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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-05-87-PT

Date: 17 November 2005

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: **Mr. Hans Holthuis**

Decision: **17 November 2005**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
VLASTIMIR ĐORĐEVIĆ
SRETEN LUKIĆ

DECISION ON SECOND APPLICATION OF DRAGOLJUB OJDANIĆ FOR BINDING ORDERS PURSUANT TO RULE 54*BIS*

The Office of the Prosecutor:
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Mr. Chester Stamp
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Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Milan Milutinović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Dragoljub Ojdanić
Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainović
Mr. John Ackerman and Mr. Aleksander Alekšić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrać for Mr. Vladimir Lazarević
Mr. Theodore Scudder for Mr. Sreten Lukić

Counsel for Parties Against Which Binding Orders are Sought
No appearance for the North Atlantic Treaty Organisation (NATO)
Ms. Colleen Swords, Ms. Janet Henchey, Mr. John Currie and Mr. Masud Husain for Canada
No appearance for Iceland

No appearance for Luxembourg
Mr. Dominic Raab for the United Kingdom
Mr. Clifton Johnson, Ms. Heather Schildge and Mr. Omar Nazif for the United States of America

Application

1. This Trial Chamber is seized of "General Ojdanić's Second Application for Orders to NATO and States for Production of Information" ("Second Application"), filed by Dragoljub Ojdanić ("Applicant") on 27 June 2005. The Second Application initially sought binding orders for the production of documents from NATO and eleven States (Belgium, Canada, Czech Republic, France, Germany, Hungary, Iceland, Luxembourg, Poland, the United Kingdom and the United States of America) pursuant to Article 29 of the Statute of the International Tribunal ("Statute") and Rules 54 and 54 *bis* of the Rules of Procedure and Evidence ("Rules"). The Applicant requests:

(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 Ojdanić was a party and which:

(1) General Ojdanić participated in the communication from Belgrade, Federal Republic of Yugoslavia;
(2) the communication was with one of the persons listed in Attachment 'A' [a list of 23 people attached to the Second Application];
(3) may be relevant to one of the following issues in the case:
  (a) General Ojdanić's knowledge or participation in the intended or actual deportation of Albanians from Kosovo or lack thereof;
  (b) General Ojdanić'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 Ojdanić'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 Ojdanić 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 Ojdanić's knowledge or participation (or lack thereof) in the intended or actual deportation of Albanians from Kosov;
  (b) General Ojdanić'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 Ojdanić's efforts to prevent and punish war crimes in Kosovo.

(C) Copies of the following **documents**:

(1) Any reports, evaluations, or comments concerning the speech given by General Ojdanić to the military attaches of foreign governments in Belgrade during July-August 1998.

(2) Any reports, evaluations, or comments of NATO General Wesley Clark concerning his contacts with General Ojdanić from November 1998 to December 1999, his assessment of General Ojdanić's attitude, position, and competence, or his evaluation of whether the formal chain of command on matters pertaining to Kosovo was respected within the FRY or Serbian government.

(3) Any information received from or provided by General Momčilo Perišić pertaining to General Ojdanić from November 28, 1998 to the present.[1]

Background

2. This application is the culmination of a lengthy procedure. Following the filing of "General Ojdanić's Application for Orders to NATO and States for Production of Information," dated 13 November 2002 ("First Application"), the subsequent responses from some of the States, an indefinite stay of the proceedings,[2] further submissions from the Applicant[3] and an oral hearing that took place on 1 and 2 December 2004, the Trial Chamber issued a Decision on 23 March 2005.[4] That decision ordered the Applicant to reformulate his request for documents with respect to certain States and to give those States a further opportunity to respond voluntarily.

3. On 19 April 2005, the Trial Chamber received notification of the Applicant's reformulated request,[5] which was sent to the twelve remaining States[6] and NATO.

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[1] General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 June 2005, para. 2 (emphasis in original).

[2] The stay, ordered on 14 November 2003, was "until further notice." *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, Order Staying Rule 54 *bis* Proceedings, 14 November 2003, p. 2.

