UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-05-87-AR108*bis*.2
		Date:	12 May 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **12 May 2006**

PROSECUTOR

v.

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

DECISION ON REQUEST OF THE UNITED STATES OF AMERICA FOR REVIEW

The Office of the Prosecutor

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The Government of the United Kingdom

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1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "International Tribunal", respectively), is seized of the "Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*" filed by the Government of the United States of America ("United States") on 2 December 2005 ("Request") pursuant to Rule 108*bis* of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

I. BACKGROUND

2. On 27 June 2005, Dragoljub Ojdanić ("Ojdanić") filed "General Ojdanić's Second Application for Orders to NATO and States for Production of Information" before Trial Chamber III ("Application"). After holding an oral hearing on the Application on 4 October 2005, the Trial Chamber issued its "Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*" on 17 November 2005 ("Impugned Decision"). In that decision, the Trial Chamber granted Ojdanić's Application in part and ordered Canada, Iceland, Luxembourg, the United States and the North Atlantic Treaty Organization ("NATO") to produce documents of intercepted communications made during a specific period and taking place in whole or in part in the Federal Republic of Yugoslavia.[1]

3. Thereafter, the United States filed its Request for review of the Impugned Decision on 2 December 2005 as did NATO in a separate filing.[2] In its Request, the United States seeks reversal of the Impugned Decision.[3] On 7 December 2005, Ojdanić filed "General Ojdanić's Submisson on Admissibility of Requests for Review" ("Submission on Admissibility")[4] and, on 12 December, "General Ojdanić's Consolidated Response to Requests for Review" ("Response").[5] The United

[1] Impugned Decision, pp. 3, 17.
[2] *See* NATO Request for Review of Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*, 2 December 2005. The present Decision solely disposes of the Request filed by the United States.
[3] Request, p. 3.
[4] In his Submission on Admissibility, Ojdanić requested an opportunity to be heard on the merits of the United States' Request, *see* para. 4, and then submitted his Response addressing the merits of the Request five days later. The Appeals Chamber notes that it is required to consider Ojdanić's Response under Rule 108*bis*(B), which stipulates that "[t]he party upon whose motion the Trial Chamber issued the impugned decision shall be heard by the Appeals Chamber. [...]" The Appeals Chamber further notes that neither the United States nor Ojdanić requested an oral hearing on the United States' Request and that pursuant to Rule 108*bis*(D) and Rule 116*bis*, a Rule 108*bis* request for review may be determined entirely on the basis of written briefs. The Appeals Chamber considers that it is appropriate to do so here in light of the entirety of the written submissions made by the United States and Ojdanić, which allow for it to reach a reasoned and fair disposition without requiring the oral presentation of arguments.
[5] The Appeals Chamber notes that Ojdanić has expressly argued for the Appeals Chamber to allow, in the interests of justice, that the Prosecution and/or his co-accused be heard on the important issues raised in this interlocutory review if they so desired. *See* Submission on Admissibility, para. 5. While the Appeals Chamber has power to do so under Rule

States filed the "Reply of the United States of America to General Ojdanić's Consolidated Response to Requests for Review" on 16 December 2005 ("Reply"). That day, the Appeals Chamber stayed the Impugned Decision until its resolution of the United States' Request.[6]

4. As a preliminary matter, the Appeals Chamber notes that there is no right of reply by a State in Rule 108*bis* proceedings[7] and that the United States has failed to request leave to file its Reply. Nevertheless, the Appeals Chamber considers that it is in the interests of justice to consider this additional submission from the United States, especially in light of the fact that Ojdanić has made no objection to this filing.[8]

5. The Appeals Chamber also notes that the Government of the United Kingdom ("United Kingdom") filed a submission by letter dated 20 December 2006 ("Submission") requesting to be associated in support of the United States' Request, particularly with regard to certain portions of the Request.[9] In its Submission, the United Kingdom provided additional legal and policy arguments against paragraph 38 of the Impugned Decision as well as against the general implications that would result from enforcement of that decision.[10] The Appeals Chamber considers that, as noted by the United Kingdom, the Impugned Decision dismissed or denied the Application as it related to a request for information from the United Kingdom.[11] Therefore, although the United Kingdom's Submission addresses issues of importance[12] also raised in the United States' Request, the United Kingdom does not have standing to make its Submission before the Appeals Chamber. Consequently, the Appeals Chamber finds that the United Kingdom's Submission is inadmissible and will not consider it in disposing of the United States' Request.

II. STANDARD OF REVIEW

6. The Appeals Chamber recalls that Rule 54 and Rule 54*bis* allow a party in proceedings before the International Tribunal to request a Judge or a Trial Chamber to order a State to produce

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108*bis*(B) of the Rules, none of the other parties to these proceedings has filed a submission requesting to be heard and the Appeals Chamber does not consider that the interests of justice require that they be further invited to do so.

[6] Stay of Trial Chamber Decision, 16 December 2005.

[7] *Prosecutor v. Milošević*, Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006 ("*Milošević* Decision of 6 April 2006"), para. 15; *Prosecutor v. Milošević*, Case No. IT-02-54-AR108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević* Rule 70 Decision"), para. 4.

[8] *Cf. Milošević* Rule 70 Decision, para. 4.

[9] Submission, p. 1.

[10] *Id.*, pp. 2-3.

[11] Impugned Decision, p. 17.

[12] *Cf. Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *Subpoenae Duces Tecum*) and Scheduling Order, 29 July 1997 ("*Blaškić* Decision on Admissibility"), para. 16.

documents or information for the purposes of an investigation or the preparation or conduct of a trial. The Appeals Chamber considers that a Judge or Trial Chamber's decision on a Rule 54*bis* request is a discretionary one.[13] Therefore, the Appeals Chamber will not conduct a *de novo* review of a Rule 54*bis* decision and the question before it is not whether it "agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."[14] It must be demonstrated that the Trial Chamber has committed a "discernible error"[15] resulting in prejudice to a party. The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion only where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."[16] The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations [. . .]" in reaching its discretionary decision.[17]

III. DISCUSSION

A. Admissibility

7. In order to consider the United States' Request, the Appeals Chamber must first determine whether it is admissible. Under Rule 108*bis,* a State may request review of a Rule 54*bis* decision after first demonstrating that the request is admissible. To meet the threshold test of admissibility, the State must demonstrate: (1) that it is directly affected by the Trial Chamber's Rule 54*bis* decision, and (2) that the decision concerns issues of general importance relating to the powers of the International Tribunal.[18]

8. The United States submits that it is directly affected by the Impugned Decision,[19] and the Appeals Chamber finds that this is established. The Impugned Decision issued a binding order to

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[13] *See The Prosecutor v. Kordić and Čerkez,* Case No. IT-95-14/2-AR108*bis,* Decision on the Request of the Republic of Croatia for Review of a Binding Order, 9 September 1999 (*Kordić and Čerkez* Review Decision"), paras. 19, 40 (holding that a Trial Chamber's determination of whether documents requested by a party from a State would be admissible and relevant at trial such that a binding order for production of those documents may be warranted is an issue that "falls squarely within the discretion of the Trial Chamber"); *see also Prosecutor v. Milošević,* Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Joinder Decision"), para. 3 (stating that a Trial Chamber exercises its discretion in "many different situations – such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure.").

[14] *Milošević* Decision of 6 April 2006, para. 16 (internal citations omitted).

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] *See* Rule 108*bis* (A).

[19] Request, p. 3.

the United States to produce, by a certain date, copies of documents in its possession relating to intelligence information as requested in Ojdanić's Application.[20]

9. The United States further submits that the Impugned Decision concerns issues of general importance relating to the powers of the International Tribunal.[21] The United States argues that the Impugned Decision has the effect of lowering the threshold for a Trial Chamber to issue a binding Rule 54*bis* order to produce documents or information such that parties before the International Tribunal will not have an incentive to work cooperatively with States to obtain sensitive information voluntarily provided under the safeguards found in Rule 70.[22] As a result, the United States claims that the Impugned Decision puts the International Tribunal "into conflict with States over the protection of their national security interests and makes it significantly more difficult for States to cooperate in providing such information to the parties in Tribunal proceedings."[23] The United States also argues that the Impugned Decision "seriously intrudes" on the relations between sovereign States because it requires a State or international organization "to provide intelligence or other information that did not originate [...]" with that State or international organization.[24]

10. The Appeals Chamber notes that clearly, the Impugned Decision does relate to the powers of the International Tribunal—specifically, the power of a Trial Chamber to issue a binding order to States for the production of documents or information at the request of a party to proceedings before the International Tribunal. Moreover, the extent and nature of the power to order production of information are issues of general importance in light of Article 29(2) of the Statute of the International Tribunal. Therefore, the Appeals Chamber now turns to consider the merits of the United States' Request.

B. The Requirements of Specificity, Relevance and Necessity under Rule 54*bis*

11. The first issue to be decided by the Appeals Chamber is whether the Trial Chamber erred in finding that Ojdanić's Application met the requirements of specificity, relevance and necessity in making his request for information and documents under Rule 54*bis*. Under those requirements, a party must: (1) identify as far as possible the documents or information to which the application

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[20] *Cf. Milošević* Decision of 6 April 2006, para. 19; *Milošević* Rule 70 Decision, para. 7; *Prosecutor v. Blaškić,* Case No. IT-95-14-AR108*bis,* Decision on the Notice of State Request for Review of Order on the Motion of the Prosecutor for the Issuance of a Binding Order on the Republic of Croatia for the Production of Documents and Request for Stay of Trial Chamber's Order of 30 January 1998, 26 February 1998 ("*Blaškić* Review Decision"), para. 8; *Blaškić* Decision on Admissibility, para. 13.

[21] The Appeals Chamber notes that Ojdanić agrees that the United States' Request is admissible and does not object to the Appeals Chamber reviewing the Impugned Decision. *See* Submission on Admissibility, para. 3.

[22] Request, p. 3.

[23] *Ibid.*

relates; and (2) 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.[25]

12. The Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber ordered the United States to produce the documents and information requested in paragraphs (A) and (B) of Ojdanić's Application as follows:

> (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";
>
> (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; and
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> 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:
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> (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 Kosovo;
>
> b) General Ojdanić's knowledge or participation (or lack thereof) in the intended or actual killing of civilians in Kosovo or lack thereof;

[24] *Id.*, p. 4.
[25] Rule 54*bis* (A).

