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Abducted Fugitives before the International Criminal Court: Problems and Prospects

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ABDUCTED FUGITIVES BEFORE THE INTERNATIONAL CRIMINAL COURT: PROBLEMS AND PROSPECTS

In the law and literature relating to the exertion of criminal jurisdiction over the person,¹ there exists a nagging problem that has plagued practitioners, courts and academics alike. The phrase of art is usually something along the lines of “irregular rendition”, but the issues are as notorious as they are controversial: what should a court do with an accused criminal brought before it as a result of abduction (or otherwise illegal detention) from a foreign state? And, in particular, should the fact of the illegal or irregular rendition of the fugitive affect either the court’s ability or its willingness to take jurisdiction over the case?

Irregular rendition is a somewhat unusual circumstance, but the relatively small number of reported domestic and international decisions that deal with the issue stands in sharp contrast to the large amount of

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1 Or “enforcement jurisdiction,” as opposed to the ability of the state to exert criminal jurisdiction over the crime or subject matter, often called the prescriptive jurisdiction.” The classic exposition is that of Professor Akehurst; see Michael Akehurst, “Jurisdiction in International Law” (1972-1973) 46 BRIT. YR. INT’L. L. 145.

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scholarly ink that has been spilled,² most usually in reaction to contentious superior court decisions such as that of the U.S. Supreme Court in *Alvarez-Machain*.³ The issue is something of a “motherhood” matter for courts, as it goes to the very legality of the criminal trial of an individual and highlights the separation of function between judiciary and executive, enabling the former to call the latter to account for unlawful conduct in criminal law enforcement. Yet beyond this, the issue has all the irresistible appeal of the most Gordian of legal problems. It presents a sharp dilemma regarding means and ends in bringing criminals to justice. It also engages international law issues, from state sovereignty to international human rights norms to international peace and security, and sharply juxtaposes them with the requirements of domestic adjudication processes. As a result, much has been said and even more has been written.⁴

Why, then, would one wish to revisit every international law student’s favourite essay topic? The time seems to be ripe for two reasons.

² A partial list only: Edwin D. Dickinson, “Jurisdiction Following Seizure or Arrest in Violation of International Law” (1934) 28 AM. J. INT’L L. 231; F. Morgenstern, “Jurisdiction in Seizures Effect in Violation of International Law” (1952) 29 BRIT. YB. INT’L L. 265; Paul O’Higgins, “Unlawful Seizure and Irregular Extradition” (1960) 36 BRIT. YB. INT’L L. 279; I.A. Shearer, “International Kidnapping” (1971) 5 INT’L L. REV. 27; M. Cherif Bassiouni, “Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition” (1973) 7 VAND. J. TRANSNAT’L L. 25; F.A. Mann, “Reflections on the Prosecution of Persons Abducted in Breach of International Law,” in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE (Yoram Dinstein, ed., 1989), pp. 407–421; A. Lowenfeld, “US Law Enforcement Abroad: The Constitution and International Law” (1989) 83 AM. J. INT’L L. 880 (plus follow-up articles at (1990) 84 AM. J. INT’L L. 444, (1990) 84 AM. J. INT’L L. 712 and (1991) 85 AM. J. INT’L L. 655); Hermann Woltring and Joanne Grieg, “State-Sponsored Kidnapping of Fugitives: An Alternative to Extradition?” in THE ALLEGED TRANSNATIONAL CRIMINAL (Richard Atkins, ed., 1995), pp. 115–126; GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW (1998), Chapter 7; M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE, 4th ed. (2002) (hereafter “Bassiouni, International Extradition”), Chapter V.

³ *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992).

⁴ For recent efforts, see Francesco de Sanctis, “The Practice of National and International Courts on Transnational Seizure: Is A Fair Balance Between Human Rights and Accountability Possible?” (2004) 22 NETH. Q. HUM. RTS. 529, and Jeffrey Loan, “*Sosa v. Alvarez-Machain*: Extraterritorial Abduction and the Rights of Individuals Under International Law” (2005) 12 ILSA J. INT’L COMP. L. 253. See also Abraham Mohit, “The Customary Law of International Abductions: Limits and Boundaries” (2006) 11 ASIAN YB. INT’L L. 123. On the related issue of extraordinary rendition, see Margaret L. Satterthwaite, “Rendered Meaningless: Extraordinary Rendition and the Rule of law” (November 20, 2006). *New York University School of Law. New York University Public Law and Legal Theory Working Papers*. Paper 43. <http://lsr.nellco.org/nyu/plltwp/papers/4>

First, while the matter was traditionally a domestic law one that had some international law features, it has recently become fully “internationalized” through commentary and decisions at the international or supra-national level. Human rights adjudicatory bodies have had cause to rule on these types of problems,⁵ and most recently the Grand Chamber of the European Court of Human Rights rendered its decision in the case of *Öcalan v. Turkey*.⁶ Most prominently, the International Criminal Tribunal for the Former Yugoslavia⁷ has dealt with the jurisdictional problems attaching to illegal arrest in a “trans-border” setting in a series of cases, culminating in the 2003 decision of the Appeals Chamber in the case of *Prosecutor v. Dragan Nikolić*.⁸

The ICTY’s decisions are perhaps the most interesting, both because the Tribunal’s mandate means that its indictees are those charged with the most heinous of international crimes, and because these are the first cases where a truly “international” criminal court has had to deal with the issue of its own jurisdiction over abducted fugitives. This leads to the second reason the topic remains worthy of attention: the fact that the International Criminal Court⁹ is now fully functional and investigating its first set of cases, wherein arrest warrants have been issued and one arrest made.¹⁰

⁵ See Section II(2.1), below.

⁶ *Öcalan v. Turkey*, Appl. No. 00046221/99, Merits, Judgment of 12 May 2005 (hereafter “*Öcalan*”).

⁷ Hereafter the “ICTY” or “the Tribunal.”

⁸ *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, Appeals Chamber, 5 June 2003 (hereafter “*Nikolić* (Appeals Chamber)”).

⁹ Hereafter the “ICC” or the “Court.” It was established by the 1998 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 17, 1998) as corr. by U.N. Doc. PCNICC/1999/INF/3, (1998) 37 I.L.M. 999 (hereafter “Rome Statute”).

¹⁰ On 2 May 2007, the Court issued arrest warrants for Ahmad Harun, current Minister of State for Humanitarian Affairs in Sudan, and Ali Kushayb, leader of the Janjaweed Militia, in connection with events in Darfur, Sudan (Press Release: <http://www.icc-cpi.int/press/pressreleases/241.html>). Earlier, arrest warrants were issued for five members of the Lord’s Resistance Army in the case regarding Uganda, and on 17 March 2006 Thomas Lubanga Dyilo, sought by the ICC in the case regarding the Democratic Republic of the Congo, was surrendered to the Court. See generally *Seventh Diplomatic Briefing of the International Criminal Court*, 29 June 2006, available online at: < http://www.icc-cpi.int/library/about/DB7-St_English.pdf > . See also William Schabas, “First Prosecutions at the International Criminal Court” (2006) 27 HUMAN RIGHTS L. J. 25; Annalisa Ciampi, “Current and Future Scenarios for Arrest and Surrender to the ICC” (2006) 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 719.

Past experience tells us that the Court will most likely be faced with this issue, and indeed, as will be argued below, its unique characteristics make this possibility nearly inevitable. Accordingly, it may be beneficial to do some stock-taking as to the state of the law regarding abducted or illegally obtained fugitives, and make an inquiry as to how this problem may and should play out before the ICC.

Section I of this article will briefly sketch out the major trends in the domestic caselaw and state practice on this issue. Section II will review the jurisprudence of international courts, focussing on the caselaw of the ICTY and in particular on the Appeals Chamber's decision in *Nikolić*. Section III will evaluate the potential fate of abducted fugitives before the ICC, in light of the significant structural differences between that body and courts which have gone before. Given the likely precedential impact of the test in *Nikolić*, the potential and propriety of the ICC applying that test will be explored, with suggestions and criticism where appropriate.

I DOMESTIC CASELAW: A MIXED BAG

Criminal defendants raising illegal rendition as a bar to court proceedings is not at all new, and cases can be traced back to the 19th century.¹¹ In modern times, two approaches have competed for dominance in state practice, which bear brief outlining.¹²

For present purposes, the logical starting point is what is probably, even in the present day, the most well-known of the abduction cases: *Israel v. Eichmann*.¹³ In that case, the accused had led the Jewish Office of the German Gestapo during World War II and was

¹¹ E.g. *Lawler*, cited in LORD MCNAIR, *INTERNATIONAL LAW OPINIONS: SELECTED AND ANNOTATED* (1956), Vol. I, at 78; *Ker v. Illinois*, 119 US 436 (1886) (Sup. Ct.).

¹² I would note that I am retreading extremely familiar and well-known ground on this point. For an excellent brief summary of similar scope to the present one, see James Sloan, "Prosecutor v. Todorović: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction" (2003) 16 LEIDEN J. INT'L L. 85, at 99–101. See also Susan Lamb, "The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia" (1999) 70 BRIT. YB. INT'L L. 167, p. 228 ff.

¹³ *The Attorney-General of the Government of Israel v. Eichmann* (1968) 36 ILR 18 (Dist. Ct., 1961) (hereafter "*Eichmann* (Dist. Ct.)") and (1968) 36 ILR 277 (Sup. Ct., 1962). See generally L.C. Green, "The *Eichmann* Case" (1960) 23 MOD. L. REV. 507; J.E.S. Fawcett, "The *Eichmann* Case" (1962) 38 BRIT. YB. INT'L L. 181.

one of the primary authors of the “final solution.” He was abducted from his home in Argentina by Israeli agents¹⁴ and taken to Israel, where he was tried for his crimes, convicted and ultimately hanged. The abduction itself provoked an international dispute between Israel and Argentina, the latter protesting what it viewed as a violation of its sovereignty—a view with which the United Nations Security Council concurred.¹⁵ The two governments eventually issued a joint declaration wherein Israel appeared to acknowledge the illegality of the abduction at international law, and both declared that they viewed the matter as closed.¹⁶

At trial before the District Court and in his appeal to the Supreme Court, Eichmann argued, *inter alia*, that the illegality of his apprehension—at international law—deprived the Israeli courts of jurisdiction over him. The District Court surveyed state practice on the issue and found that, as “an established rule of law”¹⁷ it was not open to a criminal accused to challenge the legality of the criminal proceedings on the basis of how he was brought within the jurisdiction of the state. This rule, usually expressed in the maxim *mala captus bene detentus*, essentially entails that because the “illegality” involved in the accused’s rendition arises from an *international* delict, the domestic court “will assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured”.¹⁸ The Supreme Court concurred with the District Court’s findings, and Eichmann’s argument failed.

Eichmann is an effective starting point because it lays out clearly some of the basic legal issues at play. First, it seems reasonably clear that abductions of this sort do indeed constitute violations of state sovereignty,¹⁹ since it is well-established that a state may not exercise

¹⁴ There was initially some controversy about this, as at one point Israeli Prime Minister David Ben Gurion claimed to have been the author of the operation but later stated it was the work of private individuals (Green, *ibid.*, pp. 514–15).

¹⁵ See the Security Council’s Resolution on the subject, U.N. Doc. S/4349 (1960), S/RES/138, 1960, in particular para. 2.

¹⁶ Quoted in *Eichmann* (Dist. Ct.), *supra* note 13, p. 59.

¹⁷ *Ibid.*

¹⁸ BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 2, p. 250.