[3] *See* Reply Memorandum: General Ojdanić's Application for Orders to NATO and States for Production of Information, 7 March 2003; General Ojdanić's Further Submission in support of Application for Orders to NATO and States for Production of Information, 20 June 2003.

[4] *See* Decision on Application of Dragoljub Ojdanić for Binding Orders pursuant to Rule 54 *bis*, 23 March 2005, ("Decision of 23 March 2005"), p. 7 ("the Applicant may reformulate paragraphs (A), (B) and (C) of the Request in appropriate terms by, for example as regards paragraphs (A) and (B), identifying the particular matters in issue in the case to which the documents sought are said to be relevant, and indicating how they are relevant to these matters, stipulating as far as possible the place and dates of intercepted communications that relate to matters which are the subject of the Indictment; and, for example as regards paragraph (C), identifying specifically the documents sought and how such documents relate to the matters in issue in the case.").

[5] *See* General Ojdanić's *Ex Parte* Request to NATO and States Pursuant to Trial Chamber's Decision of 23 March 2005, 19 April 2005.

That request sought production of the desired documents within 60 days of service of the request. The Applicant subsequently filed, on 27 June 2005, the Second Application at issue here.

4. At a Status Conference on 25 August 2005, the Applicant requested - and Judge Bonomy, as pre-trial judge, agreed - that the Trial Chamber take no further action on the Second Application until the Applicant notified the Trial Chamber of the outcome of ongoing discussions with certain States.

5. On 6 September 2005, the Applicant filed "General Ojdanić's Report on Status of Second Application to NATO and States for Production of Information (Rule 54 *bis*)," notifying the Trial Chamber of the responses received from the States concerned and requesting that the Trial Chamber, *inter alia*, schedule an oral hearing on the Second Application. The hearing was scheduled for and occurred on 4 October 2005. By then, the Second Application had been restricted to five States - Canada, Iceland, Luxembourg, the United Kingdom and the United States of America - and NATO. In addition, the Applicant had restricted his application in relation to the United Kingdom to paragraphs (C)(2) and (C)(3).[7]

Submissions

6. Iceland and Luxembourg neither submitted responses nor appeared at the hearing. Canada, the United Kingdom and the United States of America all responded to the Reformulated Request, filed written submissions prior to attending the hearing and made oral submissions at the hearing.

7. Canada argues that the Second Application should be dismissed as premature on account of what Canada characterizes as the Applicant's unilateral termination of communications that might have led to the voluntary production of certain requested documents.[8] In the alternative, Canada asks that the Second Application be dismissed

[6] Those States were Belgium, Canada, the Czech Republic, France, Germany, Hungary, Iceland, Luxembourg, the Netherlands, Poland, the United Kingdom and the United States of America.
[7] *See* Hearing, 4 October 2005, T. 119; Response of the Government of the United Kingdom to General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, Annex A; Hearing, 4 October 2005, T. 100.
[8] Rule 54 *bis* (A)(iii) and Rule 54 *bis* (B)(ii) require that the applicant demonstrate that he has first pursued voluntary measures to acquire the desired information, and in *Prosecutor v. Blaškić*, the Appeals Chamber held that mandatory orders should be sought against States only when they decline to co-operate voluntarily. *See Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A R108 *bis*, Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Subpoena Decision"), para. 31.

on account of its failure to satisfy Rule 54 *bis*(A)'s requirements of specificity and relevance. In particular, Canada contends that paragraphs (A) and (B) of the Second Application "fail to identify specific documents" and "fail[...] to explain how the requested information is relevant . . . [or] necessary to a fair determination of"[9] the matters at issue. Likewise, paragraph (C) is said to generally lack the requisite relevance and necessity, that paragraph (C)(2) is an entirely new request rather than a reformulated one and that paragraph (C)(3) is overly broad. Canada adds that the Second Application's vagueness makes it impossible to assess the national security implications of complying with the request, and that the request is especially troubling if it seeks information regarding Canada's data-collection capabilities.[10] If the Trial Chamber does not dismiss the Second Application, Canada asks that the Applicant be ordered to further reformulate his request and continue his efforts to secure Canada's voluntary cooperation.

