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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-94-2-AR73

Date: 5 June 2003

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Amin El Mahdi

Registrar: **Mr. Hans Holthuis**

Decision of: **5 June 2003**

PROSECUTOR

v.

DRAGAN NIKOLIĆ

DECISION ON INTERLOCUTORY APPEAL CONCERNING LEGALITY OF ARREST

Counsel for the Prosecutor:
Mr. Upawansa Yapa

Counsel for the Accused:
Mr. Howard Morrison
Ms. Tanja Radosavljević

I. Background

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (respectively, "Appeals Chamber" and "International Tribunal") is seised of the "Appellant's Brief on Appeal Against a Decision of the Trial Chamber Dated 9th October 2002" filed by counsel for Dragan Nikolić (respectively, "Defence" and "Accused" or "Appellant") on 27 January 2003 ("Appeal"), pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. The Appeal concerns a decision issued by Trial Chamber II on 9 October 2002 on the legality of the Accused's arrest by the Stabilisation Force (respectively, "Impugned Decision" and "SFOR"). The Accused, indicted by the International Tribunal for crimes against humanity and war crimes on 1 November 1994, was arrested by SFOR on or about 20 April 2000 in Bosnia and Herzegovina.[1] In the Impugned Decision, the Trial Chamber found that the Appellant was "allegedly illegally arrested and abducted from the territory of FRY by some unknown individuals and transferred by them to the territory of Bosnia and Herzegovina" and that "neither SFOR nor the Prosecution were involved in these acts".[2] It also determined that since the Accused had "'come into contact with SFOR", SFOR was obliged to arrest, detain and transfer him to the Hague'".[3] It found that the Accused's abduction involved neither a violation of the sovereignty of Serbia and Montenegro[4] that could be attributed either to SFOR or to the Office of the Prosecutor ("OTP" or "Prosecution"), nor a violation of the Accused's human rights or the fundamental principle of due process of law.[5] For all these reasons, it concluded that there did not exist a "legal impediment to the Tribunal's exercise of jurisdiction over the Accused".[6]

3. The question presented in this appeal is whether the International Tribunal can exercise jurisdiction over the Appellant notwithstanding the alleged violations of Serbia and Montengro's sovereignty and of the Accused's human rights committed by SFOR, and by extension OTP, acting in collusion with the unknown individuals who abducted the Accused from Serbia and Montenegro.

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[1] *Prosecutor v.Dragan Nikolić*, Case No. IT-94-AR72, "Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", 9 October 2002.
[2] *Supra* n.1, p. 39.
[3] *Ibid.*
[4] As the name of the Federal Republic of Yugoslavia (FRY) has been officially changed on 4 February 2003 and now is Serbia and Montenegro, this decision will, except where quoting portions of the Impugned Decision, only refer to the State Union of Serbia and Montenegro.
[5] *Ibid.*
[6] *Ibid.*

4. As to the procedural background leading to this appeal, the following must be recalled. On 9 October 2002, the Appellant filed a notice of appeal against the Impugned Decision pursuant to Rule 108 and/or Rule 72 of the Rules[7]. The Prosecution responded on 18 November 2002.[8] On 9 January 2003, the Appeals Chamber dismissed the Notice of Appeal on the ground that the Defence should have filed its Notice of Appeal neither under Rule 108 nor under Rule 72 but under Rule 73 of the Rules.[9]

5. On 14 January 2003, the Appellant sought certification for leave to appeal from the Trial Chamber.[10] OTP responded on 17 January 2003.[11] The Defence replied on 20 January 2003.[12] On 17 January 2003, the Trial Chamber granted certification.[13] On 27 January 2003, the Appellant filed the Appeal. The Prosecution responded on 3 February 2003 ("Response").[14] No reply was filed by the Defence.

II. Submissions of the Parties

Ground I – The Trial Chamber erred in holding that the conduct of third parties who unlawfully abducted the Accused across state borders could not be attributed to SFOR and OTP.