¹⁹ This has been settled since even before the famous 1935 Harvard Research Document, which made note of it: Harvard Research in International Law, “Draft Convention on Jurisdiction With Respect to Crime” (1935) 29 AJIL Special Supplement Part II 435, pp. 623–624. For a short but effective demonstration of the point, see M. Scharf, “*The Prosecutor v. Slavko Dokmanović*: Irregular Rendition and the ICTY” (1998) 11 LEIDEN J. INT’L L. 369, pp. 372–373.

police or criminal enforcement powers on the territory of another state without the latter's permission.²⁰ It is just as clear, however, that this violation of one state's rights by another does not, in and of itself, provide the individual concerned with standing to request a remedy for the violation; he/she is truly, in this sense, the traditional object of the law, rather than its subject. The international law violation must be cognizable and justiciable by the domestic criminal court, on the basis of the domestic law.

By what route, then, can such justiciability arise? From the individual's perspective, abduction or illegal rendition will tend to violate international human rights norms, particularly those dealing with due process and security of person.²¹ Redress for these violations at the international law level can be sought before the supervisory bodies under the relevant treaty regimes, such as the U.N. Human Rights Committee, if the individual has the means to do so. To the extent that these norms are incorporated into the domestic human rights regime (if any), it is conceivable that the accused may obtain a remedy by that route. Yet this will only appertain, if it does at all, where the domestic state's enforcement authorities were directly involved in the abduction. Moreover, it does not answer the question of

²⁰ R. HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT*, p. 70 (1994); JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE*, p. 173 (2000). An interesting point which one does not see covered in the literature is this: beyond the international illegality of trans-border abductions, abduction is clearly illegal in any setting, whether perpetrated by state or private actors. It is an offence known to virtually every criminal law system in the world, to the point where it is likely a "general principle of law" for the purposes of Article 38(1)(c) of the ICJ Statute. Since state police cannot legally operate outside their own borders, even a trans-border "arrest" is ultimately simply a common abduction. As Mann has argued cogently, even if the abduction is performed by private actors, the receiving state offends sovereignty by "ratifying" this illegal action (Mann, *supra* note 2, p. 408). At the very least, this may speak to why abduction and illegal rendition taint, in some sense, every proceeding in which they occur.

²¹ E.g. International Covenant on Civil and Political Rights (1966) 999 UNTS 171 ("ICCPR"), article 9; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221 ("ECHR"), article 5; American Convention on Human Rights (1969) OASTS 36 ("ACHR"), article 7. See HIGGINS, *ibid.*; Mann, *supra* note 2, p. 470. It is perhaps worth noting that in its assessment of the *Alvarez-Machain* case, discussed below, the U.N. Working Group on Arbitrary Detention stated that "[the] detention of Humberto Alvarez-Machain is declared to be arbitrary, being in contravention of ... Article 9 of the [ICCPR]" (Report of the Working Group on Arbitrary Detention, UN Commission on Human Rights, 50th Session, U.N. Doc. E/CN.4/1994/27 (1993), at 139–40).

how, and whether, the international law violation itself affects the domestic process.

The *mala captus bene detentus* rule, of course, dictates that the domestic judicial forum should not entertain issues related to the legality of capture. The most prominent modern application of the rule was by the U.S. Supreme Court in *Alvarez-Machain*.²² In that case, the Mexican accused was abducted from his office in Mexico by agents retained by the U.S. Drug Enforcement Agency (DEA), and taken to Texas where he was arrested by DEA personnel. His motion to dismiss the indictment on the basis of his abduction was granted by the lower courts, both of which emphasized that the Executive had violated the existing extradition treaty between the U.S. and Mexico by simply ignoring it, as well as Mexico's formal protests of the abduction at the international level. The Supreme Court, however, applied the *mala captus bene detentus* rule²³ and, while it acknowledged that the government's actions were likely in violation of international law, ruled that forcible extra-territorial abduction did not prohibit the criminal trial of Alvarez-Machain.²⁴

The *mala captus bene detentus* rule, then, enjoys a certain amount of currency in state practice.²⁵ It seems appropriate to note, however,

²² *Supra*, note 3. Space literally does not permit even partial citation of the literature pertaining to this highly controversial decision; but see Reisman, "Covert Action" (1995) 20 YALE J. INT'L L. 419; Paul Michell, "English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After *Alvarez-Machain*" (1996) 29 CORNELL INT'L L. J. 383; C. Biblowit, "Transborder Abductions and United States Policy: Comments on *United States v. Alvarez-Machain*" (1996) 9 N.Y. INT'L L. REV. 105; CHRISTOPHER PYLE, EXTRADITION, POLITICS AND HUMAN RIGHTS, pp. 281–299 (2001).

²³ Known in U.S. jurisprudence as the "*Ker-Frisbie* Doctrine" after the foundational cases on point.

²⁴ The charges against Dr. Alvarez-Machain were later dismissed for lack of evidence, the court noting that the indictment was based on "the wildest speculation" (Seth Mydans, "Judge Clears Mexican in Agent's Killing," New York Times, Dec. 15, 1992, p. A20). His civil action against his abductors and the U.S. government was also dismissed by the Supreme Court (*Sosa v. Alvarez-Machain*, 542 U.S. (Docket No. 03–339, June 29, 2004)).

²⁵ Given the current climate in the U.S. with regard to the "war on terror," any changes in the law in this regard seem unlikely. For a recent and succinct overview of the US position on the issue, see Matthew Slater, "Trumpeting Justice: The Implications of U.S. Law and Policy for the International Rendition of Terrorists from Failed or Uncooperative States" (2004) 12 U. MIAMI INT'L & COMP. L. REV. 151, pp. 168–186. See also David P. Warner, "Challenges to International Law Enforcement Cooperation for the United States in the Middle East and North Africa: Extradition and its Alternatives" (2005) 50 VILL. L. REV. 479, pp. 500–503.

as Professor Bassiouni has, that those who wish to utilize Roman maxims would do well to pay attention to others which historically took precedence. The first of these is *nunquam decurritur ad extraordinarium sed ubi deficit ordinarium* (never resort to the extraordinary until the ordinary fails).²⁶ Frustration with the ineffectiveness of ordinary channels of obtaining personal jurisdiction, such as extradition, is often pleaded as a justification for abduction.²⁷ It is noteworthy, however, that in both *Eichmann* and *Alvarez-Machain*, arguably the two most prominent abduction cases in legal history, no serious attempt was made to obtain the “fugitive” by way of ordinary means. Clearly abduction will often be used as an abusive method of enforcing domestic or foreign policy, particularly by those states with the power and resources to do so.

The second relevant maxim is this: *ex injuria ius non oritur* (“certain violations of law [should] not ripen into lawful results”).²⁸ It is this principle which underpins the other important trend in state practice on this issue, which has been termed “*male captus male detentus*,”²⁹ but is perhaps best described as a specific application of the doctrine of abuse of process. The central idea is that a court has an inherent duty to protect the dignity, legitimacy and legality of its process, which would be subverted in any case where a criminal accused has been apprehended through illegal activities or abuses of power on the part of the state. The state “must come to court ‘with clean hands’ as it were.”³⁰ Participation by state agents in violations of international law, by this view, must be seen as tainting the process to the point where a court

²⁶ BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 2 p. 286.

²⁷ See, e.g., Michael H. Cardozo, “When Extradition Fails, is Abduction the Solution?” (1961) 55 AM. J. INT’L L. 127.

²⁸ BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 2 p. 287; Mann, *supra* note 2, p. 414. Professor Higgins has queried whether this represents too expansive an application of this principle; see HIGGINS, *supra* note 20, p. 72; Lamb, *supra* note 12, pp. 228–230.

²⁹ *Prosecutor v. Dragan Nikolić*, No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002 (hereafter “*Nikolić* (Trial Chamber)”), para. 70, quoting a Defence motion.

³⁰ *State v. Ebrahim*, 1991 (2) SA 553, in translation at 95 ILR 417, at 442 (ILR).

should, in sufficiently egregious circumstances, decline to exercise jurisdiction over the individual.³¹

The most prominent example of this approach is probably that of the House of Lords in *Ex Parte Bennett*.³² Bennett, a New Zealand national, was sought by British authorities for alleged offences. Discovering he was in South Africa, the British authorities arranged with police in that country for Bennett to be abducted—or at least irregularly deported³³—and unofficially delivered into their hands. As the House of Lords noted disapprovingly, this procedure was carried out despite, and in complete disregard for, the existing extradition procedures between the U.K. and South Africa.³⁴

The Law Lords concluded that by way of the abuse of process doctrine, courts may inquire into the manner in which an accused was brought before them and may stay the prosecution if the circumstances warrant. In this case, the authorities' deliberate flouting of the extradition arrangements, *inter alia*, rendered such a remedy appropriate. It seems clear, however, that it was not the subverting of

³¹ As Professor Sloan has noted, the specific rationalia for applying this principle that have been put forth by domestic courts include: (i) the rule of law; (ii) the integrity of the executive branch (it must not be rewarded for illegal behaviour); (iii) the integrity of the judicial branch; (iv) the fairness of the legal process; and (v) respect for state sovereignty (James Sloan, "Prosecutor v. Dragan Nikolić: Decision on Defence Motion on Illegal Capture" (2003) 16 Leiden J. Int'l L. 541, pp. 546–47, footnotes omitted).

³² *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett*, [1994] 1 A.C. 42. See V. Lowe, "Circumventing Extradition Procedures is an Abuse of Process" (1993) 52 CAMBRIDGE L. J. 371. See also *R. v. Hartley*, [1978] 2 NZLR 199, 77 ILR 330 (NZCA); *State v. Ebrahim*, *supra* note 30; *State v. Beahan*, 1992(1) SACR 307 (A) (Zimbabwe).

³³ I.e. the not unusual practice of "disguised extradition," a multi-layered term which will be used here in a general way to cover situations where there is some kind of legal irregularity employed by state officials to remove a fugitive from one jurisdiction to another. A typical example is the use of deportation from one state which is undertaken, not to exclude the individual from the deporting state, but to put him in the hands of the authorities of another state. This would include the practice Professor Bassiouni defines as "unlawful seizure"; BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 2, pp. 258–261. See generally GILBERT, *supra* note 2, pp. 362–377.

³⁴ *Ex parte Bennett*, *supra* note 32, pp. 62–64.

extradition procedures itself that was so offensive to the court;³⁵ rather, the matter was one of respect for the rule of law in the global sense:

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 the laws of another state in order to secure the presence of the accused ..., I think that respect for the rule of law demands that the court take cognisance of that circumstance.³⁶

In this manner, the abuse of process doctrine addresses the international law violations involved in abduction and illegal rendition, but in terms that “domesticize” them into a framework where the national court is comfortable passing judgment.³⁷ With regard to this specific issue, this approach shares some roots with *mala captus bene detentus*, in that courts are not automatically deprived of jurisdiction by way of illegal rendition³⁸; the inquiry, rather, is whether a court *should* exercise jurisdiction.³⁹ The ultimate sanction, dismissal, is a function of the court’s ability to control its own process from abuse by the state. This is also observable in another prominent decision, that of the U.S. 2nd

³⁵ As Professor Sloan points out, the Prosecutor made an argument attempting to narrow this approach to extradition in the *Todorović* case, discussed below, but it is largely unconvincing (Sloan, “Prosecutor v. Todorović,” *supra* note 12, pp. 102–103). Certainly in a subsequent case, *R. v. Mullen*, [1999] 3 W.L.R. 777, the U.K. Criminal Court of Appeals went beyond subversion of extradition as a basis for declining jurisdiction.