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

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

13. First, the United States claims that the Application lacks specificity in its request for access to intercepted communications over a six-month period involving Ojdanić and any of 23 other individuals as well as to any communication involving a government or military official of Serbia or Yugoslavia that mentions Ojdanić and "'may be relevant to' one of four broadly framed issues in the case."[26] The United States submits that Ojdanić has drawn these categories merely on the basis of "a particular method of collection" and that they are devoid of substance.[27] According to the United States, the Trial Chamber therefore erred in granting the Application without requiring that Ojdanić "specify the time, place, date, or content of a single one of the alleged conversations that he was seeking" or "any topic, incident, or action that might narrow the categories he describes."[28] As a consequence, the Trial Chamber's Rule 54*bis* order "turns the carefully focused production mechanism of Rule 54*bis* into a sweeping discovery tool more akin to that found in U.S. civil litigation."[29]

14. The Appeals Chamber notes that with respect to paragraph (A), the Trial Chamber found that Ojdanić identified as precisely as possible the specific documents sought given the lapse of time since the communications took place. The Trial Chamber noted that in this paragraph, the request is temporally circumscribed, geographically limited, and is narrowed to communications involving himself and any of 23 people specifically listed in Annex "A" to the Application. The Trial Chamber also noted that the Applicant made attempts to recall the dates of some of the conversations with these people and stated that he spoke with Slobodan Milošević and his subordinates during the period indicated almost on a daily basis. Finally, the Trial Chamber found that the requested information was limited to those communications touching upon four important issues in the case. Similarly, with regard to paragraph (B), the Trial Chamber found that the request for information was sufficiently specific in that it was temporally confined to the most significant period in the indictment; limited to material relating to one of four important issues in the case; and

[26] *Id.*, p. 6.
[27] Reply, p. 2.
[28] Request, pp. 6-7.
[29] *Id.*, p. 7.

required that at least one party to the conversation hold a position specifically in the government, the armed forces or the police of the Federal Republic of Yugoslavia or Serbia.[30]

15. The Appeals Chamber considers that the Trial Chamber did not err in finding that Ojdanić's Application met the specificity requirement under Rule 54*bis*. The Appeals Chamber recalls that a request for production under Rule 54*bis* should seek to "identify specific documents and not broad categories"[31] but that the use of categories is not prohibited as such.[32] This is because "[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."[33] Therefore, a category of documents may be requested as long as it is "defined with sufficient clarity to enable ready identification" by a State of the documents falling within that category.[34]

16. In this case, the United States has failed to demonstrate that the categories of information and documents requested by Ojdanić were insufficiently clear such that it was unable to identify the requested materials or that the requested search was unduly burdensome. This is especially the case in light of the specific limitations placed upon the material sought. The Appeals Chamber does not agree that the categories of materials requested were based upon a method of intelligence collection without any reference to their content or were devoid of any substance when considering *inter alia* the four main issues to which those materials are to relate as found in sub-paragraphs (A) and (B) of the Application.

17. Furthermore, the Trial Chamber did not err in granting Ojdanić's Application even though he could not specify the exact time, place, date or content of any one of the intercepted communications for which he seeks information. "The Trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial [...] 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."[35] The Trial Chamber found this to be the case here and did not err given that Ojdanić made an attempt to provide such particular information and identified the categories of documents and information requested in as precise a manner as was possible in light of the passage of time.

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[30] Impugned Decision, paras. 20-21, 25.
[31] *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Judgement on Review Request"), para. 32.
[32] *Kordić and Čerkez* Review Decision, para. 38.
[33] *Id.*

18. Second, the United States claims that Ojdanić failed to establish how the documents requested in his Application are relevant to his case. Instead, he requests broad categories of information "corresponding to the four main counts of the indictment rather than by establishing the relevance of specific information sought."[36] Thus, the Trial Chamber, in granting the Application, erred by approving "what amounts to a circular exercise: allowing the relevance requirement to be satisfied by the artifice of asking for any documents or information that pertain to the charges in the indictment."[37] The United States contends that because Ojdanić was not required to specify the content of the documents and information sought, there could be no proper assessment by the Trial Chamber of whether or not they were relevant to the main charges in Ojdanić's case.[38]

19. Third, the United States contends that Ojdanić failed to show in his Application in any meaningful sense how the materials he requested are necessary for a fair determination of his case due to the fact that he did not give a concrete articulation of the information he was seeking, offer a showing that the information actually exists, or demonstrate that the materials are relevant to his case. Thus, the Trial Chamber erred in its "conclusory" finding that, on the face of it, the documents requested are necessary simply because of the significance of the four issues in the indictment raised by Ojdanić in his Application. Furthermore, the United States argues that the necessity requirement means that Ojdanić should have demonstrated that he had exhausted all other available sources for the requested information, which he did not. Finally, the United States claims that the Trial Chamber erred in dismissing the "extraordinary effort" of the United States to be as responsive as possible to Ojdanić's Application when it informed him that after conducting a search of all of its holdings, it had not located any exculpatory information falling within the four categories of the indictment highlighted therein. The United States claims that its "focus on exculpatory information was consistent with the focus of Rule 54*bis* on information 'necessary' for a determination of the matters in question."[39]

20. The Appeals Chamber notes that with regard to the requirements of relevance and necessity, the Trial Chamber found that the information and documents requested in paragraphs (A) and (B) of the Application met these requirements because they were limited to those pertaining to the four most important issues in Ojdanić's case that were clearly identified in the Application. Furthermore,

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[34] *Id.*, para. 39.
[35] *Blaškić* Judgement on Review Request, para. 32.
[36] Request, pp. 7-8.
[37] *Id.*, p. 8.
[38] Reply, p. 3.
[39] Request, pp. 8-10.

in light of the significance of those issues, the Trial Chamber found that any documents or information relating to them were necessary for a fair determination of those issues at trial.[40]

