

IN THE TRIAL CHAMBER

Before:

**Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson**

Registrar:

Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:

25 June 1999

PROSECUTOR

v.

**DARIO KORDIC
MARIO CERKEZ**

**DECISION STATING REASONS FOR
TRIAL CHAMBERS RULING OF 1 JUNE 1999
REJECTING DEFENCE MOTION TO SUPPRESS EVIDENCE**

The Office of the Prosecutor

**Mr. Geoffrey Nice
Ms. Susan Somers
Mr. Patrick Lopez-Terres
Mr. Kenneth Scott**

Counsel for the Accused

**Mr. Mitko Naumovski, Mr. Turner Smith Jr., Mr. Ksenija Turkovic, Mr. Robert A. Stein, Mr. Mr. Stephen M. Sayers, Mr. David F. Geneson, and Mr. Leo Andreis, for Dario Kordic
Mr. Bozidar Kovacic and Mr. Goran Mikulicic, for Mario Cerkez**

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 ("the International Tribunal"),

NOTING the Motion to Suppress Evidence by Defendant Dario Kordic ("the Motion"), filed by Defence counsel of the accused Dario Kordic on 22 January 1999 with attachments, and the Prosecutors Response to Motion to Suppress Evidence, filed by the Office of the Prosecutor ("Prosecution") on 5 February 1999,

NOTING FURTHER this Trial Chambers Order Scheduling a Hearing on the Motions Concerning Rule 95, filed on 4 May 1999, pursuant to which the Defence submitted Affidavits in Lieu of Live Testimony (including the affidavits of Stipo Zigonjic, Mato Tadic and Vinko Antunovic), filed on 17 May 1999, whereas the Prosecution submitted a Prosecutors Summary of Evidence Concerning Search Warrant

Hearing, filed on 17 May 1999, and a Submission of Declarations in Connection with Rule 95 Hearing (including the affidavits of Trudie Gillissen, Sylvie Pantz, and Michael Dornan), filed on 31 May 1999,

NOTING the written submissions of the parties and their oral arguments heard on 31 May 1999,

NOTING that at the hearing on 1 June 1999, the Trial Chamber ruled that "the motion will be rejected and the evidence will be admitted; a written decision will follow in due course"¹,

NOTING that the Defence argues:

(a) The accused Dario Kordic has *locus standi* to challenge the introduction of evidence obtained in this search pursuant to the Judgement of the Appeals Chamber in *Prosecutor v. Dusko Tadic*²,

(b) Neither the Statute nor the Rules of Procedure and Evidence of the International Tribunal ("the Rules") grant the Prosecution authority to take direct enforcement action in the form of armed search and seizure operations within the boundaries of a sovereign state without their consent and/ or participation³;

(c) The absence of any express language in the Statute or the Rules indicates that the Security Council of the United Nations did not intend the International Tribunal or the Prosecution to have enforcement jurisdiction in the territory of sovereign states; the International Tribunal as an international organisation has enumerated powers under the "doctrine of speciality"⁴;

(d) In the absence of expressly granted powers, the International Tribunal is bound by customary international rules of consent-based judicial assistance and must therefore rely upon cooperation with the municipal authorities of the sovereign state to execute its orders, in compliance with domestic law⁵;

(e) The Prosecution did not seek the consent of Bosnia and Herzegovina and was therefore in violation of customary international law on state sovereignty⁶, the laws of Bosnia and Herzegovina⁷, and standards of criminal procedure⁸; moreover, a satisfactory inventory of the confiscated materials has yet to be provided;

(f) The power of the Prosecution cannot derive from SFOR; under Annex 1-A of the General Framework Agreement for Peace in Bosnia and Herzegovina SFOR is not vested with the power to execute search and seizure warrants but only with the power to arrest, detain and transfer indictees;

(g) All evidence seized as a result of the unlawful search is inadmissible and must be suppressed pursuant to Rule 95 of the Rules if the rule of law, the interests of justice and fundamental fairness are to be respected in this case.

