IT-99-37-PT
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24 MARCH 2005

10902 AT

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-99-37-PT

Date: 23 March 2005

Original: English

**IN THE TRIAL CHAMBER**

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

**Registrar:** **Mr. Hans Holthuis**

**Decision:** **23 March 2005**

**PROSECUTOR**

**v.**

**MILAN MILUTINOVIĆ**
**NIKOLA ŠAINOVIĆ**
**DRAGOLJUB OJDANIĆ**

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

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**The Office of the Prosecutor:**
**Mr. Thomas Hannis**
**Ms. Christina Moeller**

**Counsel for Milan Milutinović:**
**Mr. Eugine O'Sullivan**
**Mr. Slobodan Zečević**

**Counsel for Dragoljub Ojdanić:**
**Mr. Tomislav Višnjić**
**Mr. Peter Robinson**

**Counsel for Nikola Šainović:**
**Mr. Toma Fila**
**Mr. Vladimir Petrović**

**North Atlantic Treaty Organisation**

**Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Spain, Turkey, United Kingdom, and United States of America**

**THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"),

**Brief procedural history**

**BEING SEISED** of "General Ojdanić's Application for Orders to NATO and States for Production of Information", filed by Dragoljub Ojdanić ("Applicant") on 13 November 2002 ("Application"), requesting that the Trial Chamber issue, pursuant to Article 29 of the Statute of the International Tribunal ("Statute") and Rules 54 and 54*bis* of the Rules of Procedure and Evidence ("Rules"), binding orders to NATO, its Member States, and six other States for the production of documents responsive to the following request for assistance:

(A) All recordings, summaries, notes, or text of any intercepted communications (electronic, oral, or written) during the period 1 January through 20 June 1999, to which General Dragoljub Ojdanić was a party;

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

(C) All correspondence, memoranda reports, recordings or summaries of any statements made by General Dragoljub Ojdanić during the period 1 January through 20 June 1999 to any representative of your organisation, including sources of information working on your behalf

(collectively referred to hereinafter as "Request"),

**CONSIDERING** the subsequent procedural history and the arguments of the Applicant, States, and NATO – both written and oral,[1]

[1] *See, e.g.*, "General Ojdanić's Application for Orders to NATO and States for Production of Information", 13 November 2002; "Scheduling Order", 26 November 2002; "Letter and Written Observations of France", 21 February 2003; "Written Response and Notice of Objection of the Government of Canada to the Application of General Ojdanić for Orders to NATO and States for Production of Information", 27 February 2003; "Written Response of the Government of the United Kingdom to the Application of General Ojdanić for Orders to NATO and States for Production of Information", 27 February 2003; "Submission of the Federal Republic of Germany Concerning General Ojdanić's Application for Orders to NATO and States for Production of Information", 27 February 2003; "Written Response of the Government of the Netherlands to the Application of General Ojdanić for Orders to NATO and States for the Production of Information", 28 February 2003; "Response of the United States of America to the Application of General Ojdanić for Order for Production of Information", 28 February 2003; "Letter from the Embassy of the Republic of Hungary", 28 February 2003; "Letter from the Embassy of

## Law

**CONSIDERING** the provisions of Article 29 of the Statute and the jurisprudence of the International Tribunal concerning the obligation of States to cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law and to comply without undue delay with requests for assistance or orders issued by the Trial Chamber,[2]

**CONSIDERING** that Rule 54*bis* of the Rules provides that a party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall (1) identify as far as possible the documents or information to which the application relates; (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; and (3) explain the steps that have been taken by the applicant to secure the State's assistance,

**CONSIDERING** that the issues raised by these criteria, although distinct, may overlap,

**CONSIDERING** that Rule 54*bis* (1) was intended to reflect the case law of the International Tribunal[3] and (2) was adopted at the twenty-first plenary session of the International Tribunal held on 17 November 1999 in order to provide a procedure for States to be heard in relation to Article 29 of the Statute and to raise, prior to the production of documents, matters of concern, such as issues of national security,[4]

