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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-95-13a-PT

Date: 22 October 1997

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **22 October 1997**

PROSECUTOR

v.

MILE MRKSIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN
SLAVKO DOKMANOVIĆ

DECISION ON THE MOTION FOR RELEASE BY THE ACCUSED SLAVKO DOKMANOVIĆ

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Clint Williamson

Counsel for the Accused, Slavko Dokmanović:

Mr. Toma Fila and Ms. Jelena Lopičić

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. Pending before 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" or "Tribunal") are Preliminary Motions of the accused, Slavko Dokmanović, challenging the legality of his arrest.

2. On 3 April 1996, Judge Fouad Riad ordered that the name of Mr. Dokmanović be added to an Indictment against three other accused, for their alleged involvement in the November 1991 beatings and killings of non-Serb men at the Ovčara farm in Vukovar, Croatia ("Amendment of the Indictment", Official Record at Registry Page Number ("RP") D1-2/69 *bis*). The counts against Mr. Dokmanović include charges of Grave Breaches of the Geneva Conventions of 1949, Violations of the Laws or Customs of War, and Crimes Against Humanity (RP D55-D64). Pursuant to Rule 53(A) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), on 1 April 1996, the Prosecutor filed an "Application that there be no Public Disclosure of the Indictment" (RP D65-D66). In support of this application for a sealed indictment, the Office of the Prosecutor ("OTP" or "Prosecution") set forth the following:

> (1) SLAVKO DOKMANOVIĆ is believed to be living in the Republic of Croatia.
> (2) The Office of the Prosecutor has been in contact with the United Nations Transitional Administration for Eastern Slavonia (UNTAES) in Zagreb, Croatia, regarding arrangements designed to result in the immediate arrest of the accused.
> (3) There are reasonable grounds to believe that if the accused was aware of any part of the indictment, he would flee to avoid apprehension.

Judge Riad signed an "Order for Non-Disclosure" on 3 April 1996 (RP D1-2/71 *bis*), "[c]onvinced that non-disclosure of the . . . indictment [was] necessary for the investigation."

3. Judge Riad also signed a "Warrant of Arrest Order for Surrender" on 3 April 1996 (RP D91-D95) in English, directing the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium ("UNTAES") to search for, arrest, and surrender the accused to the International Tribunal. UNTAES was also directed in the Warrant to advise Mr. Dokmanović, at the time of his arrest, in a language he understands:

1) of his rights as set forth in Article 21 of the Statute of the International Tribunal ("Statute") and Rules 42 and 43 of the Rules; 2) of his right to remain silent; and 3) that any statement he makes shall be recorded and may be used in evidence.[1] On 17 July 1996, a copy of the confirmation of the Indictment naming the three co-accused, the Order to amend the Indictment, the Amended Indictment, the Warrant of Arrest and Order of Surrender for the accused and a statement of the rights of the accused were forwarded to UNTAES in English, French, and Serbo-Croatian.[2]

4. Mr. Dokmanović was arrested on 27 June 1997. The legality of this arrest has been raised and discussed in several motions and responses. Counsel for the accused (the "Defence") filed a preliminary motion for release on 7 July 1997 (RP D118-D121) and an amendment to that motion on 8 July 1997 (RP D127-D128). The Prosecution filed a response to this preliminary motion on 22 July 1997 (RP D155-D169). The Defence then submitted an amended motion for release on 31 July 1997 (RP D229-D239), to which the Prosecution responded on 14 August 1997 (RP D490-D502). The Prosecution filed a list of authorities for its position on 27 August 1997 (RP D518-D748). The Defence replied to the Prosecutor's response on 28 August 1997 (RP D750-D846). A hearing was held on 8 September 1997, and additional Defence documents were filed on 11 September 1997 (RP D885-D890).[3]

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[1] The Serbo-Croatian translation of the arrest warrant erroneously directed Croatia to arrest the accused, whereas the original version directed UNTAES to do so. The Registrar of the International Tribunal explained to the Trial Chamber during the Hearing on 8 September 1997 that this mistake had occurred in the Registry and further stated that "[i]t was not sent to Croatia because [there] was an order by the judge telling us that there was no need to disclose it to and send it to the Republic of Croatia." (Draft transcript of the Hearing on 8 September 1997 (hereafter "Draft transcript"), at p. 141) The Registrar also explained that the official Registry files were subsequently corrected when the mistake was discovered. The Trial Chamber notes that this matter has raised further issues that have caused some confusion. The Prosecution has failed to explain clearly in its written and oral submissions exactly the procedure which was followed when the arrest warrant was issued. Nevertheless, upon an examination of the official files, the Trial Chamber has discovered that there were indeed two arrest warrants signed on 3 April 1996, by Judge Riad - one directed to UNTAES and one directed to Croatia. Neither of these were transmitted for execution at that time. After some consideration and discussion with UNTAES, the Prosecution filed an "Application Requesting Transmission of Arrest Warrants to the United Nations Transitional Administration for Eastern Slavonia (UNTAES)" on 11 July 1996 (RP D76-D85). This requested Judge Riad to order the transmission to UNTAES of the arrest warrant directed to it, and the non-transmission of the arrest warrant directed to Croatia. Judge Riad signed the requested Order that same day (RP D87-D89). Hence the reason why the arrest warrant, which had been issued on 3 April 1996, directing UNTAES to arrest the accused, was not received by it until 17 July 1996.

[2] *See* Notification to the Representative of the United Nations Transitional Administration for Eastern Slavonia, 17 July 1996, Defence Exhibit D14.

[3] Due to the number of different motions and responses which were filed in this matter, when referred to in the present Decision they will be identified by their date.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions, testimonial evidence, and the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Applicable Provisions

5. Several Articles of the Statute and Rules of the Tribunal are applicable to the present Decision. The primary Articles and Rules that will be discussed are as follows:

1) Article 15 of the Statute reads:

> The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

2) Article 16, paragraph 1, of the Statute reads:

> The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

3) Article 19, paragraph 2, of the Statute reads:

> Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

4) Article 20, paragraph 2, of the Statute reads:

> A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

5) Article 21, paragraph 4(a), of the Statute reads:

> In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him[.]

6) Article 29 of the Statute reads:

> Cooperation and judicial assistance
>
> 1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
>
> 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
>
> (a) the identification and location of persons;
> (b) the taking of testimony and the production of evidence;
> (c) the service of documents;
> (d) the arrest and detention of persons;
> (e) the surrender or the transfer of the accused to the International Tribunal.

7) Rule 5 of the Rules reads:

> Non-compliance with Rules
>
> Any objection by a party to an act of another party on the ground of non-compliance with the Rules or Regulations shall be raised at the earliest opportunity; it shall be upheld, and the act declared null, only if the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice.

8) Rule 53 of the Rules reads:

> Non-disclosure of Indictment
>
> (A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.
>
> (B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.
>
> (C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.

9) Rule 55 reads:

Execution of Arrest Warrants

(A) A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. These rights include those set forth in Article 21 of the Statute, and in Rules 42 and 43 mutatis mutandis, together with the right of the accused to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) Subject to any order of a Judge or Chamber, a warrant for the arrest of the accused and an order for the surrender of the accused to the Tribunal shall be transmitted by the Registrar to the person or authorities to which it is addressed, including the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to the accused in a language the accused understands and that the accused be cautioned in that language.

(C) When an arrest warrant issued by the Tribunal is executed, a member of the Prosecutor's Office may be present as from the time of arrest.

10) Rule 59 *bis* of the Rules reads:

Transmission of Arrest Warrants

(A) Notwithstanding Rules 55 to 59, on the order of a Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for his prompt transfer to the Tribunal in the event that he be taken into custody by that authority or international body or the Prosecutor.

(B) At the time of being taken into custody an accused shall be informed immediately, in a language he understands, of the charges against him and of the fact that he is being transferred to the Tribunal and, upon his transfer, the indictment and a statement of the rights of the accused shall be read to him and he shall be cautioned in such a language.

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B. Pleadings

1. Factual Background

6. The accused, Mr. Slavko Dokmanović, was born in Trpinja, in the Republic of Croatia, in 1949 and is a graduate from the Faculty of Agriculture in Osjek, also in Croatia. He is currently without citizenship and testified during the Hearing on 8 September 1997 that he has refugee status. He has an identity card that was issued in Croatia, but not a passport. Before becoming a refugee, Mr. Dokmanović was a citizen of the Socialist Federal Republic of Yugoslavia.

7. In early 1996, Mr. Dokmanović was living in Vukovar, in the region of Eastern Slavonia, Croatia, which had been placed under control of UNTAES pursuant to a Resolution of the Security Council of the United Nations.[4] He served as the President of the Municipal Assembly in Vukovar until April 1996. Thereafter he continued to be employed in Vukovar in some other capacity (which has not been identified to the Trial Chamber), until 5 October 1996.[5] He did, however, move to Sombor, in the Serbian part of the Federal Republic of Yugoslavia ("FRY"), in July 1996, where he lived until the time of his arrest.

8. Mr. Dokmanović first contacted the Belgrade office of the OTP in December of 1996, expressing his desire to give evidence of alleged atrocities committed by Croats against Serbs in the area of Vukovar. In an attempt to entice Mr. Dokmanović out of the FRY and into the UNTAES region where he could be arrested, OTP Investigator Kevin Curtis followed up on this initial conversation by contacting the accused in January 1997, suggesting a possible meeting between himself and Mr. Dokmanović in Vukovar. Mr. Dokmanović, however, mentioned that he was not able to go to Vukovar for personal reasons. Mr. Curtis then suggested a number of other possible meeting locations, but Mr. Dokmanović stated that he was not prepared to meet with the OTP anywhere in UNTAES territory.[6] When asked by Mr. Dokmanović why he could not travel to Sombor for a meeting, Mr. Curtis stated that he could not make such a trip because of the civil unrest at that time in Belgrade.

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[4] S/RES/1037 15 January 1996.

[5] The employment card of Mr. Dokmanović, which indicates his employment in Vukovar until 5 October 1996, has been tendered as Defence Exhibit D6a.

[6] Mr. Dokmanović was among those included on a list of persons not granted amnesty and/or indicted as war criminals by Croatia.

