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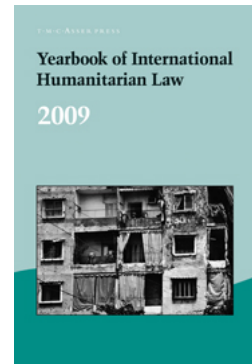
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## Breaching international law to ensure its enforcement: the reliance by the ICTY on illegal capture

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## BREACHING INTERNATIONAL LAW TO ENSURE ITS ENFORCEMENT: THE RELIANCE BY THE ICTY ON ILLEGAL CAPTURE<sup>1</sup>

James Sloan<sup>2</sup>

### 1. INTRODUCTION

In an address to the United Nations General Assembly on 7 November 1995, Antonio Cassese, then President of the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>3</sup> highlighted the difficulty of enforcing international criminal justice in the absence of state cooperation. To emphasise his point, Cassese offered an apt – if somewhat inelegant – analogy: he likened the Tribunal to a limbless giant, dependent on the ‘artificial limbs’ of the enforcement agencies of UN Member States. First among the various areas cited by Cassese where the Tribunal depended upon state cooperation was the arrest of suspected criminals living within the borders of those states.<sup>4</sup> Over nine years later the problem remained acute. In a 23 November 2004 address to the Security Council, the Prosecutor of the ICTY, Carla Del Ponte, highlighted failures on the part of the governments of Croatia, Serbia and Montenegro and Bosnia and Herzegovina to arrest indictees and turn them over to the Tribunal.<sup>5</sup> In particular, she mentioned the lack of cooperation by Belgrade as ‘the single most important obstacle faced by the

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1. © J. Sloan, 2005.

2. Lecturer in public international law at the University of Glasgow. I am extremely grateful to Professor Tom Franck and Ms Catriona Drew for generously agreeing to read an earlier draft of this article and for their helpful comments.

3. Also referred to as ‘the Tribunal’ or ‘the International Tribunal’.

4. ‘[T]he decisions, orders and requests of the International Tribunal can only be enforced by others, namely national authorities. Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants; it cannot seize evidentiary material, it cannot compel witnesses to give testimony, it cannot search the scenes where crimes have been allegedly committed. For all these purposes, it must turn to State authorities and request them to take action. Our Tribunal is like a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities; without their help the Tribunal cannot operate.’ Address of Antonio Cassese, President of the International Criminal Tribunal for the former Yugoslavia to the General Assembly of the United Nations, 7 November 1995.

5. ICTY Press Release, CDP/P.I.S./917-e, 23 November 2004 <[www.un.org/icty/latest/index.htm](http://www.un.org/icty/latest/index.htm)>.

Tribunal<sup>6</sup> in the implementation of its strategy to complete its trials by the end of 2008.<sup>7</sup>

In the light of the widely accepted view that the Tribunal could not conduct a trial in the absence of the accused,<sup>8</sup> there was a genuine risk that if states failed to execute the Tribunal's arrest warrants, it could indeed become a limbless giant. While such non-cooperation violates states' obligations in international law,<sup>9</sup> the Statute provides no remedy for it. The judges of the Tribunal attempted to address this shortcoming by amending its Rules of Procedure and Evidence<sup>10</sup> to provide for the reporting of state non-cooperation to the Security Council<sup>11</sup> and to permit hearings to reconfirm indictments against accused who were not present before the Tribunal under the 'Rule 61 procedure'.<sup>12</sup> It is fair to say that neither tactic achieved very much.<sup>13</sup> A new sense of hope emerged with the end of the conflict in Bosnia and Herzegovina and the signing of the Dayton Agreement in December 1995.<sup>14</sup> By the terms of this agreement, a multinational military Implementation Force for Bosnia and Herzegovina (IFOR) – later to be replaced by the Stabilisation Force (SFOR)<sup>15</sup> – was established to ensure compliance with military aspects of the Dayton Agreement. Despite an initial reluctance to get involved in the arrest

6. According to Del Ponte, there were some 20 indictees still at large in the three countries listed, including key indictees such as Radovan Karadžić, Ratko Mladić and Ante Gotovina.

7. As required by the Security Council; see SC Res. 1503 (2003) para. 7.

8. While not specifically provided for in the ICTY Statute, adopted 25 May 1993 under SC Res. 827, as amended (hereafter, Statute); the Secretary-General's report commenting on the Statute indicates that '[a] trial should not commence until the accused is physically present before the International Tribunal'. See 'Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)', UN Doc. S/25704, 3 May 1993, para. 101 (hereafter, Secretary-General's Report).

9. In the words of the Trial Chamber: 'As the Secretary General of the United Nations confirmed in his report on the establishment of this Tribunal, "[a]n 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".' *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defense Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 48 (hereafter, *Nikolić* Decision on Illegal Capture).

10. Rules of Procedure and Evidence, adopted pursuant to Art. 15 of the Statute, 14 March 1994, as amended (hereafter, Rule(s)).

11. See, e.g., Rule 7bis.

12. Rule 61 sets out a procedure whereby a three-judge panel may be convened to consider the evidence in a case in the absence of the accused and, if there are reasonable grounds for believing that the accused has committed all or any of the crimes charged, to issue a further arrest warrant.

13. Reports were made to the Security Council regarding the lack of state cooperation in arresting Nikolić (whose case is discussed *infra*) and a Rule 61 hearing was held which resulted in the reconfirmation of the indictment against him and the issuing of an international arrest warrant. See *Prosecutor v. Dragan Nikolić, aka "Jenki"*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, 20 October 1995. Nevertheless, he remained at large for a further six and a half years.

14. General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995.

15. On 12 December 1996 the Security Council authorised the Member States to establish SFOR as the legal successor to IFOR, SC Res. 1088 (1996).

process, SFOR effected numerous arrests in Bosnia and Herzegovina.<sup>16</sup> As SFOR had no mandate outside Bosnia and Herzegovina, indictees residing in Croatia or Serbia and Montenegro remained largely unaffected by its authority. Nevertheless, SFOR did play a role in the transfer to The Hague of at least two indictees from Serbia and Montenegro; what is less clear is whether SFOR had any involvement in their highly unorthodox capture.

This discussion will consider the cases of *Stevan Todorović* and *Dragan Nikolić*, each of whom was captured from Serbia and Montenegro in suspicious circumstances, removed from that country against their will and turned over to SFOR which, in turn, transferred them to the ICTY.<sup>17</sup> In separate proceedings, Todorović and Nikolić argued that the ICTY lacked jurisdiction to decide their cases as they had each been captured in a manner that violated international human rights law and state sovereignty. As we shall see, in the *Todorović* case, the issue of whether illegal capture impeded the ICTY's jurisdiction to try an individual was avoided (along with potentially embarrassing disclosure by SFOR of any involvement it may have had in the capture) by means of a last-minute plea agreement. In the *Nikolić* case, the impact of illegal capture was addressed both at the trial and appeal levels, with each Chamber taking an entirely different approach. The Trial Chamber concluded that neither state sovereignty nor international human rights law had been violated; as such, it did not need to consider the impact of an illegal capture on its jurisdiction. The Appeals Chamber, largely disregarding the findings of the lower Chamber, operated on the assumption that the sovereignty of Serbia and Montenegro and the fundamental human rights of Nikolić had been violated. Despite this, it indicated, in a perfunctorily reasoned judgement, that it was content to ignore such violations in all but the most exceptional circumstances.

## 2. THE *TODOROVIĆ* CASE

Stefan Todorović, a Bosnian Serb, was indicted by the ICTY on 21 July 1995 for crimes against humanity, grave breaches of the Geneva Conventions and war crimes.<sup>18</sup> He was alleged to have committed acts of rape, murder and torture against Bosnian Croats, Bosnian Moslems, and others while he was chief of police

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16. For a partial list of accused who have been brought before the ICTY through the intervention of SFOR, see S. Lamb, 'The powers of arrest of the International Criminal Tribunal for the former Yugoslavia', 70 *BYIL* (1999) p. 167, n. 3.

17. The first accused to make a claim of illegal capture before the ICTY was Slavko Dokmanović, who was transferred to the Tribunal after being lured out of Serbia and Montenegro and into Croatia by means of a joint effort between the Office of the Prosecutor and a UN mission. *Prosecutor v. Mile Mrškić, Miroslav Radić, Veselin Sljivancanin and Slavko Dokmanović*, Case No. IT-95-13a-PT. The Trial Chamber found that the trickery used by the OTP did not amount to kidnapping, as he had alleged, and that the conduct was 'consistent with the principles of international law and the sovereignty of [Serbia and Montenegro]'. *Ibid.*, para. 57 (the Trial Chamber emphasised the fact that Dokmanović left the Serbia and Montenegro willingly and was not arrested until he was outside that state).