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the Czech Republic", 28 February 2003; "Reply Memorandum: General Ojdanić's Application for Orders to NATO and States for Production of Information", 7 March 2003 ("Reply Memorandum"); "Order for Further Submission", 13 May 2003; "General Ojdanić's Further Submission in Support of Application for Orders to NATO and States for Production of Information", 20 June 2003; "Order Staying Rule 54 *bis* Proceedings", 14 November 2003; "Scheduling Order", 22 September 2004; "Declaration of Expert Witness in Support of General Ojdanić's Application for Orders to NATO and States for Production of Information", 12 November 2004; "Scheduling Order", 24 November 2004; "Request of the United States and Canada for Hearing *in Camera*", 26 November 2004; "General Ojdanić's Opposition to Request of United States and Canada for Hearing *in Camera*", 29 November 2004; Hearing, dated 1-2 December 2004, at T. 711-855; "Letter from NATO to the Trial Chamber", 2 December 2004.

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

[3] *Blaškić* Subpoena Decision, at para. 32; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Order to the Republic of Croatia for the Production of Documents, 21 July 1998, and Opinion of Judge Mohamed Shahabuddeen, at page 12; *Prosecutor v. Dario Kordić & Mario 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, at para. 38; *Prosecutor v. Blagoje Simić, et al.*, Case No. IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, at para. 40 (noting that Rule 54*bis* "enshrines the procedure first discussed in the *Blaškić Subpoena Decision*").

[4] Seventh Annual Report 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

**CONSIDERING** the following, with respect to **Rule 54*bis*(A)(i)**:

(1) Rule 54*bis*(A)(i) of the Rules provides that a party requesting an order under Rule 54 of the Rules that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall identify as far as possible the document and information to which the application relates;

(2) the Appeals Chamber in the *Blaškić* Subpoena Decision held that a request for a binding order against a State for production of documents issued under Article 29(2) of the Statute "must identify specific documents and not broad categories" and that a 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 Applicant, if he is acting bona fide and has no means of providing certain details (such as title, date, and author), to omit those details – as long as he explains the reasons therefor and has identified the specific documents in some appropriate manner;[5] and

(3) the Appeals Chamber in *Prosecutor v. Kordić* has held that "[t]he 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" and that "[t]he requirement of specificity clearly prohibits the use of broad categories, which, of course, in itself is a relative term. It does not . . . prohibit the use of categories as such",[6]

**CONSIDERING** the following, with respect to **Rule 54*bis*(A)(ii)**,

(1) Rule 54*bis*(A)(ii) of the Rules provides that a party requesting an order under Rule 54 of the Rules shall indicate how the documents or information to which the application relates are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and

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A/55/273 – S/2000/777, 7 August 2000, at para. 296 <<http://www.un.org/icty/rappannu-e/2000/index.htm>> accessed 5 October 2004.

[5] *Blaškić* Subpoena Decision, at para. 32 (notes omitted).

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

(2) The Appeals Chamber, in the *Blaškić* Subpoena Decision, held that a request for a binding order must "set out succinctly the reasons why such documents are deemed relevant to the trial",[7]

**CONSIDERING** that **Rule 54*bis*(A)(iii)** of the Rules provides that the Applicant shall explain the steps that have been taken by him to secure the State's assistance,

**Paragraph (A) of the Request**

**NOTING** that paragraph (A) of the Request refers to intercepted communications in which the Applicant himself was a participant,

**CONSIDERING** that, with respect to paragraph (A) of the Request, the Applicant has not indicated how the documents sought are relevant to issues in this case, *e.g.*,

(a) he does not even state that the Request relates to events in Kosovo;

(b) he does not attempt to state where and when relevant communications to which the Applicant was a party took place; and

(c) there is no mention of the issue to which the communications sought might relate such as the Applicant's lack of criminal responsibility for the crimes alleged in the Indictment, his intent or knowledge,

**CONSIDERING** that the Applicant has demonstrated his ability to specifically identify the matters in issue in the case to which the documents he seeks are said to be relevant, and to indicate how they are relevant to these matters, since he has done so in the body of the original Application,[8]

**Paragraph (B) of the Request**

**NOTING** that, paragraph (B) of the Request refers to intercepted communications in which the Applicant was mentioned or referred to,

[7] *Blaškić* Subpoena Decision, at para. 32.
[8] *E.g.*, "General Ojdanić's Application for Orders to NATO and States for Production of Information", 13 November 2002, at para 15.