9. After additional attempts to arrange a meeting place with Mr. Dokmanović, investigators from the OTP contacted the accused at his Sombor home in June 1997, again for the purpose of enticing him to go into the UNTAES region where he could be arrested. The OTP requested a meeting with him for later in the month to discuss the statement which he wished to give in relation to atrocities unrelated to those alleged in the Indictment. The meeting took place in Mr. Dokmanović's home on 24 June 1997, at which time Mr. Dokmanović inquired of the OTP investigator, Mr. Curtis, about the possibility of compensation for his property in Croatia. Upon being informed that such compensation was a matter for discussion with the Transitional Administrator, Mr Dokmanović expressed an interest in pursuing the matter with General Jacques Klein, who was, at that time, acting in that capacity. Mr. Curtis, through an interpreter, advised Mr. Dokmanović that he (Mr. Curtis) would contact the office of the Transitional Administrator to see if such a meeting could be arranged. OTP personnel subsequently met with UNTAES officials, making them aware of Mr. Dokmanović's desire for a meeting. The UNTAES officials agreed to cooperate with the investigators by arranging the necessary meeting between Mr. Dokmanović and General Klein.

10. Mr. Curtis and the interpreter arrived back at Mr. Dokmanović's home the next day, 25 June 1997, and informed Mr. Dokmanović that a meeting with General Klein was possible. Mr. Curtis informed Mr. Dokmanović that he should call General Klein's executive assistant, Michael Hryshchyshyn, at 10:15 hours that day to arrange the details of the meeting. Mr. Dokmanović called Mr. Hryshchyshyn at the agreed upon time, and confirmed a meeting time with General Klein of 15:30 hours on 27 June in Vukovar. Mr. Hryshchyshyn stated that he would send an UNTAES vehicle to collect Mr. Dokmanović from the bridge over the Danube River, which divides Croatia and Serbia and where the UNTAES checkpoint is located.

11. On the afternoon of 27 June 1997, Mr Dokmanović and his companion, Milan Knežević, arrived at the border post on the FRY side of the Danube River bridge. After making their way on to the bridge, and having passed the FRY border post, Mr. Dokmanović and Mr. Knežević entered an UNTAES vehicle shortly before 15:00 hours, believing that they

were being taken to their meeting with General Klein.[7] The vehicle carrying the accused and his companion, along with two escort vehicles, proceeded to cross the bridge towards the Erdut base in the UNTAES administered area of Croatia. Upon arrival at Erdut, UNTAES soldiers removed Mr. Dokmanović and Mr. Knežević from their vehicle at gunpoint and searched them. Mr. Dokmanović was handcuffed, advised by the OTP (through an interpreter) of his rights, and informed of the nature of the charges against him.[8] His jacket and handbag were seized, and he had a hood placed over his head before being driven to the Čepin airfield. Upon arrival at the airfield, he was examined by a medical officer and then taken on board an UNTAES aeroplane. Around 16:00 hours, the plane departed the Čepin airfield in Croatia bound for The Hague, The Netherlands, in order to transport Mr. Dokmanović to detention and trial by the International Tribunal. Minutes after lift-off, Mr. Dokmanović was provided with a copy of the Indictment, the arrest warrant, and a statement of his rights, these documents all being in Serbo-Croatian.[9]

12. Upon arrival at The Hague, Mr. Dokmanović was met by Dutch police officers who took him to the United Nations Detention Unit located in the prison at Scheveningen. At the Detention Unit, the Prosecution investigator, Mr. Curtis, searched the property of Mr. Dokmanović in view of the prison officers. In the jacket, he found a wallet and miscellaneous papers. In the handbag there were a number of items, including a loaded .357 Magnum Zastafa hand pistol.

2. Defence Arguments

13. The Defence contends that the arrest of Mr. Dokmanović was illegal, violating the Statute and Rules of the Tribunal, the sovereignty of the FRY, and international law. The Defence appears to bring six arguments in support of these claims.

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[7] It is disputed as to exactly where Mr. Dokmanović and Mr. Knežević entered the UNTAES vehicle. It is clear that it was somewhere in between the FRY checkpoint in Serbia and the UNTAES checkpoint in Croatia. However, it is *unclear* as to whether it was is in FRY or Croatian territory. Nevertheless, as discussed below in the Findings, this factual point is irrelevant because Mr. Dokmanović was not detained against his will until he arrived at the UNTAES Erdut base in Croatia.

[8] Mr. Knežević was led away to a building where he was temporarily detained and later released.

[9] The Defence denies that the contents of the Indictment were read or told to Mr. Dokmanović until after his arrival at the Detention Unit in the Hague. However, audiotapes and a videotape of the arrest and subsequent events, which were admitted as evidence by the Tribunal, contradict the Defence's claim. (*See* Transcript of Audiotape 2, side B.)

14. First, the Defence asserts that the correct procedure for arrest was not followed. It argues that the arrest was implemented contrary to Rule 55 of the Rules. The Defence contends that Mr. Dokmanović's basic rights were violated "since the contents of the indictments (*sic*) were refused to be told to him."[10] In addition, the Defence states that Sub-rule 55(B) of the Rules was violated "because FRY could extradite any persons who are not citizen[s] of the [FRY] since there is no Constitutional and other legal restrictions for that and Mr. Slavko Dokmanović is not a citizen of [the] Federal Republic of Yugoslavia."[11]

15. Secondly, building upon the Sub-rule 55(B) argument, the Defence asserts that Mr. Dokmanović should have been brought to trial pursuant to Article 29 of the Statute. The Defence contends that "[a]ccording to this rule the Tribunal was compelled to request the extradition . . . [of] the indicted," especially because the OTP "knew that the indicted is not [a] citizen of the FRY" and because "there [are] no Constitutional and other legal restrictions for his arrest and extradition."[12] Thus, the Defence contends that both Rule 55 of the Rules and Article 29 of the Statute gave the FRY the sole authority for bringing the accused before the Tribunal.

16. Thirdly, the Defence argues that Mr. Dokmanović was arrested in a "tricky way," which can only be interpreted as a "kidnapping."[13]

17. Fourthly, the Defence contends that Mr. Dokmanović was guaranteed safe conduct to Croatia and back again to his home in Sombor, FRY, by OTP and UNTAES officials.[14]

18. Fifthly, the Defence claims that Mr. Dokmanović's arrest violated the sovereignty of the FRY and international law because he was arrested in the territory of the FRY without the knowledge or approval of the competent State authorities.[15]

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[10] Defence Preliminary Motion of 7 July 1997, at p. 3. It may be useful to note that the Defence did not always number the pages of their motions correctly. The Trial Chamber has decided to cite the actual page number for our references, not necessarily the number printed on the particular Defence Motion page.
[11] Defence Preliminary Motion of 30 July 1997, at p. 10.
[12] *Id.*, at p. 8.
[13] Defence Preliminary Motion of 30 July 1997, at p. 3.
[14] Defence Preliminary Motion of 7 July 1997, at p. 2.
[15] Defence Preliminary Motion of 30 July 1997, at p.8.

19. Sixthly, while not providing any other case law in support of its submission, the Defence asserts that the U.S. Court of Appeals decision in *U.S. v. Alvarez-Machain* dictates that the Tribunal does not have jurisdiction to try Mr. Dokmanović.[16]

3. Prosecution Arguments

20. The Prosecution contends that the Statute and Rules of the Tribunal were fully complied with in all aspects of the arrest. It supports its contentions, in particular in relation to the allegations of impropriety in the method of obtaining the accused in an area where the arrest could be executed, by putting forth a range of case law, which generally relates to forcible abduction. For the most part, these cases stand for the proposition that, in relation to jurisdiction over a defendant, it does not matter how such a person is brought before a court. The Prosecution makes five major points.

21. First, the Prosecution contends that there was nothing procedurally wrong with the way in which Mr. Dokmanović was arrested. The OTP argues that UNTAES was in possession of a valid arrest warrant. It states that the warrant was presented to the accused along with a statement of his rights shortly after the aircraft transporting him to the Hague departed Croatia. Further, in the view of the OTP, it was issued pursuant to Rule 59 *bis* of the Rules, supported by Article 20, paragraph 2, of the Statute.[17] In fact, "UNTAES would have been in contravention of a court order had they failed to take the accused into custody," according to the OTP.[18] In addition, the Prosecution asserts that there was nothing amiss with the indictment process. It argues that sealed indictments were envisioned and are acceptable according to Rule 53 of the Rules and that a copy of the Indictment was presented to Mr. Dokmanović at the same time as he was given a copy of the Warrant for Arrest, all in a language he understands.[19]

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[16] 946 F.2d 1466 (9th Cir. 1991), *rev'd, United States v. Alvarez-Machain*, 504 U.S. 655 (1992).
[17] Prosecutor's Response to the Defence Motion for Release of 21 July 1997, at p. 7; Draft transcript, at p. 164.
[18] Prosecutor's Response to the Defence Motion for Release of 21 July 1997, at p. 7.
[19] *Id.*, at pp. 9 and 12-13.

22. Secondly, the Prosecution argues that in no way can the arrest be viewed as a "kidnapping," given that there was an Indictment against Mr. Dokmanović, a valid warrant for his arrest, and given that he went to Erdut, where he was arrested, of his own free will.[20]

23. Thirdly, the Prosecution claims that Mr. Dokmanović was never given explicit guarantees that he would not be arrested by the OTP or UNTAES, because no such assurances were sought by him. The Prosecution states that Mr. Dokmanović only sought safe conduct in relation to the Croatian authorities.[21]

24. Fourthly, the Prosecution argues that there was no violation of the sovereignty of the FRY because: (1) there was no prohibition in force which disallowed vehicles on the Serbian side of the border; (2) Mr. Dokmanović entered the vehicle of his own volition; (3) Mr. Dokmanović's arrest cannot be said to have been effected until after the UNTAES vehicle in which he was riding crossed into Croatian territory; and (4) Mr. Dokmanović does not have standing to raise the issue.[22]

25. Fifthly, the Prosecution notes that the Defence has inappropriately relied on the United States Court of Appeals decision in *United States v. Alvarez-Machain*, as this decision was subsequently reversed by the Supreme Court.[23] It contends that on the basis of the Supreme Court opinion, the case of *Attorney General of the Government of Israel v. Adolf Eichmann*,[24] and decisions from various common law jurisdictions, the way an accused is brought to the International Tribunal does not affect its jurisdiction.

III. FINDINGS

26. A large number of arguments have been presented by both parties in their various written and oral submissions, in a manner not entirely conducive to the expeditious resolution of the matters in contention. The Trial Chamber therefore deems it appropriate to separate the issues into five headings which, naturally, have areas of overlap. These headings are

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[20] *Id.*, at p. 10.
[21] Prosecutor's Response to the Amended Defence Motion for Release of 14 August 1997, at p. 3.
[22] *Id.*, at pp. 4-5.
[23] *Id.*, at p. 5.
[24] 36 I.L.R. 277, (Sup. Ct. 1962).

termed: A. The arrest of the accused; B. Authority for the arrest of the accused; C. Non-disclosure of the indictment and issuance of the warrant of arrest; D. The method of arrest; E. Safe conduct.

