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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-AR108*bis*.1

AR108*bis*.2

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding

Judge Mohamed Shahabuddeen

Judge Mehmet Guney

Judge Theodor Meron

Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Date Filed: 12 December 2005

THE PROSECUTOR

v.

MILAN MILUTINOVIC

NIKOLA SAINOVIC

DRAGOLJUB OJDANIC

NEBOJSA PAVKOVIC

VLADIMIR LAZAREVIC

VLASTIMIR DJORDEVIC

SRETEN LUKIC

GENERAL OJDANIC'S CONSOLIDATED RESPONSE TO REQUESTS FOR REVIEW

The Office of the Prosecutor:

Mr. Thomas Hannis

Ms. Christina Moeller

Counsel for the United States:

Mr. Clifton Johnson

Ms. Heather A. Schlidge

Ms. Karen K. Johnson

Counsel for General Ojdanic:

Mr. Tomislav Visnjic

Mr. Peter Robinson

Counsel for NATO:

Mr. Baldwin De Vidts

Mr. Eugene O'Sullivan and Mr. Slobodan Zecevic for Milan Milutinovic

Mr. Toma Fila and Mr. Vladimir Petrovic for Nikola Sainovic

Mr. John Ackerman and Mr. Aleksander Aleksic for Nebojsa Pavkovic

Mr. Mihaljo Bakrac for Vladimir Lazarevic

Mr. Theodore Scudder for Mr. Sreten Lukic

Introduction

1. Unlike the events in Bosnia and Croatia, to which the majority of the Tribunal's jurisprudence has been applied, the war in Kosovo involved the military forces and intelligence capabilities of some of the greatest powers of the world. These forces, under the auspices of NATO, brought those capabilities to full bear upon the Federal Republic of Yugoslavia, including the Yugoslavian Army of which General Dragoljub Ojdanic was Chief of the General Staff.

2. As was reported when President Milosevic first appeared before this Tribunal:

> "Kosovo is a small place, and with the violence against its civilians, along with those of Bosnia, no doubt ranks among the most thoroughly recorded war crimes of modern times. The arsenal of modern spying, the satellites and drones that hovered in the sky above the conflict, has yielded reams of material. There are intercepts of telephone and radio conversations between commanders in the field."[1] (emphasis added)

3. As just one example, shortly after the incident at Racak in January 1999[2], the Washington Post reported that "the attack…came at the orders of senior officials of the Serb-led Belgrade government who then orchestrated a coverup following an international outcry, according to telephone intercepts by Western governments." The information, which quoted from alleged telephone conversations, was leaked to the news media by "Western sources familiar with the intercepts."[3]

4. Newsweek magazine has quoted Miroslav Tudjman, son of the late President of Croatia and former Director of the Croatian Intelligence Service, as saying that the American CIA "spent at least $10 million on Croatian listening posts to intercept telephone calls in Bosnia and Serbia."[4]

5. James Bamford, author of the book Body of Secrets, described the method of the United States in collecting and storing intercepted conversations and concluded that "the NSA undertook a major effort to conduct signals intelligence (interception of communications) against the most senior military and civilian officials of the government of the former Yugoslavia during the conflict in Kosovo. This would have certainly included the conversations of General Dragoljub Ojdanic who was in charge of the army of the former Yugoslavia."[5]

6. General Ojdanic has maintained from the beginning that he never ordered the commission of any war crimes, and had no knowledge of the plan to deport Kosovo Albanians alleged in the Indictment. He further contended that he had no knowledge of, or participation in, the events at Racak, and the other events charged in the indictment, and that his standing orders, from which he never varied, were that war crimes were to be prevented and punished. He has sought disclosure of intercepted conversations from NATO and its member States in the firm belief that disclosure of contemporaneous conversations concerning him will provide critical evidence in support of his defence at trial.

7. As steadfast and determined as General Ojdanic has been to obtain the intercepted conversations for use at trial, NATO and the United States have been equally steadfast and determined not to disclose them. This has led to three years of litigation in the Trial Chamber, which resulted in the *Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (the "Impugned Decision") on 17 November 2005.

8. The Appeals Chamber has held that "to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's functions."[6] The Appeals Chamber's review of the Trial Chamber's decision in General Ojdanic's case presents an historic opportunity to apply this principle to States outside of the former Yugoslavia and to demonstrate that there is no room for "victor's justice" at this Tribunal.

Procedural History

9. On 25 April 2002, General Dragoljub Ojdanic voluntarily appeared at the ICTY and pled not guilty to the indictment charging him with murder, deportation, and forcible transfer of Kosovo Albanians during the war in Kosovo in 1999.[7]

10. On 15 May 2002, General Ojdanic sent a letter to NATO, its member States, and neighboring countries, requesting that they voluntarily provide copies of, *inter alia*,[8] the following material:

> All recordings, summaries, notes, or text of any and all intercepted communications (electronic, oral or written) in which General Dragoljub Ojdanic was a party, during the period 1 January 1999 through 20 June 1999.
>
> All recordings, summaries, notes, or text of any and all intercepted communications (electronic, oral or written) in which General Dragoljub Ojdanic was mentioned or referred to in the communication, during the period 1 January 1999 through 20 June 1999.[9]

11. General Ojdanic advised NATO and the States that he would apply for a binding order pursuant to Rule 54 *bis* if the information was not produced voluntarily. NATO never responded to this letter. The United States requested a meeting with counsel for General Ojdanic. General Ojdanic delayed filing his motion while efforts to obtain voluntary cooperation were pursued. However, after the meeting of 19 September 2002 and an exchange of correspondence, the parties were unable to agree on voluntary production of the intercepted conversations.