21. The Appeals Chamber considers that the Trial Chamber did not err with regard to applying the relevancy and necessity requirements under Rule 54*bis*. First, the Appeals Chamber recalls that "the State from whom the documents are requested does not have *locus standi* to challenge their relevance" to a trial.[41] Under this rule, a State may not challenge whether, on the basis of the request, the Trial Chamber was able "to accurately determine the relevance of the documents sought."[42] Such a determination is an integral part of the Trial Chamber's competence to determine relevancy. The Appeals Chamber holds that the same rule applies with regard to challenging the necessity of documents or information for a fair determination of the trial.[43]

22. In this case, the United States challenges the Trial Chamber's ability to determine the relevancy of the requested information on grounds that Ojdanić's Application requests "a broad category of information that is defined not by its content but by its method of collection" and therefore, the Trial Chamber was unable to conduct a "meaningful relevance inquiry" requiring "a link between specific information requested and issues relevant to the defense."[44] Similarly, the United States submits that the Trial Chamber was unable to determine whether the requested materials in the Application are necessary for a fair determination of matters at issue in Ojdanić's trial. Because the United States lacks standing to bring these particular arguments, the Appeals Chamber dismisses them.

23. Furthermore, the Appeals Chamber does not agree with the United States that the necessity requirement under Rule 54*bis* stipulates that an applicant must make an additional showing that the requested materials in fact exist.[45] The necessity requirement obliges the applicant to show that the requested materials, if they are produced, are necessary *for a fair determination of a matter at trial.* Requiring an additional showing of actual existence would be unreasonable and could impinge upon the right to a fair trial given that these materials are State materials, often of a confidential

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[40] Impugned Decision, paras. 21, 25.
[41] *Kordić and Čerkez* Review Decision, para. 40.
[42] *Id.*
[43] This rule does not, however, prevent a State from challenging the necessity of the requested information or documents on grounds demonstrating that there was no real necessity for the applicant to request the material from it because, for example, the material could have been or has already been obtained elsewhere. A State simply may not challenge whether the requested material is relevant or necessary for a fair trial in the circumstances of a particular case.
[44] Reply, p. 3.
[45] Request, p. 8. The Appeals Chamber cautions that its rejection of such an obligation under the necessity requirement should not be interpreted in any way to undermine the overriding principle with regard to Rule 54*bis* orders to produce that they should "be reserved for cases in which they are really necessary," *Blaškić* Judgement on Review Request, para. 31 (internal citation omitted).

nature. In many cases, it would be impossible for an applicant to prove the existence of these materials. All that is required is that an applicant make a reasonable effort before the Trial Chamber to demonstrate their existence. Ojdanić made such an effort in this case when he submitted media reports and an expert witness declaration to the Trial Chamber on intercepted conversations by NATO and its member States during the Kosovo conflict.

24. The Appeals Chamber also rejects the United States' argument that the necessity requirement under Rule 54*bis* obliges an applicant to demonstrate that it has exhausted all other possible sources for the requested materials.[46] The United States contends that "[m]ost, if not all, of the information the Applicant is seeking, if it exists at all, can be provided by the Applicant himself, his Government and its archives, subordinates who received and executed his commands, or other former or current Serbian officials. In addition, having identified a list of interlocutors in his request, the Applicant has the responsibility to seek corroboration from those sources or to explain why he cannot."[47] Thus, the United States submits that Ojdanić should have made a showing that he has sought and failed to obtain the requested information from all of these other, more direct sources, when making his Rule 54*bis* request.[48]

25. The Appeals Chamber considers that requiring an applicant to make a showing that he has exhausted all other possible avenues that may provide access to the information is too onerous and could inhibit the right to a fair trial. However, the Appeals Chamber recalls that it has held that a Trial Chamber's binding order to a State to produce documents or information must be "strictly justified by the exigencies of the trial"[49] in light of the reliance of the International Tribunal on "the bona fide assistance and cooperation of sovereign States."[50] Therefore, the Appeals Chamber holds that it is reasonable under the necessity requirement for an applicant to demonstrate either that: 1) it has exercised due diligence in obtaining the requested materials elsewhere and has been unable to obtain them; or 2) the information obtained or to be obtained from other sources is insufficiently probative for a fair determination of a matter at trial and thus necessitates a Rule 54*bis* order.

26. In this case, the Appeals Chamber finds that Ojdanić has made the requisite showing. As the former Chief of the General Staff of the army of the Federal Republic of Yugoslavia in 1999, he represents that he knows of no other available sources for recordings of the conversations indicated in paragraphs (A) and (B) of his Application than NATO and its Member States. He claims that the

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[46] Request, pp. 8-9.
[47] *Id.*, p. 9.
[48] *Ibid.*
[49] *Kordić and Čerkez* Review Decision, para. 41 (internal citation omitted).
[50] *Blaškić* Judgement on Review Request, para. 31 (internal citation omitted).

only sources available to him are his own imprecise recollection and that of his superiors and subordinates of conversations taking place six to seven years ago, and that the Prosecution will certainly mount an attack as to the credibility of that testimony. Thus, he argues that "[t]he existence of a verbatim, contemporaneous recording, made by and in the custody of the party opposing General Ojdanić 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 of the case."[51]

27. Finally, the Appeals Chamber disagrees with the United States' unsupported argument that the necessity requirement allows for it, as a non-party to the trial proceedings, to unilaterally narrow a request for documents or information under Rule 54*bis* to materials that it deems to be exculpatory for the applicant on grounds that this is the only information that would be necessary for a fair hearing.[52] The Trial Chamber correctly 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."[53] Rather, it is "for the Applicant to determine which documents, if any, of those produced should be used in his case"[54] given that it is the requesting party under Rule 54*bis* who is best placed to determine whether certain material, even seemingly inculpatory material, may be useful for its case. That being said, the Appeals Chamber emphasizes that Rule 54*bis* orders to produce are to "be reserved for cases in which they are really necessary."[55]

C. The Reasonable Steps Requirement under Rule 54*bis* and its Relationship to Rule 70

28. The next issue to be considered by the Appeals Chamber is whether the Trial Chamber erred in finding that Ojdanić demonstrated that he met the "reasonable steps" requirement under Rule 54*bis* (A)(iii) and (B)(ii) for making a request. Pursuant to that requirement, a party must explain the reasonable steps that it has taken to secure the State's assistance prior to making a Rule 54*bis* request.