A. The Arrest of the Accused

27. The first issue to be resolved in order to address those which arise subsequently is that of when and where Mr. Dokmanović was arrested. For the reasons set out below, the Trial Chamber finds that Mr. Dokmanović was arrested and detained *only after* he arrived at the Erdut UNTAES base in the Eastern Slavonia region of Croatia.

28. In the sphere of international law, a restraint upon a person's free movement is seen as a necessary component of an arrest. Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") protects the "right to liberty and security of person," with "liberty" meaning the physical liberty of the person.[25] An arrest or detention, in the sense of Article 5, is an extreme form of restriction upon freedom of movement.[26] In practice, most arrests are carried out by law enforcement officers in relation to a criminal proceeding. When a law enforcement officer, by physical restraint, conduct, or words indicates to an individual that he or she is not free to leave, there is an arrest for the purposes of Article 5.[27] Article 9(1) of the International Covenant on Civil and Political Rights ("ICCPR") has a similar provision protecting a person's "right to liberty and security of person." The words "arrest" and "detention", for the purposes of this Article, refer to the act of depriving a person of his liberty, and the state of deprivation of liberty, respectively.[28]

29. In all the national criminal justice systems with which this Trial Chamber is familiar, an "arrest," at the minimum, requires some sort of restriction of liberty by government personnel, or their agents, of an individual. In the United States, for example, any action by law enforcement officers that makes it impossible for a suspect to leave police custody, and

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[25] *See Engel v. Netherlands* A 22 para. 58 (1976); Law of the European Convention on Human Rights, DJ Harris, et. al., 1995 (hereafter "Harris"), at p. 97.
[26] *Id.*
[27] Harris, at p. 100.
[28] U.N. Covenant on Civil and Political Rights: CCPR Commentary, Manfred Nowak, 1993 (hereafter "Nowak"), at p. 169.

which makes use of the general trappings of police detention, would generally constitute an arrest.[29] Determining whether other seizures are arrests depends on factors such as the duration, purpose, manner and location of the detention.[30] In the United Kingdom, it is said that an arrest consists of the touching or seizure of a person's body with a view to his or her restraint.[31] Words may also amount to an arrest if they are calculated to, and do, cause a person to believe that he or she is under compulsion and he or she submits to that compulsion.[32] In Australia, while it is not possible to speak of a "magic formula," it has been said that to effect an arrest, a law enforcement officer must simply make clear to a person by what is said or done that that person is no longer a free individual.[33] Lesser actions by law enforcement officers are often considered less than a true arrest.

30. Mr. Dokmanović did not have his freedom of movement restricted or liberty deprived until he arrived at Erdut. The record clearly shows that Mr. Dokmanović entered the UNTAES vehicle that carried him to the Erdut base in Croatia of his own free will. The accused, in fact, was quite eager to get into the vehicle, due to his belief that he was heading to a meeting with the Transitional Administrator, General Klein, to discuss his property rights in Croatian territory.

31. Furthermore, the fact that Mr. Dokmanović had absolutely no apprehension or fear of arrest until he arrived at Erdut is quite telling. During cross-examination, Mr. Dokmanović admitted his shock in being arrested at the base:

> MR. WILLIAMSON: [U]p until the point in time when you were actually removed from the vehicle, you still believed you were going to a meeting with General Klein; is that correct?
> MR. DOKMANOVIĆ: Yes.
> MR. WILLIAMSON: You were shocked when you were taken out of the vehicle, right?
> MR. DOKMANOVIĆ: Yes.[34]

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[29] *See generally Terry v. Ohio*, 392 U.S. 1 (1968); Criminal Procedure, Charles H. Whitebread and Christopher Slobogin (1993) (hereafter "Whitebread"), at p. 96.
[30] Whitebread, at p. 96.
[31] Halsbury's Laws of England, Fourth Edition, Vol. 11(1): Criminal Law, Evidence and Procedure (1990), at para 693.
[32] *Id. See also Murray v. Minister of Defence* [1988] WLR 692 (The House of Lords found that a person is arrested from the moment he is subject to a restraint of his liberty. It makes no difference if the formal words of arrest are communicated later).
[33] *See* Criminal Procedure, John Bishop (1983), at p. 43.
[34] Draft transcript, at pp. 46-47.

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Thus, Mr. Dokmanović's firm belief that he was on his way to a meeting, until he arrived at the base, provides evidence that UNTAES officials had not created the type of environment in which 'a person knows he is not free,' until the accused got out of the vehicle at the Erdut base.

32. Mr. Dokmanović testified that the door locked while he was in the vehicle,[35] yet he did not attempt to open it. He did not express any desire whatsoever for the vehicle to stop or to be let out. Furthermore, he was not handcuffed or forcibly restrained in any way until he arrived at Erdut. Given the uncertainty as to what would have transpired had the accused attempted to leave the vehicle, and the facts stated above, this Trial Chamber finds that the accused was arrested and detained only once he arrived at the UNTAES Erdut base in Croatia.

B. Authority for the Arrest of the Accused

33. The Trial Chamber finds it established that the arrest of the accused was executed at the Erdut base when UNTAES removed him from the vehicle and handcuffed him. Investigators from the OTP immediately thereafter informed him of his rights and the nature of the charges pending against him. It is thus necessary to determine the authority of the forces involved in the operation to make such an arrest. Such a determination can only be made by the examination of two separate but closely related issues. First, the power conferred on bodies other than States to arrest persons indicted by the International Tribunal and, secondly, whether the mandate of UNTAES allows for its involvement in such an arrest process. It is also necessary to discuss briefly the respective roles played by the OTP and the forces of UNTAES in the arrest of Mr. Dokmanović.

1. Examination of the Statute and Rules

34. The Defence contends that Article 29 of the Statute, in conjunction with Rule 55 of the Rules, prescribes the sole method for securing the presence of accused persons before the International Tribunal. Since the accused was residing in the FRY at the time of his arrest,

[35] Draft transcript, at p. 41.

the Defence asserts that the FRY bore sole responsibility for his arrest and transfer to The Hague for trial. Any other method of proceeding, in the view of the Defence, is in violation of the Statute, Rules and principles of international law. The Trial Chamber, however, finds that the mechanism prescribed in Rule 59 *bis* provides an alternative procedure to that contemplated by Article 29 and Rule 55, and that the circumstances of the present case merited the utilisation of this alternative.

35. The Statute of the Tribunal was adopted by the United Nations Security Council in Resolution 827, on 25 May 1993. This resolution requires that all States cooperate with the Tribunal and take all necessary measures under their domestic law to implement the Statute and comply with those orders issued by a Trial Chamber under Article 29 of the Statute. Article 29 sets out the general obligation of all States to cooperate with the Tribunal and afford it complete judicial assistance.[36] In addition, Article 29, paragraph 2 (d) and (e), provides that States must comply with orders for the arrest or detention of persons and their surrender or transfer. The Report of the Secretary-General[37] emphasises that the establishment of the Tribunal on the basis of a Chapter VII decision "creates a binding obligation on all States to take whatever steps are required to implement the decision."[38] The Report also states that "an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."[39] However, neither the terms of the Article itself, nor the Report of the Secretary-General, provide that this duty of States precludes the arrest and transfer of accused persons by other methods.

36. According to Rule 59 *bis,* once an arrest warrant has been transmitted to an international authority, an international body, or the Office of the Prosecutor, the accused

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[36] For a discussion of Article 29 and the duty of States to comply with orders of the Tribunal, see *Prosecutor v. Tihomir Blaškić* (IT-95-14-PT), Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, 18 July 1997 (RP D6641-D6714) (appeal pending) (hereafter "Subpoena Decision").

[37] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (hereafter "Secretary-General's Report").

[38] Secretary-General's Report, at para. 125. The provisions of Article 29 confer a very specific obligation, which may be termed "obligations of conduct." *See Prosecutor v. Tihomir Blaškić* (IT-95-14-T), Decision of the President on the Defence Motion Filed Pursuant to Rule 64, 3 April 1996 (RP D1817-D1832) (hereafter "Decision of the President"), which discusses the duty of States to pass implementing legislation in fulfilment of their obligations under Article 29. At para. 8, "This obligation [to comply with orders and requests from the Tribunal] is such that states are in breach of it not only when they are confronted with a specific situation whereby they cannot execute arrest warrants or orders of the Tribunal, but even before this possible occurrence, by failing to pass implementing legislation (if such legislation was needed under national law)."

[39] Secretary-General's Report, at para. 126.

person named therein may be taken into custody without the involvement of the State in which he or she is located. This Rule was adopted by the Judges of the Tribunal at the Ninth Plenary session in January 1996, in accordance with Article 15 of the Statute, which grants the Judges the power to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of proceedings, trials and appeals. . . and other appropriate matters." The procedure established by Rule 59 *bis* is valid and fully supported by the terms of the Statute.

37. Article 19, paragraph 2, of the Statute confers upon the Judge who has confirmed the indictment in any given case the authority to issue such orders and warrants for arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial. This power, phrased in discretionary terms, clearly indicates that the Article does not contemplate that arrest warrants may only be directed to States. Rule 59 *bis*, therefore, can be regarded as giving effect to this Article when a decision has been made by the confirming Judge that it is "required" that entities other than States receive and execute warrants for the arrest, detention and transfer of accused persons. Judge Riad directed the arrest warrant in the present case to UNTAES, upon the motion of the Prosecution. The Prosecution stated that it had reason to believe that the accused was in the territory of Eastern Slavonia, which was being administered by UNTAES in accordance with a resolution of the Security Council.[40] Thus, the Judge considered that such an order was required, pursuant to Article 19, paragraph 2, of the Statute, and the mechanism established by Rule 59 *bis* was thereby triggered.

38. Article 20, paragraph 2, is the most specific provision of the Statute regarding the procedure to be followed after the confirmation of an indictment and lends additional weight to Rule 59 *bis*. The plain language of this Article only contemplates that an accused person shall be taken into custody, informed of the charges against him, and transferred to the International Tribunal. No mention is made of States, nor is any limitation placed upon the authority of an international body or the Prosecutor to participate in the arrest process.