12. On 13 Nov 2002, General Ojdanic filed *General Ojdanic's Application for Orders to NATO and States for Production of Information*. He requested the Trial Chamber to order, pursuant to Rule 54 *bis*, production of, *inter alia*, the following material:

> (A) All recordings, summaries, notes, or text of any intercepted communications (electronic, oral, or written) during the period 1 January through 20 June 1999, to which General Dragoljub Ojdanic was a party;
>
> (B) All recordings, summaries, notes, or text of any intercepted communications (electronic, oral, or written), during the period 1 January through 20 June, 1999, originating in the Federal Republic of Yugoslavia, and relating to Kosovo, in which Gen. Dragoljub Ojdanic was mentioned or referred to in the communication.

13. On 27 and 28 Feb 2003, the government of the United States, among others, filed objections to General Ojdanic's application.[10] NATO did not file a response. General Ojdanic

filed a reply on 7 March 2003,[11] and a further submission in response to an order of the Trial Chamber on 20 June 2003.[12]

14. An oral hearing was held on the application on 1 and 2 December 2004.

15. On 23 March 2005, the Trial Chamber issued its *Decision on Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis*. The Trial Chamber held that the requests, as framed, were too broad and did not contain an adequate showing of relevance. It ordered that the request to NATO and the States be reformulated and that the States be given the opportunity to voluntarily produce material in response to a reformulated request.

16. On 19 April 2005, General Ojdanic made a reformulated request which he served upon NATO and the States. The material requested included:

(A) Copies of all recordings, summaries, notes or text of any **intercepted communications** (electronic, oral, or written) during the period 1 January 1999 and 20 June 1999 in which General Dragoljub Ojdanic was a party and which:

(1) General Ojdanic participated in the communication from Belgrade, Federal Republic of Yugoslavia

(2) the communication was with one of the persons listed in Attachment "A"[13]

(3) may be relevant to one of the following issues in the case:

(a) General Ojdanic's knowledge or participation in the intended or actual deportation of Albanians from Kosovo or lack thereof

(b) General Ojdanic's knowledge or participation in the intended or actual killing of civilians in Kosovo or lack thereof

(c) whether the formal chain of command on matters pertaining to Kosovo was respected within the FRY or Serbian government

(d) General Ojdanic's efforts to prevent and punish war crimes in Kosovo or lack thereof

(B) Copies of all recordings, summaries, notes or text of any **intercepted communications** (electronic, oral, or written) during the period 1 January 1999 and 20 June 1999 in which General Dragoljub Ojdanic was mentioned or referred to by name in the conversation and which:

(1) took place in whole or in part in the Federal Republic of Yugoslavia

(2) at least one party to the conversation held a position in the government, armed forces, or police in the Federal Republic of Yugoslavia or the Republic of Serbia

(3) may be relevant to one of the following issues in the case:

(a) General Ojdanic's knowledge or participation (or lack thereof) in the intended or actual deportation of Albanians from Kosovo

(b) General Ojdanic's knowledge or participation (or lack thereof) in the intended or actual killing of civilians in Kosovo

(c) whether the formal chain of command on matters pertaining to Kosovo was respected within the FRY or Serbian government

(d) General Ojdanic's efforts to prevent and punish war crimes in Kosovo

17. General Ojdanic requested that NATO and the States voluntarily provide the requested information within 60 days. After another exchange of correspondence did not result in the voluntary production of the information by NATO, the United States, and other States, General Ojdanic filed *General Ojdanic's Second Application for Orders to NATO and States for Production of Information* on 27 June 2005.[14]

18. The United States and NATO filed written objections to the *Second Application*.[15] An oral hearing was held on 4 October 2005.

19. On 17 November 2005, the Trial Chamber issued its *Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis*. It granted the Application as to the intercepted conversations, and denied it as to three other items sought by General Ojdanic.

20. On 2 December 2005, requests for review of the Trial Chamber's decision were filed by NATO and the United States.[16] On 7 December 2005, General Ojdanic notified the Appeals Chamber that he did not oppose review.[17]

The Impugned Decision

21. In its *Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis*, the Trial Chamber, after accurately reciting the background facts of the

case and the legal principles involved, analyzed the application in light of these facts and principles.

22. The Trial Chamber determined that the intercepted conversations met the criteria of specificity, relevance, and necessity, and that the applicant had taken reasonable steps to assure the voluntary assistance of NATO and the States.

23. With respect to the specificity requirement, the Trial Chamber noted that the request for General Ojdanic's intercepted conversations was confined temporally to the most significant time period covered by the indictment, limited in place to conversations occurring in Belgrade, limited by the identity of the speakers (23 specified persons with whom General Ojdanic had regular contact), and limited by their content to matters relevant to important issues in the case (General Ojdanic's knowledge or participation in the charged crimes, his place in the chain of command, and his efforts to prevent and punish the crimes).[18] With respect to conversations in which General Ojdanic was not a party, the Trial Chamber found that it was likewise limited temporally and by content to four very important issues in the case.[19]

24, The Trial Chamber further noted that none of the States had claimed that compliance with the request was unduly onerous and that each of the States had been able to search their records within the parameters of the description of the material sought.[20] Thus, the Trial Chamber found, in light of these facts, that General Ojdanic had identified as far as possible the specific documents sought.[21]

25. With respect to the relevance requirement, the Trial Chamber found that insofar as General Ojdanic had limited his request to intercepted conversations related to four important issues in the case, the material to be produced was relevant to matters in issue before the Trial Chamber.[22] The Trial Chamber also noted that "it is for the Trial Chamber alone to determine, within its discretion, whether the documents sought are relevant: the State from whom the documents are requested does not have the locus standing to challenge their relevance."[23]

