide a good basis for achieving the goals set out by the Trial Chamber” as it “does not allow the Defence to demonstrate how exactly it planned to challenge the evidence-in-chief by means of cross-examination during the remaining time, i.e. through which questions”¹ and that the Defence should “therefore be allowed to set forth the questions that it was unable to pursue due to the interruption of cross-examination, and the documents that it planned to use in connection with those questions”;²

NOTING that the Defence, in its Motion, requests the Trial Chamber to modify its Decision of 9 June 2006 accordingly and *inter alia* order the Defence to submit “a list of questions that it intended to ask Witness Milan Babić, but was unable to due to the interruption of cross-examination” and “any documents it intended to use in connection with those questions” and furthermore, to order the Prosecution to submit “a list of questions and any documents 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”;³

NOTING the “Prosecution’s Response to Defence Motion for Reconsideration and Modification of the Trial Chamber’s Order of 9 June 2006” filed on 28 September 2006 (“Response”), in which the Prosecution opposes the Motion arguing *inter alia* that the proposed modifications of the Defence to the Decision of 9 June 2006 would result in the Defence being “relieved of its obligation to

¹ Motion, para. 8.

² Motion, para. 9.

³ Motion, para. 11.

identify the specific portions of Mr BABIC's evidence which it intended to challenge", that the proposed submission of a list of questions "would be of minimal or no utility to the Trial Chamber" and that the modification proposed by the Defence in its Motion would be of negligible benefit to the Trial Chamber;⁴

NOTING that the Prosecution in its Response requests that it be permitted ten days after the filing of the Defence submission in which to file its further response;

RECALLING that the disposition of the Decision of 9 June 2006 reads as follows in the relevant part:

"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";

CONSIDERING that the above procedure has come into effect as an order to the Defence as it has elected to avail itself of the option provided to it in the Decision of 9 June 2006;

NOTING that on 20 June 2006, the Trial Chamber granted the Defence Request for Certification of Appeal in relation to the Decision of 9 June 2006,⁵ and that the Appeals Chamber dismissed this Appeal in its Decision of 14 September 2006 ("Appeals Chamber Decision");⁶

NOTING that in its Decision, the Appeals Chamber found that:

⁴ Response, paras 4-8.

⁵ Decision on Defence Application for Certification of Appeal Pursuant to Rule 73(B), filed on 20 June 2006.

⁶ Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006.

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 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]”;⁷

CONSIDERING, therefore, that any alteration to this procedure would be tantamount to a review of the Appeals Chamber Decision;

NOTING that following the Appeals Chamber Decision of 14 September 2006, a deadline for compliance with the procedure set out in the Decision of 9 June 2006 was set for 21 September 2006, and that the Defence, on 18 September 2006, requested that the Trial Chamber extend this deadline by an additional 4 days, which was granted by the Trial Chamber;⁸

CONSIDERING that the effect of the Motion would be to further extend the deadline of 25 September and, therefore, that it appears to the Trial Chamber to be an abuse of the extension granted and to frustrate the proceedings;

CONSIDERING that when the Defence requested the extension on 18 September 2006, it did not indicate to the Trial Chamber that it intended to contest the procedure set out in the Decision of 9 June 2006;

CONSIDERING that the submissions, which the Defence was ordered to make, concerned “the 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”, and that the submissions to be provided ought to have been in the possession of the Defence at the time of the death of Milan Babić; and that there may be some misunderstanding on the part of the Defence in this respect;

RECALLING that the procedure set out in the Decision of 9 June 2006 concerns the right of the Defence to confront the testimony of Milan Babić through cross-examination and that the order clearly sets out the two prongs of the procedure in light of the fact that *viva voce* cross-examination is no longer possible;

FINDING that the Defence has failed to show that there has been a change of circumstances which would require the Trial Chamber to reconsider its Decision of 9 June 2006, and that the Defence has failed to show that the Decision of 9 June 2006, as upheld by the Appeals Chamber Decision, was erroneous or caused injustice;

⁷ Appeals Chamber Decision, para. 32 [emphasis added].

⁸ Hearing 18 September 2006, T. 8485-8486.

CONSIDERING that the Prosecution has not provided any reasons why it should be granted an extension of time for filing any response to the Defence submission, nor does the Trial Chamber see any reason to grant additional time;

FOR THE FOREGOING REASONS

PURSUANT TO Rules 4 and 54 of the Rules of Procedure and Evidence;

DENIES the Motion,

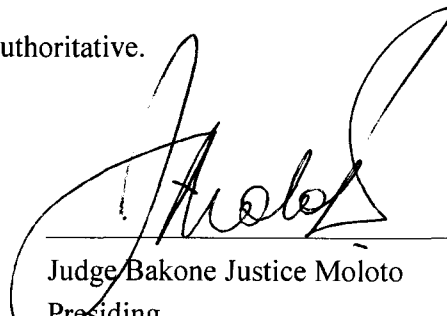
DENIES the Prosecution request for extension of time; and

ORDERS as follows:

(1) as the Defence has elected to avail itself of the procedure set out in the Decision of 9 June 2006, it shall file its submissions in compliance with that procedure no later than Wednesday 4 October 2006;

(2) that the Prosecution, if it chooses to do so, shall in accordance with the procedure set out in the Decision of 9 June 2006, file its submissions within 7 days of the Defence submission, i.e. on Wednesday 11 October 2006.

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



Judge Bakone Justice Moloto
Presiding

Dated this thirtieth day of September 2006,

In Split,

Croatia

[Seal of the Tribunal]