39. The FRY has failed to pass implementing legislation that would permit it to fulfil its obligations under Article 29. It has taken the position that its constitution bars the extradition

[40] Resolution 1037.

of its nationals to the Tribunal, and thus legislation which provides for the surrender of Yugoslav nationals would be unconstitutional.[41] However,

> [t]here exists in international law a universally recognized principle whereby a gap or deficiency in municipal law, or any lack of the necessary national legislation, does not relieve States and other international subjects from their international obligations; consequently, no international legal subject can plead provisions of national legislation, or lacunae in that legislation, to be absolved of its obligations; when they do so, they are in breach of those obligations.[42]

The approach taken by the FRY is also in direct conflict with Rule 58 of the Rules, which provides that the obligation to surrender accused persons shall prevail over any national legislation.[43]

40. However, as established above, Article 29 is obligatory in terms of conduct and is not a statement of exclusivity. It became clear with the commencement and continuation of the functioning of the Tribunal that several States were not fulfilling their obligations with regard to the arrest and transfer of indicted persons. This is evident from the utilisation of the procedure established by Rule 61 of the Rules on five occasions.[44] The Judges, therefore,

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[41] *See Fourth 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,* 7 August 1997, A/52/375, S/1997/729 (hereafter "Fourth Annual Report"). At para. 149: ("Unfortunately, other States have continued to refuse cooperation on the grounds of their national legislation and/or failed to enact such legislation as would make cooperation a possibility. A notable example remains the Federal Republic of Yugoslavia (Serbia and Montenegro)." At para. 188: ("Again, it needs no argument to point out that the invocation by the Federal Republic of Yugoslavia (Serbia and Montenegro) of its Constitution is no answer for its failure to meet its international obligations, including the treaty obligations it solemnly undertook before the world community at Dayton.")

[42] Decision of the President, at para. 7. *See also* the Address to the General Assembly by President Cassese, 19 November 1996 ("[S]ome Parties to that Agreement [Dayton] have simply failed to implement it in a crucial area: the apprehension of persons indicted by the Tribunal, and their surrender to the Hague. This applies, in particular, to the Federal Republic of Yugoslavia (Serbia and Montenegro) and Republika Srpska. They have refused so far to arrest any indictee on their territory on the pretext that the arrest and surrender of indictees having their nationality would be contrary to their constitutions, which prohibit the extradition of nationals to other States. In this regard, I would like to say that this argument is utterly fallacious. Firstly, the surrender of indictees to the Tribunal, an international judicial body established by the Security Council under Chapter VII of the Charter of the United Nations, has nothing to do with the extradition of nationals to other States. Secondly, in any case there exists a universally accepted principle of international law whereby states cannot claim that their national legislation, including their constitution, prevents them from complying with international legal obligations.") A/51PV.59.

[43] Rule 58 - National Extradition Provisions - "The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned."

[44] When the Rule 61 mechanism is triggered, a hearing is held, during which evidence is brought by the Prosecution and which may result in a finding by the Trial Chamber that there are reasonable grounds for believing that the accused committed the crime(s) charged. The Trial Chamber then issues an international arrest warrant for the accused and may request the President to notify the Security Council that the State which has received the warrant for his arrest and transfer has not complied with its obligations. Such notification has

adopted Rule 59 *bis* within the parameters of Articles 19 and 20 of the Statute to provide for a mechanism additional to that of Rule 55, which, however, remains the primary method for the arrest and transfer of persons to the Tribunal. Such an interpretation of the Statute is fully consonant with its object and purpose as the constitutive instrument of an international judicial body intended to take effective measures to bring to justice those persons responsible for serious violations of international humanitarian law.[45] Without the presence of those persons indicted by the Tribunal in The Hague, it is not possible for their guilt or innocence to be established and the functioning of the Tribunal is substantially impeded.[46] Although the Rules cannot extend the powers of the Tribunal beyond those envisaged in the Statute, the enactment of a Rule that clearly is not in violation of the Statute and comports with its spirit can only be regarded as legitimate.

41. An interpretation of Rule 55 - grounded in Article 29 of the Statute - which assumes exclusivity, fails to take into account the provisions of Rule 59 *bis* of the Rules. It is axiomatic that a rule cannot be rendered meaningless by a restrictive interpretation of other provisions of the same instrument.[47] Rule 59 *bis* is clear in its terms and is supported by the Statute of the Tribunal. It must, therefore, be considered to be valid and supplementary to Rule 55. Indeed, Rule 59 *bis* explicitly provides that it applies "notwithstanding Rules 55 to 59", indicating further that what was contemplated was an additional mechanism.

42. Furthermore, the FRY has failed or refused to execute the warrants which remain outstanding for the arrest of the three co-accused in the Indictment against Mr. Dokmanović.[48] Considering this failure, the utilisation of the procedure for arrest

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occurred in relation to the *Nikolić* case (IT-94-2-R61) (non-cooperation of the Bosnian Serb administration), the *Rajić* case (IT-95-12-R61) (non-cooperation of Bosnia and Herzegovina and the Republic of Croatia), the *Karadžić and Mladić* case (IT-95-11-R61 and IT-95-18-R61) (non-cooperation of the FRY and the Republika Srpska), as well as in the present case in relation to the other three persons accused on the Indictment - *Mrkšić, Radić and Šljivančanin* (IT-95-13-R61) (non-cooperation of the FRY). The fifth Rule 61 hearing was in the *Martić* case (IT-95-11-R61).

[45] *See* the Subpoena Decision, in which Trial Chamber II "exercised its power to interpret the Statute and Rules in accordance with the proper meaning of their terms and considering their object and purpose." (at para. 152). *See also Prosecutor v. Dražen Erdemović* (IT-96-22-A) Joint Separate Opinion of Judge McDonald and Judge Vohrah in the Judgement on Appeal, 7 October 1997 (A348-A423), and the Separate and Dissenting Opinion of Judge Cassese in that Judgement (A277-A331), at para. 2.

[46] Trials *in absentia* are not provided for in the Statute.

[47] *See, e.g.,* Maxwell on Interpretation of Statutes, 12th ed. by P. St. J. Langan (1969). At p. 36: ("A construction which would leave without any effect any part of the language of a statute will normally be rejected.") At p. 45: ("[T]he court should avoid interpretations which would leave any part of the provision to be interpreted without effect.")

[48] *See* the Letter of the President Addressed to the President of the Security Council, 25 April 1996, S/1996/319, sent upon the finding of Trial Chamber I in its Review of the Indictment Pursuant to Rule 61 that failure to

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contemplated by Rule 55 would very well have been an exercise in futility. In addition, when the warrant for the arrest of Mr. Dokmanović was issued, it was reasonably believed that he was residing in the area of Eastern Slavonia. Indeed, the evidence shows that he was in fact resident in Eastern Slavonia until July 1996, when he moved to Sombor in the FRY. Under these circumstances, the utilisation of the procedures of Rule 59 *bis* was appropriate. Although the arrest warrant was issued in April 1996, UNTAES did not itself receive it until July 1996, by which time the accused was no longer residing in Eastern Slavonia.[49] Thus, UNTAES arrested Mr Dokmanović when he subsequently re-entered the area under its administration.[50]

2. The Participation of UNTAES

43. It is undisputed that the forces of UNTAES as well as representatives of the Office of the Prosecutor were involved in the arrest of the accused. The Prosecution has not, however, ever contended that it received an arrest warrant signed by Judge Riad pursuant to Rule 59 *bis*. The only warrant which has been made a part of the record in this matter is the one directed to UNTAES. Thus, without at this point exploring the role played by the Office of the Prosecutor in the process, the Trial Chamber must examine the mandate conferred upon UNTAES as an international authority entitled to receive and execute warrants of arrest issued by the Tribunal.

44. The Basic Agreement on the region of Eastern Slavonia, Baranja and Western Sirmium (the "Basic Agreement") was signed by representatives of the Federal Republic of

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serve the Indictment on the other three accused was due to the refusal of the FRY to cooperate with the Tribunal. ("The refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to cooperate with the International Tribunal should be seen in its broadest context. . . The cooperation of the states of the former Yugoslavia is particularly imperative: without such cooperation, few accused would ever be delivered to The Hague to stand trial. To this day, however, the Federal Republic of Yugoslavia (Serbia and Montenegro) has not executed a single arrest warrant addressed to it.")

[49] Mr. Dokmanović testified that he resided in Eastern Slavonia until sometime in July 1996, when he moved to Sombor, in the FRY. He also testified that he returned to Eastern Slavonia because he had a house in Trpinja and was employed in Vukovar until 5 October 1996 (as is also apparent from his employment card, which has been tendered as an exhibit in this matter). A certificate from the Serbian Ministry of Internal Affairs, which certifies his residency in Sombor, FRY, from July 22 1996 has also been tendered. Ms. Lopičić, counsel for the accused, stated during the hearing on 8 September that "he travelled every day because he was employed until 1996, we have a document, until 1996, October 5th, but his wife moved to Sombor on July 22nd." (Draft transcript, at p. 54)

[50] The legitimacy of the method of obtaining the presence of the accused in UNTAES territory is further discussed in section D below.

Yugoslavia and Croatia on 12 November 1995.[51] This agreement prescribed that there would be a transitional period of twelve months during which an international body, described as a Transitional Administration, would govern the region.[52] The Security Council was requested to establish this Administration and also to authorise an international force to be deployed for the maintenance of peace and security and to assist in the implementation of the Basic Agreement.

45. After receiving a Report from the Secretary-General on all aspects of the establishment of the Administration and force requested by the parties to the Basic Agreement,[53] the Security Council adopted Resolution 1037, on 15 January 1996. This resolution emphasised that the region is a part of Croatian territory and endorsed the proposal contained in the Basic Agreement to create a transitional body for its administration pending reintegration into Croatia. The Security Council, invoking Chapter VII of the U.N. Charter, thus established a peace-keeping operation with both civilian and military components - UNTAES. The mandate granted to UNTAES is clearly extensive, as was envisaged by the Secretary-General in his Report[54] and as is evident from the statements of some member States when the resolution was adopted.[55] When testifying before the Trial Chamber, the military assistant to the Transitional Administrator, Michael Hryshchyshyn, was also of the view that the Transitional Administrator had "complete executive authority over the area."[56]

46. Moreover, the resolution requires UNTAES to cooperate with the International Tribunal in the performance of its mandate, explicitly directing it to cooperate with Tribunal investigators.[57] The importance of such cooperation was emphasised by the Italian

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[51] A/50/757, S/1995/951, 15 November 1995.

[52] The Agreement recognised the possibility that the mandate of the Transitional Administration could be extended for an additional 12 month period. The Security Council has indeed, on the advice of the Secretary-General, renewed the UNTAES mandate, until 15 January 1998.

[53] *Report of the Secretary-General Pursuant to Security Council Resolution 1025* (1995), 12 December 1995, S/1995/1028.