18. See *Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, Sentencing Judgement, Trial Chamber, 31 July 2001.

in the Bosanski Samac municipality of Bosnia and Herzegovina. After remaining at large for over three years, he was captured and transferred to the Tribunal in September 1998 following what he described as a 'kidnapping'.<sup>19</sup> According to Todorović, on 27 September 1998, four armed, masked men burst into his home in Zlatibor in western Serbia, gagged and blindfolded him and beat him with a baseball bat,<sup>20</sup> and then smuggled him out of the country and into Bosnia and Herzegovina.<sup>21</sup> Upon arriving in Bosnia and Herzegovina, an SFOR helicopter met him and he was taken into SFOR custody and later handed over to Tribunal authorities.<sup>22</sup>

Todorović brought a series of motions which focussed on the alleged illegalities in his forcible removal from Serbia and Montenegro.<sup>23</sup> He argued that, as a result of the illegality of his capture, the Tribunal was required to order the dismissal of the indictment against him and his release from custody.<sup>24</sup> An important part of his argument was that SFOR was involved in his illegal capture – a claim for which some support existed in newspaper reports<sup>25</sup> – and he focussed on obtaining information to prove this. Over the strenuous objections of SFOR,<sup>26</sup> Todorović obtained orders from the Tribunal requiring SFOR to provide disclosure.<sup>27</sup> Due to the way in

19. At his initial appearance before the ICTY on 30 September 1998, Todorović advised the Trial Chamber that he 'did not feel well because he had received a heavy blow with a baseball bat over his head "during the kidnapping"'. See Prosecution response to the appeal brief of the accused/appellant Stevan Todorović, filed 4 August 1999, para. 9, n. 8.

20. *Ibid.*

21. See S. Castle, 'Bosnian police chief may escape war crimes trial', in *The Independent*, 16 August 2000, p. 11. See also T. Walker, 'SAS carried out Serbian raid', in *The Times*, 11 November 1998.

22. *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Trial Chamber, 18 October 2000, para. 11 (hereafter, *Todorović Decision on Motion for Judicial Assistance*).

23. For a discussion of the various motions, see J. Sloan, 'Prosecutor v. Todorović: illegal capture as an obstacle to the exercise of international criminal jurisdiction', 16 *LJIL* (2003) p. 85.

24. As summarised by the Trial Chamber in *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Case No. IT-95-9-PT, Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović, Trial Chamber, 25 March 1999, p. 2.

25. Some newspaper accounts alleged that his capturers were 'bounty hunters' paid by NATO or by the US government. See Castle, *supra* n. 21 and Walker, *supra* n. 21. See also S. Davids, 'NATO "gang" jailed over Todorović', in *The Birmingham Post*, 12 December 2000, p. 9, where it is reported that '[n]ine Serbs who were allegedly paid £15,500 by NATO to capture and smuggle [Todorović] into Bosnia, were yesterday jailed for kidnapping'. Other reports assert that members of the British or US Forces were involved in the capture. See Walker, *supra* n. 21, and J. Swain, 'Serb snatched by rogue bounty hunter', in *The Sunday Times*, 23 July 2000.

26. For example, Todorović had received a letter from the Office of the Legal Advisor of SFOR, Colonel James M. Coyne, dated 24 March 2000, declining to provide the material sought and stating 'It is the position of SFOR that the ICTY has no authority to order SFOR to disclose any information.' *Todorović Decision on Motion for Judicial Assistance*, *supra* n. 22, para. 5.

27. The Trial Chamber ordered SFOR and the North Atlantic Council, as well as the 33 states participating in SFOR, to provide Todorović with evidence relating to his arrest, including the identities of the individuals who were involved with his arrest. Furthermore, the Trial Chamber issued a subpoena requiring the testimony of the Commanding General of SFOR. See *Todorović Decision on Motion for Judicial Assistance*, *supra* n. 22.

which the arguments were put forward in the motions,<sup>28</sup> the Trial Chamber did not address the question of the impact the accused's apparently illegal capture had on its jurisdiction to hear the case.<sup>29</sup> Such arguments would, in the normal course, have been heard after Todorović had been provided with the ordered information, which the Trial Chamber had determined was required in order for him to make his argument based on illegal capture.

However, an airing of the facts and a determination on the issues relating to illegal capture was not to be. Instead, almost immediately after the Trial Chamber issued its order requiring disclosure from SFOR, a plea agreement was entered into between the ICTY's Office of the Prosecutor (OTP) and Todorović. According to its terms, the OTP would drop all counts against Todorović but one and, in return, Todorović would cease his pursuit of information from SFOR and cooperate with the OTP in relation to information and evidence regarding the events in the former Yugoslavia.<sup>30</sup> As envisaged by the plea agreement,<sup>31</sup> Todorović was sentenced to ten years' imprisonment for the single count to which he pleaded guilty. Despite assurances of OTP officials that '[a]bsolutely nothing has been sacrificed',<sup>32</sup> it is clear that Todorović received a relatively light sentence. Whether SFOR had involvement in Todorović's capture was to remain forever undisclosed. The issues relating to the impact the nature of the capture would have on the Trial Chamber's jurisdiction were left undecided in the *Todorović* case,<sup>33</sup> however, they were to re-emerge before long in the *Nikolić* case, to which we now turn.

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28. The OPT and SFOR took an approach whereby it was argued that the information should not be disclosed to the accused as, even assuming all the allegations were true, dismissal of the indictment and release of the accused were inappropriate remedies in the circumstances. The Trial Chamber, however, did not accept this and ordered the disclosure without entering into a discussion of the issues relating to illegal capture and what remedies might be appropriate. See Sloan, *supra* n. 23.

29. The bulk of the decision considered whether the Tribunal was authorised to order disclosure from SFOR and whether it was appropriate to do so in the circumstances.

30. See *Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, Sentencing Judgement, Trial Chamber, 31 July 2001, paras. 5 et seq.

31. According to the terms of the plea agreement, both sides agreed that the OTP would recommend to a Trial Chamber a sentence of not less than five and not more than twelve years' imprisonment and that neither party would appeal. *Ibid.*, para. 11.

32. See J. Cogan, 'International criminal courts and fair trials: difficulties and prospects', 27 *Yale JIL* (2002) pp. 111 at 127, where he quotes a representative of the OTP.

33. The OTP, in its pleadings, did elaborate its views on whether refusal of jurisdiction by the Trial Chamber was an appropriate step in the circumstances. Its arguments centred on an assertion that, in the circumstances, it would have been an abuse of the Trial Chamber's discretion to order that the indictment against Todorović be dismissed and that he be released; such a remedy was only available in the most egregious situations and the conduct he alleged was not sufficiently egregious.

## 3. THE NIKOLIĆ CASE

## 3.1 The Trial Chamber's decision on the effect of the arrest

Dragan Nikolić, the ICTY's first indictee, remained at large from November 1994 – when he was indicted for 24 counts of crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions<sup>34</sup> – until April 2000. On the evening of 21 April 2000, he was abducted from Serbia and Montenegro by unknown captors, smuggled across the Drina River and into Bosnia and Herzegovina and handed over to what is reported to have been a US contingent<sup>35</sup> of SFOR. He was then transferred to the ICTY in The Hague where he pleaded not guilty to all charges against him at his initial appearance on 28 April 2000. In motions lodged with a Trial Chamber on May 17 and 29 October 2001,<sup>36</sup> Nikolić alleged that his capture had violated the national sovereignty of Serbia and Montenegro and his internationally guaranteed human rights.<sup>37</sup> He argued that the breaches were of 'such a magnitude that even absent the involvement of SFOR or [the] Prosecution', the only appropriate remedy was for the indictment against him to be dismissed and his immediate return to Serbia and Montenegro to be ordered.<sup>38</sup> He described his capture as 'pernicious'<sup>39</sup> and 'tainted with illegality'<sup>40</sup> and asserted that 'a judicial body set up with ... the objectives of preserving human rights can have no proper option but to make it plain that jurisdiction will not be entertained in such circumstances'.<sup>41</sup>

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34. *Prosecutor v. Dragan Nikolić a/k/a "Jenki"*, Case No. IT-94-2-I, Indictment, 1 November 1994. His indictment was amended several times by the Tribunal. The 'crimes were allegedly committed by the accused during 1992 in the Vlasenica region of eastern Bosnia. Most of the crimes alleged are said to have occurred within the Susica camp, a former military installation converted by Bosnian Serbs into a detention camp of which Nikolić is alleged to have been the commander'. See *Nikolić Decision on Illegal Capture*, *supra* n. 9, para. 2.

35. Z. Cvijanovic and V. Zimonjic, 'Belgrade crackdown: bounty hunters strike inside Serbia to seize war crimes suspects', in *The Independent*, 18 May 2000, p. 14.

36. The defendant's initial motion in this regard, 'Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72', 17 May 2001 (hereafter, Defendant's Motion of 17 May 2001), was supplemented and modified by a second motion, '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 (hereafter, Defendant's Motion of 29 October 2001).

37. Defendant's Motion of 29 October 2001, *supra* n. 36, para. 16. See also *Nikolić Decision on Illegal Capture*, *supra* n. 9, paras. 24-25.

38. *Nikolić Decision on Illegal Capture*, *supra* n. 9, para. 25.

39. Defendant's Motion of 17 May 2001, *supra* n. 36, para. 11.

40. *Nikolić Decision on Illegal Capture*, *supra* n. 9, para. 25.