26. The Trial Chamber also found that the documents were necessary for a fair determination of the matter because General Ojdanic should have access to documents bearing on important issues in his case, such as whether he had knowledge or participation in the charged

crimes, his place in the chain of command, and his efforts to prevent and punish the crimes.[24] It rejected the United States' argument that only those documents which it deemed "exculpatory" were necessary to a fair determination of the matter. The Trial Chamber held that "A State cannot arrogate to itself the right to limit the request of an applicant to material that it considers to be favourable to the Applicant's case."[25]

27. The Trial Chamber then addressed the issue of whether General Ojdanic had taken reasonable steps to obtain the documents from the States. The Trial Chamber noted that the States had conditioned their production of documents upon General Ojdanic's agreement that they be produced under the provisions of Rule 70, which prohibit use of the material at trial absent the consent of the provider. The Trial Chamber held that an applicant was not required to agree to such a condition.[26]

28. Finally, the Trial Chamber noted its willingness to apply the protections of Rule 54 *bis* to safeguard the legitimate national security interests of the States. It invited the States to request protective measures or seek other appropriate relief that would protect the confidentially of the information it produced.[27] The Trial Chamber also rejected NATO's argument that it should not be required to produce material which it did not originate, but indicated it would consider protective measures for NATO or any other third-party holder of sensitive material received from another State.[28]

29. Instead, NATO and the United States filed the instant Requests for Review.

Argument

I. National Security Interests Provide No Justification For Resisting a Binding Order from the Tribunal

30. The United States has raised objections to every facet of General Ojdanic's application. It claims that the application lacks specificity, seeks records which are irrelevant to the trial and unnecessary to a fair determination of the case, is the product of insufficient efforts to obtain the material voluntarily, and extends to material which the United States did not originate. However, since the United States, on national security grounds, has repeatedly refused to confirm or deny that it

intercepts conversations, it is clear that it would have declined to produce them no matter how specific, relevant, and necessary the request.[29]

31. In the *Blaskic* decision, the Appeals Chamber rejected an argument by the government of Croatia that it could not be compelled to produce to the Tribunal material which would impact upon its national security. The Appeals Chamber held that:

> "The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved (in this case military
>
> documents may be needed to establish or disprove the chain of command, the degree of control over the troops exercised by a military commander, the extent to which he was cognisant of the actions undertaken by his subordinates, etc.). To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'ê tre* of the International Tribunal would then be undermined.[30]

32. The Appeals Chamber went on to enumerate protections that could be afforded to a State producing sensitive materials implicating its national security interests. Among the protections were submission of the documents to a single Judge, translations provided by the State rather than the Tribunal, judicial review of the documents in an *in camera, ex parte* unrecorded proceeding, return of documents whose production to the parties were found to be outweighed by national security concerns, and redaction of some documents by the State if necessary.[31]

33. These protections were later incorporated into Rule 54 *bis* (F), (G), and (I). The Trial Chamber in General Ojdanic's case invited NATO and the United States to utilize these protective measures or seek other appropriate relief that would protect the confidentially of the information it produced.[32]

34. Therefore it is clear that protection of the national security interests of a State are built into the Tribunal's rules and into the Trial Chamber's decision. Efforts to resist the binding order on grounds of national security must be rejected in this case.

II. An Applicant under Rule 54 *bis* Cannot be Compelled To Accept Material Under the Conditions of Rule 70

35. Information provided pursuant to Rule 70 cannot be used at trial without the consent of the provider of the information. The United States contends that the Trial Chamber erred in refusing to compel General Ojdanic to agree to receive the information subject to the conditions of Rule 70.[33]

36. The Trial Chamber held that:

> "The Applicant argued that he should not be required to accept information that the States are empowered to prevent from being disclosed at trial, and the Trial Chamber agrees. Where the material is relevant to and necessary for a fair determination of the issues at trial, an applicant is entitled to seek an order pursuant to Rule 54 *bis* rather than be dependent on the willingness of a State to agree to the use at trial of material over which it has the final say pursuant to Rule 70."[34]

37. General Ojdanic has always made it clear that he was seeking the intercepted conversations so he could use them as evidence at his trial.[35] Therefore he could never agree that the decision as to whether he could use that evidence be made by the parties who had attacked his country, with whom he was at war, and who had encouraged his arrest and prosecution. That decision, from his perspective, must be in the capable hands of the Trial Chamber.

38. The argument of the United States that an applicant must agree to use Rule 70 before obtaining a binding order pursuant to Rule 54 *bis* finds no support in a textual analysis of Article 29 and both rules.

39. Article 29 contains no exception providing that a State must consent before the evidence it produces can be used at the Tribunal. Rule 54 *bis* (A)(iii) simply requires the

applicant to "explain the steps that have been taken by the applicant to secure the State's assistance." General Ojdanic accepts that this implies that the applicant must take steps to secure the State's assistance before making an application to the Trial Chamber. However, there is no requirement in Rule 54 *bis* that those steps include agreeing that the State can control the use of the information at trial pursuant to the provisions of Rule 70.