³⁶ *Ex parte Bennett*, *supra* note 32, p. 67, per Lord Bridge of Harwich. Bennett ultimately faced trial in Scotland on different charges, where a full inquiry into the facts of his return from South Africa determined that the police conduct had not been sufficiently “abusive” to warrant declining of jurisdiction; *Bennett v. H.M. Advocate* 1995 S.L.T. 510. For a summary in the context of an excellent review of this use of abuse of process by British courts, see Colin Warbrick, “Judicial Jurisdiction and Abuse of Process” (2000) 49 INT’L. COMP. L. Q. 489.

³⁷ Indeed, it is something of a simplification to simply use “abuse of process” as a general descriptive term; as Lamb notes, the relevant criteria for courts which have applied this principle involve a mix of domestic and international legal issues, some of which she describes as “arrests effected in violation of extradition procedures,” “official complicity in the unlawful conduct leading to the presence of the accused before the court,” and “egregious conduct on the part of law enforcement authorities amounting to an abuse of the court’s process” (Lamb, *supra* note 12, pp. 232–37).

³⁸ Though the stricter approach was adopted in *Ebrahim*; *supra* note 30.

³⁹ Accord, Mann, *supra* note 2, p. 414.

Circuit Court of Appeals in *Toscanino*,⁴⁰ where that court was willing to decline jurisdiction on the basis of egregious, physical human rights abuses perpetrated upon the fugitive which were brought about via irregular trans-border conduct by U.S. authorities.⁴¹

The tension between these two approaches, *mala captus bene detentus* on the one hand and abuse of process on the other, remains current from a state practice point of view. Given this tension, neither approach could be seriously suggested to have attained any status as a rule of customary international law.⁴² While it has been expressed, even recently, in learned quarters that *mala captus bene detentus* may be viewed as having significant normative force,⁴³ a combination of contrary national decisions, a general rise in the prominence of human rights, and the harsh criticism of the *Alvarez-Machain* case would seem to have undermined this.⁴⁴ As will be seen, however, as

⁴⁰ *United States v. Toscanino*, 500 F.2d 267 (Ct. App. 2nd Circ., 1974), p. 274.

⁴¹ In American law, *Toscanino* operates as more of an exception to the *Ker-Frisbie* doctrine; see S. Wilske and T. Schiller, "Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of *United States v. Alvarez-Machain*" (1998) 5 UNIV. OF CHICAGO LAW SCHOOL ROUNDTABLE 205 p. 208.

⁴² Methodologically speaking, the central obligation on states is probably to give accused persons a fair trial. Adherents of *mala captus* advocate that this approach does not violate that obligation, while adherents of abuse of process disagree. It is the lack of any customary law clarity on this point to which I am referring.

⁴³ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* p. 314, n. 109 and accompanying text (6th ed., 2003); although to be faithful to Professor Brownlie's text, he ultimately describes *mala captus bene detentus* as "the view adopted by courts in many states and by some writers" (*ibid.*). As prominent a jurist as Richard Goldstone has rather blithely suggested that the rule is a "[principle] of customary international law"; R. Goldstone & J. Simpson, "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism" (2003) 16 HARV. HUM. RTS. J. 13, p. 19, where at fn. 33 the authors also oddly identify it as a "principle of extradition law". On the other hand, it has been suggested that "customary international law prevents courts from exercising criminal jurisdiction over abducted defendants," though this argument is apparently unconvincing (Silvia Borelli, "Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Co-operation" (2003) 16 LEIDEN J. INT'L L. 803, p. 810, n. 34, citing S. WILSKE, *DIE VOLKERRECHTSWIDRIGE ENTFUHRUNG UND IHRE RECHTSFOLGEN* (2000)).

⁴⁴ The Trial Chamber in *Nikolić* pointedly observed, "...in general the maxim [*mala captus bene detentus*] has been interpreted and commented upon in a much more negative sense in academic circles than in legal practice" (*Nikolić* (Trial Chamber), *supra* note 29, para. 78, fn. 79). This significantly understates the negative reaction to *Alvarez* on the part of states as well as academics; see M. Feinrider and T. Marauhn, "Kidnapping", in R. Bernhardt, ed., 3 EPIL (1997), pp. 79–84; Mark S. Zaid, "Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout" (1997) 19 HOUSTON J. INT'L L. 829, pp. 853–55.

international courts have begun to address the issue, *mala captus bene detentus* has experienced something of a revivification.

II ABDUCTION BEFORE “INTERNATIONAL” COURTS

2.1 *Human Rights Bodies*

Decisions of the human rights supervisory bodies are not exactly on point with the current discussion, as they fulfil different functions than either the national courts or the international criminal tribunals. While abduction and illegal rendition may cause jurisdictional inquiries in the latter fora, being the very courts which can try the individuals, bodies such as the European Court of Human Rights and the United Nations Human Rights Committee have a supervisory function. At their most specific these courts will adjudge whether a particular prosecution undertaken in spite of abduction or illegal rendition was itself a violation of its constitutive human rights instrument, or at least whether the mode of apprehension itself was offensive.

However, as will be recalled from the discussion above, abduction and forms of rendition that are not prescribed by law are generally viewed as being human rights violations. While this has usually not been a conclusive point in domestic cases on point, it is one that has often warranted comment by courts inquiring into jurisdiction. Accordingly, a brief summary of what might be called the “pure” human rights jurisprudence is warranted.

The human rights bodies have generally taken an approach which mirrors that of the jurisdictions applying the “abuse of process” principle, certainly agreeing that the threshold issue is whether a state should take (or, given the usual *ex post facto* scope of their decisions, “should have taken”) jurisdiction at all in light of an abduction or illegal rendition.⁴⁵ As might be expected, these cases rest on the illegal acts themselves as human rights violations, rather than speaking to the inherent process of the court. In *Lopez Burgos*,⁴⁶ for example, the U.N. Human Rights Committee found a violation of Article 9(1) of

⁴⁵ See, e.g. *Stocké v. Federal Republic of Germany* (European Commission of Human Rights, 12 October 1989), 95 ILR 328, at 332–33; *Garcia v. Ecuador* (Human Rights Committee), Comm. No. 319/1988, UN Doc. A/47/40 (1994), at 287–90; *Celiberti de Casariego v. Uruguay* (Human Rights Committee), Comm. No. 56/1979, UN Doc. A/36/40 (1981), at p. 185.

⁴⁶ U.N. Doc. A/36/40 (1981), reprinted 68 ILR 29.

the ICCPR where Uruguayan agents forcibly abducted an Uruguayan refugee from Argentina. In *Bozano v. France*,⁴⁷ the European Court of Human Rights found a violation of Article 5(1) of the ECHR where the petitioner was the victim of a disguised extradition, having been seized in France and deported to Switzerland, whereupon he was extradited to Italy.

Borelli has pointed out an intriguing divergence between the caselaw of the HRC and the ECHR on this topic:

... while according to the Human Rights Committee the attitude of the state whose territorial sovereignty has been violated is irrelevant, the [ECHR] still seems inclined to consider that the forcible abduction of a fugitive constitutes per se a violation of the rights protected by the Convention only in the case where the authorities of the territorial state do not consent to the abduction, and where the procedures put in place by any existing extradition treaty have not been followed.⁴⁸

This observation⁴⁹ was recently confirmed by the ECHR Grand Chamber's judgment in *Öcalan*.⁵⁰ In that case, the petitioner was a prominent Kurdish leader who was sought by Turkish authorities to face terrorism charges. He sought refuge in Kenya, which did not have an extradition treaty with Turkey. Turkish authorities nonetheless obtained the cooperation of Kenyan government officials, who surreptitiously delivered Öcalan to a Turkish aircraft in the international zone of the Nairobi airport, where he was arrested.

Öcalan pleaded a violation of Article 5 of the European Convention, arguing that he had been subjected to abduction and/or disguised extradition because his apprehension had not been in been in accordance with "a procedure prescribed by law." The Court, however, found the arrest to be lawful, on the basis that: (1) Turkey had validly issued several arrest warrants for Öcalan, and the formal arrest itself complied with Turkish domestic law; (2) the Court had no power of review vis-à-vis Kenyan law, so any violations thereof were

⁴⁷ (1986) ECHR, Series A, No. 111; (1987) 9 European Human Rights Report 297.

⁴⁸ Borelli, *supra* note 43, p. 807.

⁴⁹ Based in part on that author's reading of the lower chamber's decision in the same case discussed here (*Öcalan v. Turkey*, Appl. No. 00046221/99, Merits, Judgment of 12 March 2003). For commentary on the 2003 decision, see Annemarieke Künzli, "Öcalan v. Turkey: Some Comments" (2004) 17 LEIDEN J. INT'L L. 141.

⁵⁰ *Supra*, note 6.

not justiciable; and (3) on the evidence,⁵¹ the Kenyan government had cooperated with the Turkish authorities in the apprehension, and such cooperation was not prevented by the Convention in the absence of specific violations of its provisions.⁵² The latter point is the important one for present purposes, as the Court confirmed its jurisprudence to the effect that violation of either the sovereignty of the “refuge” state or of an existing extradition or other cooperative arrangement between the two states is required for the arrest to be deemed illegal.⁵³

2.2 *The ICTY and ICTR*

Each of the UN ad hoc tribunals has asserted control over its jurisdiction, which includes supervision of the arrest and detention of accused criminals. In this regard, something of a bifurcated “abuse of process” doctrine has been developing.⁵⁴ On the one hand, these courts have shown explicit willingness to “fully exercise ... supervisory powers over pre-trial human rights violations”⁵⁵ and provide appropriate remedies. On the other hand, at least until the Appeals Chamber’s decision in *Nikolić*, the ICTY in particular showed itself willing to seriously entertain the ability of an accused to plead violations of state sovereignty in his/her defence.⁵⁶ This latter point is consistent with the “abuse of process” approach in domestic illegal rendition cases, where it is the illegality of executive conduct that matters, rather than the traditional niceties of who has standing to plead what law.

⁵¹ And, remarkably, despite a statement by the Kenyan Minister of Foreign Affairs that there had been no official involvement in the arrest or transfer (*Öcalan*, *supra* note 6, para. 98).

⁵² *Öcalan*, *supra* note 6, para. 86. See also at para. 87: “The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5.”

⁵³ *Öcalan*, *supra* note 6, paras. 90 and 98.

⁵⁴ See GEERT-JAN A. KNOOPS, *SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURE* (2002), Chapter VIII.

⁵⁵ Göran Sluiter, “International Criminal Proceedings and the Protection of Human Rights” (2003) 37 *NEW ENGLAND L. REV.* 935, p. 944.

⁵⁶ See *Prosecutor v. Tadić*, Case IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995), esp. para. 55.

A detailed inquiry into the Tribunals' approach to personal jurisdiction is unwieldy and unnecessary in this article.⁵⁷ A survey of the highlights leading up to the *Nikolić* appeal should suffice.

*i Dokmanović*⁵⁸

Dokmanović was the first Tribunal case to formally approach and resolve the issue of illegal rendition of an indictee, in this case Slavko Dokmanović who had been indicted for his role in the massacre at Vukovar, eastern Croatia in 1991. Dokmanović was resident in the Federal Republic of Yugoslavia (FRY), and because of the FRY's previous failures to surrender fugitives to the ICTY⁵⁹ an official of the Office of the Prosecutor lured him into Eastern Slavonia under false pretenses, and he was arrested and transmitted to The Hague.