**CONSIDERING** that although paragraph (B) of the Request identifies the geographical area as relating to Kosovo, the Applicant has not identified the issues in the case to which the documents sought relate;[9]

**Paragraph (C) of the Request**

**NOTING** that paragraph (C) of the Request refers to all correspondence, memoranda reports, recordings or summaries of any statements made by General Ojdanić,

**CONSIDERING** that paragraph (C) of the Request contains a description that is vague and obscure; for example, the phrase "sources of information working on your behalf" is ambiguous; and it is unclear whether the phrase "made by General Dragoljub Ojdanić" refers to "all correspondence, memoranda reports, recordings or summaries of any statements" or simply to "any statements",

**CONSIDERING THEREFORE** that, with respect to paragraph (C) of the Request, the Applicant has failed to identify as far as possible the documents sought and to indicate how they are relevant and necessary,

**Countries against which the Applicant does not seek binding orders**

**CONSIDERING** that the Applicant (1) has indicated that he no longer wishes to proceed with the Application in respect of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Denmark, Former Yugoslav Republic of Macedonia, Italy, Romania, Spain, and Turkey[10] and (2) has not indicated that he is still pursuing a binding order against Greece,[11]

**NOTING** that the Applicant has not requested a binding order with respect to Norway and Portugal,[12]

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[9] "General Ojdanić's Further Submission in Support of Application for Orders to NATO and States for Production of Information", 20 June 2003, para. 12.
[10] Reply Memorandum, at para. 2 (with respect to Denmark, Former Yugoslav Republic of Macedonia, Romania, Spain, and Turkey); Further Submission, at para. 17 (with respect to Croatia); Telephone conversation with Senior Legal Officer of Trial Chamber III, 1 December 2004 (with respect to Albania, Bosnia and Herzegovina, Bulgaria, and Italy).
[11] Telephone conversation with Senior Legal Officer of Trial Chamber III, 1 December 2004.
[12] Application, at para. 20

**National security interest objections**

**NOTING** that several States have made objections on grounds of national security interest,[13] but that, in light of the Trial Chamber's disposition at this stage of the litigation, it is unnecessary for the Trial Chamber to deal with these objections,

**NOTING FURTHER** that it is open to States (1) to make subsequent requests to the Trial Chamber for protective measures in relation to specific documents, the disclosure of which they believe will prejudice their national security interests, and (2) to utilise the procedures in Rule 54*bis* to address their legitimate national security interests,

**PURSUANT** to Article 29 of the Statute and Rules 54 and 54*bis* of the Rules,

**HEREBY ORDERS** as follows:

(1) In respect of **Belgium**, **Canada**, **Czech Republic**, **France**, **Hungary**, **Iceland**, **Luxembourg**, **Netherlands**, **Poland**, **United States**, **United Kingdom**, and **NATO**, the Applicant may reformulate paragraphs (A), (B) and (C) of the Request in appropriate terms by, for example as regards paragraphs (A) and (B), identifying the particular matters in issue in the case to which the documents sought are said to be relevant, and indicating how they are relevant to these matters, stipulating as far as possible the place and dates of intercepted communications that relate to matters which are the subject of the Indictment; and, for example as regards paragraph (C), identifying specifically the documents sought and how such documents relate to the matters in issue in the case.