40. The same analysis was used in the *Blaskic* decision when the Appeals Chamber rejected Croatia's argument that there was a "national security" exemption in Article 29. The Appeals Chamber held that:

> "[a] plain reading of Article 29 of the Statute makes it clear that it does not envisage any exception to the obligation of States to comply with requests and orders of a Trial Chamber. Whenever the Statute intends to place a limitation on the International Tribunal's powers, it does so explicitly, as demonstrated by Article 21, paragraph 4 (g), which bars the International Tribunal from "compelling" an accused "to testify against himself or to confess guilt". It follows that it would be unwarranted to read into Article 29 limitations or restrictions on the powers of the International Tribunal not expressly envisaged either in Article 29 or in other provisions of the Statute.[36]

41. Likewise had the Security Council intended to provide its Member States with the right to control the use of documents provided to the Tribunal pursuant to Article 29 it would have said so in the Statute. Had the judges of the Tribunal wanted to impose such a requirement, it would have done so in the Rules. As in *Blaskic*, this indicates that no such requirement can be read into the Statute or the Rules.

42. In addition, a plain reading of the text of Rule 70(B) indicates that it was designed for situations where a party seeks the material "solely for the purpose of generating new evidence." Nothing in the text of Rule 70 indicates that the rule was designed for situations, as in General Ojdanic's case, where the material is sought for the purpose of use at trial.

43. The United States' argument, if adopted by the Tribunal, would have the potential to eviscerate the Tribunal's ability to prosecute leaders of countries in the former Yugoslavia. If the Prosecutor was required to resort to Rule 70 before obtaining records from the government of Serbia and Montenegro, for example, that government could then effectively block all of that material from being used to prosecute President Milosevic or any other officials. Surely the Security Council did not intend States to have that kind of power over proceedings at the Tribunal.

44. The United States argues that unless an applicant can be compelled to use Rule 70, he can simply make a demand for the material under Rule 54 *bis* and proceed to a compulsory process if the State fails to meet the demand unconditionally.[37] This is not so, since Rule 54 *bis* implies that the steps taken to obtain the information voluntarily be reasonable. The Trial Chamber did not abuse its discretion in determining that General Ojdanic was reasonable in not being willing to agree that the United States decide whether he can use the evidence at trial.

45. The United States contends that unless an applicant can be compelled to accept material pursuant to Rule 70, it will eviscerate that rule.[38] This is not so, since Rule 54 *bis* requires a showing of relevance and necessity, whereas Rule 70 is designed to allow a party to obtain, without any showing, a much wider body of material "for the purpose of generating new evidence". The strict requirements of Rule 54 *bis* operate to limit its reach to a far narrower class of material than that available under Rule 70.

46. The United States contends that by refusing to compel a party to agree to receive the material pursuant to Rule 70, it makes the protection of the sensitive information dependant on the whim of the party.[39] This is not so, since Rule 54 *bis* (F), (G), and (I) provide the same protection from disclosure and dissemination as Rule 70. The only difference is that it is the Trial Chamber, rather than the provider, who decides on the extent and modalities of that protection.

47. There is no requirement that compels a party to accept the conditions of Rule 70 prior to obtaining a binding order pursuant to Rule 54 *bis*. The Trial Court did not abuse its discretion in so holding.

III. The Request was Sufficiently Specific

48. The United States contends that the Trial Chamber abused its discretion in finding that General Ojdanic's requests for intercepted conversations satisfied Rule 54 *bis'* requirement that he "identify as far as possible the documents or information to which the application relates."[40]

49. The Appeals Chamber, in is decision in *Kordic,* held that "the underlying purpose of the requirement of specificity is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requesting party."[41]

50. In General Ojdanic's case, the request was transmitted to NATO and 25 States. NATO and 22 States were successfully able to search their records and determine that they had no records responsive to the request. The remaining three States, Canada, Croatia, and the United States were able to search their records and identify the requested documents.[42] As the Trial Chamber noted, none of the States claimed that the request was unduly onerous.[43]

51. The request for intercepted conversations in which General Ojdanic was a party was limited in time to the period covered by the Indictment, limited in place to Belgrade, limited to conversations with 23 named participants, and limited in content to matters relevant to the core issues in the case—whether General Ojdanic had knowledge of or participation the intended or actual deportation of Albanians from Kosovo or the killing of civilians in Kosovo, whether the formal chain of command on matters pertaining to Kosovo was respected within the FRY or Serbian government, and General Ojdanic's efforts to prevent and punish war crimes in Kosovo.

52. The request for intercepted conversations in which General Ojdanic was not a party was limited to the time period covered by the Indictment, limited in place to the Federal Republic of Yugoslavia, limited by participants to those who held a position in the government, armed forces, or police in the Federal Republic of Yugoslavia or the Republic of Serbia, and limited in content to the same core issues in the case.

53. The Trial Chamber found that General Ojdanic had identified as far as possible the documents sought, that he could not be more precise, and that he had restricted his request to one that was reasonable under the circumstances.[44] NATO and the United States have not shown that the Trial Chamber abused its discretion in so holding.

54. The United States complains that General Ojdanic had not specified the time, place, date, or content, topic, incident or action of any of the conversations. Since the United States was able to identify the conversations responsive to the request, General Ojdanic fails to see the substance behind this complaint. The Appeals Chamber has held that a request may be made for a "category" of documents so long as the category is "defined with sufficient clarity to enable ready identification" of the documents falling within that category.[45] The ability of all 26 recipients of the request to readily determine if they had material responsive to the request demonstrates that the specificity requirement was met in this case.

55. The Appeals Chamber has held that:

> "Where the party requesting the order for the production of documents is unable to specify the title, date and author of documents, or other particulars, this party should be allowed to omit such details provided it explains the reasons therefore, and should still be required to identify the specific documents in question in some appropriate manner. The Trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial referred to in Rule 89 (B) and (D), to allow the omission of those details if it is satisfied that the party requesting the order, acting bona fide, has no means of providing those particulars."[46]

56. General Ojdanic satisfied the Trial Chamber that, as Chief of Staff of the Yugoslavian Army, his conversations concerning Kosovo during the relevant period took place on a daily, continuous basis while his country was being bombed by NATO.[47] Therefore, it was reasonable for the Trial Chamber to allow the omission of those details since he had no means of providing them and had narrowed his request to conversations with those with who he was in regular contact.