8. The United Kingdom argues that paragraphs (C)(2) and (C)(3) of the Second Application are new requests rather than reformulations. As to paragraph (C)(2), the UK says that it is too broad, in that it seeks information from outside the indictment period, and too unspecific, in that it fails to identify particular contacts between the Applicant and General Clark.[11] The UK applies its criticisms of (C)(2) to paragraph (C)(3), noting in particular (C)(3)'s extremely broad request of "[a]ny information received from or provided by General Momćilo Perišić pertaining to General Ojdanić from November 28, 1998 to the present." This request, adds the UK, fails to suggest how the information sought is relevant or necessary to trial, which is a failure shared by (C)(2)'s request of material containing General Clark's "assessment of General Ojdanić's attitude, position, and competence." Aside from these objections, the UK questions why it - rather than Generals Clark, Perišić or their respective States - is being asked for information originating from the two men. Finally, the UK says, like

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Canada states that, "without confirming or denying the existence of intercepted communications, certain Canadian documents potentially responsive to the substance of paragraphs A and B of the reformulated request ha[ve] . . . been identified." Written Response and Notice of Objection of the Government of Canada to General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, para. 9. Canada offered to produce certain excerpts of these documents, provided that they be protected from disclosure at trial, absent Canada's consent, pursuant to Rule 70. The Applicant declined this offer and very shortly thereafter filed the Second Application, which Canada took as an act of "abandoning attempts at cooperation." Ibid., para 12. Additionally, at the 4 October 2005 hearing, Canada indicated that it had found material responsive to paragraph (C)(1) of the Second Application that it was willing to share pursuant to Rule 70, but that the Applicant's refusal to discuss Rule 70 had precluded Canada from conveying this offer. *See* Hearing, 4 October 2005, T. 107.

[9] Written Response and Notice of Objection of the Government of Canada to General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, para. 26.

[10] Canada indicated at the 4 October 2005 hearing that it was particularly concerned that the Applicant might be seeking information on the means of Canada's information-gathering capabilities, rather than seeking the content of the desired information. *See* Hearing, 4 October 2005, T. 114.

Canada, that the Applicant has failed to reasonably seek its voluntary cooperation.[12] Accordingly, the UK asks that the Second Application be dismissed.

9. The United States of America ("USA") makes arguments that largely mirror those of Canada and the United Kingdom: that the Applicant failed to take reasonable steps to obtain the USA's voluntary cooperation by, among other things, declining the USA's offer to make information available pursuant to Rule 70,[13] and that the Second Application fails to demonstrate the specificity, relevance and necessity that Rule 54 *bis* requires. Paragraphs (A) and (B), for example, fail to identify any specific dates or conversations, and are too broad in seeking communications spanning six months involving any of some 23 people. The USA also asserts that paragraph (C) of the Second Application is a new rather than reformulated request, and that complying with the Second Application would implicate national security concerns, especially if the information sought turns on the USA's data-collection methods. Finally, the USA says that, in any event, it does not possess any "exculpatory information"[14] regarding the events described in paragraphs (A)(3) and (B)(3) of the Second Application. Accordingly, the USA asks that the Second Application be dismissed.

10. NATO submitted a letter dated 3 October 2005, which concerned only paragraph (C)(2) of the Second Application. The letter states that "the revised request, set out in the Second Application, still lacks adequate specificity or an explanation of the relevance and necessity of the information sought to trial issues." NATO contends that, in an effort to be cooperative, it has examined its archives and can confirm that it does not possess the information sought under paragraph (C)(2) of the Second Application, "which at least had some evident connection with NATO." NATO asserts that it has no independent intelligence gathering capacity, and thus that any other aspect of the Second Application should properly be addressed to Member States of the Alliance. As for NATO's absence from the 4 October 2005 hearing, NATO says that it should not be taken as an acceptance of the requests made in the Second Application.

