

IT-02-55-Misc-4
D194 - D191
15 JANUARY 2003

194
JK

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: IT-02-55-Misc 4

Date: 17 July 2002

Original: English

BEFORE THE DUTY JUDGE

Before: Judge David Hunt

Registrar: Mr Hans Holthuis

Decision of: 17 July 2002

**[REDACTED PUBLIC VERSION OF DECISION ORIGINALLY
FILED ON A CONFIDENTIAL AND *EX PARTE* BASIS]**

RECONSIDERATION OF ORDER OF 9 MAY 2002

The Office of the Prosecutor

Ms Carla Del Ponte

1. The prosecution has sought a reconsideration of what are said to be “conditions” which I imposed upon the issue of warrant for search and seizure, namely:¹

AND FURTHER ORDERS

(5) that the OTP is to-

(a) notify me (or, if I am not available, a Judge nominated by the President) within seven days of the receipt of the material seized once the warrants have been executed or of the fact that no material was found, and

(b) to produce to me, or to such other Judge as appropriate, within the same period an undertaking from the Team Leader of the Investigations Team investigating Case OTP-INV-08-2000 (the “[REDACTED] investigation”), or any other person into whose charge any such material is given, that notice of such receipt will be given to the Senior Trial Attorney in each case being conducted by the OTP which arises out of events associated with or related to the events which are the subject of the [REDACTED] Investigation; and

(6) that such Senior Trial Attorneys are to bring to the attention of the relevant Trial Chambers (on an *ex parte* basis) the receipt of such documents and to seek directions as to the disclosure, if any, of those to the Defence in that case.

The prosecution complains (a) that these “conditions” extend beyond the supervision necessary to enforce the lawful execution of the warrant, and (b) that an “accidental” non-compliance with them could invalidate the search and hence preclude the admission into evidence of any material seized.²

2. I am prepared to reconsider my decision in the light of these two complaints. Taking the second of these complaints first, I do not agree that orders (5) and (6) are conditions upon the execution of the warrant. They are expressed merely as further orders. I do not accept that non-compliance with them could invalidate the search, although obviously a deliberate non-compliance with them would constitute a contempt of court.

3. But, even if I am wrong in that interpretation of orders (5) and (6), I remain satisfied that such orders are necessary in order to protect the rights of any accused person to whom the documents may be relevant. The power of seizure granted to the prosecution is a very powerful weapon in its hands. By seizing material, the prosecution denies such accused persons access to that material. Experience has demonstrated that the results can be seriously deleterious to the rights of those accused.

¹ IT-02-55-Misc 4, Order Granting Warrants for Search and Seizure of Potential Evidence, 9 May 2002, p 3.

² A Motion Seeking Reconsideration of the Terms of the Order of Judge David Hunt of 9 May 2002 Granting Warrants for Search and Seizure, Case IT-02-55-Misc 4, 26 June 2002 (“Motion”), pars 3, 32.

4. In one case, in which the accused became aware of the seizure by the prosecution, it took the prosecution over six months to provide the accused with a copy of the documents.³ In another case, in which the accused was unaware of the seizure by the prosecution, the accused had obtained a binding order to the relevant Bosnian authorities to produce the documents, which was not complied with.⁴ After the trial had concluded, it was discovered that the documents had been in the possession of the prosecution during the course of the trial.⁵

5. Despite this discovery, the prosecution has apparently taken no steps to ensure that the same thing will not happen again. For this reason, I made orders in relation to the issue of a warrant to seize documents in another matter last year along the same lines as those in issue here.⁶ That order excited no complaint from the prosecution. Unfortunately, it appears to have excited no reaction at all. It seems that the only way “the rights of those accused persons adversely affected by the warrant” can be protected is to keep making orders of this type.⁷

6. The protection of the rights of accused persons may be ensured in many different ways. The origin of the right of the accused to remain silent and to be cautioned in relation to that right now enshrined in Rule 42(A)(iii) of the Rules of Procedure and Evidence is to be found in what are called, in the United Kingdom, the “Judges Rules”. These were originally formulated by the Judges of the Kings Bench Division of the High Court of Justice in 1912 and reformulated from time to time since then by the Judges of that Division. The Judges Rules have had a profound effect upon the way in which suspects are interviewed by the police, and consequently upon the admissibility into evidence of any confession obtained. It seemed to me that, if the prosecution is not prepared to institute its own system to protect the rights of accused persons, orders of this type are necessary.

7. I do not propose to alter the orders which I made.

³ *Prosecutor v Brđanin & Talić*, Case IT-99-36, Status Conference, 2 February 2001, T 268-269, 271-275.

⁴ *Prosecutor v Kordić & Čerkez*, Case IT-95-14/2 (*Kordić & Čerkez*), Order to Bosnia & Herzegovina for the Production of Documents, 18 July 2000; Application for Issuance of an Order to Bosnia & Herzegovina and to the Federation of Bosnia-Herzegovina Compelling the Production of Documents and Other Materials, 20 June 2001.

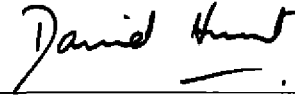
⁵ *Kordić & Čerkez*, Status Conference 22 June 2001, T 28522-28523, 28525-28528.

⁶ *In re Prosecutor's Application for an Order and Warrants Authorising the Search of Various Sites Located in [REDACTED], and the Inspection and Seizure of Evidence Found Therein*, IT-01-49-Misc 1, (Confidential and *Ex Parte*) Order Issuing Search Warrant and Authorising the Seizure of Evidence, 31 Aug 2001, p 3.

⁷ I have used the terminology of par 7 of the Motion.

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

Dated this 17th day of July 2002,
At The Hague,
The Netherlands.



Judge David Hunt
Duty Judge

[Seal of the Tribunal]