57. Although General Ojdanic's request does not involve "hundreds of documents", the Appeals Chamber has recognized that the specificity criterion does not automatically exclude all requests that involve the production of hundreds of documents. The Appeals Chamber has found that the specificity requirement involves "the striking of a balance between the need, on the one hand, for the Tribunal to have the assistance of States in the collection of evidence for the purpose of prosecuting persons responsible for serious violations of international humanitarian law and the need, on the other hand, to ensure that the obligation upon States to assist the Tribunal in the evidence collecting process is not unfairly burdensome."[48]

58. General Ojdanic's request for two categories of documents compares favorably to the 40 categories involving hundreds of documents approved by the Appeals Chamber in *Kordic*, as well as the dozens of categories of documents spanning, in some cases as much as seven years, approved by the Trial Chamber in the *Milosevic* case.[49] The Trial Chamber was well within its discretion in finding that the request satisfied the specificity requirement.

IV. The Material Sought Was Relevant and Necessary

59. The United States contends that the Trial Chamber abused its discretion in determining that the material sought by General Ojdanic's request was relevant to a matter in issue before the Trial Chamber and necessary for a fair determination of that matter.

60. General Ojdanic contends, as a threshold matter, that the United States has no standing to challenge the Trial Chamber's determination of these matters. The Appeals Chamber specifically held in the *Kordic* decision that "the State from whom the documents are requested does not have *locus standi* to challenge their relevance."[50] General Ojdanic contends that this rule is also applicable to the companion requirement in Rule 54 *bis* (A)(ii) of necessity. Both require an evaluation of the relationship between the material sought and the contentious issues in the case. A State from whom material is sought is in no position to challenge the Trial Chamber's assessment of these matters. This is particularly true in General Ojdanic's case, where this Trial Chamber has had the benefit of hearing the evidence of the same events in the *Milosevic* trial and is particularly well suited to understand and determine the relationship of the requested material to the issues in the case.

61. Therefore, General Ojdanic requests that the grounds of review pertaining to relevance and necessity be dismissed by the Appeals Chamber for lack of standing.

62. Should the Appeals Chamber choose to consider the merits of the arguments put forth by the United States on these issues, it will find that the Trial Chamber did not abuse its discretion in finding that the requirements of relevance and necessity had been met.

63. The United States claims that the request is framed "in broad terms corresponding to the four main counts in the indictment."[51] This is incorrect. The request does not seek all materials related to the counts of the indictment. It seeks a narrow class of evidence—intercepted conversations—involving a limited number of people in a specified place over a limited time period. The content of those conversations, which further limits the request, relates to the core contentious issues in the case and do not simply correspond to the counts in the indictment. While the charges of murder, deportation, and forcible transfer as crimes against humanity have a myriad of elements, the request is limited to intercepted conversations which bear on General Ojdanic's personal knowledge or participation in the crimes, his role in the *de facto* chain of command, and his personal efforts to prevent and punish war crimes.

64. It cannot be contested that those issues are "plainly four important issues in the case"[52] and the Trial Chamber was well within its discretion in finding that the request met the requirement of relevance.

65. Likewise, the Trial Chamber was well within its discretion in concluding that "in view of the significance of these issues, it is, of the face of it, necessary for a fair determination of the case that any material bearing on them should be available to the Applicant."[53]

66. The United States contends that General Ojdanic failed to articulate concretely the information he was seeking, or offer any showing that it existed and therefore did not meet the requirement of demonstrating that the material requested was necessary to a fair determination of his case.[54] This is incorrect. General Ojdanic's Application stated that:

> "General Ojdanic maintains that he never ordered the commission of any war crimes, and had no knowledge of the plan to deport Kosovo Albanians alleged in

> the Third Amended Indictment. He further contends that he had no knowledge of, or participation in, for example, the events at Racak charged in the indictment, and that his standing orders, from which he never varied, were that war crimes were to be prevented and punished. He believes that disclosure of his contemporaneous conversations will provide critical evidence in support of his defence at trial."[55]

67. General Ojdanic's basis for believing that the information sought existed came from media reports in which officials of NATO governments leaked the contents of intercepted conversations and other reports of the widespread use of intercepted conversations by NATO and its member States during the Kosovo conflict.[56] This was confirmed by an expert witness he retained, James Bamford, and who submitted a declaration to the Trial Chamber.[57]

68. It was also confirmed by the United States and Canada, which represented that they were in possession of material responsive to General Ojdanic's request[58], and the government of Croatia, which produced intercepted conversations pursuant to the request.[59] Therefore, the Trial Chamber had ample reason to conclude that material responsive to the request was in existence and was necessary to a fair determination of General Ojdanic's case.

69. The United States also contends, without citation to any authority, that an applicant must demonstrate that he has exhausted all other available sources for the information.[60] No such requirement appears in Article 29, Rule 54 *bis*, or the jurisprudence of this Tribunal.

70. General Ojdanic knows of no other available source for recordings of his conversations. All General Ojdanic has is his own recollection, and that of his superiors and subordinates, as to what was said during conversations in 1999. The lack of precise recollection of the conversations of some 6-7 years ago is enough to demonstrate the necessity of a verbatim, contemporaneous recording of those same conversations. Moreover, the prosecution will not blithely accept the recollection of General Ojdanic and his associates as to what was said. It will mount an attack on their credibility. The existence of a verbatim, contemporaneous recording, made by and in the custody of the party opposing General Ojdanic in the war, will eliminate the

issue of credibility over what was said and provide the Trial Chamber with reliable evidence from which it can accurately determine the facts in the case.