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[11] *See* Hearing, 4 October 2005, T. 117-118.
[12] *See* Response of the Government of the United Kingdom to General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, paras. 23-25.
[13] The USA maintains that it offered to disclose - like Canada as described in *supra* note 8 - certain information to the Applicant on the condition that the USA have the option of protecting the information from disclosure at trial pursuant to Rule 70. The Applicant declined this request and subsequently filed the Second Application.
[14] Although the USA restricts its assertion on this point to exculpatory evidence, the Second Application contains no such restriction.

11. The Applicant argues that, with regard to paragraph (A) of the Second Application, he has identified the place and dates of the information he seeks to the best of his ability. The Applicant says that he was in Belgrade for almost the entire duration of the specified dates, and that his near-daily conversations with Slobodan Milošević and others preclude his limiting the dates of his request any further.[15] The Applicant also says that he has narrowed paragraph (A) by seeking communications between himself and only 23 other specified people, and that asking for only "intercepted communications" is a narrower request than one for any communications that a State might possess in any form.

12. As for paragraph (B), the Applicant maintains that it is sufficiently specific and relevant because it is limited to conversations in which one of the parties was a member of the government, armed forces or police of Yugoslavia or Serbia, and that the request seeks information limited to the Applicant's efforts to advance or prevent war crimes in Kosovo.[16]

13. The Applicant also contends that, because information falling within the specific parameters of paragraphs (A) and (B), as revised, bears on the core allegations against him - such as, for example, whether he planned, ordered or otherwise aided and abetted the killing of civilians - the information is necessary to fairly determine the matters that will be at issue at trial.

14. The Applicant acknowledges that paragraph (C)(1) is a new request, but asserts that he has the right to make new requests and that the information (C)(1) seeks bears on his credibility.[17] As for paragraph (C)(2), the Applicant argues that General Clark's assessment of him will be relevant to trial,[18] just as he asserts that, as regards (C)(3), information from General Perišić will be relevant to determining the Applicant's involvement or lack thereof, for example, in expelling Albanians from Kosovo.[19]

15. In sum, the Applicant argues that his Second Application satisfies the requirements of Rule 54 *bis* and that, given the breadth of the binding orders issued to Serbia and Montenegro by this Trial Chamber in the *Milošević* case,[20] it is only fair that the comparatively precise request be granted here.

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[15] *See* Hearing, 4 October 2005, T. 92.
[16] *See ibid.*, T. 93.
[17] *See ibid.*, T. 95 – 96.
[18] *See ibid.*, T. 97 – 98.
[19] *See ibid.*, T. 98.
[20] *See Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, *see e.g.*, Decision in part on Prosecution Motion for Orders pursuant to Rule 54*bis* against Serbia and Montenegro, 5 June 2003; Second Decision on Prosecution

16. As for the various States' offers to make information available to the Applicant pursuant to Rule 70, the Applicant says that he must decline because accepting material under that provision presupposes that the States will retain control over the use of the material at trial.[21]

Law

17. Article 29 of the Statute and the jurisprudence of the International Tribunal oblige States to "co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."[22] This obligation includes the specific duty to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber [for] . . . the service of documents."[23]

18. A party seeking an order that a State produce documents or information must, pursuant to Rule 54 *bis*(A), "(i) identify as far as possible the documents or information to which the application relates; (ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and (iii) explain the steps that have been taken by the applicant to secure the State's assistance."[24]

19. The Appeals Chamber has described the general requirements for obtaining an order issued pursuant to Article 29 of the Statute. The Chamber has explained, for example, that although the request for such an order "must identify specific documents and not broad categories,"[25] "[t]he requirement of specificity . . . does not . . . prohibit the use of categories as such."[26] The Appeals Chamber has also instructed that a request for a binding order must "set out succinctly the reasons why such documents are deemed

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Motion for Orders pursuant to Rule 54*bis* against Serbia and Montenegro, 12 June 2003; Thirteenth Decision on Applications pursuant to Rule 54*bis* of Prosecution and Serbia and Montenegro, 17 December 2003.

[21] *See* Hearing, 4 October 2005, T. 100.

[22] Article 29(1). *See also Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A R108 *bis*, Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Subpoena Decision"), para. 26 ("The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be 'ordered' either by other States or by international bodies)".).

[23] Article 29(2)(c).

[24] Rule 54 *bis*(A).

[25] *Blaškić* Subpoena Decision, para. 32 (notes omitted). *See Prosecutor v. Blaškić*, Case No. IT-95-14-T, Order to the Republic of Croatia for the Production of Documents, 21 July 1998, Opinion of Judge Mohamed Shahabuddeen, p. 12 ("[P]rovided that a category is defined with sufficient clarity to permit ready identification of its members and that it is not so broad as to be oppressive, a State may be ordered to say whether it has any documents within the category even if particulars of each document are not given, and, if it has, to produce them either to a party or to the Chamber, barring valid considerations of State security.").

[26] *Prosecutor v. Dario Kordić & Mario Čerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Case No. IT-95-14/2-AR108 *bis*, 9 September 1999 ("*Kordić*"), para. 38.

relevant to the trial,"[27] and 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 locus standing to challenge their relevance."[28] In addition to the specificity and relevance that an applicant must plead, the Appeals Chamber has noted that "a State shall be given sufficient time for compliance with a binding order."[29] To these general points, which the jurisprudence of the International Tribunal supported even before Rule 54 *bis* was adopted,[30] Rule 54 *bis*(A) added two more requirements: first, that the applicant indicate how the information sought is "necessary for a fair determination" of a matter at issue,[31] and second, that the applicant "explain the steps that have been taken . . . to secure the State's assistance."[32]

Paragraph (A) of the Second Application – Intercepted Communications in which the Applicant was a Participant

20. The Trial Chamber considers that, in this paragraph of his request, the Applicant has identified as far as possible the specific documents sought, in that (a) the request is temporally circumscribed, (b) the Applicant is seeking only those communications in which he participated while he was in Belgrade and (c) the Applicant has narrowed his request to communications that involved, besides himself, any of the 23 people listed in Annex "A" of the Second Application. The Trial Chamber's Decision of 23 March 2005 ordered the Applicant to "stipulate as far as possible the place and dates of intercepted communications that relate to matters which are the subject of the Indictment."[33] The Applicant can recall the dates of some of the conversations he had with some of the 23 people, such as General Wesley Clark, and he has stated that he spoke to Slobodan Milošević and with his subordinates during the period stated on an almost daily basis. Given the lapse of time, the Trial Chamber accepts that the Applicant cannot be more precise than this and so has restricted the request to one that is reasonable in light of all the circumstances;

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[27] *Blaškić* Subpoena Decision, para. 32.
[28] *Kordić*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, para. 40. In that case, the Appeals Chamber, having found that the criterion of specificity had been met, also rejected the State argument that the Trial Chamber, because of lack of specificity, was unable to accurately determine the relevance of the requested documents. *See ibid.*
[29] *Ibid.*, para. 43.
[30] The *Blaškić* and *Kordić* Decisions cited were filed on 29 October 1997 and 9 September 1999, respectively. Rule 54 *bis* was adopted on 17 November 1999.
[31] Rule 54 *bis*(A)(ii).
[32] Rule 54 *bis*(A)(iii).
[33] Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54 *bis*, 23 March 2005, p. 6.

21. In the opinion of the Trial Chamber, the Applicant has identified what are plainly four important issues in the case, and seeks the specified documents only insofar as they may relate to these issues. In view of the significance of these issues, it is, on the face of it, necessary for a fair determination of the case that any material bearing on them should be available to the Applicant. None of the States is claiming that the request in paragraph (A) is unduly onerous. Further, Canada has been able to search its records and has found material potentially responsive to the request in paragraph (A) of the Second Application.[34] The United Kingdom and the United States have also been able to search their records, although they have stated that no material responsive to paragraph (A) was found.[35]

22. The Trial Chamber finds that the steps taken by the Applicant to secure the assistance of States in order to obtain the documents are reasonable under the circumstances. Canada says that it is willing to provide the potentially relevant material it has discovered, but only pursuant to Rule 70.[36] The USA also states that it will voluntarily provide certain material pursuant to Rule 70.[37] The Applicant argues 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 under Rule 70.