[54] *Id.* ("By the end of the transitional period, the region should be demilitarized and secure under the sovereign control of the Government of Croatia." at para. 12. "The transitional administrator might also need to have legislative power to enact regulations for carrying out the functions attributed to him by the agreement." at para. 17. "A Chapter VII mandate would also be necessary to give the transitional administrator the power to 'govern,' as stipulated in the agreement." at para. 22.)

[55] The representative of the United States of America emphasised that UNTAES was a new peace-keeping operation, whose mandate ensures that it will be able to govern the region in an authoritative fashion. The representative of France stated that "the authority of the Transitional Administrator should be total during the transition period in order for him to be able to govern effectively." S/PV 3619 SC Records, 15 January 1996.

[56] Draft transcript, at p. 125.

[57] Resolution 1037, at para. 21.

representative to the Security Council, speaking on behalf of the European Union when the resolution was adopted, as well as by the representatives of Chile and Poland. That this cooperation included the arrest of persons indicted by the Tribunal was made clear by the statements of the representatives of both Egypt and the Republic of Korea. This view was not challenged by any other member State.[58]

47. The civilian and military components of UNTAES were established by the Security Council under its Chapter VII authority. One of the aims of the latter component, expressed in the resolution, was "to contribute, by its presence, to the maintenance of peace and security."[59] This mirrors one of the stated purposes for the establishment of the International Tribunal, for it too was created as a Chapter VII mechanism to "contribute to the restoration and maintenance of peace."[60] It is thus apparent that the Security Council considered that both UNTAES and the Tribunal would advance a common goal. Hence, it is incumbent upon them to fully cooperate with one another and co-ordinate their activities. Resolution 1037 re-emphasises the duty of States to cooperate with and assist the Tribunal, yet it also places responsibility on UNTAES for cooperating with the Tribunal. It is therefore apparent that the Security Council took the view that the duty of States and the mandate of UNTAES were not mutually exclusive.

48. Under the terms of Resolution 1037, the Secretary-General is to report to the Security Council on a regular basis on the functioning of UNTAES and the implementation of its mandate. It is clear from these reports that UNTAES performed a comprehensive governing role for the region. Of importance to the present issue is that the demilitarisation overseen by the military component was total. The only forces entitled to carry weapons were those of UNTAES and the transitional police force which had been established by it. The local police were no longer operating and UNTAES was responsible for the training and supervision of the transitional police force.[61] There was, therefore, no Croatian police force in the region, in a position to execute arrest warrants on behalf of the Croatian Government, as is the procedure envisaged by Rule 55.

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[58] Supra note 55.
[59] Resolution 1037, at para. 9(c).
[60] Preambles of Security Council Resolutions 808 and 827.
[61] *See also* the testimony of Mr. Hryshchyshyn ("[T]he police force in that region, which is called the Transitional Police Force or the TPF, is specifically responsible to the Transitional Administrator and not to the Republic of Croatia, so that in the administration of the - what I will call policing functions, that that is UNTAES's responsibility." Draft transcript, at p. 133.)

49. As has been previously stated, Rule 59 *bis* provides a proper alternative to the procedures called for by Rule 55, without seeking to replace them, and is supported by Articles 19 and 20 of the Statute. Furthermore, UNTAES is an international authority within the meaning of Rule 59 *bis* and it was executing its mandate to cooperate with the Tribunal by effecting the arrest of the accused.

3. Participation of the Office of the Prosecutor

50. In its written submissions, the Prosecution does not take a clear position as to whether the arrest was accomplished by UNTAES or itself.[62] The Prosecution argued orally at the 8 September hearing that the arrest was carried out by military personnel from UNTAES and by representatives of the Office of the Prosecutor,[63] citing Rule 59 *bis* in support. Mr. Hryshchyshyn, however, stated during his testimony that, in his view, the accused was arrested by the Prosecution investigators, with the assistance of UNTAES in his detention.[64]

51. The Trial Chamber has, in this Decision, found that an arrest occurs when, by physical restraint or conduct, or by words, an individual is made aware that he is not free to leave. Having examined the audiotapes and transcripts thereof and the video of the arrest, it is clear that the accused was arrested by military forces of UNTAES. Immediately thereafter he was read his rights and informed of the charges against him by an investigator from the OTP. While the arrest in this case was accomplished pursuant to Rule 59 *bis*, the presence of the OTP when an arrest is executed is also explicitly contemplated in sub-section (C) of the other Rule that is concerned with arrests, Rule 55. Although the arrest warrant directs UNTAES to

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[62] *See* Response of 21 July 1997 ("OTP personnel met with UNTAES officials and made them aware of Dokmanović's desire for a meeting. They agreed *to cooperate and assist in the operation* by appearing to set up a meeting between Dokmanović and Klein" (emphasis added) at para. 7. "As soon as Dokmanović was secured and handcuffed, OTP investigator Vladimir Dzuro, through an interpreter, advised him of his rights and informed him of the nature of the charges against him" at para. 9. "UNTAES would have been in contravention of a court order had they failed to take the accused into *custody*" (emphasis added) at para. 12).

[63] *See* argument put forward by Mr. Williamson at p. 159 of the Draft transcript. Mr. Williamson, further stated "My position is that UNTAES military personnel physically placed Mr. Dokmanović under arrest. They physically removed him from the vehicle, searched him, placed handcuffs on him. At that point in time, an investigator from the Office of the Prosecutor advised Mr. Dokmanović of his rights and he was transported, together with representatives of the Office of the Prosecutor and UNTAES military personnel to an airport in Croatia from which he departed to fly to the Hague." (Draft transcript, at p. 163). Upon questioning from the bench, Mr Williamson then stated that the arrest was completed upon the reading of rights by the OTP investigator after the physical detention by UNTAES. (Draft transcript, at p. 164).

search for, arrest and transfer the accused to the Tribunal and to inform him promptly of his rights and the nature of the charges against him, it was actually the OTP that informed the accused of his rights and of the nature of the charges. What is imperative, however, is that the accused be informed of his rights and the charges against him and this was done. Clearly the OTP has the authority to do this.

52. During what was characterised by the Prosecution as a "joint operation,"[65] the rights of the accused were fully protected. The accused was made aware of the purpose of his detention and arrest, of the charges against him, and of his rights. This constitutes the basic protection of the rights to which he is entitled. It is to be noted that Rule 5 of the Rules states that any action which is in non-compliance with the Rules shall only be declared null if it occasioned a miscarriage of justice and if it was inconsistent with the fundamental principles of fairness. Contrary to the averment of the Defence, these principles were fully respected.

C. Non-disclosure of the Indictment and Issuance of the Warrant of Arrest

53. On 3 April 1996, the name of Mr. Dokmanović was added to the Indictment against the other three accused persons in this case, subject to an order for non-disclosure as provided for in Rule 53. The Office of the Prosecutor has adopted this approach of requesting orders for non-disclosure due to the non-cooperation of some States in executing arrest warrants issued by the Tribunal.[66] The Defence does not appear to have raised a general challenge to the legitimacy of this practice of issuing sealed indictments. It is useful to quote here from the transcripts of the hearing of 8 September 1997:

> MR. FILA: No, I want to say that through a UN procedure through the statute, there is a foreseen procedure of arrests. He was a refugee in the territory of an independent state called Yugoslavia. Arrests cannot be carried out on its territory. A request should have been made to Yugoslavia to carry out an arrest. His right was violated because he was arrested in an inhumane way. I am explaining that this would not have happened if this was done properly, if ordinary police had come, because UNTAES does have police, if they had come to arrest him and we would be confirming today or tomorrow whether he was guilty or not. I believe that an illegal arrest was a violation of the

[64] Draft transcript, at pp. 120-121.
[65] The OTP also argued at the 8 September hearing that the arrest was a "joint operation" (*see* Draft transcript, at p. 157).
[66] *See* the Fourth Annual Report.

> sovereignty of Yugoslavia, he was arrested in a very tricky way, and that is simply not acceptable.
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> . . .
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> JUDGE McDONALD: So it is not your position that an accused is entitled to be arrested within a certain period of time, it is your position that Article 29 of the statute prescribes the sole method for arresting an accused and that is to seek the co-operation of a state and that UNTAES lacks the authority as well as the method for arresting --
> MR. FILA: UNTAES is not a state, and third, and you also have the fact that this warrant of arrest has to be carried out without a delay, that the State is requested to carry it out without undue delay and not when somebody finds it necessary to carry it out in a year, two or three. That is so.
> JUDGE McDONALD: So are you saying then the fact then of a sealed indictment prevents a State from complying with its obligation under Article 29, because it says "executed without undue delay". Does that mean undue delay from the time it receives it or undue delay from the time it is signed by the judge?
> MR. FILA: Yes.
> JUDGE McDONALD: Which one?
> MR. FILA: It cannot be submitted to them because they do not know, but if a judge issues a warrant of arrest it has to be served to the State where the indictee is. I do not think that indictments are hidden from States, they are hidden from criminals. That is how I understand it. I have not understood Rule 59 as hiding from the State, because States are obliged and they have to carry it out. Otherwise it would have a different meaning, that would mean that we would have parachute forces and we would be carrying out different assaults in different States to pull someone out.[67]

It would thus appear that the Defence is not contending that the fact that Mr. Dokmanović was unaware of the existence of the Indictment against him or the warrant for his arrest constitutes a violation of his rights.[68] Instead, the Defence seemingly claims that, because the Indictment was under seal, the FRY was denied the opportunity to serve it upon the accused and thus, somehow, its sovereign rights were violated.

54. Rule 53 provides that a Judge may order that there be no public disclosure of an indictment until it is served upon the accused named therein. The contention of the Defence

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[67] Draft transcript, at pp. 151-152.

[68] The Prosecution has, nonetheless, argued that the use of confidential indictments is standard practice in many national jurisdictions and such practice cannot be regarded as constituting a violation of the fundamental rights of the accused person. This latter point is based on Articles 9(2) and 14(3)(a) of the International Covenant of Civil and Political Rights, as reflected in Rules 55 to 59 of the Rules of the Tribunal, which state that an accused person must be informed of the charges against him upon his arrest.

that the FRY is exempted from such "non-disclosure to the public" is without any basis, for the Rule is as clear as it is absolute in its terms. In addition, it is uncontested that on 3 April 1996, when the Indictment was confirmed, the arrest warrant issued, and the order for non-disclosure entered, the accused was not resident in the FRY. Rather, he was living in Eastern Slavonia, Croatia.[69] This, therefore, constitutes a second reason why the Indictment was not required to be transmitted to the FRY for service, at that time. Moreover, given the history of non-cooperation with the Tribunal of the FRY[70] it is reasonable to conclude that if the arrest of the accused was to be achieved, it was necessary that the order for non-disclosure remain in effect, even after October 1996, when his employment in Eastern Slavonia ceased and he resided in Sombor in the FRY. Thus, the Trial Chamber finds that the non-disclosure of the Indictment does not constitute grounds for a challenge to the arrest of the accused.