71. The necessity for the evidence sought by the request is further bolstered when one considers that General Ojdanic is not obligated to testify in his defence and is entitled to obtain and utilize other sources of relevant information to meet the prosecution's case. Therefore the argument of the United States that General Ojdanic should rely on his own testimony and that of his associates cannot serve to defeat the Trial Chamber's finding that the material requested was necessary to a fair determination of the case.

72. The United States also contends that since it has unilaterally declared that none of the material in its possession is "exculpatory", there is no necessity for it to be produced. The Trial Chamber rejected this argument, holding that "A State cannot arrogate to itself the right to limit the request of an applicant to material that it considers to be favourable to the applicant's case."[61]

73. The United States has cited no authority for the proposition that a party to which a request or subpoena is directed is entitled to only produce those materials which it believes will help the cause of the requesting party. Such a rule would indeed be contrary to common sense since it is the party, and not the third-party provider, who is in a position to know what is useful for his case.

74. The intercepted conversations produced by Croatia provide a prime example. Among the material produced is a conversation between General Ojdanic and President Milosevic in which they discuss the capture of seven soldiers by the KLA. A review of this transcript by a person uninitiated to the case might well conclude that it is not "exculpatory". Yet the conversation demonstrates that General Ojdanic's relationship with President Milosevic was a professional one, that he had genuine concern for the well being of the soldiers and their families, that they attempted to find a peaceful, non-violent solution to the problem, and that no mention or allusion to deporting ethnic Albanians, or committing murders was made.[62]

75. The test for necessity proposed by the United States would likewise hamstring the prosecution in its work at the Tribunal. If the United States is able to successfully avoid

producing specific relevant information on its say-so that the material will not help the defence, than States like Serbia and Montenegro and Croatia can likewise decline to produce information requested by the prosecution on its say-so that the information will not help the prosecution case. No legal system in the world allows such a loophole to the obligation of third parties possessing relevant information.

76. Therefore, the United States has failed to demonstrate that the Trial Chamber abused its discretion in holding that the relevance and necessity requirements of Rule 54 *bis* had been satisfied. Likewise, NATO, which never represented in the Trial Chamber that it was not in possession of any of the requested material, cannot now complain that the Trial Chamber's order was not necessary on that ground.

V. The Applicant Took Reasonable Steps to Obtain the States' Assistance

77. The United States contends that the Trial Chamber abused its discretion in holding that the steps taken by General Ojdanic to secure the assistance of States in order to obtain the documents were reasonable under the circumstances.[63] The United States consistently conditioned voluntary production on the material on its having control over how the material was used at trial pursuant to Rule 70. Since this was unacceptable to General Ojdanic, there was never an opportunity to obtain voluntary compliance with the request.

78. An examination of the efforts undertaken by General Ojdanic demonstrates that he made a reasonable, good faith effort to secure the assistance of the States:

(A) Before filing the Request, he corresponded with NATO and the States and requested voluntary production of the material

(B) His counsel delayed filing the Application while they met with representatives of the United States to discuss voluntary production of the records

(C) He filed the application when those discussions failed to result in the voluntary production of any of the requested records by the United States.

(D) He requested that the States be given an opportunity to be heard by the Trial Chamber rather than pursuing an ex parte binding order

(E) Whenever a State indicated that it had no material responsive to the request, General Ojdanic promptly withdrew his application as to that State

(F) Prior to filing his *Second Application*, General Ojdanic requested voluntary production of the information and gave the States 60 days in which to do so

(G) He only filed the *Second Application* when it remained clear that the United States continued to insist it would only produce material pursuant to Rule 70.

(H) He continued to negotiate and exchange correspondence with the United States up until the date of the oral hearing.

79. Since, as demonstrated in section II, above, General Ojdanic was not required to accept the material under Rule 70, there is nothing more he could have done to obtain the voluntary production of the material. The Trial Chamber did not abuse its discretion in holding that his efforts to secure the assistance of the States were reasonable.[64]

VI. There is no "Originator" Exception to Article 29

80. The United States and NATO contend that the Trial Chamber erred in requiring it to produce material in its possession responsive to General Ojdanic's request regardless of whether it was the originator of that material. In response to NATO's claim that it had no intelligence gathering capabilities of its own, the Trial Chamber held that "questions of ownership and whether the material was initially obtained by another are irrelevant."[65]

81. The United States has never alleged that it is in possession of material responsive to the request which originated from another State. If this is truly the case, General Ojdanic has no objection to the originating State being given an opportunity to make submissions in this matter to the Appeals Chamber or to make submissions to the Trial Chamber as to the extent of protective measures that should be afforded.

82. Article 29 requires States to comply with States shall comply with any request for, *inter* alia, "the production of evidence". It says nothing about the production of evidence which it originated.

83. Rule 54 *bis* applies to an order under "that a State produce documents or information. It says nothing about documents and information which it originated.

84. Thus, unlike the regime agreed to by the States ratifying the treaty establishing the International Criminal Court[66], the United Nations Security Council put in place a compulsory regime requiring States to produce evidence to the Tribunal. There is no basis for reading into the Statute or the Rule a requirement that the State be the originator of the information.