23. It should be noted that, although the Applicant at some point accepted the USA's offer to view certain material pursuant to Rule 70, the USA limited its search in relation to paragraph (A) to exculpatory material, thereby failing to satisfy the Applicant's request in its entirety. 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. If a specific request is made for the production of material relevant to an issue in the case, then the primary obligation of a State is to co-operate with the Applicant by searching for any material falling within the terms of the Request. It is

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[34] *See* Written Response and Notice of Objection of the Government of Canada to General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, para. 9.
[35] *See* Response of the Government of the United Kingdom to General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, para. 8; Submission of the United States of America in advance of the Hearing on General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, p. 2. It should be noted that although the United States claimed that it had found no "exculpatory" material responsive to paragraph (A), that paragraph does not seek only "exculpatory" communications.
[36] *See* Hearing, 4 October 2005, T. 108.
[37] *See ibid.*, T. 132.

for the Applicant to determine which documents, if any, of those produced should be used in his case.

24. In sum, paragraph (A) of the Second Application meets the requirements of Rule 54 *bis*, and the Applicant cannot be said to have failed to take reasonable steps to secure voluntary cooperation by his refusal to accept the States' conditional offers.

Paragraph (B) of the Second Application – Intercepted Communications in which the Applicant was Mentioned or Referred to by Name

25. The Applicant has now limited this paragraph of the Application to those conversations, during a period of less than six months, in which at least one party to the conversation held a position in government, armed forces or police of the Federal Republic of Yugoslavia or Serbia, as the Applicant considered that these persons would be more likely to have relevant, useful information about the Applicant's activities and state of mind relating to Kosovo. The Trial Chamber is of the opinion that paragraph (B) of the Second Application is specific enough to meet the requirements of Rule 54 *bis*. It is confined to the most significant period covered by the Indictment.[38] It is also confined to material that may relate to any one of four very important issues in the case. How others perceived the activities and state of knowledge of the Applicant at that time is of particular relevance to a proper judicial determination now of these matters. Any material falling within paragraph (B) should be available to the Applicant if a fair determination of these issues at trial is to be ensured.

26. For the reasons given in relation to paragraph (A), the Trial Chamber considers that the Applicant has fulfilled his obligation to endeavour to secure the voluntary provision of the material. The Applicant has thus met the requirements of Rule 54 *bis*.

Paragraph (C) of the Second Application

27. The States' objection, that parts of this paragraph amount to a new request, does not prevent this Chamber from considering the request. In the opinion of the Trial Chamber this paragraph can be properly described as a reformulation of paragraph (C) of the original Request. In any event, an applicant may make an application for different documents. Nevertheless, the Trial Chamber is of the opinion that no part of (C) satisfies the requirements of Rule 54 *bis*.

28. Regarding paragraph (C)(1), which concerns "any reports, evaluations or comments concerning the speech given by the Applicant to the military attachés of foreign governments in Belgrade during July – August 1998", the Trial Chamber notes that the Applicant has a copy of the speech and can produce it in evidence at trial. In addition, the Applicant has failed to show that the evaluation and comments of others on his speech would be relevant to any issue at the trial. It is for the Trial Chamber to evaluate the speech itself in the context in which it was delivered.

29. As regards (C)(2), which seeks information from NATO General Wesley Clark, the Trial Chamber considers that the appropriate way for the Applicant to try to obtain the information in the first place is to approach General Wesley Clark. The Trial Chamber also finds that paragraph (C)(2) lacks basic clarity and fails to demonstrate that the material sought is necessary to fairly determine an issue at trial.

30. In relation to paragraph (C)(3), which concerns any information received from or provided by General Momčilo Perišić pertaining to the Applicant from November 1998 to the present, the Applicant has not endeavoured to obtain the information from General Perišić and, in any event, has failed to show how information "pertaining to General Ojdanić from November 28, 1998 to the present" given by General Perišić to NATO or any of the States involved would be relevant to any issue at the trial.

National security interest objections

31. The Appeals Chamber has cautioned that if States were able to "unilaterally assert national security claims and refuse to surrender those documents," it could jeopardise "the very function of the International Tribunal, and 'defeat its essential object and purpose'" because documents requested could be vital to determine the guilt or innocence of an accused.[39] The Appeals Chamber has also been cognizant, however, of "legitimate State concerns related to national security,"[40] and there are procedures to follow when a Trial Chamber considers a State's national-security objection to the production of documents.

32. Rule 54 *bis* of the Rules provides, in relevant part, that:

> (F) The State, if it raises an objection pursuant to paragraph (D), on the grounds that disclosure would prejudice its national security interests, shall file a notice of objection not less than five days before the date fixed for the hearing, specifying the grounds of objection. In its notice of objection the State:

[38] Although the Indictment related to events in 1998 and 1999, the charges are confined to 1 January 1999 – 20 June 1999.
[39] *Blaškić* Subpoena Decision, para. 65.
[40] *Ibid.*, para. 67.

(i) shall identify, as far as possible, the basis upon which it claims that its national security interests will be prejudiced; and

(ii) may request the Judge or Trial Chamber to direct that appropriate protective measures be made for the hearing of the objection, including in particular:

(a) hearing the objection in camera and *ex parte*;

(b) allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;

(c) ordering that no transcripts be made of the hearing and that documents not further required by the Tribunal be returned directly to the State without being filed with the Registry or otherwise retained.

(G) With regard to the procedure under paragraph (F) above, the Judge or Trial Chamber may order the following protective measures for the hearing of the objection:

(i) the designation of a single Judge from a Chamber to examine the documents or hear submissions; and/or

(ii) that the State be allowed to provide its own interpreters for the hearing and its own translations of sensitive documents.

* * *

(I) An order under this Rule may provide for the documents or information in question to be produced by the State under appropriate arrangements to protect its interests, which may include those arrangements specified in paragraphs (F)(ii) or (G).

The Trial Chamber considers that these provisions, which on their face relate to applications determined by a Trial Chamber without hearing the State concerned, can for sound, pragmatic reasons be applied in a case where the State has been heard but cannot clearly identify the particular national security interest in need of protection until it knows what documents the Trial Chamber may order it to produce. The Trial Chamber considers that to be the situation here. Now that the documents which the Trial Chamber considers should be produced have been identified, the States are much better placed to consider whether any national security interest is implicated and to explain clearly how that arises.

33. In their submissions, Canada, the UK and the USA have raised concerns on grounds of national security interests. Canada maintains that it is difficult to assess whether such interests are engaged and also that the wording seems to target information received or obtained from a particular investigative technique, such as "intercepted

communications."[41] The US argues that production may reveal the nature and extent of its intelligence-gathering capabilities as well as where and how they might be directed.[42]

34. The Applicant has no interest in the techniques the States use to gather information, but only wants the information relevant to his request that they possess. A State that is subject to a binding order is free to request protective measures in relation to specific documents pursuant to the procedures of Rule 54 *bis*, or to seek other appropriate relief. The operative effect of the order made here will be suspended for 21 days to allow any State to make a motion for protective measures or other appropriate relief.

NATO

35. Having confirmed that it does not possess any information contained in paragraph (C)(2) of the Second Application, NATO asserts that it has no independent intelligence-gathering capacity and that the request should properly be addressed to member States of the Alliance. This argument essentially asserts that a "non-originating" State or holder of material is not obliged under Article 29 of the Statute to produce documents or information that it received from an "originating" State, and that "ownership" rather than "possession" triggers the obligation to produce, or that intelligence-sharing agreements with States trump any obligation under Article 29 of the Statute.