41. Defendant's Motion of 17 May 2001, *supra* n. 36, para. 11.



In its decision of 9 October 2002,<sup>42</sup> the Trial Chamber denied Nikolić the relief he requested. The Trial Chamber divided its reasoning into two parts. First, it considered whether the conduct of the alleged kidnappers could be attributed to SFOR or the OTP. Because the defence had agreed for the purposes of the motions that 'the apprehension and transportation into the territory of Bosnia and Herzegovina was undertaken by unknown individuals having no connection with SFOR and/or the Tribunal',<sup>43</sup> this argument was a difficult one to make. Nevertheless, counsel for Nikolić tried, arguing that SFOR had adopted the captors' previous illegal behaviour and that, as a result, the illegal behaviour attached to the Tribunal.<sup>44</sup> The Trial Chamber rejected the assertion that SFOR had adopted the illegal conduct, finding instead that by detaining the accused and transferring him to the Tribunal it merely did as it was obliged to under the Tribunal's Statute and Rules. As a result, it determined that the claim that SFOR's 'illegal' conduct could be attributed to the OTP was moot.<sup>45</sup>

In the second part of its decision, the Trial Chamber turned to the question of whether 'the illegal arrest in itself constitutes a direct obstacle to the exercise of jurisdiction by the Tribunal'.<sup>46</sup> In order to address this question, the Trial Chamber considered the two different approaches in national law regarding illegal interstate capture, each conveniently summarised by a Latin maxim: *male captus, bene detentus* (i.e., a person improperly seized may nevertheless be properly detained) and *male captus, male detentus* (i.e., the detention of a person improperly seized is itself improper). Under the first approach, the circumstances of the capture of the accused would be irrelevant, because the 'court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court'.<sup>47</sup> Under the second approach, the national court would consider the circumstances of the accused's capture and, if they were improper (or sufficiently improper), refuse jurisdiction.<sup>48</sup> While the Trial Chamber avoided explicitly endorsing either approach, it indicated a move away from the *male captus, bene detentus*

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42. Nikolić Decision on Illegal Capture, *supra* n. 9.

43. *Ibid.*, para. 21. This concession was made despite the existence of reports that the captors had been paid by foreign sources to deliver Nikolić to SFOR's US contingent. See Cvijanovic and Zimonjic, *supra* n. 35. One of the reasons counsel for Nikolić suggested that the case proceed on the basis of an admitted set of facts was 'to avoid the quagmire of enquiry, allegation and counter-allegation that typified the approach of the parties in [the similar case of] *Todorović*'. See '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', filed by the defendant on 7 November 2002. As we shall see below, it was in large measure because of this concession that the Trial Chamber was able to find that there had been no illegal behaviour associated with Nikolić's capture.

44. Based either on SFOR's status as an agent of the Prosecution or, in the alternative, based on the OTP ratifying SFOR's conduct. See Nikolić Decision on Illegal Capture, *supra* n. 9, para. 32.

45. *Ibid.*, paras. 68 and 69. As noted by the Trial Chamber at para. 69: 'Whatever the relationship between SFOR and the Prosecution, no attribution to the Prosecution can take place.'

46. *Ibid.*, para. 70.

47. *Ibid.*

48. 'In the view of the defence, this Tribunal should apply the principle of *male captus, male detentus*, meaning that an irregularity has occurred in the arrest of the accused and therefore should bar any further exercise of jurisdiction by the Tribunal.' *Ibid.*

approach, with its total disregard of the issue of how the defendant came before the judicial body, by examining the facts relating to Nikolić's illegal arrest.<sup>49</sup> Moreover, it specifically applied aspects of some of the national decisions which followed the *male captus, male detentus* approach.<sup>50</sup>

The Trial Chamber considered the breaches of international law alleged by Nikolić in two categories: those relating to a violation of state sovereignty and those relating to a violation of international human rights or the rule of law.<sup>51</sup> In each case it ruled that there had been no violation of international law.<sup>52</sup> In making its determination that there had been no violation of the sovereignty of Serbian and Montenegro, the Trial Chamber relied heavily on the defence concession that, for the purposes of the motions, there was no connection between his capture and SFOR or the OTP.<sup>53</sup> On the question of whether there was a violation of human rights or the rule of law, the Trial Chamber held that it must undertake 'a balancing exercise in order to assess all the factors of relevance in the case at hand and in order to conclude whether, in light of all these factors, the Chamber can exercise jurisdiction over the accused'.<sup>54</sup> The Trial Chamber considered the level of seriousness of the mistreatment<sup>55</sup> and whether 'persons acting for SFOR or the Prosecution were involved'.<sup>56</sup> It held that even without the involvement of SFOR or the Prosecution, it would be 'extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated'.<sup>57</sup> Here, however, based on the agreed facts, including, once again, the agreement by the defence that, for the purposes of the motions, there was no link between Nikolić's capture and SFOR or the OTP, the Trial Chamber was able to find there had been no human rights or due process violation. In short, as the Trial Chamber was able to conclude that there was no

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49. The OTP, too, was unwilling to go so far as endorsing a strict *male captus, bene detentus* approach for the Tribunal, arguing instead that national precedents 'do not present a consistent picture of the validity, or not, of the maxim *male captus, bene detentus*'. See Nikolić Decision on Illegal Capture, *supra* n. 9, para. 72. It argued that even if the *male captus, male detentus* approach was favoured in national law, it was inapplicable in Nikolić's case because his capture did not violate international law.

50. For example, it relied on the South African Supreme Court case, *State v. Ebrahim*, 95 ILR (1991) pp. 417 at 442, for the proposition that the OTP must come before the Trial Chamber with 'clean hands'. See Nikolić Decision on Illegal Capture, *supra* n. 9, para. 111.

51. See Nikolić Decision on Illegal Capture, *supra* n. 9, para. 96.

52. The findings of the Trial Chamber were somewhat strained in this regard. For a more detailed discussion, see J. Sloan, 'Prosecutor v. Dragan Nikolić: decision on defence motion on irregular capture', 16 LJIL (2003) p. 541.

53. Indeed the Trial Chamber builds upon the concession of the defence that there was no connection between SFOR or the OPT and the captors, noting that 'from the assumed facts the conclusion must be drawn that *there are no indicia that SFOR or the Prosecution offered any incentives to [the captors]*' [emphasis added]. Nikolić Decision on Illegal Capture, *supra* n. 9, para. 101.

54. See *ibid.*, para. 112.

55. 'In a situation where an accused is very seriously mistreated, maybe even subjected 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.' *Ibid.*, para. 114.

56. *Ibid.*

57. *Ibid.*

illegality, either regarding state sovereignty or human rights or due process provisions, it did not have to decide whether illegality would interfere with its jurisdiction.

As noted, the reasoning of the Trial Chamber in *Nikolić* was dominated by its reliance on the concession of the accused that there was no connection between the OTP or SFOR and his capture. Given that the defence expressly reserved its right to seek 'to establish the facts surrounding his arrest as an alternative challenge to the Tribunal's exercise of jurisdiction',<sup>58</sup> it was clear what was likely to come next. If these illegal capture proceedings based on the assumed facts failed, *Nikolić* could still pursue his case of illegal capture by requesting an evidentiary hearing whereby he would seek disclosure orders against the OTP and SFOR. *Todorović* provides a clear precedent for this. Of course, such an attempt to find evidence to link SFOR with *Nikolić*'s capture could potentially be highly embarrassing to SFOR; moreover, it would likely damage relations between NATO states and the Tribunal. However, before any such evidentiary hearing was to be requested, the matter would first go before the Appeals Chamber for final disposition. As we shall see, the decision by the Appeals Chamber ensured that no such disclosure would be pursued.

### 3.2 The Appeals Chamber's decision on the effect of the arrest

In contrast to the Trial Chamber, the Appeals Chamber proceeded on the assumption that a violation of both the sovereignty of Serbia and Montenegro and of *Nikolić*'s human rights had occurred, disregarding the reasoning of the Trial Chamber almost entirely. The Appeals Chamber set out a three-stage approach to the matter:

1. First it would consider the 'circumstances, if any, [in which] 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'.<sup>59</sup>
2. Once armed with such a standard, it would then determine whether the facts, if proven, would warrant such a remedy.
3. If so, it would then 'determine whether the underlying violations are attributable to SFOR and by extension to the OTP'.<sup>60</sup>

As we shall see, the Appeals Chamber put forward tests for when jurisdiction should be denied in the face of an illegal capture. Based on its application of these tests to the limited facts that were discernable from its decision, the Appeals

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58. *Ibid.*, para. 6.

59. *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, Appeals Chamber, 5 June 2003, para. 18 (hereafter, *Nikolić* Decision on Illegal Capture at Appeal).

60. *Ibid.*, para. 18.

Chamber held that the proposed remedy was not warranted. Therefore, it did not have to consider the third stage of its approach.<sup>61</sup>

### 3.2.1 *Stage one: when should the ICTY decline jurisdiction based on violation of state sovereignty or human rights?*

On the issue of when it is appropriate to refuse jurisdiction based on a violation of state sovereignty, the Appeals Chamber acknowledged an 'absence of clarity in the Statute, Rules and jurisprudence of the International Tribunal'.<sup>62</sup> Therefore, the Appeals Chamber turned to national criminal law to fill the gaps. It is, of course, perfectly appropriate for the ICTY to turn to national law where there are gaps in international criminal law – a relatively young part of international law – and it has done so many times in the past.<sup>63</sup> But it must be acknowledged that this gap-filling process vests in the ICTY judges a tremendous discretion in deciding what national jurisdictions to consult (it would be impractical to consult the national jurisdiction of each and every state in the world), what the characteristics of national law in the jurisdictions consulted are and which particular aspects of this national law are applicable to the ICTY in view of its many differences from a national system. While this discretion is necessary and desirable, with it must come a duty on the part of the judges to be balanced and comprehensive (or at least relatively so) in their analysis of the national law and clear in their reasoning as to why the law of one national jurisdiction is apposite – and why that of another is not. Unfortunately, in the *Nikolić* decision the Appeals Chamber's treatment of national case law was flawed; it was neither comprehensive – giving the impression of selectivity – nor clearly reasoned, at times relying on cases that are either inapposite or controversial, and at times failing to cite a source at all.