(2) The Applicant is to notify the Trial Chamber of any reformulation of the Request within one month of this Decision, and the Applicant will also give the States listed in paragraphs (1) and (2) above, further opportunity to respond voluntarily to the

[13] For example, the United States argues that production may reveal the nature and extent of its intelligence gathering capabilities and where and how they might be directed and that it is unnecessary in the present circumstances to derogate from the customary international law privilege against production on grounds of national security interests. The United Kingdom argues that, although the requested information is subject to Rule 54*bis*(F), it is difficult (if not impossible), without a more specific request, for it to explain why it objects to the request in line with their duty to do so under Rule 54*bis*(F)(i). Canada accepts that States may not avoid their obligation to co-operate by a unilateral blanket assertion that national security interests are at stake, but point out that the jurisprudence of the International Tribunal has repeatedly affirmed the need to respect legitimate State concerns relating to national security. An argument is also made that a "non-originating" State is not obliged under Article 29 of the Statute to produce documents or information that it received from an

reformulated Request; or in the event that the Applicant does not reformulate the Request, notify the Trial Chamber that he does not wish to so do within one month of this Decision.

(1) With respect to paragraphs (A), (B) and (C) of the Request, the Application is DENIED in respect of **Albania**, **Bosnia and Herzegovina**, **Bulgaria**, **Croatia**, **Denmark**, **Former Yugoslav Republic of Macedonia**, **Germany**, **Greece**, **Italy**, **Romania**, **Spain**, and **Turkey**.

Judge Iain Bonomy appends a separate and concurring opinion to this Decision.

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

Judge Patrick Robinson
Presiding

Dated this twenty-third day of March 2005
At The Hague
The Netherlands

**[Seal of the Tribunal]**

"originating" State, essentially that "ownership" rather than "possession" triggers this obligation or that intelligence-sharing agreements between States trump any obligation under Article 29 of the Statute.

UNITED
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| | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 | Case No. | IT-99-37-PT |
| | | Date: | 23 March 2005 |
| | | Original: | ENGLISH |

**IN THE TRIAL CHAMBER III**

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

**Registrar:** **Mr. Hans Holthuis**

**Decision:** **23 March 2005**

**PROSECUTOR**

**v.**

**MILAN MILUTINOVIĆ**
**NIKOLA ŠAINOVIĆ**
**DRAGOLJUB OJDANIĆ**

# SEPARATE AND CONCURRING OPINION OF JUDGE IAIN BONOMY IN THE DECISION ON APPLICATION OF DRAGOLJUB OJDANIĆ FOR BINDING ORDERS PURSUANT TO RULE 54*BIS* DATED 23 MARCH 2005

**The Office of the Prosecutor:**

**Mr. Thomas Hannis**
**Ms. Christina Moeller**

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**Mr. Eugene O'Sullivan**
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**Counsel for Dragoljub Ojdanić:**

**Mr. Tomislav Višnjić**
**Mr. Peter Robinson**

**Counsel for Nikola Šainović:**

**Mr. Toma Fila**
**Mr. Vladimir Petrović**

**North Atlantic Treaty Organisation**
**Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Spain, Turkey, United Kingdom, and United States of America**

I agree with Judges Robinson and Kwon that it is, as matters stand, inappropriate to grant any part of the Request for Production of Documents. I shall explain briefly my reasons in relation to each part.

Prior to invoking the mechanism of Rule 54*bis*, whereby a State may be ordered to produce documents sought by a party to a case before the Tribunal, an Applicant must have failed to secure production by making a Request directly to the State.[1] Where the Trial Chamber to which application is made is unable to reject the application out of hand *in limine*, it appoints a hearing at which the State has an opportunity to be heard.[2] That was the course followed in this case, and eight of the States to whom the application was addressed were represented at the hearing.[3]

Before an order may be made, the Trial Chamber has to be satisfied that the order sought is appropriate. The Rule requires that consideration be given to a number of factors. These are principally the specificity of the application,[4] the relevance of the documents to any matter in issue before the Trial Chamber and the necessity thereof for a fair determination of that matter,[5] what steps have been taken to secure the State's assistance voluntarily,[6] and the prejudice that disclosure might cause to the national security interests of the State.[7] The burden which may be placed upon the resources of the Requested State by the order sought may also be taken into account.[8] While these factors can be separately identified from a construction of the Rule, they are not necessarily all discrete issues. Considerations of specificity and relevance may be closely woven together; one or both may have a particular bearing on the reasonableness of the steps taken by the Applicant to secure voluntary assistance. On the other hand, the necessity of the documents sought to a fair determination of a matter in issue in the case does not fall to be addressed until their relevance has been established.