29. The United States submits that although the Trial Chamber properly recognized this requirement in the Impugned Decision, it erred in applying it. In particular, the United States claims that the Trial Chamber erred in finding that Ojdanić satisfied his burden to take bona fide,

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[51] Response, para. 70.
[52] Request, pp. 9-10; Reply, p. 4.
[53] Impugned Decision, para. 23.
[54] *Ibid.*
[55] *Blaškić* Judgement on Review Request, para. 31(internal citation omitted).

reasonable steps when he rejected information offered by the United States under the conditions of Rule 70.[56]

30. The Trial Chamber found in the Impugned Decision that, "under the circumstances" of the case, Ojdanić's steps towards securing voluntary cooperation from the United States were reasonable under Rule 54*bis*.[57] The Trial Chamber noted that the United States had offered to provide Ojdanić certain requested material pursuant to Rule 70. However, the Trial Chamber held that an applicant is "not required to accept information that the States are empowered to prevent from being disclosed at trial."[58] The Trial Chamber reasoned that "[w]here 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."[59]

31. The Appeals Chamber considers that the Trial Chamber erred in making this statement and holds, for the reasons that follow, that an applicant may not be found to have met the reasonable steps requirement under Rule 54*bis* where he or she refused the same requested documents or information when they were volunteered by a State under Rule 70.

32. The Appeals Chamber recalls that the basis for a Trial Chamber's power to issue a binding Rule 54*bis* order against a State to produce is found in Article 29(2) of the Statute and paragraph four of Security Council resolution 827 (1993), which provides that "States shall comply without undue delay with [...] an order issued by a Trial Chamber" for various kinds of judicial assistance.[60] The binding force for such an order derives from the provisions of Chapter VII and Article 25 of the United Nations Charter.[61] However, Article 29 encompasses "two modes of interaction [by a State] with the International Tribunal" in fulfilling its obligations: cooperative and mandatory

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[56] Request, pp. 10-11.
[57] Impugned Decision, paras. 22, 26.
[58] *Id.*, para. 22.
[59] *Ibid.*
[60] *Blaškić* Judgement on Review Request, para. 26. The Appeals Chamber notes that the content for a binding order under Article 29 as laid out in this decision was later codified in Rule 54*bis*.
[61] *Ibid.* Article 25 of the Charter of the United Nations, which entered into force on 24 October 1945 ("UN Charter"), states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 39, Chapter VII, of the UN Charter provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall [...] decide what measures shall be taken in accordance with Articles 41 [not requiring the use of force] and 42 [requiring the use of force], to maintain or restore international peace and security." This International Tribunal was established as "a measure not requiring the use of force" for restoring international peace and security by decision of the Security Council under Chapter VII of the UN Charter.

compliance.[62] The Appeals Chamber has held that it is sound policy for the Prosecutor as well as defence counsel to first seek the assistance of States through cooperative means.[63] This is due to the fact that "the International Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign States" due to its lack of a police power.[64] Only after a State declines to lend the requested support should a party make a request for a Judge or a Trial Chamber to take mandatory action as provided for under Article 29.[65]

33. The Appeals Chamber notes that "[i]t is clear that the Tribunal's Rules have been intentionally drafted to incorporate safeguards for the protection of certain State interests in order to encourage States in their fulfilment of their cooperation obligations under the Tribunal's Statute and Rules."[66] One such rule is Rule 70, which allows for a person or an entity, such as a State, to provide information to either the Prosecutor or the Defence on a confidential basis.[67] In providing that information, a State is not required to justify the reasons for its confidentiality on national security interests grounds or otherwise. Consequently, the Rule encourages States to share a broad range of information with parties "by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected"[68] and that this protection will not be lifted without their consent. Thus, where the provided information is being used solely for the purpose of generating new evidence, it shall not be disclosed to the other party without the consent of the State providing the information.[69] Where the Prosecutor or the Defence "elects to present as evidence any testimony, document or other material so provided" before a Trial Chamber and must disclose it to the other party, they are required to first obtain the consent of the State.[70] In examining the evidence, the Trial Chamber may not: (i) order either party to produce additional evidence received from the State providing the initial information; (ii) summon a person or a representative of that State as a witness or order their attendance for the purpose of obtaining additional evidence; (iii) order the attendance of witnesses or require production of documents in order to compel the production of additional evidence; or (iv) compel a witness introducing into

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[62] *Id.*, para. 31. *See also* Article 29(1), which provides that States shall cooperate in the investigation and prosecution of persons, and Article 29(2), which states that States shall comply without undue delay to any "request for assistance" in addition to an order from a Trial Chamber.
[63] *Blaškić* Judgement on Review Request, para. 31.
[64] *Ibid.*
[65] *Ibid.*
[66] *Prosecutor v. Milošević,* Case No. IT-02-54AR108*bis*.2, Decision on Serbia and Montenegro's Request for Review, 20 September 2005 ("*Milošević* Decision of 20 September 2005"), para. 11.
[67] *See* Rule 70(B), (C) and (F). Contrary to Ojdanić's submission, Rule 70 is not limited in its application to "situations where a party seeks the material 'solely for the purpose of generating new evidence'" such that it does not apply to the situation, as in this case, where material is sought for the purpose of use at trial. Response, para. 42. *See Milošević* Rule 70 Decision, paras. 20-21, 25.
[68] *Milošević* Rule 70 Decision, para. 19.
[69] Rule 70(B).
[70] Rule 70(C) and (F).