Despite its acknowledgement that 'it is difficult to identify a clear pattern in [the national criminal] case law'<sup>64</sup> on the question of the exercise of jurisdiction in the face of an illegal or irregular interstate capture, and that 'caution is needed when generalising',<sup>65</sup> the Appeals Chamber appeared to disregard its own good advice and proceeded to generalise based on a small number of cases, several of which were of only limited value to the ICTY. Based on a perfunctory review of

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61. Nonetheless, the Appeals Chamber signalled that even if such a link had existed, it would not consider the requested remedy to be warranted. See text accompanying n. 146 *infra*.

62. *Nikolić* Decision on Illegal Capture at Appeal, *supra* n. 59, para. 20.

63. As noted by no less an authority than Professor Antonio Cassese, the first President of the ICTY: 'International criminal law is a relatively new branch of international law' and one which 'more than any other ... simultaneously derives its origins from, and continuously draws upon, both international human rights law and national criminal law'. A. Cassese, 'International criminal law', in M. Evans, ed., *International Law* (Oxford, Oxford University Press 2003) pp. 721 at 722-723. Citing the paucity of international treaty rules, he noted 'international criminal law is largely the result of the gradual transposition onto the international plane of rules and legal constructs proper to national criminal law or to national trial proceedings'. *Ibid.*, p. 724.

64. *Nikolić* Decision on Illegal Capture at Appeal, *supra* n. 59, para. 24.

65. *Ibid.*

*Eichmann*,<sup>66</sup> *Barbie*<sup>67</sup> and a handful of other cases,<sup>68</sup> the Appeals Chamber reduced the detailed and complex jurisprudence on the subject of irregular capture from the world's national courts to two principles and a balancing test. Unfortunately, neither its first principle nor its balancing test appear to have much support in the national case law referred to by the Appeals Chamber; its second principle does not appear to comport with earlier jurisprudence of the Appeals Chamber.

The first principle that the Appeals Chamber determined should govern its decision as to when a violation of state sovereignty may require it to set aside its jurisdiction was that, in cases involving allegations of what it styled 'universally condemned offences', national courts 'seem to find in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction'.<sup>69</sup> While the Appeals Chamber's main source for this principle appears to be the writings of Professor, now Judge, Rosalyn Higgins,<sup>70</sup> the Appeals Chamber instead referred readers to the decisions in *Eichmann* and *Barbie* in support of the principle. *Eichmann* is perhaps the most famous case involving the issue of whether it is appropriate for a court to exercise jurisdiction when faced with an illegal capture. There the accused, who was head of the Jewish Office of the German Gestapo and in charge of its policy to exterminate European Jews, argued that his prosecution in Israel following his abduction from Argentina conflicted with international law and exceeded the jurisdiction of the Israeli courts.<sup>71</sup> In its decision, the Jerusalem District Court entered into an extremely thorough analysis of the approaches of various nations to illegal interstate capture *at the time* before endorsing the *male captus, bene detentus* approach. It concluded that it was 'an established rule of law that a person being tried for an offence against the laws of a state may not oppose his trial by reason of the illegality of his arrest or the means whereby he was brought within the jurisdiction of that State'.<sup>72</sup> The District Court's approach was confirmed by the Israeli Supreme Court.<sup>73</sup>

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66. *The Attorney-General of the Government of Israel v. Eichmann* (D.C. Jerusalem, 1961), 36 *ILR* (1968) p. 18 (hereafter, *Eichmann* District Court), and (S. Ct. Israel, 1962), 36 *ILR* (1968) p. 304 (hereafter, *Eichmann* Supreme Court).

67. *Fédération nationale des déportés et internés résistants et patriotes et autres c. Barbie* (Cass. crim., 1983), 78 *ILR* (1988) p. 125 (hereafter, *Barbie*).

68. In its consideration of sovereignty issues, the Appeals Chamber's analysis of the national law on illegal interstate capture ran to a mere three paragraphs; in its human rights analysis, it referred to a single national case.

69. *Nikolić* Decision on Illegal Capture at Appeal, *supra* n. 59, para. 24.

70. The Appeals Chamber referred to Judge Higgins' highly regarded discussion of international law, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press 1994) p. 72, only for the proposition that 'universally condemned offences are a matter of concern to the international community as a whole'. (*Nikolić* Decision on Illegal Capture at Appeal, *supra* n. 59, para. 25. However, the first principle put forward by the Appeals Chamber bears a striking similarity to Judge Higgins' thesis that there should be an exception to any prohibition on the exercise of jurisdiction in the face of irregular apprehension where the crime in question was a universally condemned one.

71. *Eichmann* District Court, *supra* n. 66.

72. *Ibid.*, p. 59.

73. *Eichmann* Supreme Court, *supra* n. 66.

While it is true, as the Appeals Chamber pointed out, that the Supreme Court in *Eichmann* did emphasise the universal character of the crimes with which Eichmann was charged, the court's decision in this regard had little relevance to the issue that was before the ICTY Appeals Chamber. The Israeli Supreme Court's emphasis on the nature of the Eichmann's crimes (they were said to have been 'condemned publicly by the civilized world'<sup>74</sup>) was for the purpose of establishing Israel's judicial jurisdiction over the accused, not in support of an assertion that the nature of Eichmann's capture had no bearing on the jurisdiction of the court to try him.<sup>75</sup> For this latter assertion, the District Court relied upon the principle of *male captus, bene detentus* which, as noted, it found to be an established rule of law. The other case offered in support of the Appeals Chambers' first principle was that of *Barbie*.<sup>76</sup> Here again, while the French court did stress the odious nature of the crimes with which the accused had been charged, once again the point was made in support of a quite different issue.<sup>77</sup> The court in *Barbie* was not asserting that somehow, due to the universally condemned nature of the crimes attributed to the accused, the French courts would be less troubled by irregular capture or the violation of state sovereignty.<sup>78</sup> Indeed, in *Barbie* there was no illegal interstate capture.

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74. *Ibid.*, p. 306.

75. The comments regarding the nature of the crimes alleged were made by the Supreme Court in response to an argument by counsel for the accused that because Eichmann was not alleged to have committed the crime in the forum state (i.e., Israel), the national case law relied upon by the District Court in support of the *male captus bene detentus* principle (which involved irregularly captured individuals accused of crimes in their forum states, who then fled to the states from which they were captured, to be ultimately returned to their forum states for trial) was inapposite and the principle was inapplicable. It was in reply to this argument that the Supreme Court noted the 'international nature' of Eichmann's crimes and stressed that they were of a type which had 'been condemned publicly by the civilized world'; because universal jurisdiction provided the necessary judicial jurisdiction, the question of whether he committed the crime in the forum state or another state was not relevant and the argument of the defence failed. The Supreme Court noted that counsel for Eichmann had 'confused the question of the substantive penal jurisdiction of the State of Israel with the question of whether his client enjoys immunity from the exercise of that jurisdiction against him by reason of the fact of his abduction. These two questions are entirely separate from one another'. *Eichmann* Supreme Court, *supra* n. 66, p. 307. The Appeals Chamber appeared to suffer from a similar confusion: counsel for Nikolić was not arguing, of course, that the ICTY lacked substantive jurisdiction, merely that, in the circumstances, it should decline jurisdiction in the face of the violations of Nikolić's human rights and Serbia and Montenegro's sovereignty.

76. *Barbie*, *supra* n. 67.

77. In *Barbie*, the accused, the head of the Gestapo in Lyon during the German occupation of France, was expelled from Bolivia and deposited in French Guinea (considered by the court to be French territory). He did not claim to have been captured in violation of Bolivian law, nor did he claim that the sovereignty of French Guyana had been violated. Instead, he applied for his release on the grounds that he had been a victim of disguised extradition which invalidated the proceedings against him. It was in reply to this claim that the *Chambre d'accusation* and later the Court of Cassation asserted that there had been no disguised extradition but simply the execution of an arrest warrant issued by a French judge and carried out on French territory.

78. Counsel for the defence argued that because the crimes in question were not provided for in French law, they lacked a proper legal basis and the defendant could not be charged with them. Rejecting this assertion, the court emphasised the universal nature of the crimes attributed to the accused.

The second principle the Appeals Chamber derived from the national case law regarding when a violation of state sovereignty might require it to set aside its jurisdiction provides that 'it is easier for courts to assert their jurisdiction'<sup>79</sup> when the state whose sovereignty has been violated has not complained of that fact.<sup>80</sup> This principle appears to have its foundation in the District Court's determination in *Eichmann*<sup>81</sup> that the defendant lacked *locus standi* to argue that Argentina's sovereignty had been violated; the right to raise this issue lay exclusively with the state.<sup>82</sup> What the Appeals Chamber failed to mention, however, is that the Appeals Chamber of the ICTY (differently constituted) had previously considered and emphatically rejected the *Eichmann* court's approach to who was entitled to raise a violation of state sovereignty. In the words of the Appeals Chamber in *Tadić*:

'Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept [i.e. that the right to raise the issue of breach of sovereignty lay exclusively with the state] recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights. ...

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber 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 an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.'<sup>83</sup>

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This is, of course, quite different than asserting the principle that where crimes are particularly odious jurisdiction should not be set aside in the face of an illegal or irregular capture.

79. *Nikolić* Decision on Illegal Capture at Appeal, *supra* n. 59, para. 24.