The principal difficulty with (C) is best characterised as one of specification.[9] The Request is in these terms:

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[1] Rule 54*bis* (A)(iii)
[2] Rule 54*bis* (B) and (D)(i)
[3] Scheduling Order, 26 November 2002
[4] Rule 54*bis* (A)(i) which states that "A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall: (i) identify as far as possible the documents or information to which the application relates;".
[5] Rule 54*bis*(A)(ii)
[6] Rule 54*bis* (A)(iii)
[7] Rule 54*bis* (E)(v) and Rule 54*bis* (F)(i)
[8] The requirement that a request should not be overly burdensome can be seen as part of the specificity requirement; *See Prosecutor v. Blaškić*, Case No. IT-95-14-T, Order to the Republic of Croatia for the Production of Documents, 21 July 1998, para. 32; and, *Prosecutor v. Kordić*, 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, para. 41.
[9] Rule 54*bis*(A)(i).

"(C) All correspondence, memoranda, reports, recordings or summaries of any statements made by General Dragoljub Ojdanić during the period 1 January through 2 June 1999 to any representative of your organisation, including sources of information working on your behalf".

The description of the materials sought is general, vague and obscure. It is not clear whether it relates to correspondence by the Applicant or a wider category of correspondence. That is simply one example of its obscurity. No State could be faulted for claiming to be unable to deal with such a Request. It lacks basic clarity. As presently framed, it does not clear the first hurdle.

The principal difficulty with the first and second parts of the Request is best characterised as one of relevance.[10] The terms thereof are as follows:

"(A) All recordings, summaries, notes, or text of any intercepted communications (electronic, oral, or written) during the period 1 January through 20 June 1999, to which General Dragoljub Ojdanić was a party;

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

I accept that both are specific enough to satisfy the requirements of Rule 54*bis* (A) (i). Request (A) is more specific than Request (B), in that it is confined to intercepted communications to which the Applicant was a party, whereas (B) is much wider – and could potentially cover a huge range of communications in which the Applicant was referred to.

However, neither (A) nor (B) identifies the matters in issue before the Trial Chamber to which the intercepted communications sought might relate. Mr. Robinson, for the Applicant, made it clear that it was a deliberate choice to draft them in wide terms without reference to specific issues, since he contended that the Applicant's innocence could be demonstrated by the absence of incriminating material in the communications intercepted. The Applicant's lack of criminal intent was the issue

[10] Rule 54*bis*(A)(ii) states that "A party requesting an order under Rule 54 ... shall: (ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber ...".

to which the material sought related.[11] I do not accept the proposition that the general absence of incriminating material from communications intercepted from time to time is likely to have probative value in casting doubt on the guilt of the Applicant. What may be relevant to that issue are communications in the course of which the Applicant or others discussed the issues which arise in the Indictment in a way that tended to show that he is not criminally responsible as alleged. Neither states even that the issue to which the communications sought relate is the Applicant's state of mind or knowledge or intent. Indeed (A) does not even state that it relates to events in Kosovo.

It was an unsurprising consequence of this that some of the opposing States expressed concern about prejudice to their national security interests, but were unable to specify sufficiently clearly the basis on which it was claimed that national security interests would be prejudiced.[12] These interests can only be addressed properly once it is clear that there are documents covered by the Request which are relevant to a matter in issue before the Trial Chamber and necessary for a fair determination thereof.

The importance of ensuring that the material sought has a potential bearing on a matter in issue in the trial cannot be overstated. There is a tendency, at least in some cases within the Tribunal, for the parties to try to explore matters which are irrelevant to the live issues in the case. The long history of conflict in Yugoslavia, combined with an intense interest there in social and political affairs, may partially explain this. The desire of some to try to write a definitive account of the history of the Balkans, not only during the period surrounding the conflict to which the work of the Tribunal relates, but much earlier in the twentieth century and beyond, is fuelled by the availability of swathes of material which has no direct bearing on the issues that must be determined in a trial. Concentration on irrelevant material has the effect of undermining the interests of justice by distracting attention from the issues that must be determined. It is important, therefore, for a Trial Chamber to address closely the question of the relevance of any material sought for production to ensure that the attention of parties is concentrated on the issues and the material relevant thereto and that proceedings are not derailed from their orderly course even before they are properly under way.