85. As pointed out by the Trial Chamber, the Appeals Chamber in *Blaskic* has designated "possession" rather than ownership or origination as the basis of an obligation of a State to produce material to the Tribunal.[67] A Trial Chamber of this Tribunal has likewise required production of documents in the "custody or control" of States and an International Organization[68]

86. Were Article 29 and Rule 54 *bis* applied so as to only require production of material originating with the party who was the subject of the order, it would wreak havoc with the Tribunal's ability to carry out its mandate. The prosecutor or defence counsel would have to bounce from State to State, filing requests for binding orders until it discovered which State was the originator of the information.

87. The "originator" rule does not even apply in the national courts of the United States. A party receiving a subpoena from the United States government or a court order must produce all material in his possession regardless of ownership.[69]

88. The United States and NATO argue that they has entered into agreements which require the consent of the originator of information before it can be disclosed. The particular agreement concerning NATO was entered into after the enactment of the Statute of the Tribunal.[70] Agreements entered into among States cannot have the effect of abrogating or modifying their obligations under Article 29. All of the NATO countries were aware of the provisions of Article 29 when they chose to share intelligence information. In fact, many of them participated in drafting the Statute. They thus accepted the risk that the material could be sought by binding order from a country with which information was shared.

89. In addition, on 10 June 1999, the United States voted in favor of Security Council Resolution 1244 pertaining to Kosovo in which the Security Council "DEMANDS full cooperation by all concerned, including the international security presence, with the International

Criminal Tribunal for the former Yugoslavia."[71] That cooperation includes producing documents pursuant to Article 29.

90. The United States and NATO have failed to show that the Trial Chamber erred when it held that possession, rather than ownership or origination, was the condition which required compliance by a State or International Organization with the provisions of Article 29 and Rule 54 *bis*. If NATO is not in possession of material ordered to be produced by the Trial Chamber, it has no obligation to comply with the Impugned Decision.

Conclusion

91. The Appeals Chamber in *Blaskic* made the obligations of countries like the United States very clear when it said:

> "It should again be emphasised that the plain wording of Article 29 makes it clear that the obligation it creates is incumbent upon all Member States, irrespective of whether or not they are States of the former Yugoslavia…. It is evident that States other than those involved in the armed conflict may have in their possession evidence relevant to crimes committed in the former Yugoslavia, or they may have instituted proceedings against persons accused of crimes in the former Yugoslavia. Similarly, suspects, indictees or witnesses may live on their territory or evidentiary material may be located there. The cooperation of these States with the International Tribunal is therefore no less imperative than that of the States or Entities of the former Yugoslavia.[72]

92. The United States represents to this Tribunal that it cannot disclose to General Ojdanic, even under strict conditions, conversations it intercepted that may mean the difference between freedom and imprisonment. It refuses to even confirm or deny that it intercepted conversations during the Kosovo war seven years ago. Yet when it sought to demonstrate that Iraq had weapons of mass destruction, in a speech to the United Nations broadcast around the world, United States Secretary of State Colin Powell played recordings of conversations intercepted from the Iraqi Army just one week earlier.[73]

93. This Tribunal cannot afford to operate under a double standard between countries of the former Yugoslavia and NATO countries, or between disclosure of intercepted conversations in a political forum and refusal of disclosure in a judicial forum. It must apply the law equally to all parties--the victorious and the vanquished, the powerful and the weak, the individual and the State. That is the essence of international criminal justice.

94. The requests for review should be denied.

Respectfully submitted,

TOMISLAV VISNJIC

PETER ROBINSON

Counsel for General Ojdanic

Word Count: 7773

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[1] Marlise Simons, New York Times News Service, "Getting Proof in Milosevic Case Will be a Challenge,", International Herald Tribune, 1 July 2001, as cited in *General Ojdanic's Application for Orders to NATO and States for Production of Information* (13 November 2002) at para. 4

[2] charged in paragraph 76(a) of the Indictment

[3] R. Jeffrey Smith, "Taps Reveal Coverup of Kosovo Massacre," Washington Post, 28 January 1999, as cited in *General Ojdanic's Application for Orders to NATO and States for Production of Information* (13 November 2002) at para. 5

[4] Roy Gutman, "What Did the CIA Know?", Newsweek, 27 August 2001, as cited in *General Ojdanic's Application for Orders to NATO and States for Production of Information* (13 November 2002) at para. 6

[5] Declaration of James Bamford at para. 3, *Declaration of Expert Witness in Support of General Ojdanic's Application for Orders to NATO and States for Production of Information* (12 November 2004)

[6] *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement on Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997)at para. 64 (hereinafter "Blaskic decision")

[7] At that time, he was charged in case no. IT-99-37. The case number was subsequently changed to IT-05-87 when his case was joined with that of other accused.

[8] A third category of material was also requested—a request which was ultimately rejected by the Trial Chamber. General Ojdanic has not sought leave to appeal from that decision and therefore has not included this aspect of the request in the procedural history.

[9] A copy of all of the correspondence between General Ojdanic's defence team and the United States was submitted to the Trial Chamber and is attached as Annex 1 to this Response for the convenience of the Appeals Chamber.

[10]*Written Response and Notice of Objection of the Government of Canada to the Application of General Ojdanic for Orders to NATO and States for Production of Information* (27 February 2003); *Response of the United States of America to the Application of General Ojdanic for Order for Production of Information* (28 February 2003)

[11] *Reply Memorandum: General Ojdanic's Application for Orders to NATO and States for Production of Information*

[12] *General Ojdanic's Further Submission in Support of Application for Orders to NATO and States for Production of Information*

[13] a list of 23 individuals

[14] General Ojdanic consistently withdrew his application when States informed him that they had no records responsive to his request. The reformulated request was so narrow that only Canada, the United Kingdom, and the United States as well as NATO

and States which had never responded (Iceland, Luxembourg, and Poland) remained parties to the application.