80. *Ibid.*

81. *Eichmann* District Court, *supra* n. 66. Two other national cases, decided after *Eichmann*, were also referred to in this regard: *Re Argoud* (Cass. crim., 1964), 45 *ILR* (1972) pp. 90 at 97; and *Stöckel v. the Federal Republic of Germany* (BVerfGE, 1985), *EuGRZ* (1986) p. 18, and (BGH, 1984), *NSIZ* (1984) p. 563.

82. In the words of the District Court: 'The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State,' *Eichmann* District Court, *supra* n. 66, para. 62.

83. *Prosecutor v. Tadić*, Case IT-94-I-AR72, Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 55 (hereafter, *Tadić* Appeal on Jurisdiction). A Trial Chamber of the ICTY, which first considered the issue in the *Tadić* case, held that the accused lacked 'the locus standi to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from that State'. *Prosecutor v. Tadić*, Case IT-94-I-T, Decision on Jurisdiction, Trial Chamber, 10 August 1995, para. 41. In this regard, it relied on *Eichmann* District Court and, in particular, its passage at para. 62, reproduced *supra* n. 82. As is evident from the above passage from *Tadić* Appeal Jurisdiction, this approach was unequivocally overruled by the Appeals Chamber. This right of an accused to assert the

Moreover, the Appeals Chamber's assertion that Serbia and Montenegro had 'not lodged any complaint and thus has acquiesced in the [ICTY's] exercise of jurisdiction'<sup>84</sup> appears somewhat disingenuous: it ignores the fact that there is no established procedure for the lodging of a complaint of violation of sovereignty with the ICTY or any other body.<sup>85</sup>

The Appeals Chamber then offered a balancing test to be applied in making a determination as to when a violation of state sovereignty might require it to set aside jurisdiction. It weighed the 'legitimate expectation [of the international community as a whole] that those accused of [universally condemned offences] will be brought to justice swiftly'<sup>86</sup> 'against the principle of state sovereignty and the fundamental human rights of the accused'.<sup>87</sup> This test is entirely unattributed.<sup>88</sup> Nothing in the cases referred to offers a similar test; however, the Appeals Chamber may have been influenced by a 1999 British court decision (to which it did not refer) propagating a similar test.<sup>89</sup> This test was also advocated by a member of the OTP staff in a published article on illegal capture.<sup>90</sup>

It may be understandable that the Appeals Chamber was not overly concerned about a comparatively minor violation of the sovereignty of Serbia and Montenegro<sup>91</sup> in view of that state's breach of its international responsibility to hand over

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breach of a state's sovereignty regardless of the state's wishes in the matter is also discussed in the *Dokmanović* case, *supra* n. 17, para. 76.

84. *Nikolić* Decision on Illegal Capture at Appeal, *supra* n. 59, para. 26.

85. Unlike the Eichmann case, where the matter was raised at the Security Council, this violation of sovereignty did not feature (so far as we can tell) one Member State entering into the territory of another. Arguably, the fact that Serbia and Montenegro brought criminal proceedings against the individuals who carried out the capture indicated that it was rather less untroubled by the abduction than the Appeals Chamber suggests.

86. *Nikolić* Decision on Illegal Capture at Appeal, *supra* n. 59, para. 25.

87. *Ibid.*, para. 26.

88. This is of an entirely different nature than the 'balancing exercise' called for by the Trial Chamber whereby it would 'assess all the factors of relevance' in order to conclude whether it can exercise jurisdiction over the accused. The factors considered by the Trial Chamber were the severity of the mistreatment of the accused and whether the OTP or SFOR had been involved. See text accompanying nn. 50-52 *supra*.

89. See *R. v. Mullen*, in *The Times*, 15 February 1999. This case involved IRA terrorism, where a test which is very similar to the one propounded by the Appeals Chamber is relied upon. There the court held that it:

'recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the IRA and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case ... [T]here may ... be ... cases in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed ... notwithstanding an abuse of process.'

90. See Lamb, *supra* n. 16, p. 240. She suggested (relying on the *Mullen* case) that the 'Tribunal may in future be required to strike a similar balance between, on the one hand, considerations of due process and the individual rights of the accused and, on the other, the dictates of the most elementary justice which require that such crimes be subject to prosecution and punishment'.

91. The Appeals Chamber noted simply that the damage to international justice by not apprehending fugitives accused of serious violations of international humanitarian law was greater 'than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly



the accused.<sup>92</sup> But to simply observe that the violation may lead to 'consequences for the international responsibility of the State or organization involved',<sup>93</sup> without establishing meaningful parameters regarding when such violations will be tolerated by the ICTY, gives a blank cheque to those who would violate state sovereignty in what they perceive to be the best interests of international criminal justice. If this were to be considered a precedent for capture of those indicted by the International Criminal Court (ICC) residing in non-cooperating member states, the ramifications could be very damaging to international peace and security.<sup>94</sup>

The Appeals Chamber's treatment of the question of when it would be appropriate for it to decline jurisdiction based on human rights concerns was briefer still. It again relied on its unattributed balancing test, adding that the 'correct balance must ... 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'.<sup>95</sup> Although it accepted that Nikolić's 'fundamental'<sup>96</sup> human rights had been breached, it did not elaborate what rights of the accused had been violated.<sup>97</sup> Moreover, despite noting that 'certain human rights violations are of such a serious nature that they require the exercise of jurisdiction be declined',<sup>98</sup> it did not offer any indication of when such a level of seriousness would be reached, commenting only that such a remedy will 'usually be disproportionate'.<sup>99</sup> In support of its approach, the Appeals Chamber cited a single case from national courts, the US case of *Toscanino*,<sup>100</sup> as well as a single case from the International Criminal Tribunal for Rwanda (ICTR).<sup>101</sup> So perfunctory was Appeals Chamber's handling of this important issue that the defendant was compelled to take the extraordinary step of petitioning the Appeals Chamber for clarification as to 'exactly what test is contemplated' in determining

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when the intrusion occurs in default of the State's cooperation'. *Nikolić Decision on Illegal Capture at Appeal*, *supra* n. 59, para. 26.

92. See *supra* nn. 9-13.

93. *Nikolić Decision on Illegal Capture at Appeal*, *supra* n. 59, para. 26.

94. Of course, unlike the ICTY, the Statute of the ICC was not established as a means to restore peace and security under Chapter VII of the Charter, with the attendant obligations on states to carry out the decision of the Security Council. Nevertheless, refusal by a member state of the ICC to surrender an accused would amount to a breach of international responsibility as well.

95. *Nikolić Decision on Illegal Capture at Appeal*, *supra* n. 59, para. 30.

96. *Ibid.*, para. 26.

97. The only hint in this regard comes from its brief reference to *US v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), where the accused alleged that he had been brought into the US illegally and had been the victim of brutal and prolonged torture with the participation of US law enforcement officials. 'The Appeals Chamber relied on the US court's reference to "due process" and the invasion of the accused's constitutional rights' in the context of the US system. *Nikolić Decision on Illegal Capture at Appeal*, *supra* n. 59, para. 29.

98. *Ibid.*, para. 30.

99. *Ibid.*

100. *US v. Toscanino*, *supra*, n. 97.

101. *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, Appeals Chamber, 3 November 1999, para. 74 (hereafter *Barayagwiza I*). The Appeals Chamber held that a court may decline to exercise jurisdiction if doing so 'in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity'.

whether a human rights violation is serious.<sup>102</sup> The Appeals Chamber, however, refused to be drawn: it not only rejected the motion, but declared it frivolous, noting that its statements 'require no clarification'.<sup>103</sup>

The Appeal Chamber's focus on the serious nature of the crimes and the indignation of the international community, and its willingness to balance it against violations of human rights or sovereignty (and, in the case of sovereignty, to find a good basis for not setting aside jurisdiction in the 'universally condemned' nature of the alleged offences) leaves the impression that the graver the alleged crime, the less troubled an international judicial body should be by the violation. On the question of human rights, at least, such an approach must surely be misguided: it does not appear to comport with the presumption of innocence. Indeed, if our human rights are to be meaningful, the opposite approach would appear fitting. That is to say, when an accused is charged with a very serious crime – one of the type that is likely to engender severe public outrage, or in the words of the Appeals Chamber one that triggers the 'legitimate expectation' of 'the international community' – a judicial body must be *most* scrupulous in ensuring that the accused's human rights are observed. For a court to provide no remedy for a human rights violation where the accused is charged with a traffic offence and subject to a fine would be regrettable; to provide no remedy where the accused is charged with mass murder or war crimes and subject to life imprisonment would be unconscionable. Equally troublingly, the Appeal Chamber's decision to make 'the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law' an essential element in its balancing test for the application of human rights guarantees results in the Appeals Chamber affording itself pure, unmitigated discretion.

The Appeals Chamber offered little guidance as to why it favoured the *male captus, bene detentus* approach over the *male captus, male detentus* approach. It did not discuss – or even acknowledge – the trend in many state courts in recent years away from the *male captus, bene detentus* approach. While a handful of national decisions favouring the *male captus, male detentus* approach are briefly touched upon in a single paragraph of the decision, there is almost no consideration of why those state courts felt compelled to reject jurisdiction. Among the reasons offered by the national courts of such states are a desire to safeguard the rule of law,<sup>104</sup> a desire to discourage violations of state sovereignty,<sup>105</sup> a reluctance to

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102. *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, Decision on Motion Requesting Clarification, Appeals Chamber, 6 August 2003, p. 2 (hereafter, Decision on Motion Requesting Clarification).