NOTING THAT, on the other hand, the Prosecution submits:

(a) The accused Dario Kordic lacks *locus standi* to challenge the collection of this evidence; only the Federal Government of Bosnia and Herzegovina can properly assert any claim that its sovereignty was violated and it has raised no such challenge either on this occasion or on any previous occasions where on-site investigations were conducted;

(b) The Prosecution was fully empowered to conduct this investigation through the Statute and Rules of the International Tribunal⁹;

(c) The United Nations Security Council intended to create an effective International Tribunal

with the powers to perform its mission¹⁰ and these powers are essential for its functioning (especially in situations of non-cooperation);

(d) The Prosecution and the International Tribunal are not subservient to the courts and authorities of Bosnia and Herzegovina; rather the International Tribunal has primacy¹¹;

(e) Provisions concerning state assistance impose obligations on states and not on the Prosecutor; the Prosecutor "may" seek the assistance of a state under Rule 39 whereas states "shall" cooperate fully with the International Tribunal under Article 29;

(f) There was no improper use of SFOR or physical force; SFOR took no part in the search but was present purely to ensure the security of all persons present;

(9) The investigation was duly carried out in a lawful and appropriate manner¹² and there exists no ground for the exclusion of the evidence found.

CONSIDERING that the dispute concerns a search executed at the Defence Office of Vitez municipality on 23 September 1998 pursuant to a search warrant issued by a Judge of the International Tribunal on 18 September 1998, by persons representing the Prosecution accompanied by SFOR,

CONSIDERING that it is not the warrant itself or the facts surrounding its execution which are in dispute, but the manner in which it was executed,

CONSIDERING that the Appeals Chamber in its Decision of 2 October 1995 in *Prosecutor v. Tadic*¹³ stated that "an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty";

CONSIDERING that Rule 95 gives the accused the right to challenge evidence "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings",

CONSIDERING that the accused therefore has standing to challenge the admissibility of this evidence,

CONSIDERING that Rule 2 of the Rules defines "investigation" as "all activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence"; this definition covers the factual circumstances concerning the search warrant at issue here,

CONSIDERING that the power of the Prosecution to conduct investigations is clearly provided for in the Statute under Article 18, paragraph 2; furthermore, Rule 39 provides that "[i]n the conduct of an investigation, the Prosecutor *may* . . . seek, to that end, the assistance of any State authority concerned", which does not mean that she is obliged to do so under any circumstances,

CONSIDERING FURTHER that pursuant to Article 29 of the Statute all States have an obligation to lend cooperation and judicial assistance to the International Tribunal including the obligation to comply with the provisions of an order issued by the International Tribunal for the search of certain premises; this obligation is also embodied in Security Council Resolution 827 (1993), paragraph 4¹⁴,

CONSIDERING that this obligation derives from the provisions of Chapter VII and Article 25 of the United Nations Charter ("the Charter"), pursuant to which the International Tribunal was established as a subsidiary organ of the Security Council itself,

CONSIDERING that Article 2, paragraph 7, of the Charter states that the principle of non-intervention in "matters which are within the domestic jurisdiction of any state . . . shall not prejudice the application of enforcement measures under Chapter VII",

CONSIDERING that the legal obligations of a Member State under the Charter of the United Nations prevail over their obligations under any other international agreement, pursuant to Article 103 of the UN Charter,

CONSIDERING ALSO that obligations under the Charter and particularly Chapter VII prevail over any international rules of consent-based judicial assistance,

CONSIDERING that the powers of the International Tribunal as provided for in the Statute are not in any way dependant upon domestic legislation,

CONSIDERING that the investigation carried out by the Prosecution, resulting in the seizure of certain materials, was perfectly within the powers of the Prosecution provided for in the Statute,

CONSIDERING FURTHER Security Council Resolution 1988 (1996), in which the Security Council:

7. Reminds the parties that, in accordance with the Peace Agreement¹⁵, they have committed themselves to cooperate fully with all entities involved in the implementation of this peace settlement, as described in the Peace Agreement, or which are otherwise authorised by the Security Council, including the International Tribunal for the Former Yugoslavia, as it carries out its responsibilities for dispensing justice impartially, and underlines that full cooperation by States and entities with the International Tribunal includes, inter alia, the surrender for trial of all persons indicted by the Tribunal and provision of information to assist in Tribunal investigations;

8. Recognises that the parties have authorised the multinational force referred to in paragraph 18 below¹⁶ to take such actions as required, including the use of necessary force, to ensure compliance with Annex 1-A of the Peace Agreement;

CONSIDERING that SFOR as an entity concerned with the implementation of the Peace Agreement acted properly and in accordance with its mandate in assisting this investigation,

PURSUANT TO Articles 18 (2) and 29 of the Statute and Rule 39 of the Rules,

HEREBY REAFFIRMS ITS RULING OF 1 JUNE 1999 REJECTING the Defence Motion.