55. The original Warrant of Arrest signed by the Judge and transmitted to UNTAES was in English and, according to the Registrar, a copy translated into Serbo-Croatian was attached. However, this translated version was erroneously directed to Croatia, instead of to UNTAES. The Registrar explained at the hearing on 8 September that this error had occurred within the Registry and had subsequently been corrected in the official files. The Defence contends, however, that the copy of the arrest warrant which Mr. Dokmanović received in Serbo-Croatian upon his arrest, was the version which had been addressed to Croatia and not to UNTAES and that this was a deliberate error jeopardising the rights of the accused.[71]

56. The Trial Chamber notes that nowhere in the Statute or Rules is it provided that the accused is entitled to a copy of the warrant for his arrest in his own language. Under Rule 55, the accused must be read the indictment and his rights in a language which he understands and be cautioned in that language. Under Rule 59 *bis* the accused is entitled to be informed of the charges against him in a language which he understands, and of the fact that he is being transferred to the Tribunal, when he is taken into custody. Upon his transfer he must have the indictment, a statement of his rights, and his caution read to him in such a language. The fact that the Prosecution provided the accused with a copy of the arrest warrant was a matter

[69] *See* discussion at para 7 and 42 above. The fact that there was an arrest warrant issued on 3 April 1996 which was directed to Croatia, although never sent to it, is further indicative of the fact that the FRY certainly cannot claim that the Indictment should have been disclosed to it at that time.
[70] *See* discussion in Section B above.
[71] *See* the argument put forward by Mr. Fila, draft transcript at pp. 142-143. *See also* footnote 1 above.

solely at its discretion. Furthermore, the official version of the warrant signed by Judge Riad was in English. The translation into Serbo-Croatian bears no official status.

D. Method of Arrest

57. While the Prosecution freely concedes that it "used trickery, it was a ruse" and that "[i]t was the intention of the Prosecutor from day one to arrest Mr. Dokmanović,"[72] the Trial Chamber *does not* believe that this amounts to a forcible abduction or kidnapping.[73] As has been established, the accused entered the UNTAES vehicle that carried him to the Erdut base in Croatia of his own free will and was actually eager to get into the vehicle due to his belief that he was going to a meeting to discuss his property rights in the UNTAES administered territory of Eastern Slavonia. However, given that the accused *was* deceived, tricked, and lured into going into Eastern Slavonia, where he was subsequently detained and arrested, the Trial Chamber must now grapple with the legality of this technique. For the reasons stated below, the Trial Chamber finds that such "luring" is consistent with principles of international law and the sovereignty of the FRY.

58. As mentioned above in the discussion concerning when and where the accused was arrested, under international law, Article 5(1) of the ECHR states in pertinent part: "Everyone has the right to liberty and security of person. *No one shall be deprived of his liberty [except in the enumerated cases] and in accordance with a procedure prescribed by law....*" (emphasis added). Article 9(1) of the ICCPR has an almost identical provision which states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and *in accordance with such procedures as are established by law*" (emphasis added).

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[72] Draft transcript, at p. 170.

[73] The Trial Chamber acknowledges that there is authority for the proposition that it may be difficult to distinguish the forcible abduction of a person from the coerced or fraudulent luring of such a person (*see English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, Paul Michell, 29 Cornell Int'l L.J. 383 at 490-491, hereafter "Michell"). We also note that the elements of kidnapping in some jurisdictions consist of the unlawful taking and carrying away of one person by another by force or fraud. *See, e.g.* International Encyclopaedia of Laws, Criminal Law, Vol. 3: United Kingdom (England and Wales), L.H. Leigh and J.E. Hall Williams, at section 20. However, on the continuum between force and fraud, the Trial Chamber does not believe that the accused was coerced in a way that would justify our comparing the case at bar to a *forcible* abduction or kidnapping case. We will only look at such cases for the limited purpose of seeing how Article 5(1) of the ECHR and 9(1) of the ICCPR have been interpreted.

59. The term "procedure" in Article 5(1) of the ECHR has been interpreted as including the procedure followed by a court when ordering a detention as well as the rules governing the making of an arrest.[74] The European Court of Human Rights has indicated that this requirement means that the procedure to be followed must be in conformity with the ECHR and applicable municipal law and must not be arbitrary.[75] The "lawfulness" requirement of this Article[76] has been interpreted as relating to both procedure and substance.[77]

60. In relation to Article 9(1) of the ICCPR, the word "law" in the phrase "established by law" should be understood in the sense of a general-abstract, parliamentary statute or equivalent, or an unwritten norm of common law accessible to individuals subject to the relevant jurisdiction.[78] The principle of legality is aimed at the lawfulness of both procedure and substance.[79] The historical background of Article 9(1) also shows that the prohibition on arbitrariness should be interpreted broadly.[80] Any deprivation of liberty provided for by law cannot be unjust, unpredictable, manifestly unproportional, discriminatory, or inappropriate to the circumstances of the case.[81] In determining whether Mr. Dokmanović was arrested in accordance with the standards enunciated in Article 5(1) of the ECHR and Article 9(1) of the ICCPR, therefore, the Tribunal's own Statute and Rules must first be revisited to see if the accused was arrested in a non-arbitrary way in "accordance with procedures prescribed by law" - namely, in accordance with the law of the Tribunal.

61. In the Statute, only Article 20, paragraph 2, and Article 21, paragraph 4, reference the procedures to be followed for obtaining jurisdiction over an indictee. Rule 59 *bis* (B) of the Rules, which is fully supported by the Statute, further incorporates the principles of Articles 20, paragraph 2 and 21, paragraph 4. In relation to the accused in the present case, these procedures were followed. As has been described in detail above, a valid Indictment was issued for Mr. Dokmanović, as was a "Warrant of Arrest Order of Surrender." The accused

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[74] Harris, at p. 104.
[75] *Winterwerp v. Netherlands* A 33 para 45 (1979); *see* Harris, at p. 104-105.
[76] The use of the word "lawful" in each sub-paragraph of Article 5(1) presupposes that any deprivation of liberty also be "lawful." Harris, at p. 105.
[77] *Id.*
[78] Nowak, at p. 171.
[79] *Id.*
[80] *Id.*, at p. 172-73.
[81] *Id.*, at p. 173. The Trial Chamber is not persuaded by the Prosecution's assertion that Article 9(1) is purely procedural. *See* Prosecutor's Response to the Defence Motion for Release, 21 July 1997, at p. 11.

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was informed of the charges against him in a timely manner upon his arrest, in a language he understands, and was promptly transferred to the International Tribunal for detention and trial.

62. Articles 5(1) of the ECHR and 9(1) of the ICCPR have been interpreted in a few international law cases relating to luring and abduction. In relation to Article 5(1), in *Stocké v Germany,*[82] before the European Court of Human Rights, a German national, Mr. Stocké, fled his country when the authorities sought to re-detain him for violating the conditions of his provisional release from custody for suspected tax offences. He fled first to Switzerland, then to Strasbourg, France. Mr. Stocké was then tricked by a police informant into re-entering German territory. The police informant told him of a possible business deal that would require his travelling to Luxembourg to attend a meeting with other interested parties. Mr. Stocké thus boarded an aeroplane which he believed was bound for Luxembourg. While he had been warned that the plane would be flying over a small part of Germany, he was not aware that it had been ordered to land in that State. There, he was promptly arrested and eventually convicted and sentenced to six years imprisonment.

63. Mr. Stocké claimed that the plan to lure him back to Germany was formed with the knowledge of the German authorities, and that he was a victim of unlawful collusion between those German authorities and an informer. He argued that such collusion rendered his arrest and trial unlawful, invoking Articles 5(1) and 6(1) of the ECHR.[83]

64. The European Court of Human Rights held that Articles 5 and 6 of the ECHR had not been violated given that there was not sufficient evidence to prove that Germany had been involved in the deception and luring of Mr. Stocké. The European Commission of Human

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[82] ECHR Ser A No. 199, 19 March 1991.

[83] The Court quoted the following parts of Articles 5(1) and 6(1) of the ECHR:
"Article 5(1) : Everyone has the right to liberty and security of persons. No one shall be deprived of his liberty save in the following cases and in a procedure proscribed by law:
(a) the lawful detention of a person after conviction by a competent court;
. . .
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
. . .
Article 6(1) : In the determination of. . .any criminal charge against him, everyone is entitled to a fair. . .hearing. . .by [a]. . .tribunal. . . ." *Id.*, at para. 47.

Rights, which had referred the *Stocké* case to the Court, had also found that there was insufficient evidence of State involvement to reach the conclusion that there was a violation of Article 5(1).[84] However, it suggested in its reasoning that if State authorities had been involved in such a deception, a violation of the ECHR could have occurred.[85] The Commission further stated, *dictum*, that:

> a person who is on the territory of the High Contracting Party may only be arrested according to the law of that State. An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve the State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Article 5§1.[86]

65. *Bozano v. France*[87] was another case considered by the European Court of Human Rights which dealt with the interpretation of Article 5(1) of the ECHR, although in the context of a forcible abduction. In that case, Mr. Bozano was convicted *in absentia* of various criminal offences by an Italian court. He was subsequently arrested by the French gendarmerie, having taken refuge in France. A French court ruling bound the French government to refuse Italy's request for his extradition and he was eventually released from custody. Soon afterwards, he was seized by French plain-clothes police officers, forced into an unmarked car, handcuffed and taken to Switzerland, pursuant to a deportation order. From there he was extradited to Italy. Mr. Bozano argued, in part, that his deportation to Switzerland was an abduction and that his forcible removal from France had violated his rights to personal liberty and freedom, contrary to Article 5(1) of the ECHR. The European Commission of Human Rights upheld the complaint and referred the matter to the European Court of Human Rights, which in turn decided that his deportation was unlawful and incompatible with the right to "security of person."[88] The Court concluded that France had acted unlawfully by circumventing the established extradition proceedings, and that there was insufficient justification for the detention of Mr. Bozano.

66. The Trial Chamber has located four cases that have been taken to the Human Rights Committee, established to monitor the implementation of the ICCPR, that interpret Article

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[84] *Id.* (Annex, Opinion of the Commission, at para. 192.)
[85] *Id.* (Annex, Opinion of the Commission, at para. 168.)
[86] *Id.* (Annex, Opinion of the Commission, at para. 167.) While this particular interpretation of Article 5(1) did not affect the Commission's finding, it should be noted that there was an extradition treaty between France and Germany, the procedures of which were clearly not followed.
[87] ECHR Ser A No. 111, 18 December 1986.
[88] *Id.*, at para. 60.

9(1) of the ICCPR in a context useful for our purposes.[89] The Committee has found in those cases that the forcible abduction of a person from one State to another for the purposes of his or her detention constitutes an arbitrary arrest and detention and violates Article 9(1).

67. The cases from the European Court of Human Rights and the Human Rights Committee, interpreting Articles 5(1) of the ECHR and 9(1) of the ICCPR, respectively, discuss illegality of arrest in relation to violations of specific, established procedures for obtaining custody of a suspect (often relating to an extradition treaty) or in relation to forcible kidnapping, which has been considered manifestly arbitrary.[90] There is, however, no such extradition treaty or cooperation agreement between the International Tribunal or UNTAES and the FRY.[91] Obviously, neither the International Tribunal nor UNTAES are States and thus do not have the power to conclude extradition treaties with other States. Furthermore, there is no long-standing, detailed arrangement between the Tribunal or UNTAES and the FRY for transferring to The Hague indicted persons who are located in the FRY which could be analogised to an extradition treaty between equal sovereign States. In addition, there was no forcible kidnapping in the case at bar, which could be seen as manifestly arbitrary. The Trial Chamber finds that the procedures for arrest established by the Tribunal were followed by the body carrying out the arrest, UNTAES. The grounds upon which Articles 5(1) of the ECHR and 9(1) of the ICCPR were, or could have been, violated in the aforementioned luring and abduction cases do not apply to the arrest of Mr. Dokmanović.

68. Having examined these international cases which address, to some extent, the issue to be determined here, the Trial Chamber finds it appropriate to analyse some pertinent national case-law. The Trial Chamber finds that there is strong support in such national systems for

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[89] *Case of Lilian Celiberti de Casariego*, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1981), at p. 185 (Uruguayan/Italian citizen abducted from Brazil with the aid of Brazilian Police. The suspect was brought to Uruguay and arrested); *Case of Sergio Ruben Lopez Burgos*, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1981), at p. 76 (Uruguayan exile in Austria brought application on behalf of her husband who had been abducted by Uruguayan agents with the assistance of the Argentinean government. The suspect was brought to Uruguay, detained and tortured); *Case of Almeida de Quinteros*, Comm. No. 107/1981, July 21, 1983 (Uruguayan national abducted from Venezuelan embassy grounds in Uruguay by Uruguayan troops); *Garcia v. Ecuador*, Comm. No. 319/1988, U.N. Doc. A/47/40 (1994), at p. 290 (Colombian citizen abducted in Ecuador at the behest of United States government officials and deported to the U.S. to face drug trafficking charges).

[90] Nowak, at p. 173.

[91] Indeed, as noted, the FRY has failed to establish implementing legislation for cooperation with the Tribunal.

the notion that luring a suspect into another jurisdiction in order to effect his arrest is not an abuse of the suspect's rights or an abuse of process. [92]

69. In the *United States v. Yunis,*[93] the defendant, a citizen of Lebanon, was lured out of his homeland and arrested in international waters off the coast of Cyprus. He was then forcibly brought to the United States to face charges related to hostage taking and aircraft piracy. His counsel argued, among other things, that the arresting officials violated the defendant's constitutional rights when they arrested him. The defendant thus moved to dismiss the indictment against him on the grounds that first, the United States' actions contravened its extradition treaty obligations with Cyprus and Lebanon; and secondly, the government used outrageous and excessive force when it arrested the defendant in violation of his Fifth Amendment right to due process.

70. The court in *Yunis* determined that the United States "government's actions did not rise to the level of 'outrageousness' that 'shocks the conscience' and warrants dismissal of the indictment."[94] The court relied heavily upon a standard of outrageous conduct established by the case of *United States v. Toscanino.*[95] In that case, a Second Circuit Court of Appeals ruled that a court must divest itself of jurisdiction in a case "where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[96] However, the court in *Yunis* found that there was no evidence that "the type of cruel, inhumane and outrageous conduct that would warrant dismissal under Toscanino" was met.[97] The court also mentioned that "[i]n cases where defendants have urged the court to dismiss the indictment solely on the grounds that they were fraudulently lured to the United States, courts have uniformly upheld jurisdiction."[98]

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[92] *But see* Jordan J. Paust, et. al., International Criminal Law (1996) (hereafter "Paust") ch. 5.3, for the proposition that the international community generally disapproves of using luring as a means of bringing a person into a particular jurisdiction to effectuate his or her arrest. However, the Trial Chamber found the very limited case authority cited for this proposition unhelpful in resolving the present issue.

[93] 681 F. Supp. 909 (D.D.C. 1988), *rev'd on other gds.*, 859 F.2d 953 (D.C. Cir. 1988).

[94] *Id.*, at p. 915. The court also concluded that individuals, acting alone, cannot enforce extradition treaties. Thus, the court decided not to consider the issue of whether the United States breached its treaty obligations.

[95] 500 F.2d 267 (2d Cir. 1974).

[96] *Toscanino*, at p. 275.

[97] *Yunis*, at p. 920.

[98] *Id.*

71. The cases of the *United States v. Wilson*[99] and *United States v Reed*[100] are two other pertinent examples of luring being viewed as a viable option for gaining jurisdiction over a criminal suspect. In *Wilson*, an undercover agent persuaded the defendant to leave his place of refuge in Libya. The court declined to dismiss the indictment concluding that "Wilson has simply been the victim of a nonviolent trick . . . any irregularity in a criminal defendant's apprehension will not vitiate proceedings against him."[101] In *Reed*, the defendant was enticed by the Central Intelligence Agency to leave an island in the Bahamas. He was informed that the private plane he was boarding was heading to Nassau and not Fort Lauderdale, Florida, which was the plane's actual destination. He was detained once on the plane and met by law enforcement officers upon arrival in Florida. The court held, in part, that the defendant's Fourth Amendment rights had not been violated because a valid arrest warrant existed, there was no violation of due process, and there was no cruel, inhuman, or outrageous treatment as there was in *Toscanino.*

72. Another case which presents a scenario somewhat similar to our own is *Re Hartnett and the Queen; Re Hudson and the Queen.*[102] In that case, a Canadian Court held that the deceptive manner in which the applicants were lured into Canada did not present a bar to their prosecution. The applicants were invited by Canadian authorities to come from the United States to Toronto to provide evidence to the Ontario Securities Commission. Upon arrival in Canada, they were arrested for fraud. The defence argued that the invitation to testify was, in fact, a ruse to bring the applicants into a jurisdiction where they could be arrested. The court stated that the manner in which the applicants were brought to trial, and the denial of extradition proceedings, did not violate their rights. The court dismissed the applicants' application to quash committal for trial and found that the court's jurisdiction to proceed with a preliminary hearing was not affected by the method of arrest.

73. In the case of *In re Schmidt,* [103] the House of Lords found that an individual who had been lured under false pretences into England from abroad by law enforcement officers could be lawfully extradited to face criminal charges in a third country. A German who had been charged with serious drug violations in Germany moved to Ireland. German officials

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[99] 721 F.2d 967 (4th Cir. 1983). *See also United States v. Wilson*, 732 F.2d 404, *cert. denied*, 469 U.S. 1099 (1984).
[100] 639 F.2d 896 (2d Cir. 1981).
[101] 721 F.2d, at p. 972.
[102] 14 C.C.C. (2d) 69, 1 O.R. (2d) 206 (Ont. (Can.) (H.C.J.) 1973).
[103] [1995] 1 App. Cas. 339 (Eng. H.L. 1994).

unsuccessfully sought his extradition. After German officials informed their English counterparts of the defendant's frequent visits to the United Kingdom from Ireland under false passports, the English authorities agreed to investigate. An English detective contacted the applicant and his solicitor in Ireland, and fraudulently informed them that he was investigating an unrelated issue and wanted to exclude the applicant from his inquiries. The applicant was subsequently lured into England on the premise that the police wished to interview him there. Furthermore, he was told that if he did not come for questioning, he would be suspected of having committed the offence and would thus be arrested during his next trip to the United Kingdom. Based upon this coercion, the applicant went to England, where he was arrested and detained, pending extradition. The applicant brought proceedings in the High Court and argued, in part, that the manner in which he was induced to enter the United Kingdom amounted to an abuse of process and executive power. The House of Lords refused the motion saying that there was no inherent supervisory power with respect to extradition proceedings. It also held that even if there were such supervisory power, it would not have been invoked in Schmidt's case.[104]

74. There are, however, cases in national jurisdictions where courts have frowned upon the notion of luring an individual into a jurisdiction to effectuate his arrest. [105] However, in all the national and international cases with which we are familiar, which found luring to be a violation of some international law principle[106] or a suspect's rights, there existed an

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[104] *See also Liangsiriprasert v. United States* [1991]1 App. Cas. 225 (American agents lured Thai appellants to Hong Kong, ostensibly to collect payment for a drug sale. The appellants were arrested upon arrival. They could not be extradited from Thailand to the United States because the relevant extradition treaty made no provision for drug offences. The Judicial Committee of the House of Lords held that it was not an abuse of process for the appellants to be extradited after being lured into Hong Kong. The Committee found that the appellants came to Hong Kong "not because of any unlawful conduct of the authorities but because of their own criminality and greed").

[105] *See e.g.* the July 15, 1982 Judgement by the Swiss Federal Supreme Court (EUGRZ (1983) 435), (German authorities had lured a Belgian national into Switzerland in order to have him arrested there for various offences. The court held that Switzerland should not extradite the defendant to Germany because it would infringe upon Belgian sovereignty. This was because Germany and Belgium had an extradition treaty that prohibited the extradition of Belgian nationals to Germany. Thus, the court found that Germany was unlawfully attempting to circumvent its own bilateral extradition treaty to acquire the defendant); *Walker v. Bank of New York*, 15 O.R. 3d 596 (Ont. (Can.) Gen. Div. 1993), *rev'd on other grounds*, 16 O.R. 3d 504 (Ont. (Can.) C.A. 1994) (Plaintiff was arrested in New York as part of a sting operation by the United States government. The plaintiff allegedly was given an aeroplane ticket to fly from Canada to the Bahamas, but was unaware until he was on board that there was a stopover in New York, where he was subsequently arrested. After he was released on bond he fled to Canada. In outlining the background to this case, Paust states that although the U.S. requested extradition, Canada refused to convene an extradition hearing, citing violations of Canada's law and sovereignty. Paust, at p. 433).

[106] There are at least two commentators who argue that fraudulent luring by a state or its agent is an international law violation. *See* Further Studies in International Law, F. A. Mann (1990) (hereafter "Mann"), at p. 340 and Paust, at p. 435.

established extradition treaty that was, in each case, circumvented or there was unjustified violence used against the suspect.

75. As stated above, there was no extradition treaty which was circumvented in securing the arrest of the accused. While Mr. Dokmanović could have been arrested and transferred to The Hague pursuant to Rule 55, as discussed, it is not the only method allowed to apprehend suspects.[107] Furthermore, as the cases amenable to luring require, there was no "cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*"[108] in the arrest of Mr. Dokmanović. The accused was not mistreated in any way on his journey to the Erdut base. There was nothing about the arrest to shock the conscience. In fact, it was an ordinary arrest by most standards, with no resistance by the accused and no force needed by UNTAES to handcuff him. The videotape and audiotapes of the arrest confirm that valid procedures were used in detaining Mr. Dokmanović and transferring him to The Hague.

76. Finally, the Defence argument that the sovereignty of the FRY was violated by the fraudulent luring of the accused into Croatia is without merit. However, contrary to the Prosecution's assertions, the accused is at liberty to raise this claim. By the International Tribunal's own jurisprudence in *Prosecutor v. Duško Tadić* (IT-94-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995, RP D413-D491), the Appeals Chamber found that an accused has the right to assert as a defence that the sovereignty of another country was violated. The Appeals Chamber stated quite clearly:

> Whatever the situation in domestic litigation, the traditional doctrine . . . is not reconcilable, in this International Tribunal, with the view 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. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of the accused is at stake, examine a plea raising the issue of violation of state sovereignty. (para. 55)

77. On the merits, however, the Defence does not have solid footing. As has been established in this Decision, there was no actual physical violation of FRY territory in gaining custody of Mr. Dokmanović. The arrest occurred in Croatian territory. While there may be a

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[107] As stated above, Rule 58 provides that no extradition treaty can interfere with a State's obligations towards the Tribunal for the surrender of witnesses or accused persons.

[108] *Yunis*, 681 F. Supp., at p. 920.

question of whether the FRY's sovereignty would be violated if the accused was fraudulently lured and subsequently arrested by another State,[109] the Trial Chamber need not address that issue in this Decision. As previously discussed, the arresting force, UNTAES, was established under Chapter VII authority - binding upon the international community - and thus does not have the type of horizontal relationship with the FRY that would exist between sovereign States. In the Subpoena Decision the Trial Chamber stated:

> All States, upon exercising their sovereign prerogative in joining the United Nations, recognize the primary authority of the Security Council in relation to matters of international peace and security. . . [W]hile the Security Council has not delegated its functions to the International Tribunal, it has created an independent subsidiary organ of a specialized nature. An order within the International Tribunal's mandate, addressed to a State, as with any compulsory action taken by the Security Council itself, in no way offends the sovereignty of that State. It is a logical corollary of the special nature and functions of the International Tribunal that it has the ability to order States to take action that falls within its given sphere of competence.

When UNTAES arrested the accused, it was fulfilling its obligation pursuant to Resolution 1037 to cooperate with the Tribunal and to contribute to the maintenance of international peace and security.

78. Finally, while the Defence and Prosecution focused much of their legal analysis on the case of *United States v. Alvarez-Machain* in both the United States Court of Appeals for the Ninth Circuit and U.S. Supreme Court, which overturned the Ninth Circuit, we do not find it necessary to consider the basic premise of the Supreme Court's decision - that a defendant cannot challenge a court's jurisdiction based upon the illegality of his arrest.[110] Given that the Trial Chamber has found that the particular method used to arrest and detain Mr. Dokmanović was justified and *legal*, we need not decide at this time whether the International Tribunal has the authority to exercise jurisdiction over a defendant *illegally* obtained from abroad.

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[109] *See* Mann, at pp. 340-41; Michell, at pp. 492-93.

[110] For this proposition, the Prosecution also urges the Trial Chamber to follow cases such as *Eichmann* (the accused was kidnapped from Argentina and taken to Israel for trial for war crimes, crimes against the Jewish people and crimes against humanity).

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E. Safe Conduct

79. The final matter that this Trial Chamber must decide is whether or not Mr. Dokmanović was guaranteed safe conduct from the FRY to Croatia and back again. In order to address this issue, two questions must be considered. First, what, if any, assurances were given to Mr. Dokmanović by the OTP or UNTAES. Secondly, if assurances were given, did they constitute legally binding guarantees of safe conduct.

80. With regard to the first issue, Mr. Dokmanović testified that he was given a full guarantee of safe conduct from the FRY to Croatia and back by Michael Hryshchyshyn, representing UNTAES. The accused stated that this guarantee was given in a telephone conversation on 25 June 1997, at which time his travel arrangements for the planned meeting with General Klein were discussed.[111] However, Mr. Hryshchyshyn testified that he did not give any assurance to Mr. Dokmanović that he would not be arrested if he came into the territory of UNTAES. He assured Mr. Dokmanović that he would not have any problems entering the UNTAES region.[112] In addition, testimony on this issue was given by Witness A, who was the interpreter for this telephone conversation between Mr. Dokmanović and Mr. Hryshchyshyn. He confirmed Mr. Hryshchyshyn's evidence by testifying that Mr. Dokmanović was not given any guarantees as to his safety, during that conversation, in relation to his travel into Croatia and back.[113]

81. Mr. Dokmanović also testified that shortly after his telephone conversation with Mr. Hryshchyshyn, he was told by Kevin Curtis from the OTP that he would have "all the assurances and guarantees."[114] However, Mr. Curtis indicated that he gave no such assurances or guarantees.[115] Mr. Curtis testified that the only assurance that Mr. Dokmanović expressed an interest in was that he did not wish to come into any contact with Croatian police or authorities. In response to this, Mr. Curtis agreed to mention this to UNTAES when making the arrangements for the meeting.[116]

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[111] Draft transcript, at p. 36.
[112] Draft transcript, at p. 112.
[113] Draft transcript, at p. 98.
[114] Draft transcript, at p. 36.
[115] Draft transcript, at pp. 71-72.
[116] Draft transcript, at p. 73.

82. In fact, the reason why Mr. Dokmanović had left Croatia and moved to the FRY was that he knew that a warrant had been issued for his arrest by the Croatian authorities for alleged crimes and he feared arrest by them.[117] At the time of Mr. Dokmanović's conversations with the representatives of the OTP and UNTAES, he knew that he was not on the list of Serbs granted amnesty by the Croatian authorities.[118] On the other hand, Mr. Dokmanović was not aware that he had been indicted by the International Tribunal or that a warrant had been issued for his arrest. Accordingly, he had no reason to seek assurances from the OTP or UNTAES that he would not be arrested by them. He did, however, have reason to seek assurances that he would not be arrested by the Croatian authorities. Thus, it seems to this Trial Chamber that the testimony of Mr. Curtis, Mr. Hryshchyshyn, and Witness A, to the effect that no guarantees of safe conduct, either specific or general, were provided to the accused, is more credible than the testimony of Mr. Dokmanović.

83. Even if Mr. Dokmanović had been given the assurances which he claims he was given, these would not satisfy the criteria required for a legally binding guarantee of safe conduct. The criteria for the issue of safe conduct were set down by Trial Chamber II (Judge McDonald, presiding, with Judges Stephen and Vohrah) in *Prosecutor v. Duško Tadić*, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996, (RP D9148-D9162). In that case, the Trial Chamber held that: first, it had the authority to make orders for safe conduct pursuant to Rule 54; secondly, such orders are made with respect to witnesses in order to secure their attendance from areas outside the issuing body's jurisdiction; and thirdly, their terms are specific. Immunity is granted with respect to crimes within the jurisdiction of the International Tribunal and only for a limited time during which the witness is present at the seat of the Tribunal for the purposes of giving testimony.[119]

84. An application of these criteria to the assurances alleged by Mr. Dokmanović indicates that, even if they were made, they would not constitute legally valid guarantees of safe conduct. Only a Judge or Trial Chamber has the authority to provide a guarantee of safe conduct - this cannot by issued by the OTP or UNTAES. These orders are issued to witnesses in order to secure their testimony. In this case, Mr. Dokmanović was clearly not

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[117] Defence Preliminary Motion , 30 July 1997, at p. 237.
[118] Draft transcript, at p. 44.
[119] *Prosecutor v. Duško Tadić*, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, at pp. 5-6.

sought as a witness, but as an accused. The alleged assurances did not specify any temporal or territorial restrictions, nor did they specify the purpose for which they were allegedly issued.

85. In conclusion, this Trial Chamber finds that no assurances of safe conduct were in fact given to Mr. Dokmanović, and even if they were, they could not have been legally binding.

F. Conclusion

86. In sum, the Trial Chamber finds that Mr. Dokmanović was arrested in the region of Croatia administered by UNTAES, by the forces of UNTAES, and with the participation of the Office of the Prosecutor. UNTAES legitimately executed the warrant of arrest, which had been directed to it pursuant to Rule 59 *bis* of the Rules, and the OTP informed the accused of his rights. Rule 59 *bis* provides for a method of arrest additional to that contemplated by Rule 55 and is fully supported by the Statute.

87. The evidence suggests that Mr. Dokmanović was not given an assurance of safe conduct and freedom from arrest by the representatives of the OTP or UNTAES. Neither would such safe conduct be enforceable, for only a Trial Chamber is entitled to give such guarantees in relation to the International Tribunal.

88. Finally, the means used to accomplish the arrest of Mr. Dokmanović neither violated principles of international law nor the sovereignty of the FRY. To the contrary, UNTAES, in discharging its obligation to cooperate with the International Tribunal and enforcing its Chapter VII mandate, is assuring the effectiveness of the Tribunal and thus contributing to the maintenance of international peace and security, as it is intended to do.

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IV. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER** being seised of the Preliminary Motions challenging the legality of the arrest of the accused, Slavko Dokmanović, filed by the Defence,

PURSUANT TO RULE 72,

HEREBY DENIES the Motions for the Release of the accused.

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

Gabrielle Kirk McDonald
Presiding Judge

Dated this twenty-second day of October 1997,
At The Hague,
The Netherlands.

[Seal of the Tribunal]