103. *Ibid.*

104. See, for example, *R. v. Horseferry Road Magistrates Court, Ex parte Bennett*, (1994) 98 Cr. App. R 114 (HL). Lord Bridge of Harwich noted at p. 130 that there is 'no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participation in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance.'

105. See, for example, *State v. Ebrahim*, *supra* n. 50, p. 442, where the court noted that 'international legal sovereignty must be respected'; see also *State v. Beahan*, 1992 (1) SACR 307 (A) p. 317,

see the administration of justice dependent on illegal conduct (and to avoid the disrepute that will follow),<sup>106</sup> a desire to avoid unfairness to the accused,<sup>107</sup> and a recognition of the need to rein in an overzealous executive branch.<sup>108</sup> All are legitimate concerns for an international judicial body such as the ICTY; however, none of these concerns are discussed by the Appeals Chamber.<sup>109</sup>

Where a body charged with applying international criminal law considers it necessary to draw upon national law to fill gaps, an essential aspect of its task must be to analyse the national case law, considering not just its relevance to the ICTY (given the difference in the nature of the obligations of nations from those of the ICTY), but also how it was received nationally and, where applicable, internationally. Here, the Appeals Chamber does not do so. For example, the Appeals Chamber relied on the US case of *Alvarez-Machain*<sup>110</sup> without criticism or qualification. It did not consider how (or whether) the case of *Toscanino* comported with the approach of the Supreme Court in *Alvarez-Machain*,<sup>111</sup> which, of course, was decided at a higher level. The Appeals Chamber gave no indication that the United States Supreme Court had been thoroughly pilloried both in the United States and

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where the court noted that illegal interstate capture 'corrodes the peaceful coexistence and mutual respect of sovereign nations'.

106. See *State v. Beahan*, *supra* n. 105. The court held that 'in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State'. See also *R. v. Horseferry Road Magistrates Court, Ex parte Bennett*, *supra* n. 104, p. 135 per Lord Lowry, where the court stayed the prosecution 'because it offends the court's sense of justice and propriety to be asked to try the accused in ... circumstances [involving illegal interstate capture]'.

107. See *State v. Ebrahim*, *supra* n. 50, p. 442, where the court noted that 'the legal process must be fair towards those affected by it'.

108. See also *R. v. Horseferry Road Magistrates Court, Ex parte Bennett*, *supra* n. 104, p. 130 per Lord Bridge of Harwich, where the court noted that 'To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view.'

109. While it is, of course, the case that its jurisdiction, method of establishment (under Chapter VII of the UN Charter) and relationship with UN Member States distinguish the ICTY from national courts, the concerns of national courts would, at least *prime facie*, appear to be applicable to the ICTY. Indeed, similar concerns were voiced by the Appeals Chamber of the ICTR in *Barayagwiza I*, *supra* n. 101, para. 108, where the accused was ordered released as a result of violations of his human rights. The Appeals Chamber observed: 'As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights. Finally, this disposition may very well deter the commission of such serious violations in the future.'

110. *United States v. Alvarez-Machain*, 504 US 655 (1992).

111. S. Wilske and T. Schiller, 'Jurisdiction over persons abducted in violation of international law in the aftermath of *United States v. Alvarez-Machain*', 5 *Univ. of Chicago Law School Roundtable* (1998) pp. 205 at 208. The authors consider the *Toscanino* case to present an exception to the general rule regarding jurisdiction in the United States, which 'hinges upon the application of the Ker-Frisbie Doctrine, which states that, as a matter of principle, a court's exercise of personal jurisdiction is not defeated by a defendant's unlawful importation in to the court's jurisdictions'.

internationally for its decision in this case.<sup>112</sup> Indeed, such was the level of indignation at the approach of the US Supreme Court in *Alvarez-Machain* that there was an international effort to have the General Assembly request an advisory opinion on the matter from the International Court of Justice.<sup>113</sup> Similarly, the adverse reaction of the international community to the abduction of Eichmann is not acknowledged by the Appeals Chamber.<sup>114</sup>

Nor did the decision of the Appeals Chamber consider the particular circumstances of the national jurisprudence and how these circumstances may impact on the relevance to the ICTY of a national decision. For example, the decision relied heavily on the *Eichmann* case without giving any indication that the Appeals Chamber was aware that the legal analysis engaged in by the District Court in 1961 (and which formed the basis of its findings on *male captus, bene detentus*) was outdated – so much so that its reasoning on illegal interstate capture can no longer be said to be sound in certain respects.<sup>115</sup> Likewise, the Appeals Chamber did not consider that the majority of the US Supreme Court in *Alvarez-Machain* implied it was not concerned with international law, so long as US constitutional law was not breached.<sup>116</sup>

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112. See, for example, C. Biblowit, 'Transborder abductions and United States policy: comments on United States v. Alvarez Machain', 9 *NY Int'l L. Rev.* (1996) pp. 105 at 107, where he observed 'Justice Stevens, in his dissenting opinion, described the decision as "monstrous"'. The *New York Times* found the majority's opinion 'astonishing'. The Inter-American Juridical Committee of the OAS criticised the decision; Mexico, and many other countries protested. Rarely has a decision of the Supreme Court on an issue of international law created as great a furor.' See also Wilske and Schiller, *ibid.*, pp. 205-213. See also M. Scharf, 'The tools for enforcing international criminal justice in the new millennium: lessons from the Yugoslavia Tribunal', 49 *DePaul Law Review* (2000) pp. 925 at 969, where he outlines the adverse international reaction to the decision.

113. See Scharf, *supra* n. 112, p. 969.

114. This included a resolution by the Security Council of 23 June 1960, UN Doc. S/4349. The resolution stated that the 'reciprocal respect for and the mutual protection of the sovereign rights of States [were] an essential condition for their harmonious coexistence', and 'that the repetition of acts [such as the capture of Eichmann] would involve a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace'. Moreover, the resolution declared that 'acts ... which affect the sovereignty of a Member State and therefore cause international friction, may if repeated, endanger international peace and security'.

115. The District Court's observation at p. 66 that it was only aware of one case conflicting with the *male captus bene detentus* precedent could not be made today. *Eichmann* District Court, *supra* n. 66. For example, the District Court relied on the case of *Ex Parte Elliott* [1949] 1 *All ER* 373 as showing that '[t]he courts in England ... have constantly held that the circumstances of the arrest and the mode of bringing the accused into the territory of the State have no relevance to his trial, and they have consistently refused in all instances to enter upon an examination of these circumstances.' *Ibid.*, p. 59. However, as noted more recently by one British expert: 'There were a number of inconsistent decisions on this point [that there could be a legitimate exercise of jurisdiction despite an illegal abduction] after the *Elliott* case, but the law has now to an extent been clarified by *R v. Horseferry Road Magistrates Court, Ex parte Bennett*, which reaches the opposite conclusion to that in the *Elliott* case.' D.J. Harris, *Cases and Materials on International Law*, 5th edn. (London, Sweet and Maxwell 1998) p. 293.

116. The court observed that counsel for the accused 'may be correct that respondent's abduction was "shocking" ... and that it may be in violation of general principles of international law ...' but the court found, nonetheless, that his 'forcible abduction did not prohibit his trial in a court in the United

What's more, the decision of the Appeals Chamber made no effort to distinguish the obligations of the ICTY from those of the states, the jurisprudence of whose courts it relied upon. While the exact scope of the ICTY's obligations to abide by international human rights law standards may be the subject of some debate,<sup>117</sup> it is clear from previous jurisprudence of the ICTY,<sup>118</sup> as well as from the human rights provisions in its Statute,<sup>119</sup> that the internationally recognised standards most relevant to its work come from the International Covenant on Civil and Political Rights of 1966 (ICCPR).<sup>120</sup> This may not be said of the *Eichmann* or *Alvarez-Machain* cases, both of which were decided in states that were not parties to the ICCPR at the time. Indeed, in regard to the latter case, a UN body made a determination that a breach of Article 9 of the ICCPR had taken place.<sup>121</sup> The Appeals Chamber made no effort to reconcile the approach in the *Toscanino* case with the jurisprudence of other states which did *not* require an egregious element to the violation of human rights of an accused in order for the court to reject jurisdiction.<sup>122</sup> Perhaps most troubling, the Appeals Chamber failed to consider whether its approach to the accused's human rights violations was reconcilable with the provisions of the ICCPR or the European Convention on the Protection of Human Rights and Fundamental Freedoms<sup>123</sup> – which, at least arguably, go against the Appeals Chamber's reasoning.<sup>124</sup>

Of course, this is not the first time the ICTY has had to balance human rights concerns with those of the administration of international criminal justice. Its most notorious case in this regard involved Jean-Bosco Barayagwiza, accused of planning and inciting the genocide against the Tutsis in Rwanda. In an initial deci-

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States for violations of the criminal laws of the United States'. *United States v. Alvarez-Machain*, *supra* n. 110, pp. 669-670. Judge Higgins, *supra* n. 70, noted at p. 71 that the 'Supreme Court was discussing whether the abduction violated the treaty, not the underlying issue of whether jurisdiction should be exercised if the abduction violated international law generally or a specific treaty'.

117. On the question of the extent to which the ICTY is bound by international human rights law, see G. Sluiter, 'International criminal proceedings and the protection of human rights', 37 *New England Law Review* (2003) p. 935.

