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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-05-87-AR108*bis*.1
		Date:	15 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: **15 May 2006**

PROSECUTOR

v.

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

DECISION ON REQUEST OF THE NORTH ATLANTIC TREATY ORGANISATION FOR REVIEW

The Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp
Ms. Christina Moeller

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 "NATO Request for Review of Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*" filed by the North Atlantic Treaty Organisation ("NATO") 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 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, NATO filed its Request for review of the Impugned Decision on 2 December 2005 as did the United States in a separate filing.[2] In its Request, NATO asks the Appeals Chamber to reverse the Impugned Decision as it relates to NATO.[3] On 7 December 2005, Ojdanić filed "General Ojdanić's Submisson on Admissibility of Requests for Review" ("Submission on Admissibility") and, on 12 December, "General Ojdanić's Consolidated Response to Requests for

[1] Impugned Decision, pp. 3, 17.
[2] *See* 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*, 2 December 2005. The present Decision solely disposes of the Request filed by NATO.
[3] Request, p. 3.

Review" ("Response").[4] On 16 December 2005, the Appeals Chamber stayed the Impugned Decision until its resolution of NATO's Request.[5]

4. The Appeals Chamber 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 NATO's Request.[6] 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.[7] The Appeals Chamber considers that, as noted by the United Kingdom,[8] the Impugned Decision dismissed or denied the Application as it related to a request for information from the United Kingdom.[9] Therefore, although the United Kingdom's Submission addresses issues of importance[10] also raised in NATO's 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 NATO's Request.

II. STANDARD OF REVIEW

5. 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 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.[11] Therefore, the Appeals Chamber will not conduct a *de novo* review

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[4] In his Submission on Admissibility, Ojdanić requested an opportunity to be heard on the merits of NATO's 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 NATO nor Ojdanić requested an oral hearing on NATO's 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 NATO and Ojdanić, which allow for it to reach a reasoned and fair disposition without requiring the oral presentation of arguments.

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

[6] Submission, p. 1.

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

[8] *Id.*, p. 1.

[9] Impugned Decision, p. 17.

[10] *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.

[11] *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, 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

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."[12] It must be demonstrated that the Trial Chamber has committed a "discernible error"[13] 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."[14] 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.[15]

III. DISCUSSION

A. NATO's Standing

6. In order to consider NATO's Request, the Appeals Chamber must find that NATO has standing to bring it before the Appeals Chamber. It is clear under Rule 108*bis* (A) that it is "a State" that "may [...] file a request for review of the [Trial Chamber's interlocutory] decision by the Appeals Chamber [...]." Similar to Rule 108*bis*, the plain language of Rule 54*bis* only makes reference to issuance of a binding order to produce documents and information to "a State" who may then seek review of that order under Rule 108*bis*.[16] NATO, as an international organization formed by an alliance of 26 individual sovereign States joined by treaty,[17] does not meet the definition of a State under the International Tribunal's Rules.[18] Therefore, in order to consider whether it has competence to review NATO's Request under Rule 108*bis*, the Appeals Chamber

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.").

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

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *See* Rule 54*bis* (C)(i)(a).

[17] *See* The North Atlantic Treaty, which entered into force on 24 August 1949.

[18] Rule 2 of the Rules defines a State as: "(i) a State Member or non-Member of the United Nations; (ii) an entity recognized by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or (iii) a self-proclaimed entity de facto exercising governmental functions, whether recognized as a State or not".

must first determine, *proprio motu,* whether the Trial Chamber erred in issuing a Rule 54*bis* order against NATO as an international organisation.[19]

7. In the Impugned Decision, the Trial Chamber held that "it is empowered to issue an Order against NATO" under Rule 54*bis*.[20] In making that statement, the Trial Chamber relied upon a decision by the Trial Chamber in the *Simić* case.[21]

8. The Appeals Chamber considers that the Trial Chamber did not err in so finding. The Appeals Chamber recalls that the basis for a Trial Chamber's binding Rule 54*bis* order to produce is found in Article 29 and paragraph four of Security Council resolution 827 (1993).[22] On the face of those texts, only "States" have the obligation to cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law[23] and to comply with requests or orders for judicial assistance.[24] However, the Appeals Chamber agrees with the Trial Chamber in *Simić* that "States" refers to all Member States of the United Nations, whether acting individually or collectively and, under a "purposive construction" of the Statute of the International Tribunal, Article 29 applies to "collective enterprises undertaken by States" such as an international organization or its competent organ.[25] It is the general rule in the jurisprudence of the International Tribunal that the rules of treaty interpretation in international law apply to the Statute of the International Tribunal.[26] Article 31(1) of the Vienna Convention on the Law of Treaties[27] provides that "a treaty shall be interpreted in