evidence any information provided by a State under Rule 70 to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.[71]

34. By comparison, where confidential information and documentation are compelled from a State pursuant to Rule 54*bis*, they are not guaranteed such protections. When a party makes a Rule 54*bis* request, it is the Judge or Trial Chamber who determines whether the party has satisfied the requirements for gaining access to that material. A State may or may not have the opportunity to be heard prior to a decision being taken.[72] A State may make an objection to disclosure, but only on grounds that it would prejudice its national security interests.[73] During the hearing, the State may request that certain protective measures apply such as holding the hearing *in camera* and allowing certain documents to be submitted in redacted form.[74] If a State is not given the opportunity to be heard and a Rule 54*bis* order is served upon it, the State may apply by notice to a Judge or Trial Chamber to have the order set aside but again, only on grounds of national security interests.[75] During the hearing on this notice, the State may also request that certain protective measures apply.[76] Where a Judge or a Trial Chamber decides to proceed with ordering a State to produce the requested materials under Rule 54*bis*, it may provide that appropriate measures be applied to the materials upon disclosure in order to protect State interests.[77] However, the use of the term "interest" in sub-paragraph (I) has been interpreted by the Appeals Chamber to refer to "national security interests" only, in light of the reference therein to other subparagraphs of Rule 54*bis*, which specifically refer to a State's national security interests.[78]

35. The Appeals Chamber considers that the protections for confidential materials produced by order under Rule 54*bis* as compared to those for the same materials provided voluntarily by States under Rule 70 differ in at least two important ways that are significant for this decision. Under Rule 54*bis*, the application of protective measures to the documents or information produced by a State are at the discretion of a Judge or the Trial Chamber who may impose them only after determining that national security interests warrant them.[79] Furthermore, it is at the discretion of the party requesting the information as to the purposes for which it will subsequently be used in proceedings

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[71] Rule 70 (C) and (D).
[72] Compare Rule 54*bis* (D) and (E).
[73] Rule 54*bis* (F).
[74] Rule 54*bis* (F) and (G).
[75] Rule 54*bis* (E)(i)-(iii).
[76] Rule 54*bis* (E)(v).
[77] *See* Rule 54*bis* (I).
[78] *Milošević* Decision of 20 September 2005, para. 19.
[79] *Id.*, para. 14 (holding that "it is generally for the State to present its argument to the Chamber than an interest is a national security interest that warrants a Chamber ordering non-disclosure of the material sought. It is then for the Chamber to consider whether that claim is justified and warrants an order of protective measures. It is not the case [...] that a Chamber must accept the qualification presented by a State.").

before a Judge or Trial Chamber. Whereas, under Rule 70, a State controls the confidentiality of the information it provides and makes its own determination that this material should be subject to certain protections--for national security interest reasons or otherwise. In addition, the State has control over how it may be used, whether for evidence generation purposes only or also as evidence at trial. Thus, Rule 70 allows for a State to avail itself of control and protections that it is able to maintain over that material in exchange for assisting parties before the International Tribunal in providing confidential material either of its own volition or at their request.

36. These distinctions are particularly important for situations, as in this case, where a State considers that the national security concerns implicated by the disclosure of certain confidential materials are so vital that the decision on disclosure or protective measures for that information cannot be appropriately determined by third parties.[80] The United States contends that Ojdanić's request for confidential information seeks to obtain the product of specific intelligence sources and methods, which "implicates national security information of the highest sensitivity."[81] It argues that answering Ojdanić's request in either the affirmative or the negative would reveal information about the scope and effectiveness of the United States' intelligence capabilities and how they are applied. Answering in the affirmative "would confirm that the United States' intelligence sources and methods enabled it to intercept specific conversation involving specific individuals in specific locations and in a particular time period" while answering in the negative "would confirm that the United States lacked this capacity or that countermeasures taken to prevent such information from being obtained had been effective."[82] Thus, the United States argues that "the ability to protect intelligence sources and methods is essential to their effectiveness."[83] It submits that although the protective measures outlined in Rule 54*bis* (F), (G) and (I) provide for important protective measures, "they are more limited in scope than and cannot supplant the more comprehensive protections and control available to a cooperating State under Rule 70," which is "expressly constructed to safeguard the sources and methods underlying information."[84]

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[80] Indeed, the United States also argues that the Trial Chamber erred in the Impugned Decision by underestimating the objections of the United States to Ojdanić's Application on grounds of national security interests. The United States claims that the Trial Chamber erred in determining that Ojdanić was not interested in the techniques that States use to gather information, but only wanted the information relevant to his request, and that any national security concerns could be appropriately protected under Rule 54*bis* (F)-(I). *See* Request, paras. 19-22. While the Appeals Chamber finds that the United States fails to demonstrate that the Trial Chamber abused its discretion here, this has no impact on this decision in light of the fact that the Appeals Chamber holds that the Rule 54*bis* order was in error because Ojdanić failed to meet the reasonable steps requirement for a Rule 54*bis* request.
[81] Request, pp. 19-20.
[82] *Id.*, p. 20.
[83] *Id.*, p. 21.
[84] *Ibid.*