6. The Defence argues that the Trial Chamber erred in holding that the conduct of the persons who apprehended the Appellant should not be imputed to SFOR and, by extension, to the OTP. The Defence asserts that the Trial Chamber's use of the International Law Commission's ("ILC")Draft Articles on State Responsibility[15] to determine whether the conduct of third parties can be attributed to SFOR or the OTP was inappropriate because the Draft Articles are not recognised as customary

[7] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Notice of Appeal from the Judgement, pursuant to Rule 108 of the Rules of Evidence and Procedure, of Trial Chamber II dated the 9th day of October 2002 concerning the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", 7 November 2002.
[8] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Prosecution Response to the Two Defence Documents filed on 8 November 2002 purporting to be a Notice of Appeal pursuant to Rule 108 and a Motion for Extension of Time under Rule 127 Respectively", 18 November 2002.

[9] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Decision on Notice of Appeal", 9 January 2003.
[10] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Motion for Certification and Relief under the Provisions of Rules 73 and 127 of the Rules", 20 January 2003.
[11] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, "Prosecution's Response to the Defence Motion for Certification and Relief Under the Provisions of Rules 73 and 127 of the Rules of Procedure and Evidence", Case No. IT-94-2-PT, 17 January 2003.
[12] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, "Reply to Response of the Prosecutor, filed on the 17th January 2003 to the Defence Motion Filed on the 14th January 2003 for Certification and Relief under Rules 73 and 127 of the Rules of Procedure and Evidence", 20 January 2003.
[13] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-AR72, "Decision to Grant Certification to Appeal the Trial Chamber's 'Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal'", 17 January 2003.
[14] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, "Prosecution Response to 'Appellant's Brief on Appeal Against a Decision of the Trial Chamber Dated 09 October 2002'", 3 February 2003.
[15] Draft Articles of the International Law Commission on the issues of Responsibilities of States for Internationally Wrongful Acts and commentary, adopted by the ILC at its fifty-third session in 2001 (*See* UNGAOR, 56th Sess., Supp. No. 10 (A/56/10), chp.IV.E.2).

or treaty law. The Defence argues that the Appeals Chamber should apply a different test. The Defence contends that SFOR knew that the Accused had been the victim of an unlawful and violent abduction and that by taking the Accused into custody, SFOR colluded in the original crime. Furthermore, it asserts that SFOR's responsibility cannot be excused simply on the ground that it was enforcing its mandate.

7. The Prosecution argues that the Trial Chamber was correct in finding that the ILC Draft Articles offer important guidance on the state of customary international law and constitute a useful distillation of State practice. It submits that in any case, since the Trial Chamber acknowledged the limitations of the ILC Draft Articles as a formal source of law, no error can be imputed to it.

8. As to SFOR's collusion with the "unknown individuals", the Prosecution points out that the parties submitted to the Trial Chamber (on 12 July 2002) a stipulation "that the apprehension and transportation [of the Accused] into the territory of Bosnia and Herzegovina was undertaken by unknown individuals having no connection with SFOR and/or the Tribunal"[16] ("Agreement"). Even without such an agreement, the Prosecution asserts that simply taking an accused into custody from third parties cannot amount to the adoption or approval of any prior irregularity on the part of such parties.

Ground II – The Trial Chamber erred in finding that SFOR implemented its obligations under the International Tribunal's Statute and Rules and that there was no collusion or official involvement in the allegedly illegal acts.

9. As in the previous ground, the Defence argues that SFOR knew that the Accused had been illegally detained and that his subsequent arrest demonstrates SFOR's collusion in the prior criminal activity. This collusion, the Defence contends, constitutes an abuse of process. The Prosecution responds that SFOR had no knowledge of the identity of the Accused's captors and that, because of SFOR's mandate, SFOR was obligated to arrest the Accused once it had confirmation that he was an indictee of the International Tribunal.

Ground III – The Trial Chamber erred by not considering the relationship between SFOR and the OTP.

[16] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, "Motion to Determine Issues as Agreed Between the Parties and the Trial Chamber as Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal under Rule 72 and Generally, the Nature of the Relationship between the OTP and SFOR and the Consequences of any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention", 29 October 2001.

10. The Defence asserts that if there was collusion between the Accused's captors and SFOR, the Trial Chamber should have examined the nature of the relationship between SFOR and the OTP when considering the question of whether a stay of the proceedings ought to be granted. In this regard, the Defence refers to its submissions before the Trial Chamber in which it argued that SFOR acts as both a *de facto* and a *de jure* agent of the International Tribunal and the OTP when detaining and arresting indictees.[17] The Defence adds that, in any event, the Trial Chamber ought to have addressed the issue of the relationship between SFOR and OTP in order to come to a reasoned conclusion on the nature and seriousness of the violations of the Accused's rights and the occurrence of an abuse of process.