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[19] NATO makes no submission with regard to this issue; it merely states that it makes the Request "[a]ssuming without conceding, that Article 29 of the ICTY Statute applies to an international organization." Request, p. 2.
[20] Impugned Decision, para. 37.
[21] *See id.*, para. 36, citing to *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 ("*Simić* Decision").
[22] *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. 26. The Appeals Chamber notes that the content for a binding order to produce under Article 29 as laid out in this decision was later codified in Rule 54*bis*. The binding force for such an order derives from Article 25 and Chapter VII of the Charter of the United Nations, which entered into force on 24 October 1945 ("UN Charter"). Article 25 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 non-forceful measure for restoring international peace and security by decision of the Security Council under Chapter VII of the UN Charter.
[23] *See* Article 29(1).
[24] *See* Article 29(2). UN Sec. Res. 827 (1993) provides: "*Acting* under Chapter VII of the Charter of the United Nations, 4. *Decides* also that all States shall cooperate fully with the International Tribunal and its organs [...] and that consequently all States shall take any measures necessary [...] to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute."
[25] *Simić* Decision, paras. 46, 48.
[26] *See, e.g., Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, paras. 282-286.
[27] Signed on 23 May 1969 and entered into force on 27 January 1980.

good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Appeals Chamber further agrees with the *Simić* Trial Chamber that "[t]he mere fact that the text of Article 29 is confined to States and omits reference to other collective enterprises of States does not mean it was intended that the International Tribunal should not also benefit from the assistance of States acting through such enterprises."[28] Indeed, the Appeals Chamber recalls that "[i]n the final analysis, the International Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation"[29] of States and the purpose of Article 29 is to require the full cooperation of States with the International Tribunal in fulfilling its crucial mandate. To interpret Article 29 in such a way that the International Tribunal would be prevented from obtaining information or documents from a State when it was acting through an international organization, would undermine the essence of the International Tribunal's functions. Thus, the Appeals Chamber finds that the International Tribunal's Article 29 power to issue binding orders is as applicable to international organizations as collective enterprises of States, as it is to individual Member States.

9. Such a purposive construction of the scope of Article 29 of the Statute is supported by Security Council resolution in which the Security Council, acting under Chapter VII of the UN Charter, applied Article 29 obligations to NATO and its competent organ.[30] In December 1995, with the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Agreement"),[31] provision was made under Annex 1A for its implementation by a multinational military force ("IFOR") to be established under the auspices of NATO. In 1996, the Security Council, by resolution, authorized Member States "acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement," or NATO, to establish a multinational stabilization force (SFOR) as the legal successor to IFOR.[32] In that same resolution, the Security Council reminded the parties to the Dayton Peace Agreement of their cooperation obligations with all *entities* involved in the implementation of that agreement as described therein (which includes SFOR and NATO), as well as the International Tribunal. The Security Council then went on to underline that "full cooperation by States *and entities* with the International Tribunal includes, *inter alia,* the surrender for trial of all persons indicated by the Tribunal and provision of

[28] *Simić* Decision, para. 47.
[29] *Blaškić* Judgement on Review Request, para. 31.
[30] The Appeals Chamber notes that under Chapter VII, Article 48 of the UN Charter, "[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. Such decisions shall be carried out by the Members of the United Nations directly *and through their action in the appropriate international agencies of which they are members.*" (Emphasis added).
[31] S/1995/999, 16 December 1995.
[32] UN Sec. Res. 1088 (1996) at para. 18.

information to assist in Tribunal investigations."[33] While NATO's role in the implementation of the Dayton Peace Agreement is not at issue here, nevertheless, it is important to note that the Security Council has, acting under Chapter VII, applied the obligation to cooperate with the International Tribunal to NATO as an international organization.

10. The Appeals Chamber notes that further support for interpreting Article 29 to allow for binding orders by the International Tribunal to be issued with regard to international organizations and their organs is found in the Rules and practice of the International Tribunal. Under Rule 39(iii) and (iv), the Prosecutor may seek the assistance of "any State authority" as well as "any relevant international body" in the conduct of an investigation and may "request such orders as may be necessary from a Trial Chamber or a Judge." Pursuant to Rule 40*bis* (A)-(B) and (E), an order for the transfer to and provisional detention of a suspect at the premises of the detention unit of the International Tribunal issued by a Judge may be transmitted to an "international body." Likewise under Rule 59*bis,* a copy of a warrant for the arrest of an accused may be transmitted to an international body together with an order for the transfer of an accused to the International Tribunal in the event that the accused was taken into custody by that international body. With regard to past practice, a Trial Chamber has successfully ordered the Presidency of the European Union Council and the Commission of the European Union to produce documents.[34] Other Trial Chambers have ordered SFOR to secure certain information and documents[35] and have found that SFOR was obliged to abide by a Rule 59*bis* order from a Judge to transfer an accused taken into its custody to The Hague.[36] Likewise, in recent decisions on provisional release, the Appeals Chamber, after expressly recognizing that the United Nations Mission in Kosovo ("UNMIK") is not a State under the Rules of the International Tribunal, but is an "international civil presence" established by Security Council resolution, has ordered UNMIK to fulfil certain obligations with regard to monitoring the conditions of provisional release of the accused.[37]