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[11] Hearing, 1 December 2004, T. 730-731, T. 740 – 743 and 2 December 2004, T. 842 – 843.

[12] *See, for example*: "Written Response and Notice of Objection of the Government of Canada to the Application of General Ojdanić for Orders to NATO and States for Production of Information", 27 February 2003, paras. 20 – 29 and Hearing, 1 December 2004, T. 750 - 752; "Written Response of the Government of the Netherlands to the Application of General Ojdanić for Orders to NATO and States for Production of Information", 28 February 2003, p. 6 – 7 and Hearing, 1 December 2004, T.762 - 765; "Written Response of the Government of the United Kingdom to the Application of General Ojdanić for Orders to NATO and States for Production of Information", 27 February 2003,paras. 31 – 34 and Hearing,1 December 2004, T. 784 – 785.

In spite of the invitation of some of the States to clarify the Request by identifying the relevancy of the communications to matters in issue in the case, an invitation repeated in the course of debate at the hearing,[13] Mr. Robinson pointedly adhered to the unsatisfactory terms of the Request. In a spirited submission, and no doubt emboldened by advocate's optimism, he strove to persuade us to give Rule 54*bis* a liberal construction.[14] In light of the failure of that approach, it may be that the Applicant will be prepared to modify the terms of his Requests. Since each is plainly capable of substantial revisal to meet the Trial Chamber's concerns, I consider it appropriate to allow the Applicant an opportunity to amend his Requests and re-submit them to the relevant States. Should he do so, but fail to secure co-operation from any State, then he may invite us to consider the revised Requests in a continuation of this process. Since the Rule provides for Trial Chamber intervention only in the event that a State refuses to produce voluntarily material sought in a specific and relevant Request, it is for the Applicant, and not the Trial Chamber, to redraft the Request.

The Applicant is particularly well placed to make an application for relevant material in relation to (A). While he may not recollect all the occasions on which he made statements indicative of proper military conduct and lack of criminal responsibility, he is best placed to remember at least some of these occasions. He is the principal source of information about his innocent behaviour. He will certainly be able to set out the places, such as an office, where, and the sorts of occasions on which, he probably had telephone discussions relating to matters which are the subject of the Indictment. He is also obliged to specifically identify the matters in issue in the case to which the documents he seeks are said by him to be relevant, and to indicate how they are relevant to these matters. That he can do so is demonstrated by part of paragraph 15 of his originating Application which is in these terms:

> "Evidence of statements made by or to General Ojdanic are directly relevant to show whether he in fact participated in any of the crimes, or in the joint criminal enterprise, alleged in the Third Amended Indictment, whether war crimes were reported to him or brought to his attention through other sources such as the news media, and to show his state of mind concerning the events occurring in Kosovo and the prevention and punishment of war crimes ...".[15]

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[13] *See, for example*: Letter from the French Embassy in The Hague dated 29 June 2002; "Reply Memorandum: General Ojdanić's Application for Orders to NATO and States for Production of Information", 7 March 2003, Annex 3 - a series of e-mails and letters sent during August and September 2002 between the United States of America's State Department and Defence counsel for the Applicant; Hearing, 2 December 2004, T. 747.

[14] T. 853.

[15] "General Ojdanić's Application for Orders to NATO and States for Production of Information", 13 November 2002, para. 15. *See also* T. 740-741 re. events of January 1999 at Račak.

These are simply indications of areas which the Applicant might seek to address with a view to drafting a relevant Request.

In relation to (B) he might wish to start by identifying the issues in the case to which the material sought is relevant and how the material is relevant to these issues.[16]

In (C) he must start by identifying the material sought clearly.

Iain Bonomy

Judge

Dated this twenty-third day of March 2005
The Hague
The Netherlands

[16] "General Ojdanić's Further Submission in Support of Application for Orders to NATO and States for Production of Information", 20 June 2003, para. 12.