118. Perhaps most famously, the passage from the first decision of the Appeals Chamber in *Tadić* Appeal on Jurisdiction, *supra* n. 83, para. 45: 'For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments.'

119. See, e.g., Art. 21 of the Statute. Also, as noted in the Secretary-General's Report, *supra* n. 8, para. 106: 'It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.'

120. Entered into force 23 March 1976. Indeed, Art. 21 of the Statute is an almost verbatim transposition of Art. 9 ICCPR.

121. See Scharf, *supra* n. 112, p. 969 where he notes that the UN Working Group on Arbitrary Detention specifically condemned the detention of Alvarez-Machain as being in violation of Art. 9 ICCPR.

122. See, for example, *R. v. Horseferry Road Magistrates Court, Ex parte Bennett*, *supra* n. 104.

123. Entered into force on 3 September 1953.

124. As noted by Higgins, *supra* n. 70, p. 70: 'From the perspective of an individual, his forcible detention and removal (whether or not from one jurisdiction to another, whether or not to stand trial) violate his human rights, in that everyone is entitled to security of the person and only to be restrained in accordance with due process. This is provided for in all the leading instruments on human rights?'

sion,<sup>125</sup> the Appeals Chamber of the ICTR ordered his release and the stay of his prosecution based on a determination that there had been abuse of process in his case.<sup>126</sup> After a political furore that included threats by Rwanda to withdraw its cooperation with the ICTR,<sup>127</sup> the matter again went before the Appeals Chamber.<sup>128</sup> This second hearing resulted in a revision of the original decision based on the introduction of new facts (facts described by one expert as 'rather dubious'<sup>129</sup>), with the result that the order for Barayagwiza's release was quashed.<sup>130</sup> This judicial flip-flop was viewed by many as politically motivated. Of course, with this decision in the *Nikolić* case, the Appeals Chamber avoided the risk of having to suffer the embarrassment of reversing itself in the face of political pressure.

In sum, the analysis of the Appeals Chamber regarding the impact on its jurisdiction of the violation of sovereignty and of human rights is inadequate. It leaves the impression of selectivity. Of course, an Appeals Chamber is not in a position to consult every jurisdiction in the world before filling the gaps that exist in international criminal law. But a more thoroughgoing approach is called for, particularly as regards such an important and controversial issue. Moreover, because the Appeals Chamber was unwilling to engage in a detailed discussion of how severe the violation of state sovereignty or the accused's human rights must be before the proposed remedy would be appropriate, its tests are of only limited utility for the future. As we see immediately below, its tests are even less helpful as the facts surrounding *Nikolić's* capture have never been clearly established.

### 3.2.2 *Stage two: do the facts in the case, when applied to the Appeals Chamber's test at stage one, justify the remedy sought?*

The next task the Appeals Chamber set itself was to take its newly minted tests for when it should reject jurisdiction and apply them to the facts. However, the Appeals Chamber attempted to do this without getting to the heart of what really happened on the night of *Nikolić's* capture – including what might motivate a group of private citizens to abduct the accused and turn him over to SFOR.<sup>131</sup> Instead, it relied on the incomplete record before the Trial Chamber and an opaque process whereby it engaged in a factual review on its own initiative.

125. *Barayagwiza I*, *supra* n. 101.

126. The abuse of process consisted of an overly long provisional detention, violation of his right to be promptly charged and violation of his right to an initial appearance without delay.

127. W. Schabas, 'Barayagwiza v. Prosecutor in international decisions', 94 *AJIL* (2000) pp. 563 at 565.

128. *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, Appeals Chamber, 31 March 2000 (hereafter, *Barayagwiza II*).

129. Schabas, *supra* n. 127, p. 566.

130. Barayagwiza was subsequently sentenced to 35 years (less time served) for genocide and crimes against humanity, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence, Trial Chamber, 3 December 2003.

131. According to one news report, the accused's captors were bounty hunters, paid £31,000 to hand the accused over to a US-led contingent of SFOR. See Cvijanovic and Zimonjic, *supra* n. 35, p. 14. The report indicates that the police said that the payment came from 'unspecified "foreign services"'.

The Appeals Chamber had before it the very limited facts agreed to for the purposes of the motions before the Trial Chamber. According to these agreed facts, on or about 20 April 2000, Nikolić was taken forcibly and against his will from his home in Serbia and Montenegro by a group of private individuals acting in contravention of the national criminal law. Again, according to the agreed facts, the accused was handcuffed, placed in the trunk of a car and transported into the territory of Bosnia and Herzegovina.<sup>132</sup> As noted, counsel for Nikolić was willing to concede for the purposes of the motion that neither SFOR nor the OTP had any connection to the abduction. The Trial Chamber did not pronounce on the accuracy of these agreed facts.<sup>133</sup> Instead, the Trial Chamber limited its findings on the facts to a determination that Nikolić was arrested by SFOR on or about 20 April 2000 and transferred to the ICTY on or about 21 April 2000,<sup>134</sup> noting, moreover, that ‘both parties agree that a trial of the alleged abductors has taken place in Serbia and that those persons have been convicted of the offence’.<sup>135</sup> By its own admission, the Trial Chamber was unclear as to what really went on that night.<sup>136</sup>

Nor were the parties much clearer on the details of what actually happened on the night of Nikolić’s capture. While Nikolić, of course, was aware of the details he personally witnessed, it appears he was in the dark about all other aspects of the capture. Indeed, in his motions before the Trial Chamber, he felt it necessary to reserve the right to request an evidentiary hearing ‘to establish the facts surrounding his arrest’.<sup>137</sup> The OTP, for its part, claimed that it had no information relating to Nikolić’s capture other than what it had provided to him.<sup>138</sup>

The facts to which the Appeals Chamber applied its tests appeared very limited indeed, and would appear to be based entirely on the facts agreed to for the purposes of the proceedings at trial. One other potential source of information that existed for the Appeals Chamber was a *proprio motu* review it had engaged in. After faulting Nikolić for not presenting it with ‘any alternative or more comprehensive view of the facts that might show that the Trial Chamber erred’,<sup>139</sup> the

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132. *Nikolić Decision on Illegal Capture*, *supra* n. 9, para. 21.

133. Although the Appeals Chamber appears to consider it to have done so. See *Nikolić Decision on Illegal Capture at Appeal*, *supra* n. 59, para. 2, where the Appeals Chamber held that ‘the Trial Chamber found that ... “neither SFOR nor the Prosecution were involved in” Nikolić’s allegedly illegal arrest and abduction, however, the Trial Chamber did not make such a finding *per se*; rather it reached that conclusion “[b]ased on the assumed facts”’. *Nikolić Decision on Illegal Capture*, *supra* n. 9, unnumbered final para., entitled ‘Conclusions’.

134. *Nikolić Decision on Illegal Capture at Appeal*, *supra* n. 59, para. 2. See also *Nikolić Decision on Illegal Capture*, *supra* n. 9, para. 15.

135. *Nikolić Decision on Illegal Capture*, *supra* n. 9, para. 6.

136. *Ibid.*, para. 15.

137. See text accompanying n. 58 *supra*.

138. *Nikolić Decision on Illegal Capture*, *supra* n. 9, para. 6.

139. *Nikolić Decision on Illegal Capture at Appeal*, *supra* n. 59, para. 31. It does not suggest how Nikolić could have conceivably come up with a more comprehensive view of the facts without an order for disclosure from the Tribunal, something which defence counsel had obligingly agreed not to request until the motions under appeal were decided.

Appeals Chamber's indicated that, 'in fairness to the Accused',<sup>140</sup> it had engaged in a *proprio motu* review of 'all the facts of this case'.<sup>141</sup> The Appeals Chamber did not indicate whether this *proprio motu* review involved the issuance of subpoenas or orders for the attendance of additional witnesses, as is arguably permitted under the Rules.<sup>142</sup> Nor does the decision of the Appeals Chamber shed even a glimmer of light on what its *proprio motu* review might have turned up. This led to counsel for the defence feeling compelled to petition the Appeals Chamber, requesting information on what the Appeals Chamber may have learned.<sup>143</sup> The Appeals Chamber dismissed the defence motion in this regard remarking, with apparent exasperation, that just because it was bound to give a reasoned opinion did not mean it was required 'to spell out every step in its reasoning'.<sup>144</sup>

Based on the incomplete facts available to the Trial Chamber, possibly modified by its *proprio motu* review – though the fact that there is no indication that the Appeals Chamber sought or obtained any additional information suggests that its review was simply a reconsideration of the incomplete information before the Trial Chamber – the Appeals Chamber concluded that 'the procedure adopted for [Nikolić's] arrest did not disable the Trial Chamber from exercising its jurisdiction'.<sup>145</sup> Having arrived at this determination, the third stage of the procedure the Appeals Chamber set out – that of making a determination as to whether the underlying violations were attributable to SFOR and by extension to the OTP – became moot. Nevertheless, the Appeals Chamber felt it appropriate to opine on this point, observing that:

'even assuming 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 [or for a breach of the rights of the accused] the Appeals Chamber finds no basis upon which the jurisdiction should not be exercised'.<sup>146</sup>

By acting as it did, the Appeals Chamber decided the motion without having to reveal to the defendant or the public at large details of what really happened – or whether SFOR and the OTP had any link to it.

Because the Appeals Chamber showed itself to be generally unmoved by the violations of state sovereignty or human rights (when measured against the essen-

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140. Ibid.