11. The Prosecution responds that, in the absence of wrongdoing by SFOR, the nature of its relationship with the OTP is irrelevant. While it is true that SFOR and the OTP have a working relationship and actively cooperate with each other, the actions of SFOR are not thereby automatically attributable to the OTP.

Ground IV – The Trial Chamber erred by concluding that SFOR did not breach State sovereignty.

12. The Defence claims that Serbia and Montenegro's constitution prohibits the transfer of persons sought by the Tribunal, and that the Accused's apprehension deprived a national of Serbia and Montenegro of his State's due process protection and of his right to challenge the legality of his arrest before Serbian and Montenegrin courts.

13. The Defence also argues that in arresting indictees such as the Accused, SFOR is analogous to an executive authority of a State. In exercising its mandate, SFOR violated Serbia and Montenegro's sovereignty by denying it the right to protect its nationals from breaches of international law, such as collusion in a cross-border abduction.

14. The Prosecution asserts that, even if SFOR breached Serbia and Montenegro's sovereignty, Serbia and Montenegro was obligated to transfer the Accused to the International Tribunal once he is in its custody. In such a case, the right to exhaust domestic judicial remedies is superseded by the transfer obligations of Serbia and Montenegro.

[17] *Supra* n.7, p.6.

Ground V – The Trial Chamber erred in concluding that the circumstances of the apprehension of the Accused were insufficiently "egregious" to justify the exercise of a discretionary stay of the proceedings.

15. The Defence contends that the Trial Chamber erred in finding that the circumstances of the Accused's arrest were insufficiently egregious to justify a discretionary stay of the proceedings. The Defence argues that, following the reasoning of the Appeals Chamber of the International Criminal Tribunal ("ICTR") in *Barayagwiza*, a court may decline to exercise its jurisdiction in cases where violations of an accused's rights are so egregious that to exercise jurisdiction would be detrimental to the court's integrity. The Defence contends that kidnapping constitutes such an egregious violation. In order to deter future kidnappings, the Defence stresses that the International Tribunal should only exercise jurisdiction over indictees who were transferred to the International Tribunal through lawful means. Exercising jurisdiction in this case amounts to condoning kidnappings that are executed with minimal violence.

16. The Prosecution responds that the Trial Chamber, in accordance with the ICTR Appeals Chamber's reasoning in *Barayagwiza,* correctly concluded that the circumstances of the Accused's arrest did not satisfy the standard of "egregious treatment". In any case, according to the Prosecution, breaches of international law by non-SFOR entities do not divest the International Tribunal of its jurisdiction over indictees.

III. Discussion

(a) Preliminary Considerations

17. The essence of the Defence's position is that SFOR, and by extension the OTP, acted in collusion with the individuals who took the Accused from Serbia and Montenegro to SFOR in Bosnia and Herzegovina. SFOR knew that the accused had been kidnapped. By taking the Accused into its custody, SFOR effectively accepted that kidnapping in breach of Serbia and Montenegro's sovereignty and the Accused's human rights. Therefore, jurisdiction must be set aside.

18. The Appeals Chamber observes that the basic assumption underlying the Defence submissions is that setting aside jurisdiction by the International Tribunal is the appropriate remedy for the violations of State sovereignty and/or human rights that allegedly occurred in this case. That assumption requires further scrutiny. For, if the setting aside of jurisdiction is not the appropriate remedy for such violations, then, even assuming that they occurred and that the Defence is correct that the responsibility for the actions of the Accused's captors should be attributed to SFOR,

jurisdiction would not need to be set aside. Thus, the first issue to be addressed is in what circumstances, if any, the International Tribunal should decline to exercise its jurisdiction because an accused has been brought before it through conduct violating State sovereignty or human rights. Once the standard warranting the declining of the exercise of jurisdiction has been identified, the Appeals Chamber will have to determine whether the facts of this case are ones that, if proven, would warrant such a remedy. If yes, then the Appeals Chamber must determine whether the underlying violations are attributable to SFOR and by extension to the OTP.