37. Turning to the reasonable steps requirement under Rule 54*bis*, the Appeals Chamber considers that Ojdanić took the first reasonable step required of parties seeking confidential materials from a State—that is, he made a request to the United States for assistance. However, thereafter, Ojdanić engaged in a series of negotiations with the United States over two to three years, which were, at times, uncooperative. The lengthy negotiations were due in part[85] to disputes over the broad framing of Odjanić's original request, which the Trial Chamber eventually found failed to meet the specificity and relevancy requirements.[86] Throughout the negotiations, the United States made offers of assistance in providing certain information under Rule 70 in light of its expressed national security concerns with Ojdanić's applications vis-à-vis its intelligence gathering capabilities. However, Ojdanić refused these offers and eventually terminated the process by seeking a compulsory Rule 54*bis* order on grounds that Rule 70 empowers the United States to retain control over the disclosure of the requested material and to prevent it from being used as evidence at trial.[87] While this is the case, the Appeals Chamber notes that Rule 70 does not presuppose that a State will, in fact, decide to retain all of that control at all times or prevent disclosure of all of the requested information at trial. More importantly, the Appeals Chamber considers that a State's availment of Rule 70 protections in assisting a party with requested information does not equal a State declining to "lend the requested support" such that seeking mandatory action from a Judge or Trial Chamber under Rule 54*bis* is warranted as the next step.[88] A party may not bypass a State's cooperative efforts to assist it with gaining access to certain confidential information simply because that party does not want the State to be able to utilize the protections afforded to it through Rule 70. Thus, the Trial Chamber erred in finding that Ojdanić met the reasonable steps requirement in his Application.

38. That being said, the Appeals Chamber emphasizes that Rule 70 should not be used by States as "a blanket right to withhold, for security purposes, documents necessary for trial" from being disclosed by a party for use as evidence at trial as this would "jeopardise the very function of the International Tribunal, and defeat its essential object and purpose."[89] Indeed, "those documents might prove crucial for deciding whether the accused is innocent or guilty."[90] Furthermore, such an

[85] The Appeals Chamber notes that some of the delay was also due to an indefinite stay of proceedings issued by the Trial Chamber on 14 November 2003. *See* Order Staying Rule 54*bis* Proceedings, 14 November 2003, p. 2.
[86] Decision on Application of Dragoljub Ojdanić for Binding Orders pursuant to Rule 54 *bis,* 23 March 2005.
[87] Impugned Decision, 22.
[88] *See supra* para. 32.
[89] *Blaškić* Judgement on Review Request, para. 65.
[90] *Ibid.*

interpretation of Rule 70 would be contrary to States' obligation to cooperate with the International Tribunal under Article 29 of the Statute.[91]

D. The Permissible Scope of a Rule 54*bis* Order to Produce and the Originator Principle

39. The final issue to be determined by the Appeals Chamber is whether the Trial Chamber erred in the Impugned Decision when "including in the scope of its Rule 54*bis* order information that a requested State or international organization does not own or did not originate but received from another State pursuant to express arrangements."[92] The United States claims that this was an abuse of discretion because generally, even after a State shares information with other States, the originating State "must control release of their own information" (the "originator principle").[93] This is due to the fact that

> [w]hen a State decides to share intelligence or other sensitive information, it typically does so under an express and binding arrangement, with specific conditions on storage, access and use. That is, the originating State does not transmit absolute rights over the information, but retains residual rights and control. It remains the owner of the information.[94]

The United States claims that the Impugned Decision has the effect of riding "roughshod" over "such long-standing arrangements" and forces a "State to delegate decisions affecting its national security" to a third-party holder of its information who is not best placed "to assess the damage that would ensue from disclosure of sensitive information and to determine which, if any, protective measures would be adequate."[95]

40. Further, the United States notes that adherence to the originator principle is of "paramount importance to information sharing" among States and their interests in national security and

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[91] The Appeals Chamber notes that it has previously suggested possible modalities for ensuring that all documents directly relevant to trial proceedings are obtained from States while recognizing their legitimate national security concerns. Such modalities may be useful in the Rule 70 context whereby if a State withholds consent to disclosure of certain materials at trial, it may be appropriate for a Trial Chamber to allow that party to apply, *ex parte*, to the Trial Chamber sitting *in camera* for consideration of the confidential material and the party's contention that the material is necessary for a fair determination of the trial. While the Trial Chamber may not thereafter issue an order compelling the State to allow for the material at issue to be disclosed and used as evidence at trial or bypass any other Rule 70 protections, it may take measures that it deems necessary in the interests of justice in light of that material while respecting the interests of the concerned State in maintaining full confidentiality. *Cf. Blaškić* Judgement on Review Request, paras. 67-68, and Rule 68 (iii) and (iv). The Appeals Chamber notes that the Prosecution may similarly apply to a Chamber sitting *in camera* where it has Rule 70 material from a State provider that is exculpatory but cannot be disclosed pursuant to the Prosecution's Rule 68 obligation due to the fact that the State has not consented. In that case, the Prosecutor shall provide the Trial Chamber (and only the Trial Chamber) with the Rule 70 information that the State seeks to keep confidential.

[92] Request, p. 16.

[93] *Ibid.*

[94] *Id.*, p. 17.