141. Ibid.

142. Rule 98 provides that a Trial Chamber may order either party to produce additional evidence and may *proprio motu* summon witnesses and order their attendance. Such actions would appear to be authorised at the level of the Appeals Chamber when these rules are read in conjunction with Rule 107, which provides: 'The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.'

143. Decision on Motion Requesting Clarification, *supra* n. 102, p. 2. The defendant petitioned to discover, *inter alia*, what the Appeals Chamber determined happened on the evening of Nikolić's capture.

144. Ibid.

145. *Nikolić* Decision on Illegal Capture at Appeal, *supra* n. 59, para. 32.

146. Ibid., paras. 27 and 33.



tial interests of the international community), because it was willing to state that there was no basis on which it would deny jurisdiction *whether or not the illegal conduct could be attributed to SFOR*, and because it purported to have engaged in a *proprio motu* review of all of the facts (though it was unwilling to reveal what, if anything, its review had determined), it effectively foreclosed Nikolić from requesting an evidentiary hearing in order to obtain further disclosure.<sup>147</sup> There was no longer any point.<sup>148</sup> As such, with its decision the Appeals Chamber spared SFOR the possibility of any embarrassing Todorović-style disclosure regarding any role it may have had in the violation of the rights of the accused. Moreover, the decision avoided the embarrassing spectre of the Appeals Chamber issuing an order requiring the disclosure of information from SFOR officials or their NATO bosses regarding the level or nature of their participation – only to see the order ignored by both organisations, as it almost certainly would have been.

#### 4. CONCLUSION

In conclusion, we see three different chambers of the ICTY dealing with similar issues in radically different ways. The Trial Chamber in *Todorović* showed itself to be the most principled of the three. It rejected the unconvincing argument from SFOR and the OTP to the effect that a disclosure order was unnecessary because the remedy requested was not suitable in the factual situation (even assuming that an illegal capture had taken place). While this reasoning would have provided it with an ‘easy out’, avoiding a negative impact on the continued cooperation of SFOR with the ICTY, the Trial Chamber was unwilling to accept it. Todorović had a legitimate right to all the information necessary to make out his case based on illegal capture. Because a plea agreement was reached after the disclosure was ordered, it remains to be seen what remedy this Chamber would have ordered had the disclosure revealed that SFOR had had a hand in the illegal capture.

Next came the approach of the Trial Chamber in *Nikolić*. Here, although the facts – limited though they were – clearly implied that illegality had occurred, the Trial Chamber concocted several arguments to the effect that there had been no breach of sovereignty or human rights and therefore no illegal capture. By making such improbable findings – the dubiousness of its reasoning was confirmed by the fact that the Appeals Chamber appeared to find no merit in it, operating, as it did, on the assumption that violations of human rights and sovereignty had indeed taken place – the Trial Chamber was able to sidestep the difficult issue of what remedy would be required. Furthermore, it was able to avoid opening the door to the process of examining the severity of the violations, thereby ensuring that

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147. Notwithstanding the fact that he expressly reserved his right to bring such a hearing. See text accompanying n. 58 *supra*.

148. On 4 September 2003 a plea agreement was approved by the Trial Chamber and on 12 December 2003 Nikolić was sentenced to 23 years’ imprisonment (less time served), *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, Trial Chamber, 18 December 2003. An appeal is currently pending.

SFOR would not be subject to an embarrassing disclosure process, potentially exposing some less than salubrious operational practices. While the Trial Chamber's approach had its obvious flaws, it may have considered there to be little alternative. After all, on the one hand it would obviously be reluctant to order the release of an accused war criminal. On the other hand, it could hardly find that there had been violations of human rights and sovereignty, assume the conduct should be attributed to SFOR (and perhaps, by implication, the OTP) and yet rule that Nikolić was entitled to no relief. Such an approach would require it to simply ignore the developing body of national law moving away from the *male captus, bene detentus* principle. This latter approach, as we have seen, was exactly that taken by the Appeals Chamber.

Next to consider the issue of illegal capture was the Appeals Chamber in *Nikolić*. It would seem right that observers of the ICTY would look to this, the ICTY's most authoritative Chamber, for a well-reasoned decision: one which was comprehensive in its scope, addressed difficult issues head on and provided a workable precedent for future cases. Moreover, the defendant himself was entitled to a decision that would explain why his motions were unsuccessful, as well as providing him with an understanding of what really occurred on the night of his capture and who was behind it. Unfortunately, the Appeals Chamber did not feel compelled to provide such a decision. As discussed above, the decision of the Appeals Chamber was perfunctory, opaque and not persuasively reasoned. The Appeal Chamber's concern for human rights and the violation of state sovereignty was half-hearted at best, with its focus on what it perceived to be the greater good.

The first obligation of a decision-making body in these circumstances should be to get to the heart of what actually happened, including whether SFOR – characterised by the ICTY as being akin to its enforcement arm<sup>149</sup> – played a role in any illegal activities. While it may be true that SFOR had shown itself to be a stalwart friend of the ICTY, a judicial body may not maintain credibility and, at the same time, appear to be protecting a friend from embarrassing disclosure. If, as in the *Todorović* case, a disclosure order had been made against SFOR, then whether the prosecution could proceed would effectively lie with SFOR: if it violated the Tribunal's order and refused to provide disclosure, a prosecution would be unlikely to go ahead. If the full facts were set out and it became clear that there was no link to SFOR, then many of the bases on which national courts have favoured the *male captus, male detentus* approach (e.g., a desire to control an overzealous executive, avoiding the perception of impropriety, etc.) would be mitigated or would become inapplicable.

If all the facts were brought to light and it became clear that SFOR *had* been involved in illegal behaviour, the nature of the violation of human rights and sovereignty would appear in a different light. Indeed, it is not beyond the realm of possibility that a thorough examination of the facts might even have shown fore-

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149. Separate opinion of Judge Robinson, in *Todorović* Decision on the Motion for Judicial Assistance, *supra* n. 22, para. 6 and n. 2, where he likens the role of SFOR 'to that of a police force in some domestic legal systems', and notes that 'it virtually operates as an enforcement arm of the Tribunal ...'.

knowledge on the part of the OTP of SFOR's intention to carry out illegal capture operations – something that had been alleged in the *Todorović* case. Were such findings to have been made, the arrest process would have been found to be contaminated. The obligation of the Appeals Chamber, therefore, would have been to provide a remedy that reflected the ICTY's intolerance of such conduct by making it clear that such behaviour in the future would be unlikely to lead to the prosecution of the accused. This might very well have taken the form of ordering the release of Nikolić; at the very least it would have required a clear indication of when such a remedy would be ordered. For an Appeals Chamber to order the release of an accused war criminal would take courage, but, depending on the circumstances (including who was involved, on whose behalf and what level of force was used), it could well be the only appropriate way forward. While there would certainly be political fallout in the face of a decision to order the release of an accused war criminal – many would view this as a retrograde movement in the battle against impunity – the impartial administration of justice must be the primary concern of a judicial body, not political factors.

None of which is to say that there may not be strong arguments for taking a different approach to illegal capture at the international level from those taken at the national level. A careful analysis of the national cases on illegal capture (which, as noted, tend to lean away from the *male captus, bene detentus* approach) may reveal a legitimate basis on which it would be inappropriate to apply them in a case such as *Nikolić*. However, the Appeals Chamber did not engage in such an analysis.

At the core of the Appeal Chamber's reasoning – and its decision to disregard the *male captus, male detentus* approach – was its focus on the severity of the offence charged and the expectation of the international community of justice. It would seem axiomatic that the severity of the violation of a state's sovereignty or an accused's human rights would impact on the nature of the remedy: a territorial incursion lasting some few minutes would require less of a remedy than an invasion lasting years; similarly, someone whose right to a speedy trial has been breached by a few days' delay would be entitled to a lesser remedy than someone whose right to a speedy trial has been breached by a delay of several years. However, the Appeal Chamber's focus was not a consideration of whether an appropriate remedy might be based on *the gravity of the violations* – to do so in a thorough way would have required it to arrive at a finding of what actually happened and how significant (and perhaps how premeditated) the violations of FRY's sovereignty and Nikolić's rights were. Instead, the Appeals Chamber considered what remedy was appropriate based, in part at least, on *the gravity of the crimes with which the accused was charged*. Such an approach provides, in effect, that the graver the alleged crime, the less troubled an international judicial body should be by a breach of a state's sovereignty or an accused's human rights. Such is misguided and appears to contradict the presumption of innocence.

In summary, the Appeals Chamber's decision in the *Nikolić* case appears to provide an illustration of the adage that 'hard cases make bad law'. In its zeal to ensure that Nikolić was prosecuted, the Appeals Chamber cobbled together a series of ill-defined, ill-considered tests of dubious provenance and applied them

to a murky set of facts. As a result, the decision of the Appeals Chamber will allow future international criminal decision-making bodies to turn a blind eye to violations of human rights and state sovereignty in pursuit of the 'greater good'. More worryingly, the absence of guidance and a tolerance of illegality means that there is nothing to give pause to SFOR, its successor<sup>150</sup> or other such forces before they engage in illegal behaviour – or commission criminals or bounty hunters to do so on their behalf – so long as it doesn't exceed what appears to be a very wide margin of appreciation.

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150. On 22 November 2004, the Security Council adopted a resolution welcoming the European Union's intention to establish EUFOR as the legal successor to SFOR, UN Doc. S/RES/1575 (2004).