19. Before turning to these issues, however, the Appeals Chamber wishes to clarify that what is at issue here, is not jurisdiction *ratione materiae* but jurisdiction *ratione personae*. Jurisdiction *ratione materiae* depends on the nature of the crimes charged. The Accused is charged with war crimes and crimes against humanity. As such, there is no question that under the Statute, the International Tribunal does have jurisdiction *ratione materiae*. In this case, jurisdiction *ratione personae* depends instead on whether the Appeals Chamber determines that there are any circumstances relating to the Accused which would warrant setting aside jurisdiction and releasing the Accused. It is to this determination that the Chamber now turns.

(b) Under what circumstances does a violation of State sovereignty require jurisdiction to be set aside?

20. The impact of a breach of a State's sovereignty on the exercise of jurisdiction is a novel issue for this Tribunal. There is no case law directly on the point, and the Statute and the Rules provide little guidance. Article 29 of the Statute, *inter alia*, places upon all States the duty to cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. It also requires States to comply without undue delay with requests for assistance or orders issued by Trial Chambers, including the arrest or detention of persons. The Statute, however, does not provide a remedy for breaches of these obligations. In the absence of clarity in the Statute, Rules, and jurisprudence of the International Tribunal, the Appeals Chamber will seek guidance from national case law, where the issue at hand has often arisen, in order to determine State practice on the matter.

21. In several national cases, courts have held that jurisdiction should not be set aside, even though there might have been irregularities in the manner in which the accused was brought before them. In the *Argoud* case, the French Court of Cassation (Criminal Chamber) held that the alleged violation of German sovereignty by French citizens in the operation leading to the arrest of the

accused did not impede the exercise of jurisdiction over the accused; it would be for the injured State (Germany) to complain and demand reparation at the international level and not for the accused.[18] The *Cour de Sûreté*, the lower court, had actually noted that the State concerned (Germany) had not lodged any formal complaint and that ultimately, the issue was dealt with through diplomatic means.[19] In *Stocke*, the German Federal Constitutional Court (Bundesverfassungsgericht) endorsed a ruling by the Federal Court of Justice (Bundesgerichtshof) rejecting the appeal of the accused, a German national residing in France, claiming that he was the victim of an unlawful collusion between the German authorities and an informant who had deceptively brought him to German territory. The Court found that, even though there existed some decisions taking the opposite approach, according to international practice, courts would in general only refuse to assume jurisdiction in a case of a kidnapped accused if another State had protested against the kidnapping and had requested the return of the accused.[20] In *United States v. Alvarez-Machain*, the Supreme Court of the United States held that the abduction of an accused who was a Mexican citizen, though it may have been in violation of general international law, did not require the setting aside of jurisdiction even though Mexico had requested the return of the accused.[21]

22. On the other hand, there have been cases in which the exercise of jurisdiction has been declined. In *Jacob-Salomon*, an ex-German citizen was abducted on Swiss territory, taken to Germany, and held for trial on a charge of treason. The Swiss Government protested vigorously, claiming that German secret agents had been involved in the kidnapping, and sought the return of Jacob-Salomon. Though it denied any involvement of German agents in Swiss territory, the German government agreed (without arbitration) to return Jacob-Salomon to the Swiss Government.[22] More recently, in *State v. Ebrahim*, the Supreme Court of South Africa had no hesitation in setting aside

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[18] *In Re Argoud*, Court of Cassation, Judgment of 4 June 1964 in ILR, Vol. 45, p. 97.

[19] See relevant portion of the decision of the *Cour de Sûreté*, which dates 30 December 1963, in *Journal du Droit International*, "Pratique Comparée des États", Vol. 13, 1964, p. 191.

[20] See respectively Decision of 17 July 1985, AZ: 2 BvR 1190/84, Bundesverfassungsgericht (Federal Constitutional Court), para 1 c) and Judgement of 2 August 1984, Az: 4 StR 120/83, Bundesgerichtshof (Federal Court of Justice), para 2 b). The Bundesgerichtshof had found that the jurisdiction of German courts would only have been put into question had the French Republic requested reparation for an alleged violation of the French-German extradition treaty. The case was then brought to the European Commission of Human Rights ("Commission"); see *Stocke v. Federal Republic of Germany*, Commission, Decision on Admissibility, Application No. 11755/85, 9 July 1987. The Commission declared it admissible and, in turn, referred it to the European Court of Human Rights ("ECHR"). The latter dismissed it without passing on, however, the issue here discussed. See *Stocke v.Germany*, ECHR, Judgement of 18 February 1991, para 54.

[21] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). See also *United States v. Matta-Ballesteros*, 71 F.3d 754 (1997), and *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

[22] See Preuss Lawrence, "Settlement of the Jacob Kidnapping Case (Switzerland-Germany)", American Journal of International Law, 1936, Vol.30/1, pp. 123-124 and, of the same author, see also "Kidnapping of Fugitives From Justice on Foreign Territory", American Journal of International Law, 1935, Vol. 29/3, pp. 502-507.

jurisdiction over an accused kidnapped from Swaziland by the security services.[23] Similarly, in the *Bennet* case, the House of Lords granted the appeal of a New Zeland citizen, who was arrested in South Africa by the police and forcibly returned to the United Kingdom under the pretext of deporting him to New Zealand. It found that if the methods through which an accused is brought before the court were in disregard of extradition procedure, the court may stay the prosecution and order the release of the accused.[24]

23. With regard to cases concerning the same kinds of crimes as those falling within the jurisdiction of the International Tribunal, reference may be made to *Eichmann* and *Barbie*. In *Eichmann*, the Supreme Court of Israel decided to exercise jurisdiction over the accused, notwithstanding the apparent breach of Argentina's sovereignty involved in his abduction.[25] It did so mainly for two reasons. First, the accused was "a fugitive from justice" charged with "crimes of an universal character...condemned publicly by the civilized world".[26] Second, Argentina had "condoned the violation of her sovereignty and has waived her claims, including that for the return of the appellant. Any violation therefore of international law that may have been involved in this incident ha[d] thus been removed".[27] In *Barbie*, the French Court of Cassation (Criminal Chamber) asserted its jurisdiction over the accused, despite the claim that he was a victim of a disguised extradition, on the basis, *inter alia*, of the special nature of the crimes ascribed to the accused, namely, crimes against humanity.[28]

24. Although it is difficult to identify a clear pattern in this case law, and caution is needed when generalising, two principles seem to have support in State practice as evidenced by the practice of their courts. First, in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognised and condemned as such ("Universally Condemned Offences"), courts seem to find in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction. Second, absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach, it is easier for courts to assert their jurisdiction. The initial *iniuria* has in a way been cured and the risk

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[23] *State v. Ebrahim, Supreme Court* (Appellate Division), Opinion, 16 February 1991. See text in International Legal Materials, Vol. 31, n. 4, July 1992, pp. 890-899.
[24] *Re Bennet, House of Lords*, 24 June 1993, All England Law Reports (1993) 3, pp. 138-139. See also Lowe Vaughan, "Circumventing Extradition Procedures is an Abuse of Process", Cambridge Law Journal, 1993, pp. 371-373.
[25] Fawcett J.E.S., *The Eichmann Case*, British Yearbook of International Law, Vol. 38, 1962, pp. 181-215.
[26] *People of Israel v. Eichmann*, Supreme Court of Israel, Judgement of 29 May 1962 in ILR, Vol. 36, p. 306.
[27] *Ibid.*
[28] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Court of Cassation (Criminal Chamber, Judgement of 6 October 1983 in ILR, Vol. 78, pp. 130-131. See also Benedetto Conforti, "International Law and the Role of Domestic Legal System", Martinus Nijhoff Publishers, p. 157.

of having to return the accused to the country of origin is no longer present. Drawing on these indications from national practice, the Appeals Chamber adds the following observations.

25. Universally Condemned Offences are a matter of concern to the international community as a whole.[29] There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts.

26. This legitimate expectation needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused. The latter point will be addressed in Part (c) below. In the opinion of the Appeals Chamber, the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved. This is all the more so in cases such as this one, in which the State whose sovereignty has allegedly been breached has not lodged any complaint and thus has acquiesced in the International Tribunal's exercise of jurisdiction.[30] *A fortiori*, and leaving aside for the moment human rights considerations, the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organisation, or other entity, do not necessarily in themselves violate State sovereignty.