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

Richard May
Presiding Judge

Dated this twenty-fifth day of June 1999
At The Hague
The Netherlands

[Seal of the Tribunal]

1. Official transcript p. 3045.

2. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadic* (IT-94-1-AR72), Appeals Chamber, 2 Oct. 1995 at para. 55.

3. The Defence argues that the language used in Articles 16 and 18 of the Statute of the International Tribunal and Rules 39 or 54 of the Rules of Procedure and Evidence does not support the existence of powers for the Prosecution to execute an (armed) search and seizure operation. On the contrary, the Defence argues that if there were no need to obtain the consent of Bosnia and

Herzegovina, there would also be no need to include Article 29 on cooperation and judicial assistance in the Statute.

4. Defence Motion to Suppress Evidence by Defendant Dario Kordić, 22 Jan. 1999 at para.19.

5. According to the Defence, those member states of the United Nations which have passed implementing legislation on cooperation with the International Tribunal have based this legislation on judicial assistance, requiring the International Tribunal to go through the relevant national authorities. This is also the framework of the Statute of the International Criminal Court (Articles 87, 99), which provides for an exception to such cooperation in cases of national security (ICC Statute Art. 93(4), Art. 72(4). At the hearing on 31 May 1999 the Defence submitted that if a state refuses to co-operate under Article 29 of the Statute, the remedy open to the International Tribunal would be to report this refusal to the Security Council (Transcript page 2989). The Defence also distinguishes the Appeals Chamber Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 in *Prosecutor v. Tihomir Blaskić* (IT-95-14-AR108 bis), A.C., 29 Oct. 1997, paras 53-56 on the ground that it deals with considerations of witness protection which are not relevant here.

6. The Defence argues that the public property of sovereign states deserves special protection in this regard.

7. In support of this argument the Defence quotes the "Decree on the proclamation of the law on extraditing criminals accused on the demand of the International Tribunal" 1996 Articles 27 and 28(1); the Code of Criminal Procedure of Bosnia and Herzegovina Articles 518 and 519 (1); and the Memorandum of Understanding Regarding Co-operation between the Government of Bosnia and Herzegovina and the Prosecutor of the ICTY, para. 11.

8. According to the Defence the search warrant was so broad as to constitute a fishing expedition; no translated inventory was presented and the one presented was too general to be of much use; the materials (and weapons) that were confiscated have not been returned.

9. The Prosecution relies on Articles 16 and 18 of the Statute and Rules 39 and 54 of the Rules of Procedure and Evidence, arguing that although these provisions may not spell out "search warrant" they specifically allow for the situation in question.

10. The Prosecutor argues that there are important differences between the International Tribunal and the International Criminal Court in that the latter is largely a consent-based entity.

11. Article 9 (2) of the Statute of the International Tribunal.

12. According to the Prosecution it has more flexibility in searching public premises than private ones; it communicated with and requested cooperation of the authorities of Bosnia and Herzegovina on the morning of the search; the correct search warrant was executed at the correct location (although an incorrect search warrant was left behind); the investigation was properly conducted for relevant materials; and an inventory was provided to the extent required and possible.

13. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Duko Tadić* (IT-94-1-AR), A.C., 2 Oct. 1995 at para. 55.

14. SC Res. 827 (1993) para. 4: (The Security Council) *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal . . .

15. General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto (collectively the Peace Agreement, S/1995/999, annex).

16. Paragraph 18 "Authorises the Member States acting through or in cooperation with the organisation referred to in Annex 1-A of the Peace Agreement to establish for a planned period of 18 months a multinational stabilisation force (SFOR) as the legal successor to IFOR under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement".