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International Criminal Tribunal for the Former Yugoslavia

Court Management and Support Services Section

Tribunal Pénal International pour l'ex-Yougoslavie

Section des Services d'administration et d'appui judiciaire

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CASE/*AFFAIRE* NO.	IT-05-87-PR108B16.1	DATE	02 December 2005

FROM/*DE* **CHUQING CHEN, COURT OFFICER**

TO/*A*

X President/*Président*	X Prosecutor/*Procureur*	X Defense Counsel/*Conseil de la Défense*	cc
X Appeals Chamber/ *Chambre d'appel* (5)	X Case Manager/ *Commis aux affaires*	**Mr. Fila/Mr. Petrović** **Mr.Visnjić/Mr. Robinson** **Mr. O'Sullivan/Mr. Zecević**	
0 Trial Chamber I/ *Chambre de 1ère instance I*	0 Chief of Investigations/ *Chef des enquêtes*	**Mr. Ackerman / Mr. Aleksić** **Mr. Bakrač** **Mr. Scudder**	
0 Trial Chamber II/ *Chambre de 1ère instance II*	.....		
X Trial Chamber III/ *Chambre de 1ère instance III* **(FOR INFO)**	.....		

X Embassy/*Ambassade* **Canada, Luxembourg, United States, United Kingdom, Iceland (5cc)**

X Other/*Autre* **NATO (1cc)**

X Registrar/Deputy Registrar/*Greffier/Greffier adjoint* **MR. A. DE WITT**	0 VWS Coordinator/*Coordinateur de la SVT*
X Senior Legal Officer/*Juriste hors-classe* **MS. Y. FEATHERSTONE/ MR. G. BOAS** ***(FOR INFO)*** **MS C.MARCHI-UHEL/LO**	0 UNDU Commanding Officer/*Commandant du QPNU*
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Ordonnance/Mandat/Décision émis(e) par la Chambre d'appel ou les Chambres de 1ère instance ou un Juge le ____/____/____

0 Order/Decision issued by the President on/*Ordonnance/Décision émise par le Président le* ____/____/____

X ~~Motion~~/Request/~~Application~~ submitted by ~~Prosecution/Defence Counsel~~ NATO on/
Motion/Requête/Demande présentée par l'Accusation/le Conseil de la défense le 02 / 12 / 05

0 Response/reply/brief submitted by Prosecution/Defence Counsel on/
Réponse/Réplique/Mémoire présenté(e) par l'Accusation/le Conseil de la défense le ____/____/____

0 Decision of the Registrar on/*Décision du Greffier le* ____/____/____

0 Other/*Autre*

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LEGAL ADVISER
LE CONSEILLER JURIDIQUE

CJ(2005)1026
2 December 2005

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-87-PT

THE PROSECUTOR

v.

MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
VLASTIMIR DORDEVIC
SRETEN LUKIC

NATO REQUEST FOR REVIEW OF DECISION
ON SECOND APPLICATION OF DRAGOLJUB OJDANIC
FOR BINDING ORDERS PURSUANT TO RULE *54BIS*

Summary of the Request

The North Atlantic Treaty Organisation ("NATO") herewith files a request for review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule *54bis* dated 17 November 2005 ("the Decision") by the Appeals Chamber in accordance with Rule 108 *bis* of the Rules of Procedure and Evidence. While the Decision dismisses paragraph (C) of the Applicant's request, which had the most obvious connection to NATO, it grants paragraphs (A) and (B) of the request and orders that "NATO shall produce to the Applicant the requested documents."

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Assuming, without conceding, that Article 29 of the ICTY Statute applies to an international organization, NATO requests review of the Decision on several other grounds. Primarily, the Trial Chamber erred in issuing the order to NATO when it does not possess any of the information sought by the Applicant's request. The Trial Chamber also erred in determining that it was necessary, as required by Rule 54 *bis*, to issue a binding order to NATO when it has no independent intelligence gathering capacity, it does not own or have authority over any intelligence that it might possess, and the request underlying the order was already addressed to all of the States that could have originated any intelligence in NATO's possession.

Rule 108 *bis* allows the Appeals Chamber to review a decision if it "concerns issues of general importance relating to the powers of the Tribunal." The decision concerns an issue of general importance relating to the powers of the Tribunal because the Trial Chamber's order negatively impacts NATO's ability to conduct relations with its member states. It directly affects NATO by ordering it to produce information which it did not originate and which remains under the control and authority of its member States. Allowing the order to stand would prevent NATO member states from being able to share intelligence information with NATO with the knowledge that they retain control over the information. This would greatly impair NATO's ability to carry out its mission and to contribute to the maintenance of international peace and security.

Argument

Firstly, the Trial Chamber erred in issuing a binding order to NATO because NATO does not possess any of the information sought in the Applicant's request. As noted by the Trial Chamber, NATO confirmed in a letter dated 4 October 2005, that "it does not possess any information contained in paragraph (C)(2) of the Second Application." Decision, para. 32. In the letter, NATO focused on paragraph (C)(2) of the request, because that was the only paragraph that had an evident link with NATO. It is for this reason that the letter stated "In particular, in paragraph (C)(2) ...." The comments and observations in NATO's 3 October 2005 letter, however, also apply to the information contained in paragraphs (A) and (B) of the Applicant's request. Because NATO does not possess any of the information sought by the Applicant, the Applicant's entire request should be dismissed in relation to NATO.

Secondly, the Trial Chamber erred in issuing a binding order for the production of intelligence information because NATO has no independent intelligence gathering capacity and any intelligence information that NATO possesses remains under the control of its member States. As noted by the Trial Chamber, NATO confirmed in its letter dated 3 October 2005 that it has "no independent intelligence gathering capacity." All intelligence information that it might possess is originated by the sovereign individual member States of the Alliance.

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Reference to the Agreement between the Parties to the North Atlantic Treaty for the Security of Information, signed on 6 March 1997, makes it clear that any intelligence information possessed by NATO remains under the control and authority of the member State that originated it. The Agreement demonstrates that Governments of the Parties of the North Atlantic Treaty agreed that provisions for the mutual protection and safeguarding of any classified information that they may interchange were necessary. In the NATO Security Policy, "Originator" is defined as "The Nation or International Organisation under whose authority information has been produced or introduced into NATO." The Originator is responsible for determining the security classification and initial dissemination of information and the Agreement provides that the classification level of NATO information shall not be changed, downgraded or declassified without the consent of the Originator. This means that the Originator has the full authority to define the level of security classification and determine to what extent classified information may be disseminated. While the Agreement is between the member States of the Alliance and NATO is not itself a party, the Agreement addresses "information introduced into NATO." It makes clear that the originating state, and not NATO, maintains ownership and control over the information.

The Trial Chamber erred in determining that the necessity requirement of Rule 54 *bis* was met when NATO has no independent intelligence gathering capabilities and the Applicant's request was directed to all of the NATO member states. Rule 54 *bis* requires that the information requested by the Applicant must be "necessary for a fair determination" of a "matter in issue in the proceedings." Any intelligence information that NATO possesses originated from the member States of the Alliance. The applicant's request was directed against all of those member States. It therefore was not necessary, as required by Rule 54 *bis*, for the Applicant to seek the requested information from NATO since all of the States from which NATO could have received such information were already subject to the Applicant's request. Any binding orders issued in response to the Applicant's request should be directly addressed to the sovereign individual member States of the Alliance as appropriate.

Conclusion

For the reasons described above, the Trial Chamber erred as a matter of law and fact in issuing a binding order against NATO. The Appeals Chamber of the Tribunal is therefore requested to reverse the decision of Trial Chamber and fully dismiss the request by the Applicant with respect to NATO.

B. De Vidts
Legal Adviser