27. Therefore, even assuming that the conduct of the Accused's captors should be attributed to SFOR and that the latter is responsible for a violation of Serbia and Montenegro's sovereignty, the Appeals Chamber finds no basis, in the present case, upon which jurisdiction should not be exercised.

[29] See Higgins, Rosalyn, "Problems & Process (International Law and How We Use it)", Clarendon Press, Oxford, 1995, p. 72.

(c) Under what circumstances does a human rights violation require jurisdiction to be set aside?

28. Turning now to the issue of whether the violation of the human rights of an accused requires the setting aside of jurisdiction by the International Tribunal, the Appeals Chamber recalls first the analysis of the Trial Chamber. The Trial Chamber found that the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction. The Trial Chamber, however, did not exclude that jurisdiction should not be exercised in certain cases. It held that:

> in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment.[31]

29. This approach, the Appeals Chamber observes, is consistent with the dictum of the U.S. Federal Court of Appeals in *Toscanino*.[32] In that case, the Court held that "[we] view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights".[33] A Trial Chamber of the International Tribunal in *Dokmanović* also relied on this approach.[34] Along the same lines, the ICTR Appeals Chamber in *Barayagwiza* held that a court may decline to exercise jurisdiction in cases "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity".[35]

30. The Appeals Chamber agrees with these views. Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*,[36] certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of

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[30] See in this regard *Ocalan v. Turkey*, ECHR, Judgement of 12 March 2003, para 97.
[31] Impugned Decision, para 114.
[32] 500 F.2d 267 (2d Cir. 1974), p. 275.
[33] *Ibid.*
[34] *Prosecutor v. Slavko Dokmanović*, Case No. IT-95-13a-PT, "Decision on the Motion for Release by the Accused Slavko Dokmanović Trial Chamber I", 22 October 1997, paras 70-75.
[35] *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, "Decision", 3 November 1999, para 74. The Appeals Chamber applied this principle in ordering the release of the accused where he was the subject of human rights violations, including an excessively long pre-trial detention and the failure to inform the accused of the charges against him. This decision was reviewed by the Appeals Chamber, at the request of the Prosecutor, in its decision of 31 March 2000. In that decision, the Appeals Chamber reversed the remedy it had previously ordered on the basis of new facts put forward by the Prosecution. These new facts presented a different picture of the violations of rights suffered by the accused and of the omissions of the Prosecutor. However, in the March 2000 decision, the Appeals Chamber "confirmed its Decision of 3 December 1999 on the basis of the facts it was founded on" (para 51).
[36] *Soering v. United Kingdom*, ECHR, Judgment of 26 June 1989, para 100.

these abuses. Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.

31. In the present case, the Trial Chamber examined the facts agreed to by the parties. It established that the treatment of the Appellant was not of such an egregious nature as to impede the exercise of jurisdiction. The Defence has not presented to the Appeals Chamber any alternative or more comprehensive view of the facts that might show that the Trial Chamber erred in its assessment of them. Nevertheless, the Appeals Chamber, in fairness to the Accused, has *proprio motu* reviewed all the facts of this case. Upon this review, the Appeals Chamber concurs with the Trial Chamber that the circumstances of this case do not warrant, under the standard defined above, the setting aside of jurisdiction.

32. In the circumstances, the evidence does not satisfy the Appeals Chamber that the rights of the accused were egregiously violated in the process of his arrest. Therefore, the procedure adopted for his arrest did not disable the Trial Chamber from exercising its jurisdiction.

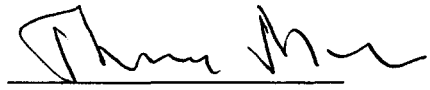
33. Thus, even assuming that the conduct of Accused's captors should have been attributed to SFOR and that the latter was as a result responsible for a breach of the rights of the Accused, the Appeals Chamber finds no basis upon which jurisdiction should not be exercised.

IV. Disposition

34. For the foregoing reasons, the Appeal is dismissed.

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

Dated this 5th of June 2003
At the Hague,
The Netherlands.



Judge Theodor Meron
Presiding Judge

[Seal of the Tribunal]