11. Having found that the Trial Chamber did not err in holding that it could issue a binding Rule 54*bis* order to NATO, the Appeals Chamber considers that it has competence under Rule 108*bis* to review the Impugned Decision as it relates to NATO although Rule 108*bis* only provides for "a State" to request review. The Appeals Chamber recalls its holding above that a State may be

[33] *Id.*, para. 7 (emphasis added).
[34] *Prosecutor v. Kordić and Čerkez,* Case No. IT-95-14/2-T, Order for the Production of Documents by the European Community Monitoring Mission and Its Member States, issued *ex parte* and partly confidential on 4 August 2004, p. 3.
[35] *Simić* Decision, paras. 58-61.
[36] *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 55.

interpreted under Article 29 and Rule 54*bis* to refer to a collective enterprise of States.[38] Furthermore, Rule 54*bis* (C)(i)(a) requires that a decision under that Rule "shall be subject to review under Rule 108*bis*." Finally, because international organizations, like States, are not parties to proceedings before the International Tribunal such that they may appeal a Rule 54*bis* decision,[39] fairness requires that international organizations must have the same right to seek a review of a Rule 54*bis* order issued against them as is enjoyed by individual States.

B. Admissibility of NATO's Request

12. Next, the Appeals Chamber must find that NATO's Request is admissible in order to dispose of it. Under Rule 108*bis*, NATO must demonstrate that its Request meets the threshold test of admissibility by showing that: (1) it is directly affected by the Impugned Decision, and (2) that the Impugned Decision concerns issues of general importance relating to the powers of the International Tribunal.[40]

13. NATO submits that it is directly affected by the Impugned Decision,[41] and the Appeals Chamber finds that this is established. The Impugned Decision issued a binding order to NATO to produce, by a certain date, copies of documents in its possession relating to intelligence information as requested in Ojdanić's Application.[42]

14. NATO further submits that the Impugned Decision concerns issues of general importance relating to the powers of the International Tribunal.[43] Specifically, NATO argues that the Impugned Decision negatively affects NATO's ability to conduct relations with its Member States by "ordering it to produce information which it did not originate and which remains under the control and authority of its Member States."[44] If the Impugned Decision were to stand, NATO contends that NATO Member States will be prevented from sharing intelligence information with NATO and this

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[37] *See Prosecutor v. Hardinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Ramush Hardinaj's Modified Provisional Release, 10 March 2006, paras. 14, 77, 103-104; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Hardin Bala to Attend His Daughter's Memorial Service, 20 April 2006, p. 3.
[38] *See supra* para. 9.
[39] Rule 54*bis* (C)(i)(b) and (ii) allows for a "party" to appeal a Rule 54*bis* decision. However, under Rule 2, parties are defined as the Prosecutor and the Defence.
[40] *See* Rule 108*bis* (A).
[41] Request, p. 2.
[42] Impugned Decision, p. 17. *Cf. Milošević* Decision of 6 April 2006, para. 19; *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, 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, para. 8; *Blaškić* Decision on Admissibility, para. 13.
[43] Request, p. 2. The Appeals Chamber notes that Ojdanić agrees that NATO's Request is admissible and does not object to the Appeals Chamber reviewing the Impugned Decision. *See* Submission on Admissibility, para. 3.
[44] Request, p. 2.

will "greatly impair NATO's ability to carry out its mission and to contribute to the maintenance of peace and security."[45]

15. 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 for the production of documents or information at the request of a party to proceedings before the International Tribunal. The Appeals Chamber finds that NATO has demonstrated that the Impugned Decision raises issues of general importance with regard to the scope of that power, which ultimately impact upon the relationship of international organizations and States with the International Tribunal. Therefore, the Appeals Chamber now turns to consider the merits of NATO's Request.