[15] *Written Response and Notice of Objection of the Government of Canada to General Ojdanic's Second Application for Orders to NATO and States for Production of Information* (27 September 2005); *Submission of the United States of America in Advance of the Hearing on General Ojdanic's Second Application for Orders to NATO and States for Production of Information* (27 September 2005); Letter from NATO (3 October 2005)

[16] *NATO Request for Review of Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis; Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis.*

[17] *General Ojdanic's Submission on Admissibility of Requests for Review* (6 December 2005)

[18] Impugned Decision at paras. 20-21

[19] Impugned Decision at para. 25

[20] Impugned Decision at para. 21

[21] Impugned Decision at para. 20

[22] Impugned Decision at para. 21

[23] Impugned Decision at para. 19

[24] Impugned Decision at para. 21

[25] Impugned Decision at para. 23

[26] Impugned Decision at para. 21

[27] Impugned Decision at para. 34. The Trial Chamber also denied documents requested by General Ojdanic pertaining to a third category of materials. (paras. 27-30) General Ojdanic did not seek leave to appeal that part of the decision.

[28] Impugned Decision at para. 38

[29] *Response of United States of America to the Application of General Ojdanic for Order for Production of Information* (28 February 2003) at pg 1, second para; page 9, first para; *Submission of the United States of America in Advance of the Hearing on General Ojdanic's Second Application for Orders to NATO and States for Production*

of Information (27 September 2005) at pg 2, third para; pg. 9, third para.; *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at pg. 20, second para.; *Request of the United States of America for an Extension of the Stay of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis Pending Appeal of the Decision* (8 December 2005) at para. 3

[30] *Blaskic* at para. 64

[31] *Blaskic* at para. 68

[32] Impugned Decision at para. 34

[33] *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at pps. 12-16

[34] Impugned Decision at para. 21

[35] *Reply Memorandum: General Ojdanic's Application for Orders to NATO and States for Production of Information* (7 March 2003) at para. 7; *General Ojdanic's Further Submission in Support of Application for Orders to NATO and States for Production of Information* (20 June 2003) at para. 9; Transcript of hearing on 2 December 2004 at page 845, 847; Letter to USA dated 21 June 2005 (contained in Annex "A"); *General Ojdanic's Second Application for Orders to NATO and States for Production of Information* (27 June 2005) at paras. 29,31.

[36] Blaskic at para. 63

[37] *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at page 13

[38] *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at page 14

[39] *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at page 15

[40] Rule 54 *bis* (A)(i)

[41] *Prosecutor v Kordic & Cerkez*, No. IT 95-14/1-A, *Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 38 (hereinafter the "*Kordic* decision")

[42] Canada produced material to the Applicant on 8 December 2005 in conformity with the Trial Chamber's Decision. The material consisted of three documents.

[43] Impugned Decision at para. 21

[44] Impugned Decision at para. 20

[45] *Kordic* decision at para. 39

[46] *Blaskic* decision at para. 32

[47] *General Ojdanic' Second Application for Orders to NATO and States for Production of Information* (27 June 2005) at para. 15

[48] *Kordic* decision at para. 41

[49] *Prosecutor v Milosevic*, No. IT-02-54-T, *Fifth Decision on Applications Pursuant to Rule 54 bis of Prosecution and Serbia and Montenegro* (15 Sept 2003); *Thirteenth Decision on Applications Pursuant to Rule 54 bis of Prosecution and Serbia and Montenegro* (17 December 2003) at ruling 12A

[50] *Kordic* decision at para. 40

[51] *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at page 7, last para.

[52] Impugned Decision at para. 21

[53] Impugned Decision at para. 21

[54] *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at page 8

[55] *General Ojdanic's Application for Orders to NATO and States for Production of Information* (13 November 2002) at para. 9

[56] See paragraphs 2-5 above.

[57] *Declaration of Expert Witness in Support of General Ojdanic's Application for Orders to NATO and States for Production of Information* (12 November 2004)

[58] *Submission of the United States of America in Advance of the Hearing on General Ojdanic's Second Application for Orders to NATO and States for Production of Information* (27 September 2005) at Annex 1, page 3; *Written Response and Notice of*

Objection of the Government of Canada to General Ojdanic's Second Application for Orders to NATO and States for Production of Information (27 September 2005) at para. 9

[59] *General Ojdanic's Further Submission in Support of Application for Orders to NATO and States for Production of Information* (20 June 2003) at Annex 1

[60] *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at page 9

[61] Impugned Decision at para. 23

[62] A transcript of this conversation was supplied to the Trial Chamber as Annex 1 to *General Ojdanic's Further Submission in Support of Application for Orders to NATO and States for Production of Information* (20 June 2003) and is copied in Annex 2 to this Response for the convenience of the Appeals Chamber.

[63] *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (2 December 2005) at page 11

[64] Impugned Decision at para. 22

[65] Impugned Decision at para. 38

[66] See Article 73

[67] Impugned Decision at para. 38 citing the *Blaskic* decision at para. 27

[68] *Prosecutor v Simic et al*, No. IT-95-9-PT, *Decision on Motion for Judicial Assistance to be Provided by SFOR and Others* (18 October 2000) at para. 61

[69] Federal Rules of Civil Procedure, Rule 45

[70] *Agreement between the Parties to the North Atlantic Treaty for the Security of Information* (6 March 1997)

[71] para. 14

[72] *Blaskic* decision at para. 29

[73] Transcript of hearing of 1 December 2004 at pp 736-37