36. The Trial Chamber has previously held that the obligation in Article 29 of the Statute applies not only to States but also to international organisations.[43] In the *Simić* case, this Trial Chamber issued a *subpoena ad testificandum* to General Shinseki of SFOR pursuant to paragraph 50 of the *Blaškić* Subpoena Decision, which provides for the issuance of subpoenas directly to State officials performing their official functions as members of international peace-keeping or peace-enforcement forces.[44] This Chamber further ordered all of the States participating in SFOR to produce documents

[41] Written Response and Notice of Objection of the Government of Canada to General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, para. 27.
[42] *See* Submission of the United States of America in advance of the Hearing on General Ojdanić's Second Application for Orders to NATO and States for Production of Information, 27 September 2005, pp. 9 – 10.
[43] *See Prosecutor v. Simić*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be provided by SFOR and Others, 18 October 2000, in which this Trial Chamber determined a Defence motion for the production of documents and witnesses from the Stabilisation Force ("SFOR") or other military and security forces operating in Bosnia and Herzegovina, in connection with the accused's arrest and transfer to the International Tribunal, stating at paras. 46-49, 58 that "Article 29 should, therefore, be read as conferring on the International Tribunal a power to require an international organisation or its competent organ such as SFOR to cooperate with it in the achievement of its fundamental objective of prosecuting persons responsible for serious violations of international humanitarian law, by providing the several modes of assistance set out therein."

to the Defence, and noted that (1) the States were obliged by paragraph 4 of Security Council Resolution 827 to cooperate fully with the International Tribunal, and that (2) pursuant to Article 103 of the Charter of the United Nations, in the event of any conflict between a State's obligations to NATO and SFOR and its obligations under the Charter, its obligations under the latter prevail.

37. In light of the above-mentioned jurisprudence, the Trial Chamber considers that it is empowered to issue an Order against NATO.

38. The target of such an Order is material that the organisation possesses. Questions of ownership and whether the material was initially obtained by another are irrelevant. As the Appeals Chamber explained in the *Blaškić* Subpoena Decision, "the obligation under consideration [that of Article 29] concerns [*inter alia*] action that States may take only and exclusively through their organs (this, for instance, happens in case of an order enjoining a State to produce documents in the *possession* of one of its officials)."[45] This applies equally to material received by one State from another. Of course, should a third-party holder of sensitive material assert that its legitimate security interests would be adversely affected by an order for production, it may seek appropriate protective measures.[46]

[44] *See ibid*, paras. 62-63, and Disposition, p. 26.
[45] *Blaškić* Subpoena Decision, para. 27 (emphasis added).
[46] *Cf. supra* note 43. If, for example, an international organisation is subject to Article 29 of the Statute and must therefore cooperate with the Tribunal in the investigation and prosecution of people suspected of violating international humanitarian law, the Trial Chamber sees no reason why such an organisaton should not be free to seek the protections offered by Rules 54 *bis*(F), (G) and (I).

Disposition

For the reasons above, pursuant to Article 29 of the Statute and Rules 54 and 54 *bis* of the Rules, the Second Application is hereby **partially GRANTED** and the Trial Chamber **ORDERS** as follows:

(1) The requests in paragraphs (A) and (B) of the Second Application are **GRANTED.** Canada, Iceland, Luxembourg, the United States and NATO shall produce to the Applicant the requested documents. The operative effect of this order is suspended for 21 days to give any appropriate State or international organisation an opportunity to request protective measures. If no such measures are requested within 21 days, this order shall take immediate effect.

(2) With respect to the United Kingdom, the Applicant has accepted that it has complied with the requests contained in paragraphs (A) and (B) of the Second Application. Those paragraphs are therefore **DISMISSED** with respect to the United Kingdom.

(3) Paragraph (C) is **DENIED** in its entirety with regard to Canada, Iceland, Luxembourg, the United Kingdom, the United States and NATO.

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

Judge Patrick Robinson
Presiding

Dated this seventeenth day of November 2005
At The Hague
The Netherlands

[Seal of the Tribunal]