C. Rule 54*bis* and the Originator Principle

16. The primary issue raised in NATO's Request is whether the Trial Chamber erred in the Impugned Decision when "issuing a binding order [under Rule 54*bis*] for the production of intelligence information" in NATO's possession.[46] NATO claims that the Trial Chamber erred "because NATO has no independent intelligence gathering capacity and any intelligence information that NATO possesses remains in the control of its member States."[47] NATO points to the Agreement between the Parties to the North Atlantic Treaty for Security where "it is clear that any intelligence information possessed by NATO remains under the control and authority of the member State that originated it" ("originator principle").[48] Furthermore, under the NATO Security Policy, the "Originator," defined as the "nation or international organization under whose authority information has been produced or introduced into NATO," has "full authority to define the level of security classification and determine to what extent classified information may be disseminated."[49] NATO states that these provisions were necessarily made for "the mutual protection and safeguarding of any classified information that they may interchange."[50] Thus, NATO contends that "any binding orders issued in response to" Odjanić's Application "should be directly addressed to the sovereign individual member States of the Alliance as appropriate."[51] NATO further argues that the Trial Chamber's Rule 54*bis* order to NATO to produce was unnecessary in light of the fact that

[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*
[48] *Id.*, p. 3.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*

Odjanić's Rule 54*bis* request was also made to "all of the States that could have originated any intelligence in NATO's possession."[52]

17. The Appeals Chamber notes that in the Impugned Decision, the Trial Chamber ordered Canada, Iceland, Luxembourg, the United States and NATO to produce the following documents and information requested in paragraphs (A) and (B) of Ojdanić's Application:

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

[52] *Id.*, p. 2.

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.

In making its Rule 54*bis* order with regard to NATO, the Trial Chamber stated, at paragraph 38 of the Impugned Decision, that

> [t]he 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.

18. The Appeals Chamber recalls its previous holding 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 the same Rule 54*bis* order to produce at issue in this case, but directed to the United States.[53] As stated in that decision, "[n]othing in the text of Rule 54*bis* or the jurisprudence concerning the International Tribunal's power to issue compelling orders[54] precludes consideration of these matters [...]."[55] Furthermore, 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.[56] Specifically, under Rule 54*bis*, a Judge or a Trial Chamber is required to consider States' national security interests 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 under a Rule 54*bis* order.[57] In its

[53] *See Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108*bis*.2, Decision on Request of the United States of America for Review, 12 May 2006, ("*Milutinović* Review Decision"), para. 43.
[54] 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.
[55] *Milutinović* Review Decision, para. 43.
[56] *See id.*, para. 33.
[57] *See* Rule 54*bis* (E)(iii), (F)(i), and (I).

previous decision, the Appeals Chamber concluded that the circumstances of the case required that a properly tailored Rule 54*bis* order to the United States would avoid requiring production of the requested intelligence information over which the United States did not have ownership due to 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."[58]

19. In this case, the Appeals Chamber has no reason to doubt NATO's assertion that it has a strong security interest in maintaining the absolute secrecy of intelligence information provided to it by States and other entities. Were NATO to divulge this information without the consent of the information providers, this could lead States to doubt NATO's willingness and ability to keep secrets entrusted to it and therefore make States less willing to share sensitive information with NATO in the future. As a result, NATO's purpose as an alliance of States to secure international peace and security under the UN Charter would be undermined to the detriment of the national security of its individual Member States. Application of protective measures to information handed-over by NATO would clearly not suffice to protect its – and its Member States' – security interests. The Appeals Chamber notes, moreover, that the Trial Chamber issued Rule 54*bis* orders to States that might have provided NATO 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 they may have provided to NATO.

20. The Appeals Chamber holds that in these circumstances, the Trial Chamber abused its discretion by issuing a Rule 54*bis* order requiring NATO to produce intelligence information that it did not own. Indeed, the bona fide security interest asserted here by NATO is one that, far from being irrelevant to whether a Rule 54*bis* order will issue – as paragraph 38 of the Impugned Decision implies – deserves the utmost consideration. Because the Rule 54*bis* order at issue in this case required NATO to produce certain intelligence information of which it is not the originator thereby implicating serious security interests held by NATO and its Member States, the Trial Chamber abused its discretion in directing that order to NATO.

IV. DISPOSITION

21. On the basis of the foregoing, the Appeals Chamber **GRANTS** the Request of NATO, **REVERSES** the Impugned Decision in part, and **DISMISSES** paragraph (1) of the Impugned Decision's Disposition insofar as it orders NATO, pursuant to Rule 54*bis*, to produce to Ojdanić the documents and information requested in paragraphs (A) and (B) of his Application.

[58] *Milutinović* Review Decision, paras. 44-45.

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

Dated this 15th day of May 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar, Presiding Judge

[Seal of the International Tribunal]