[95] *Ibid.*

international relations.[96] Its importance is widely shared by the United States, NATO and other States and is also reflected in State practice as demonstrated by its recognition in Article 73 of the Rome Statute of the International Criminal Court.[97] In conclusion, the United States argues that the Impugned Decision's Rule 54*bis* order to States and NATO to provide information that did not originate with them was unnecessary[98] and, if allowed to stand, "will undermine existing information-sharing regimes and have a chilling effect on the sharing of sensitive information."[99]

41. Paragraph 38 of the Impugned Decision, which is at issue here, reads as follows:

> The target of such an Order [under Rule 54*bis*] 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)." 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.

42. The Appeals Chamber considers that the holding in paragraph 38 of the Impugned Decision was made in the context of issuing a Rule 54*bis* order to produce with regard to NATO and not the United States.[100] Nevertheless, the Appeals Chamber accepts the United States' argument that this holding could directly affect it in two ways and therefore, the United States has standing to challenge it. First, it would require NATO, as a third-party holder of information originating from the United States, to provide that information to the International Tribunal. Second, because the Trial Chamber generally stipulated that its holding "applies equally to material received by one State from another" it "would require the United States to produce any responsive information in its possession that had originated with another State" in the future if served with a Rule 54*bis* order.[101]

43. The Appeals Chamber finds that the Trial Chamber erred in paragraph 38 of the Impugned Decision when summarily dismissing the issues of ownership and origination of information as irrelevant to a Rule 54*bis* order. Nothing in the text of Rule 54*bis* or the jurisprudence concerning

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[96] *Id.*, p. 16.
[97] *Ibid.*
[98] The United States claims that the order to provide such non-originating information was unnecessary given that Ojdanić directed his request to all NATO Member States. Thus, an order to one NATO Member State (or NATO) to produce information originating from another NATO Member State that Ojdanić could obtain directly from that State was unnecessary. *See* Request, p. 18.
[99] Request, p. 18.
[100] The Appeals Chamber does not address here whether it was proper for the Trial Chamber to issue a binding Rule 54*bis* order to an international organization. This issue is considered in a separate decision disposing of a Rule 108*bis* request for review of the Impugned Decision brought by NATO.
[101] Request, p. 16.

the International Tribunal's power to issue compelling orders to States[102] precludes consideration of these matters or indicates that the only question of concern for a Trial Chamber is whether or not the State is in possession of the requested information or documents. Furthermore, the Appeals Chamber recalls that the Rules of the International Tribunal have been intentionally drafted to take into account certain State interests and to provide safeguards for them in order to encourage States in the fulfilment of their obligation to cooperate with the International Tribunal under Article 29 of the Statute.[103] Indeed, under Rule 54*bis*, a Judge or a Trial Chamber is required to consider the national security interests raised by a State in determining whether to issue a Rule 54*bis* order or whether to direct, on national security interests grounds, protective measures for the documents or information to be produced by a State under a Rule 54*bis* order.[104]

44. In this case, the Appeals Chamber has no reason to doubt the United States' assertion that it has a strong national security interest in maintaining the absolute secrecy of the intelligence information provided to it by other States and entities. The Appeals Chamber accepts as logical the United States' claim that, were it to divulge this information without the consent of the information providers, this could lead other States to doubt the United States' willingness and ability to keep secrets entrusted to it and therefore make other States less willing to share sensitive information with the United States in the future. Application of protective measures to this information handed-over by the United States would clearly not suffice to protect this national security interest. The Appeals Chamber notes, moreover, that the Trial Chamber issued Rule 54*bis* orders to other States that might have provided the United States with information responsive to Odjanić's requests. Rule 54*bis* orders to these States provide Odjanić with an alternate means of obtaining responsive information that may have been provided to the United States.

45. The Appeals Chamber holds that in these circumstances, a properly tailored Rule 54*bis* order would necessarily avoid requiring production of information over which the United States does not have ownership. Indeed, the bona fide national security interest asserted here by the United States is one that, far from being irrelevant to whether a Rule 54bis order will issue – as paragraph 38 of the Impugned Decision implies – deserves the utmost consideration.

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[102] The Trial Chamber's reliance upon *Blaškić* for this holding is inapposite. In that decision, the Appeals Chamber was considering what State actions are implicated by the Article 29 obligation on States to cooperate with the International Tribunal. The Appeals Chamber held that the obligation concerns both "action that States may take only and exclusively through their organs" and "action that States may be requested to take with regard to individuals subject to their jurisdiction." *Blaškić* Judgement on Review Request, para. 27. By way of example, the Appeals Chamber noted that a State may be enjoined to produce documents in the possession of one of its officials. *Ibid.* The Appeals Chamber was not considering the question of whether a State may be enjoined to produce documents in its possession that was shared with it by another State.

[103] *See supra* paras. 33-34.

[104] *See* Rule 54*bis* (E)(iii), (F)(i), and (I).

IV. DISPOSITION

46. On the basis of the foregoing, the Appeals Chamber **GRANTS** the Request of the United States in part as it relates to the Trial Chamber's errors in the Impugned Decision in finding that Ojdanić met the reasonable steps requirement under Rule 54*bis* and holding that a Rule 54*bis* order requires production of documents or information regardless of ownership or origination, **SETS ASIDE** paragraph (1) of the Impugned Decision's Disposition insofar as it orders the United States, pursuant to Rule 54*bis*, to produce to Ojdanić the documents and information requested in paragraphs (A) and (B) of his Application, and **INVITES** Odjanić and the United States to immediately resume their negotiations for provision of the information requested in paragraphs (A) and (B) of Odjanić's Application consistent with this Decision and to conclude them as expediently as possible in light of the pending commencement of the trial in this case.

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

Dated this 12th day of May 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar, Presiding Judge

[Seal of the International Tribunal]