Dokmanović challenged the Tribunal's jurisdiction on the basis of his "illegal" arrest, which his submissions described as a "kidnapping" that had violated the sovereignty of the FRY.⁶⁰ The Trial Chamber dismissed the application, however, pointedly distinguishing between "luring" and "forcible abduction"; the former was not offensive to international law, in particular because there had been "no actual physical violation of FRY territory"⁶¹ and Dokmanović had come into Eastern Slavonia willingly. Abduction was conceded to involve significantly more illegality, and the Chamber expressed the view that it could ground a dismissal in a case where it was validly raised.⁶²

The distinction made by the Trial Chamber between luring and abduction seems strained, founded as it was on the controversial view that luring is not a sovereignty violation. Moreover, luring largely

⁵⁷ The reader is commended to Knoops, *supra* note 54, along with other chapters in that volume.

⁵⁸ *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Sljivancanin and Slavko Dokmanović*, Decision on the Motion for Release by the Accused Slavko Dokmanović, Case No. IT-95-13a-PT, T.Ch. II, 22 October 1997 (hereafter "*Dokmanović*"). For commentary, see Scharf, *supra* note 19.

⁵⁹ Scharf, *supra* note 19, p. 370.

⁶⁰ *Dokmanović*, *supra* note 58, paras. 16–18.

⁶¹ *Dokmanović*, *supra* note 58, para. 77. Professor Scharf expresses doubt regarding this conclusion, based on the fact that the Prosecution official physically went into FRY under false pretenses to accompany Dokmanović out of the jurisdiction (Scharf, *supra* note 19). Mann has opined that even luring without physical intrusion is a sovereignty violation, at least as between states, apparently on the basis of the effects doctrine (Mann, *supra* note 2, pp. 408–409).

⁶² *Dokmanović*, *supra* note 58, para. 77.

amounts to disguised extradition, and has been described as a “*de facto* [form] of abuse of process.”⁶³ The better view may be that the force of the Security Council’s exercise of Chapter VII powers that underpins the ICTY’s function effectively trumps any sovereignty concerns, particularly with regard to a defaulting state.⁶⁴ As explored below, this level of comfort does not exist for the ICC.

*ii Barayagwiza*⁶⁵

Barayagwiza was not an abduction or luring case, but is of interest because the Appeals Chamber explicitly utilized the doctrine of abuse of process in articulating the ability of the Tribunal to control its process,⁶⁶ which control explicitly reached back to pre-trial treatment of the accused. *Barayagwiza* was legally arrested, but then detained for an exceptionally long period and had his rights, both to prompt information as to the charges against him and to *habeas corpus*, violated. The Appeals Chamber explicitly linked the preservation of the integrity of the proceedings with the pre-trial treatment of the accused, and demonstrated its willingness to seize itself of human rights violations and provide remedies therefor—though the power of dismissal would be exercised “in light of serious and egregious violations of the accused’s rights [that] would prove detrimental to the court’s integrity.”⁶⁷ While the initial remedy provided to *Barayagwiza* was altered in a subsequent review requested by the Prosecutor,⁶⁸ as Judge Sluiter has pointed out, “‘*Barayagwiza II*’ did not in any way affect the guiding principles established in ‘*Barayagwiza I*’.”⁶⁹

⁶³ Knoop, *supra* note 54, p. 245.

⁶⁴ Accord, Scharf, *supra* note 19. This line of reasoning appeared to be at play when Slobodan Milošević challenged his surrender to the ICTY, on the basis that he had been surrendered by the government of the Republic of Serbia, rather than the FRY (to which state the warrant had been issued). See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Decision on Preliminary Motions, 8 November 2001, paras. 35–47.

⁶⁵ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 (hereafter “*Barayagwiza*”).

⁶⁶ *Ibid.*, paras. 74–77. In *Milosevic* (*supra* note 64), the ICTY was also willing to entertain the abuse of process defence as set out in *Barayagwiza* (see paras. 48–51).

⁶⁷ *Barayagwiza*, *supra* note 65, para. 74.

⁶⁸ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-A, Decision (Prosecutor’s Request for Review or Reconsideration), 31 March 2000. See William Schabas, “*Barayagwiza v. Prosecutor*” (2000) 94 AM. J. INT’L L. 536.

⁶⁹ Sluiter, *supra* note 55, p. 945, citing “*Barayagwiza II*”, *ibid.*, para. 28.

*iii Todorović*⁷⁰

Stevan Todorović was indicted by the ICTY for war crimes, crimes against humanity and grave breaches stemming from the 1991–1993 period, when he was Chief of Police in Bosanski Samac, Bosnia and Herzegovina. After his arrest by the NATO-led stabilization force (SFOR), Todorović alleged that he had been kidnapped from his home in Zlatibor, Western Serbia; that he had been blindfolded, gagged and beaten with a baseball bat during the “kidnapping”, after which he was delivered by helicopter to SFOR; and that SFOR and the Office of the Prosecutor had some involvement in his illegal capture. He brought a series of motions designed to require SFOR and the Prosecution to disclose relevant information, which were opposed at every turn. Ultimately, the Trial Chamber ordered SFOR to provide disclosure, including the identification of individuals who had been involved in the capture, as well as issuing a subpoena for the testimony of the Commanding General of SFOR.⁷¹ Soon after this decision was rendered, Todorović entered into a plea agreement with the Prosecution whereby he pleaded guilty to a single count and all other charges were dismissed. He was sentenced to ten years’ imprisonment.⁷²

The illegal capture issue, while it was the subject of argument by both parties during the series of motions leading to the disclosure decision,⁷³ was never ruled upon by the Tribunal, and a result *Todorović* is of mostly historical interest for present purposes. It is noteworthy that the Tribunal was willing to compel SFOR to provide information regarding the circumstances of the arrest, which can be viewed as further solidification of its control over all aspects of the exercise of personal jurisdiction.

⁷⁰ For a detailed review of the *Todorović* matter, see Sloan, *supra* note 12, from which this summary is drawn. See also J. Cogan, “International Criminal Courts and Fair Trials: Difficulties and Prospects” (2002) 27 YALE J. INT’L L. 111.

⁷¹ *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, T.Ch., 18 October 2000.

⁷² *Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, Sentencing Judgment, T. Ch., 31 July 2001. The Tribunal recently commuted Todorović’s sentence after he served two-thirds of it, noting his guilty plea and agreement to assist the Tribunal (Press Release, 29 June 2005, Registry Doc. JP/MOW/984e).

⁷³ These arguments are reviewed in Sloan, *supra* note 12, and Lamb, *supra* note 12.

iv Nikolić

a) Trial Decision⁷⁴

Dragan Nikolić was the first person to be indicted by the ICTY, in relation to war crimes that were committed by him⁷⁵ during his tenure as commander of the *Susica* camp, a Bosnian Serb detention centre in the Vlasenica region of eastern Bosnia. After his apprehension and arrest by SFOR, Nikolić made a motion similar to the one in *Todorović*, arguing that his arrest had been illegal and requesting dismissal of the charges. Interestingly, Nikolić and the Prosecution agreed to proceed with the motion on the basis of an agreed statement of facts, to the effect that: Nikolić had been abducted from the FRY by persons unknown, put into the trunk of a car and smuggled across the border into Bosnia and Herzegovina; he was then arrested uneventfully by an SFOR contingent; and, most notably, there was no connection between SFOR, the Prosecution and the abductors.⁷⁶ Nikolić argued that his arrest had violated both the sovereignty of FRY and his internationally-protected human rights, as well as being an abuse of process, and that the only appropriate remedy was dismissal and his return to (the by this time renamed) Serbia and Montenegro.⁷⁷

After a long and inconclusive discussion of national case law on the *mala captus bene detentus* issue, the agreed statement of facts proved fatal to the argument regarding sovereignty violation. While the defence submitted that the actions of the unknown kidnappers should be attributed to SFOR and/or the OTP⁷⁸ the Trial Chamber held that there were no factual links to justify attribution to either

⁷⁴ *Nikolić* (Trial Chamber), *supra* note 29. For detailed commentary, see Sloan, *supra* note 31.

⁷⁵ Nikolić eventually pleaded guilty and was sentenced by the Trial Chamber to 23 years' imprisonment minus time already served (*Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgment, Trial Chamber, 18 December 2003). This sentence was reduced to 20 years by the Appeals Chamber (*Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, Judgment on Sentencing Appeal, Appeals Chamber, 4 February 2005). On June 21, 2006 he was transferred to Italy to serve his sentence (Press Release, Doc. CT/MOW/1091e, 23 June 2006).

⁷⁶ Who had reportedly been convicted and sentenced in FRY for the abduction.

⁷⁷ *Nikolić* (Trial Chamber), *supra* note 29, paras. 17, 25.

⁷⁸ Relying on both the law of state responsibility, specifically Art. 11 of the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (*Nikolić* (Trial Chamber), *supra* note 29, para. 60 ff.), and on Mann's argument about "ratification" (*Prosecutor v. Dragan Nikolić*, No. IT-94-2-PT, Defence Motion of 29 October 2001 at para. 15).

body. It also emphasized the “vertical context” of the relationship between the Tribunal and UN member states, stating that the ICTY’s status “as an enforcement measure under Chapter VII” meant that “sovereignty by definition cannot play the same role”.⁷⁹

The defence fared no better in its request for dismissal on the basis of human rights violations or abuse of process. The Trial Chamber had generally invoked *Barayagwiza* for the proposition that it could exercise control over personal jurisdiction,⁸⁰ and did so again to support its holding that for abuse of process to be made out, “it needs to be clear that the rights of the Accused have been egregiously violated.”⁸¹ Undertaking a “balancing exercise”⁸² of the relevant factors, it noted that unlike the various Human Rights Committee cases which had been referred to, there was no involvement by SFOR or OTP in the abduction—which appeared to equate to a finding that there been no human rights violations in the strict sense.⁸³ Moreover, while concern was expressed that some level of violence had been done to Nikolić during his arrest, the facts did not disclose “very serious mistreatment” which might justify dismissal.⁸⁴ Accordingly, the motion on jurisdiction was itself dismissed.

b) Appeal Decision⁸⁵

The Appeals Chamber, presided over by Judge Theodor Meron, took a drastic and unexpected approach to the illegal rendition issue: the central inquiry was, assuming that there *had been* either a breach of sovereignty or human rights, in what circumstances should the

⁷⁹ *Nikolić* (Trial Chamber), *supra* note 29, para. 100. On this point I am in agreement with Professor Sloan that “the Decision would have benefited from consideration of whether there are ... limits on the ICTY [in this regard], and, if so, what they are and whether Nikolić’s capture in violation of the law of the FRY violated them” (Sloan, *supra* note 31, pp. 549–550). As will be seen, however, the Appeals Chamber’s decision rendered this issue moot.

⁸⁰ *Nikolić* (Trial Chamber), *supra* note 29, para. 74.

⁸¹ *Ibid.*, 111.

⁸² *Ibid.*, 112.

⁸³ *Ibid.*, 111–113.

⁸⁴ Though the court noted that, as had been held in *Barayagwiza*, it was “irrelevant which entity or entities were responsible for the alleged violations of the Appellant’s rights” (at para. 114, quoting *Barayagwiza*).

⁸⁵ *Nikolić* (Appeals Chamber), *supra* note 8. For commentary, see Andrea Carcano, “The ICTY Appeal Chamber’s *Nikolić* Decision on Legality of Arrest: Can An International Criminal Court Assert Jurisdiction Over Illegally Seized Offenders?” (2003) 13 ITALIAN YB. INT’L L. 77; James Sloan, “Breaching International Law to Ensure Its Enforcement: The Reliance by the ICTY on Illegal Capture” (2003) 6 YB. INT’L HUMANITARIAN L. 319.

Tribunal decline to exercise jurisdiction?⁸⁶ Once this standard was determined, then the Court could inquire as to whether the present facts would warrant this remedy, and if so whether “the underlying violations are attributable to SFOR and by extension to the OTP.”⁸⁷

The framing of the threshold inquiry, of course, was an implicit statement that the illegality of sovereignty or human rights breaches was not enough, by itself, to warrant dismissal as a remedy, and this theme coloured the Appeals Chamber’s fairly terse decision. On the question of when a violation of state sovereignty would require dismissal, the Court used a fairly brief review of some of the prominent cases from national courts⁸⁸ to support its proposition that “it is difficult to identify a clear pattern” on point.⁸⁹ However, it relied in particular upon *Eichmann* and *Barbie*⁹⁰ as “cases concerning the same kinds of crimes as those falling within the [ICTY’s] jurisdiction”⁹¹ to support an observation that state practice revealed courts finding “a good reason for not setting aside jurisdiction” in such cases.⁹² It also observed that courts were also more willing to take jurisdiction “absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach”.⁹³

The bold twist came next. Emphasizing the importance of achieving accountability for “Universally Condemned Offences” as “a necessary condition for the achievement of international justice,” the Court made a decisive policy declaration:

...the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State’s cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a

⁸⁶ *Nikolić* (Appeals Chamber), *supra* note 8, para. 19.

⁸⁷ *Ibid.*

⁸⁸ Including *Re Argoud* (1964) 45 ILR 90 (Fr. Cour de Cassation), *Alvarez-Machain*, the older Swiss case of *Jacob-Salomon* (citing Preuss Lawrence, “Settlement of the Jacob Kidnapping Case (Switzerland-Germany)” (1936) 30 AM. J. INT’L L. 123), *Ebrahim* and *Bennett*.

⁸⁹ *Nikolić* (Appeals Chamber), *supra* note 8, para. 24.

⁹⁰ *Federation nationale des deportes et internes resistants et patriots et autres c. Barbie* (1988) 78 ILR 125 (Cass. Crim., 1983).

⁹¹ *Nikolić* (Appeals Chamber), *supra* note 8, para. 23.

⁹² *Ibid.*, 24.

⁹³ *Ibid.*

violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved.⁹⁴

Accordingly, even if SFOR had violated the sovereignty of the FRY, jurisdiction would not be set aside.

The second question the Court posed was “under what circumstances does a human rights violation require jurisdiction to be set aside?”⁹⁵ It validated the Trial Chamber’s approach (and its reliance on *Barayagwiza*) which allowed for the possibility of dismissal “where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal,”⁹⁶ observing in passing that this approach was consistent with *Toscanino*.⁹⁷ It stated that “certain human rights violations are of such a serious nature” as to warrant dismissal, though this remedy would “usually be disproportionate.” The balance to be struck was 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.”⁹⁸ Based on the agreed facts,⁹⁹ Nikolić had not suffered such egregious treatment, and thus there was no basis for dismissal on this ground either.

III ILLEGAL RENDITION AND THE ICC

3.1 *Nikolić: Mala Captus Bene Detentus (Redux?)*

The point was made above that *Eichmann* is an effective starting point for this discussion of illegal rendition. This is true in more ways than one, since in *Nikolić*, which is the latest and in some ways most

⁹⁴ *Nikolić* (Appeals Chamber), *supra* note 8, para. 26. The Court also noted that jurisdiction certainly would not be set aside where private actors acted privately in carrying out the abduction, since there would be no violation of sovereignty (*ibid.*).

⁹⁵ *Nikolić* (Appeals Chamber), *supra* note 8, para. 28 (title).

⁹⁶ *Ibid.*, citing the Trial Chamber decision at para. 114.

⁹⁷ *Nikolić* (Appeals Chamber), *supra* note 8, para. 29; although the Trial Chamber judgment clearly extended the remedy to situations where third parties were involved in the abuses, unlike *Toscanino* which dealt only with abuses by or attributable to the state.

⁹⁸ *Nikolić* (Appeals Chamber), *supra* note 8, para. 30.

⁹⁹ As well as on a rather mysterious *proprio motu* review (*Nikolić* (Appeals Chamber), *supra* note 8, para. 31).

authoritative court decision on the subject, we are presented with *Eichmann* all over again. Again, a person accused of heinous crimes is illegally abducted and tried; again, the court states that any violations of international law that took place are essentially immaterial; again the court takes personal jurisdiction in the face of a manifestly illegal arrest, due in some part to the nature of the offences being tried. The *mala captus bene detentus* rule is held to apply with particular force, not as a matter of judicial disengagement from the international law aspects of the matter, but as a means of validating illegality in arrest as a necessary evil to combat even more pernicious crime.

The similarities between the two are somewhat cosmetic, however, and even more complex than would appear. In *Nikolić*, the Appeals Chamber explicitly invoked *Eichmann* (as well as *Barbie*) for the proposition that state practice is somehow more accepting of *mala captus bene detentus* where it is sought to prosecute the accused for “Universally Condemned Offences.” However, as Professor Sloan has pointed out,¹⁰⁰ the Israeli Supreme Court did not invoke the nature of the alleged offences as a means of supporting the *mala captus bene detentus* principle; this was, in the court’s view, already well-established. Rather, the nature of the offences was put forward as a means of validating the court’s exercise of substantive jurisdiction over Eichmann, i.e. because the offences were so heinous they justified the exercise of criminal jurisdiction on an extra-territorial basis. The invocation of *Barbie* can be dispensed with in largely the same manner.¹⁰¹

Shorn of support from previous caselaw, then,¹⁰² the Appeal Chamber’s approach is quite startling. Put simply, the interest in effectively prosecuting the core international crimes outweighs any messiness left behind: abduction or other manifestly illegal arrest, notwithstanding the violation of domestic and international law this entails; abuse of the human rights of the fugitive, which are protected at both domestic and international law, unless such violations reach a high threshold of overt physical abuse; or even violations of state sovereignty, the central underpinning of the classical international legal order. This remarkable expression of the weight behind the goals of international criminal justice truly breaks new ground.¹⁰³

¹⁰⁰ *Supra*, note 85, p. 330, footnote 75.

¹⁰¹ *Ibid.*, fn. 77.

¹⁰² Though similar to what Higgins put forward in her book; see HIGGINS, *supra* note 20, pp. 72–73.

¹⁰³ Thus, Carcano’s suggestion (*supra*, note 85) that the Appeals Chamber’s findings may reflect customary international law must be seen as unsupportable.

It is beyond doubt that *Nikolić* is a very significant decision, not least because it somewhat unexpectedly validated an *Alvarez*-type approach to abduction in the international criminal justice arena. Post-*Dokmanović*, one commentator had remarked that the “precedents would suggest that an international criminal tribunal would have to dismiss a case where the defendant has been abducted in violation of international law”¹⁰⁴—a reasonable position in light of the increasing swing towards the “abuse of process” approach. Instead, *mala captus bene detentus* is elevated from its former status as a declining principle of domestic jurisdiction to being the new sword of the international criminal legal order, cutting through virtually all of the substantive and procedural concerns that might impair an international court’s ability to try an individual before it. Given the source of the ruling, there is little doubt it will have significant persuasive power in future cases.¹⁰⁵

Is all as it should be? Certainly no tears are being shed for Dragan Nikolić, whose guilty plea earned him a well-deserved prison sentence. What is difficult about the case, however, is that it reflects one of the founding paradoxes of this “nascent”¹⁰⁶ discipline called “international criminal law.” On the one hand, the very idea of criminal liability on an international scale is heavily rooted in human rights concerns, as prototypical as human rights might have been during the early part of the 20th century when the idea of international criminal liability was first being seriously mooted. The crimes that are deemed to attract this level of opprobrium are primarily those which *entail* human rights violations, both in the sense that they offend very basic aspects of human dignity (race, freedom, gender etc.) and that they are most likely to be carried out by state actors or persons in a position of quasi-governmental power.¹⁰⁷

On the other hand, for international criminal justice to have any sense of legitimacy, it must be enforced in a manner that comports with human rights standards—specifically, that the rights of the accused not be abused as part of the enforcement process. As Judge Mansfield commented in *Toscanino*, “Society is the ultimate loser

¹⁰⁴ Michael Scharf, “The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal” (2000) 49 *DePaul L Rev.* 925, p. 970.

¹⁰⁵ Accord, Carcano, *supra* note 85.

¹⁰⁶ M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* xxxv (2003).

¹⁰⁷ This will often factually be the case, though it is not any kind of requirement; private persons may commit genocide, crimes against humanity, etc.

when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.”¹⁰⁸

Thus, oddly but necessarily, respect for the rule of law is the animating concept for both sides of this issue. Those who feel that abduction should not preclude prosecution will argue that upholding the rule of law means ensuring that people who commit such atrocious crimes are held responsible, so as to serve both the deterrent and punitive purposes of the criminal law. Those who feel that the abduction should preclude prosecution will argue that the rule of law means discouraging lawlessness on the part of those enforcing the criminal law; and, that human rights abuse and overt criminality should not be a part of the enforcement process, because allowing them undermines the legitimacy of international criminal justice.

In *Nikolić* the Appeals Chamber was faced with a situation where it had to rule that one of the above perspectives was to dominate, and given the facts of the case the actual result is fairly reasonable. However, the test put forward by the court places the threshold for obtaining jurisdictional relief far higher than was necessary to decide the fate of Nikolić himself, and was clearly designed to preclude further defence motions of this sort. Moreover, the logical implications are fairly stark. For example, if State A sends its police or agents into the territory of State B where they violently abduct a fugitive, then so long as State A can present the individual to the Tribunal there will be no jurisdictional problems (absent serious physical abuse). That A has violated the territorial integrity of B is of no moment, even supposing relations between these states are already fractious and the abduction might provoke an international incident.

As a result, the tension between competing interests of justice described above produces a troubling circularity: international criminal law upholds human rights by trying those who violate them egregiously, yet we are prepared to countenance human rights violations in order to facilitate the trials. The difference, we are told, is one of degree; the interest in trying alleged *génocidaires*

¹⁰⁸ *United States v. Toscanino*, 500 F.2d 267 (Ct. App. 2nd Circ., 1974), at 274. As the Hon. R. Roy McMurtry, Chief Justice of Ontario (now retired) recently noted, guardians of the rule of law have a duty to ensure “that law enforcement is conducted according to law, that we have more than law and order in that we have ordered liberty according to law” (Symons Lecture on the State of Canadian Confederation, delivered in Charlottetown, November 9, 2005, available online (in excerpt) at: < <http://cleonet.ca/news/267> >).

and perpetrators of war crimes and crimes against humanity counter-balances the other violations of both sovereignty and international human rights. Physical abuse of the offender *might* swing the balance the other way, but only if it is “inhuman, cruel or degrading” to a sufficiently shocking degree—the sort of egregious standard of conduct that would itself attract prosecution of the captor for a crime against humanity, were it widespread and systematic rather than specific to one instance. Accordingly, the international human rights of the offender are implicitly ordered: the right to be free from cruel physical treatment is upheld, but freedom from arbitrary/illegal arrest and interference with physical integrity are not as important. Under the *Nikolić* test, the threat to international peace and security that these offenders pose is more significant than the inter-state conflict their arrest might engender, even though that inter-state conflict might itself threaten peace and security.

The ultimate effect, then, is similar to that suggested by Professor Bassiouni with regard to *Alvarez* and similar U.S. cases: the court does not condone the illegal conduct by enforcement authorities, but removes any consequences that might accrue.¹⁰⁹ In one swoop it settles the issue of whether individuals have standing to raise violations of sovereignty—holding, if implicitly, that they do—but finds that such violations do not matter.

3.2 *Why the Nikolic Test Should Not Be Used by the ICC*

As will be seen, the position put forth here is that the *Nikolić* test is mostly inappropriate for use by the ICC. The reason for this is twofold: first, it is not at all clear that the Appeals Chambers decision is “correct” in law (to the extent this criticism can be made in a situation where this level of court faced this issue for the first time). Second, using the *Nikolić* test has the potential to be destructive of the ICC’s important mission, because of the unique relationship between the Court, state parties to the Rome Statute and, most importantly, non-party states. In fact, the very features that make *Nikolić* a workable test for the ICTY are what make it unsuitable for the ICC. These reasons are essentially woven together in the argument that follows.

¹⁰⁹ BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 2, pp. 262–280.

i Illegally Arrested Persons Under the Rome Statute

The Rome Statute is silent as to the impact, if any, of abduction. The only provisions with any bearing on the current discussion concern the legality of arrest and human rights standards attaching thereto. Article 59(1) obliges states to arrest fugitives upon request from the Court, but “in accordance with the law of that state,” while 59(2) obliges the arresting state to have its “competent judicial authority” determine, “in accordance with the law of that State, that:...(b) The person has been arrested in accordance with the proper process; and (c) The person’s rights have been respected.” As Swart comments, “Article 59 does not accord an additional right to the person arrested to have the lawfulness of his arrest or detention reviewed by a court. Such a right may nevertheless follow from human rights conventions to which the requested State is a party.”¹¹⁰

As to those human rights standards, Article 55(1) of the Rome Statute provides *inter alia* that anyone being investigated “shall not be subjected to arbitrary arrest or detention.” Article 21(3), dealing with the applicable law to be applied by the Court, says that application and interpretation of law “must be consistent with internationally recognized human rights.”

What is missing from the Rome Statute is any entitlement of the requested state to decline to surrender a fugitive on the basis of an illegal arrest of some sort. This sets up an interesting dynamic between member states and the Court, since the surrender obligation would appear to override any domestic extradition/surrender law that might allow a court to decline to surrender because of abduction or illegal arrest. It seems clear that the intention is for the ICC to deal with any arrest irregularities itself. This is supported by Article 85(1), which states that “Anyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation,” which anticipates the Court itself being the arbiter of this question.¹¹¹

As to challenges to the Court’s personal jurisdiction, Article 19(2)(a) speaks to the possibility of the accused challenging the jurisdiction of the Court. What is not clear is whether this extends to challenging jurisdiction *ratione personae*. Article 85 speaks only to the possibility of compensation for illegal arrest, and there does not seem

¹¹⁰ B. Swart, “Arrest Proceedings in the Custodial State” in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, Vol. II (A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., 2002), p. 1252.

¹¹¹ See generally S. Zappalà, “Compensation to An Arrested or Convicted Person” in Cassese et al., eds., *ibid.*, at 1577.

to be any specific mechanism in the Statute or the Rules of Procedure to address this question.¹¹²

Starting from first principles, however, points towards a definite answer. The ICC must, like any other court, have the ability to control its own process and to address any abuse of its process—up to, and including, the ability to impose dismissal as a remedy. This is a matter of simple credibility for any court, and goes to basic notions of legality; as Professor Morgenstern wrote many decades ago, “[I]t is the duty of courts to administer the law with an eye not only to the merits of each individual case but also to higher considerations of legality.”¹¹³ Both the ICTY and ICTR have invoked such inherent/ implied powers, including the ability to remedy abuse of process, though it is not spoken to in their respective Statutes or Rules of Evidence and Procedure.¹¹⁴

Moreover, it is highly arguable that the right to be free from arbitrary arrest and detention, as well as other civil rights geared towards fair trial, have status as customary international law and must be respected by the ICC as by any other judicial body.¹¹⁵ The *ad hoc* tribunals were certainly prepared to do so, notwithstanding the disconnect between the expansive approach taken in *Barayagwiza* and the *Nikolić* test. Given that article 21(3) of the Rome Statute binds the Court to apply international human rights law, it must be the case, as Judge Sluiter puts it, that “the trial forum must take account of every human rights violation that occurs in the framework of the criminal proceedings.”¹¹⁶ Thus, the ICC must at least make an inquiry (probably under 21(3)) into whether the circumstances of an accused’s arrest and detention can and should have an effect on its exercise of jurisdiction.

¹¹² It is worth noting that the Prosecutor has discretion under Article 53 not to prosecute where it would not be in the interests of justice to do so, though this is not a “jurisdictional” power.

¹¹³ F. Morgenstern, “Jurisdiction in Seizures Effected in Violation of International Law” (1952) 29 BRIT. YB. INT. L. 265, p. 281.

¹¹⁴ WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS (2006), pp. 112–116, 539–542.

¹¹⁵ Sluiter, *supra* note 55.

¹¹⁶ *Ibid.*, at 942. Accord, Kenneth S. Gallant, “Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts” (2003) 48 VILLANOVA L. REV. 763, p. 797.

ii The Relationship Between the ICC and States: Vertical, Horizontal or Lateral?

In recent writing on the nature and features of international criminal justice mechanisms, it has been popular to contrast the “horizontal” model of inter-state criminal cooperation with the “vertical” model pertaining to supra-national courts.¹¹⁷ The former pertains to the traditional mode of inter-state cooperation by way of treaty, usually governing extradition and mutual legal assistance in criminal matters, while the latter speaks to the authority of the “international judicial body”¹¹⁸ to issue and enforce binding orders to states to cooperate. “Horizontally”, states function as sovereign equals and agree to cooperate; “vertically” the ICTY, for example, bears the *imprimature* of the UN Security Council and (at least nominally) may compel states to deliver both individuals and evidence.¹¹⁹

While these terms are usually used to describe the system of cooperation at play,¹²⁰ they can be used in a more general way to describe the manner in which questions regarding jurisdiction, particularly personal jurisdiction, are resolved.¹²¹ Under the inter-state “horizontal” model states may individually exercise jurisdiction over a matter with which they have a “real and substantial connection” by way of a jurisdictional principle recognized at international law (territorial, nationality, universal, etc.). Problems stemming from concurrent jurisdiction are resolved by recourse to international law rules and, realistically, to political wrangling. Under the “vertical” model the supra-national courts, such as the ICTY and ICTR, have concurrent jurisdiction over crimes but can invoke primacy and take jurisdiction of a case and individual from a national court as a function of the Security Council’s Chapter VII powers.¹²²

¹¹⁷ See generally A. CASSESE, *INTERNATIONAL CRIMINAL LAW* 355–56 (2003); B. Swart, “International Cooperation and Judicial Assistance—General Problems” in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, Vol. II (A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., 2002), pp. 1592–1605.

¹¹⁸ CASSESE, *ibid.*, p. 356.

¹¹⁹ Scharf, *supra* note 19, p. 375; Gallant, *supra* note 116, p. 806.

¹²⁰ See also A. Cassese, “The Statute of the International Criminal Court: Some Preliminary Observations” (1999) 10 *EUR. J. INT’L. L.* 144, p. 164.

¹²¹ For an example of this kind of analysis (though one that does not use the descriptors in this way), see Mark A. Drumbl, “Looking Up, Down and Across: The ICTY’s Place in the International Legal Order” (2003) 37 *NEW ENG. L. REV.* 1037.

¹²² ICTY Statute Art. 9, ICTR Statute Art. 8. See generally Adolphus G. Karibi-Whyte, “The Twin *Ad Hoc* Tribunals and Primacy Over National Courts” (1998–1999) 9 *CRIM. L. FORUM* 55.

How to define the nature of the relationship between the ICC and states, both in terms of jurisdiction and cooperation, has been a challenge. In general terms, whether the Rome Statute represents a simple compromise of state sovereignty or an illegitimate and undemocratic effort has been controversial.¹²³ Jurisdictionally, the Court's *sui generis* nature is summed up in the term "complementarity," a word not found in the Rome Statute but which nonetheless conveys the manner in which Article 17 of that Statute functions.¹²⁴ Describing the cooperation regime has been more of a puzzle. As with much of the Rome Statute, there is much that is familiar but much that is new. While Judge Sluiter refers to the ICC's "'still predominantly hierarchical, vertical, nature'"¹²⁵ others find that the Court has both "horizontal" and "vertical" features.¹²⁶ Professor Cassese famously emphasized the dependence of the Court on state cooperation by calling it a "giant without arms and legs," which "needs artificial limbs to walk and work."¹²⁷ ICC Prosecutor Luis Ocampo described the Court as "independent and interdependent at the same time".¹²⁸

What is clear, however, is that the relationship between the ICC and the international community is a different one altogether, not least because the Court is ultimately going to have legal dealings with its member states, non-member states, other international

¹²³ See generally Dominic McGoldrick, "Political and Legal Responses to the ICC" in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* (Dominic McGoldrick, Peter Rowe and Eric Donnelly, eds., 2004), 389, pp. 441–49.

¹²⁴ There is no need to canvass the particulars of, or the massive literature regarding, the ICC's complementarity regime here. Suffice it to note for present purposes that the ICC's jurisdiction over a case is not primary, but will be taken only where a State party is "unwilling" or "unable" to do so.

¹²⁵ Göran Sluiter, "The Surrender of War Criminals to the International Criminal Court" (2003) 25 *LOY. L.A. INT'L & COMP. L. REV.* 605, p. 651.

¹²⁶ Silvia A. Fernandez de Gurmendi and Hakan Friman, "The Rules of Procedure and Evidence of the International Criminal Court" (2000) 3 *YB. INT. HUM. L.* 289, pp. 328–329; Swart, *supra* note 117, p. 1594.

¹²⁷ A. Cassese, "On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 *EUR. J. INT'L. L.* 2, p. 13.

¹²⁸ Statement of the Prosecutor at the Second Session of the Assembly of States Parties, The Hague, 9 Sept 2003, as cited in Dominic McGoldrick, "The Legal and Political Significance of a Permanent International Criminal Court" in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* (Dominic McGoldrick, Peter Rowe and Eric Donnelly, eds., 2004), 453, p. 477.

organizations and the UN by way of the Security Council.¹²⁹ The ICC was created by treaty, and its jurisdiction is mostly limited to the territories or nationals of its parties.¹³⁰ The nature of its birth was highly political, and as a result the principles which underpin its operation are complex and unique, bearing the hallmarks of the many unresolved controversies that went into it.¹³¹ This complexity is reflected in much of the early scholarship on the nature of the court which, while successfully analyzing and describing the network of functional relationships between the ICC and various stakeholders in the international community, was less successful in trying to define it.

Accordingly, it may be useful to identify, if not a new paradigm, then at least a new label that defines the unique set of relationships within which the ICC exists. A term that suggests itself is “lateral”. Without delving too deeply into dictionary definitions of the term,¹³² it is appealing because it evokes a sort of continuum, where the Court and states are always to one side of each other. Certainly as between the Court and member states the relationship is not “horizontal,” as the member states do bear certain obligations to surrender jurisdiction to the Court in some circumstances and are obligated to cooperate with the Court in various ways when this occurs. Neither, however, is the relationship “vertical,” as there is a substantial measure of primacy accorded to the exercise of criminal jurisdiction by the states themselves, and even the cooperation obligations are tempered and qualified in various ways that differentiate the relationship from that, say, between the ICTY and UN member states.

While no attempt will be made to be exhaustive, it may be useful to elaborate on the “lateral” nature of these relationships in more detail. The uniqueness of the complementarity regime is itself a good

¹²⁹ See generally on this point the excellent article by Kenneth Gallant, “The International Criminal Court in the System of States and International Organizations” (2003) 16 LEIDEN J. INT. L. 553.

¹³⁰ Rome Statute, articles 12(2)(a) and (b). The Court may also exercise jurisdiction over crimes where a non-party state has agreed to let it do so (article 12(3)), or where the UN Security Council has referred the matter to the Court (article 13(b)).

¹³¹ As Professor Cassese has remarked, the Rome Statute is “markedly different from other modern multilateral treaties. It bears the mark of strong political and diplomatic differences over certain major issues, and shows the difficulty of ironing them out” (Cassese, “Preliminary Observations”, *supra* note 120, p.145).

¹³² But see the Oxford Handy Dictionary, (6th ed., 1986): “Of, at, towards, from, the side(s)...” And, intriguingly, “~thinking, seeking to solve problems by apparently illogical methods.”

example, since functionally it means that the ICC has neither primacy nor complete subservience to the jurisdiction of state courts. Article 17 of the Rome Statute formally presumes that a case over which the Court can properly take jurisdiction is admissible but compels the Court to defer to a state party which has jurisdiction and is investigating/prosecuting—unless that state is demonstrably “unable” or “unwilling” genuinely to pursue the case. The Court makes its own determination of whether or not a case is admissible (including the highly-contentious issue of unwillingness), but states can challenge both the initiation of an investigation by the Prosecutor¹³³ and admissibility generally.¹³⁴ The Prosecutor must suspend any ongoing investigations while such a challenge is being made,¹³⁵ but the state is ultimately bound by the Court’s decision on the matter.

The convoluted design of the complementarity regime was deliberate, the objective being both to create opportunities for legitimate international criminal trials, and “to encourage national institutions to comply with their responsibilities under international humanitarian law to investigate and prosecute”.¹³⁶ This, arguably, is the “lateral” effect of complementarity—in the sense of a lateral pass on the rugby pitch, where the player best-placed to pursue the objective is handed the ball, but with more of a compulsory flavour. If a state cannot or will not take jurisdiction, then the ICC will do so, but it is this very potentiality that will encourage states to pursue cases, and in a manner that will not be found to be “unwilling”.¹³⁷ The design is deliberate, as well, in that it displays a built-in sensitivity to the political concerns that motivated the negotiators, which ranged from reluctance for a Court that could impinge upon state sovereignty to the imperative of empowering the Court to intervene when states were unable to prosecute or chose to shield a perpetrator.¹³⁸ These political concerns are now enshrined in a set of provisions that will

¹³³ Rome Statute, art. 18.

¹³⁴ Rome Statute, art. 19.

¹³⁵ Rome Statute, art. 19(7).

¹³⁶ McGoldrick, “Legal and Political Significance,” *supra* note 128, p. 468, referring to JI Charney, “International Criminal Law and the Role of Domestic Courts” (2001) 95 AM. J. INT’L. L. 120, who opines that this was the effect of the ICTY and ICTR.

¹³⁷ Accord, Drumbl, *supra* note 121, at 1042, n. 25.

¹³⁸ For a compelling and detailed account of the negotiations on this point, see John T. Holmes, “The Principle of Complementarity,” in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* (Roy S. Lee, ed., 1999), 41.

clearly give rise to a great deal of political and legal wrangling. As Professor Schabas has commented, “the two systems [of national courts and the ICC] function in opposition and to some extent hostility with respect to each other”,¹³⁹ which means that even relations between the Court and state parties (and among state parties) will be delicate—to say nothing of relations with non-party states.¹⁴⁰

The lateral aspect is perhaps even better reflected in various parts of the Rome Statute’s regime on cooperation and surrender.¹⁴¹ The vertical-seeming starting point is that states “shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes”,¹⁴² and must ensure that there are national procedures which provide for all of the forms of cooperation set out in the Statute.¹⁴³ Where the Pre-Trial Chamber determines that there is no competent mechanism or authority to respond to a cooperation request, it may even authorize the Prosecutor to conduct investigations on the territory of a party state, without that state’s consent.¹⁴⁴

Closer examination reveals, however, that the cooperation scheme is not so much a framework of obligations as a compendium of “sophisticated instruments of conflict resolution.”¹⁴⁵ Some of the more prominent examples of these are:

- a state party is normally under an obligation to surrender an individual requested by the Court (Art. 89(1)), but may give priority to competing state requests in certain circumstances (Art. 90),

¹³⁹ WILLIAM SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 85 (2nd ed., 2004).

¹⁴⁰ Or the Security Council, since a referral of a case by this body tilts the Court-state relationship into far more “vertical” territory than is otherwise the case (see Rome Statute, art. 13(b)).

¹⁴¹ Here I rely heavily on the thorough analysis of the cooperation provisions in Hans-Peter Kaul and Claus Kreß, “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises” (1999) 2 *Y.B. INT’L HUMANITARIAN L.* 143; but see also Phakiso Mochochoko, “International Cooperation and Judicial Assistance” in *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 138, p. 305; Jackson N. Maogoto, “A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime” (2004) 23 *UNIV. QUEENSLAND L. J.* 102.

¹⁴² Rome Statute, art. 86.

¹⁴³ Rome Statute, art. 88.

¹⁴⁴ Rome Statute, art. 57(3)(d). See also art. 99(4).

¹⁴⁵ Kaul and Kreß, *supra* note 141, p. 170.

with similar provisions in relation to other forms of assistance (Art. 93(9)(a));

- where there are parallel national proceedings against the individual for a different crime, “the requested state may not refuse the execution of the request but the execution may be postponed for a period of time as agreed upon with the Court” (Arts. 89(4) and 94);¹⁴⁶
- despite Art. 88, there are numerous references to requests for surrender and assistance being rendered in accordance with the law of the state party (e.g. Arts. 89(1), 93(1));
- numerous instances where the Court and state party will “consult” as to the form, procedure and scope of a request for assistance (e.g. Art. 91(4));
- in particular, if a request is “prohibited in the Requested state on the basis of an existing fundamental legal principle of existing application,” the State must consult with the Court to try to negotiate a modified request that would be acceptable (Art. 93(3)), though it appears that the State may ultimately refuse the request;
- a state party must consult with the Court where executing a request would potentially violate “a pre-existing treaty obligation undertaken with respect to another State” (Art. 97);
- a state party may “postpone” executing a request by the Court where so doing would interfere with an ongoing investigation in that state (Art. 94), or where an admissibility challenge is pending (Art. 95);
- with regard to on-site investigations, the Court has different powers as between the state on whose territory the crime is alleged to have been committed (Art. 99(4)(a)), and other state parties (Art. 99(4)(b)); the latter provision has been described as “fall[ing] short of a consent requirement but go[ing] beyond mere consultation”;¹⁴⁷
- a detailed regime governing consultations between the Court and a state party that views a request as being directed towards “national security information” (Art. 72);¹⁴⁸

¹⁴⁶ Kaul and Kreß, *supra* note 141, p. 166, describing the effect of these provisions as “constructive ambiguity.”

¹⁴⁷ *Ibid.*, at 169.

¹⁴⁸ This is more properly framed as a rule of evidence, since it is included in Part 6 of the Statute. See generally Donald K. Piragoff, “Protection of National Security Information” in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 138, p. 270.

- while the obligations to cooperate are vertical in form, a failure to cooperate only allows the Court to “make a statement to this effect” and refer the matter—laterally, perhaps—to the Assembly of States Parties. At this point, state responsibility for treaty violation governs.¹⁴⁹

iii The Destructive Potential of Nikolić in a Lateral System

The system, then, is one of mutual support (and doubtless no little friction) between the Court and state parties. The Rome Statute envisions a Court with some power but mandates ongoing consultations and negotiations as the mode by which the criminal justice work gets done in the pre-trial phase. Formally states must cooperate, but there are roadblocks to be thrown up and some provisions that may amount to grounds for refusal of a Court request. Both vertical and horizontal approaches were combined, and distorted, in order to produce a mutually agreeable package. The Court and its members work laterally, in parallel fashion, ostensibly moving towards the same goal of ensuring international crime is punished and impunity extinguished. To a much greater extent than with the *ad hoc* tribunals, however, politics is the driver.

Why is the lateral nature of the ICC of such importance? Put simply, the nature of the relationship between the ICC and the international community is the key determinant on the issue of the fate of abducted fugitives before the Court. It is also, in my submission, the key disqualifier of the use of *Nikolić* test by the ICC at such time as the issue comes before it.

On the latter point, it seems reasonable to expect that the Court will at some point have to make a decision about whether to dismiss an indictment because of abduction or other illegal arrest or rendition. This potential was contemplated by the framers of the Rome Statute, as Article 85 makes clear. Before the ICTY alone, Slavko Dokmanović, Slobodan Milosević, Stevan Todorović and Dragan Nikolić all made the argument in one form or another. Moreover, history tells us, from Eichmann to Alvarez to Bennett to Nikolić, that law enforcement authorities and other “interested” individuals will resort to illegal arrest in some form in order to apprehend fugitives who are of particular interest.

Further, in the context of the sorts of crimes of which the ICC will seize itself, the perpetrators will truly deserve the label *hostis humani*

¹⁴⁹ Cassese, “Preliminary Observations”, *supra* note 120, p. 166.

generis (enemies of humanity), and thus the interest in apprehending them will be intense—all the more relevant here because it is relatively easy to envision situations where abduction would become an attractive prospect. Writing of the ICTY experience, Professor Scharf has made the point that even in a vertical system states will fail to comply with orders to surrender fugitives.¹⁵⁰ Thus, even where a matter comes before the Court by way of a Security Council referral, there is reason to suspect that apprehension will never be easy. This is compounded by one of the manifest frailties of the ICC's lateral system: the Court may very well be forced to try to induce cooperation from the very governments whose members it is trying to prosecute.¹⁵¹ Accordingly, the prospect of a national leader who engages the Court in a protracted dispute about admissibility of a case in order to maintain his or her own impunity is real. The Court itself has no effective enforcement regime and can simply refer the matter to the Assembly of States parties, whose only power appears to be "naming and shaming."¹⁵² In such circumstances, the possibility of abduction would also be real.

Scenarios involving non-party states are equally disturbing. The national leader from the previous scenario, if he or she chose to flee the party state, would most likely flee to a non-ICC member state, particularly one where some sanctuary and freedom from prosecution would be offered. Other situations where a perpetrator whose crimes come within the Court's jurisdiction are possible, e.g. a senior military official commits war crimes on a member state's territory and then flees to his home state, which is not an ICC member. One can easily imagine circumstances in which vengeful politicians in a post-conflict or post-dictatorship government were motivated enough by an individual's crimes to employ their own forces—or bounty hunt-

¹⁵⁰ Scharf, *supra* note 104, p. 944. As is well-known, Radovan Karadžić and Ratko Mladić remain at large 10 years after the Srebrenica genocide (see "Briefing by the Prosecutor", 23 June 2005, available online at < <http://www.un.org/icty/pressreal/2005/speechCdP-e.htm> >).

¹⁵¹ Scharf, *supra* note 104, p. 978; P. Benvenuti, "Complementarity of the International Criminal Court to National Criminal Jurisdictions" in *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, Vol. I (F. Lattanzi and W. Schabas, eds., 1999), 21, p. 50; Office of the Prosecutor, "Paper on some policy issues before the Office of the Prosecutor", available online at < http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf > at p. 2; Olympia Bekou and Robert Cryer, "Introduction", in *THE INTERNATIONAL CRIMINAL COURT* (Bekou & Cryer, eds., 2004), i, p. xix.

¹⁵² Schabas, *supra* note 139, p. 130.

ers—to apprehend their otherwise unreachable quarry. Indeed, in such situations abduction followed by surrender to the ICC would not be the worst fate that could befall the fugitive, but the Court would still have to adjudicate upon the issue.

It is not only the prospect of abduction itself, or illegal arrest, or even rough handling of fugitives that should give one pause in these situations, though they are very questionable and generally abhorrent practices. The demonstrable corrosive effect that interstate abduction has on international relations is a significant worry. As noted above, Eichmann's abduction sparked an international incident that led to a Security Council resolution. The Alvarez matter created such interstate friction in North America that both Mexico and Canada intervened in the U.S. Supreme Court hearing in opposition to the American government's position. In more politically unstable regions, it is not difficult to imagine that the abduction of an ICC-indicted but much-loved national leader from one state might lead to a political—and potentially military—showdown between one or more states, possibly even playing into the hands of third states who have some interest in maintaining instability in the region. While it is not at all inevitable that an abduction could create a threat to international peace and security, it is certainly a live possibility.¹⁵³

The Appeals Chamber's approach in *Nikolić* has a certain *carte blanche*, “hang the consequences” flavour, adopting as it does the view that international crime in the form of universally-condemned offences represents a greater threat to international peace and security than the prospect of states invading each others' territory to abduct wanted individuals. I submit that this was a finding that was relatively easy for the ICTY to make, given that it has the weight of the Security Council behind it and that, at least in the case of *Nikolić* himself, the state of refuge was essentially in default of its obligation to surrender the fugitive to the Tribunal. The ICTY is itself an arm of the Security Council, an embodiment of collective measures, clothed with a great deal of moral and legal authority that *might* even extend to prioritizing between threats to international security (at least insofar as they affect its own exercise of jurisdiction). It can, perhaps, afford to take a permissive approach to acts which violate both state sovereignty and international human rights law.

¹⁵³ See Kristin Weissman, “Extraterritorial Abduction: The Endangerment of Future Peace” (1994) 27 U.C. DAVIS L. REV. 459.

The situation is entirely different with the lateral and highly political nature of the ICC. At its starkest, the *Nikolić* test essentially encourages abduction. Interested states would correctly judge that, unlike many domestic systems, an illegal abduction of the accused for law enforcement purposes will cause no difficulty with prosecution, so long as the fugitive is not significantly physically abused. The use of a *Nikolić*-type test by the ICC would therefore increase the already reasonable chance that there will be abductions of indictees.

In the lateral system, however, the case for of universally condemned offences as the overarching threats to international peace and order cannot be made with either the legal or normative force that it was by the ICTY in *Nikolić*. While the ICC has a large number of state parties, it is by no means a universal treaty; third party states will inevitably be engaged, since international criminals will not necessarily respect borders. The state parties, moreover, exist as sovereign equals in what is essentially a glorified treaty regime. The obligations under the Rome Statute are for parties to cooperate with the Court, even to the point of surrendering jurisdiction in appropriate circumstances, but those obligations are ultimately owed to the state parties themselves. The lack of “verticality” deprives ICC proceedings of some of the moral suasion that attaches to the *ad hoc* tribunals.

Thus, there are many grounds for destructive friction as a result. One can imagine a situation where the Court is involved in an admissibility tussle with party state X which insists it is engaged in a bona fide investigation of an individual, but the Court disagrees and has requested surrender. An abduction of the individual by party state Y would throw fuel on that particular fire, creating conflict both between the two party states involved (for the sovereignty violation) and between party state X and the ICC—the former no doubt accusing the latter of illegally taking/accepting personal jurisdiction over the fugitive.

Abduction could also create problems within the domestic process for surrender, which in many states involves both judicial and ministerial reviews of all of the circumstances involving the request. As noted above, Article 59(2) of the Rome Statute actually obliges national governments to implement a review of the circumstances of any indictee’s arrest. In Canada, for example, where the surrender process is assimilated to the domestic extradition procedure,¹⁵⁴ any

¹⁵⁴ *Extradition Act*, S.C. 1999, c. 18.

request for surrender by the ICC will engage a judicial hearing wherein it is well-established that the judge is competent both to scrutinize the process for compliance with domestic human rights norms,¹⁵⁵ and to adjudicate claims of abuse of process.¹⁵⁶ Particularly under the latter heading, it would be entirely within the discretion of the extradition court to dismiss the surrender proceedings where the circumstances of the fugitive's detention were manifestly illegal, particularly if domestic or foreign police forces were implicated. Yet this would likely put Canada in violation of its obligation to surrender the fugitive to the Court, certainly creating a difficult political climate between the Court, the state parties and Canada. An abduction and its attendant problems could not be ruled out.¹⁵⁷

Further, those "attendant problems" could have extremely serious consequences where non-party states to the ICC are involved. The most obvious hypotheticals are where a party state abducts a fugitive from a non-party state, or where the fugitive is a national of a non-party state regardless of the site of the abduction. The violation of sovereignty, while a potentially serious matter, would simply be the starting point for resulting conflict. Those states which have not signed the Rome Statute have generally expressed serious reservations about the legality of the Court generally, and many (notably the U.S.) have been quite vociferous in expressing the view that the exercise of jurisdiction by the Court over a national of a non-party state would be unlawful.¹⁵⁸ If the ICC has a blanket policy towards jurisdiction similar to that in *Nikolić*, and if the U.S. is indeed the injured state in question, this raises the prospect of that state directing even more of its energies towards undermining the Court—possibly engaging the Security Council (the Permanent

¹⁵⁵ Under the *Canadian Charter of Rights and Freedoms*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; see *Argentina v. Mellino*, [1987] 1 S.C.R. 536.

¹⁵⁶ *United States v. Cobb*, [2001] 1 S.C.R. 587. See generally ELAINE F. KRIVEL ET AL., *A PRACTICAL GUIDE TO CANADIAN EXTRADITION* 141–159 (2002).

¹⁵⁷ If this seems unlikely, consider that individuals have been abducted from Canada before, albeit by U.S. government-employed bounty hunters; see, e.g. Wade A. Buser, "The *Jaffe* Case and the Use of International Kidnapping as an Alternative to Extradition" (1984) 14 GA. J. INT'L & COMP. L. 357.

¹⁵⁸ See Statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court, Before the Committee on Foreign Relations of the U.S. Senate, July 23, 1998, reprinted in 1998 WL 425945, 1 (F.D.C.H.).

Members of which are mostly non-signatories to the ICC) to do so, or even taking more extreme measures.¹⁵⁹ The best possible resolution would be the Security Council making a request under Article 16 for the Court to defer the proceeding, but if this was done simply to quell inter-state arguments about a particular fugitive, it would undermine what moral authority the Court enjoys in the international community.

I should not be heard to suggest that every abduction or illegal rendition that might occur under the bailiwick of the ICC is such a nightmare scenario, though nightmare scenarios are well within the realm of possibility. The important point is that the ICC, for all the importance of its mission, is in a politically precarious environment and should implement and apply its legal regime in a way that does not undermine its own mandate, or indeed its very existence. If the Court stays in operation for a significant period of time, then the abduction of an accused person is a near-inevitability. The Court will have to deal with this very difficult jurisdictional issue, and in a manner that is consistent with the unique requirements of international criminal justice. Adopting a *Nikolić*-type stance that will see virtually all abducted or illegally arrested fugitives face process, however, has the strong potential to defeat the Court's mission by: (1) tilting the uncertain balancing which is inherent in international criminal justice too far towards substantive justice at the expense of a process which requires adherence to human rights standards; and (2) undermining the very foundations, as well as the work, of the ICC by fanning the flames of disagreement about its existence and jurisdiction. As best it can, the Court should strive to walk a line which avoids this potential, while at the same time combating impunity for the enemies of humanity who will face its process.

IV CONCLUSION: WHAT IS TO BE DONE?

Ironically enough, if the *Nikolić* line of reasoning prevails before the ICC there may be certain cases where prosecuting universally

¹⁵⁹ In this regard, one need only note the *American Servicemembers' Protection Act of 2002*, Pub. L. No. 107-206, 116 Stat. 820 tit. II (2002), which "[permits] the use of military force to rescue any members of the armed forces of the United States and certain others detained by or on behalf of the International Criminal Court (earning the legislation the nickname 'The Hague Invasion Act')..." (Leila N. Sadat, "Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court" (2003) 21 WIS. INT'L L. J. 557, p. 558).

condemned offences will *create* threats to international peace and security—different from those underpinning the offence itself but no less destructive for that. The prospect of dousing a smaller fire only to start a larger one is troubling, but very real. Even the more “minor” political conflicts can only hurt the cause, legitimacy and credibility of a Court which already has to operate in a highly-charged political atmosphere; if it is seen to be encouraging or approving of international illegality, then the Court may very well play into the hands of those who view it as a politicized and biased forum.¹⁶⁰ A wholesale application of the *mala captus bene detentus* rule should have no future before the ICC.

However, as critical as the foregoing has been regarding the Appeal Chamber’s approach in *Nikolić*, and in particular its portability beyond the UN tribunal system, that decision nonetheless provides some guideposts for formulating an approach to abduction that is specifically tailored to the new international criminal justice order embodied in the ICC. It is worthwhile to recall again that Dragan Nikolić was the first individual indicted by the ICTY and was certainly deserving of the label *hosti humanis generii*. The persons indicted by the ICC will be accused of crimes of a comparable gravity, and the notion that proceedings against them might be dismissed because of procedural irregularities and “minor” human rights abuses is also extremely unpalatable. It is easy to be sympathetic to the Appeals Chamber’s view that it is worthwhile to balance the justice to be served by prosecuting against the relative seriousness of the illegality that is alleged by the fugitive, which may or may not involve sovereignty violations and could amount to procedural mistreatment of the more innocuous variety. Adopting a blanket *mala captus, mala detentus* approach would be equally destructive of the mission of international criminal justice, and this too is an option that should not be entertained seriously.

Regardless of one’s feelings about the triumph of functionalism over formalism, the best that can be hoped for on this nearly-intractable issue is an exercise in flexible balancing, driven equally by the interests of criminal justice, international security and international human rights norms. As the ICTY itself has offered, there should be some connection between the egregiousness of the

¹⁶⁰ See, e.g., John Rosenthal, “A Lawless Global Court: How the ICC Undermines the UN System” POLICY REVIEW, February–March 2004, p. 29.

circumstances and the nature and extent of the remedy.¹⁶¹ I offer the following suggestions as the skeleton of a solution:

- 1) The Appeal Chambers' suggestion in *Nikolić* that a reviewing court should not attribute any significance to international law violations stemming from abduction must be rejected. The legality of this holding is questionable even before that body, but it is entirely inappropriate for the lateral system in which the ICC exists. The ICC must engage with, and must be seen to engage with, the issues of abduction, illegal rendition and illegal arrest, and in a manner which makes the Court's jurisdiction *ratione personae* a live issue; unlike the UN tribunals, it does not have the freedom not to.
- 2) The Court (most likely in a Pre-Trial Chamber) should engage in a multi-factored balancing test:
 - i Step 1: examine any alleged inter-state international law violations, e.g. actual abduction (including by way of state-employed bounty hunters), disguised extradition in violation of treaties (including the *Refugee Convention*¹⁶²), unlawful high seas apprehension, etc. The Court should adopt an approach which expressly acknowledges the unique circumstances of the lateral system, as well as both the Court's and the international community's policy interests in deterring illegal state conduct;
 - ii Step 2: examine any alleged human rights violations, using the procedural provisions of the Rome Statute and customary international human rights law as the baseline standard. In a *Nikolić*-type situation where the fugitive was "apprehended" by persons unknown who have no provable connection to state forces, the acts of these persons should be treated as those of state authorities, in order to dispense with any argument as to whether the accused enjoys human rights vis-à-vis private actors;¹⁶³
 - iii Step 3: review and acknowledge the crimes for which the accused was indicted by the Court, including a specific account of what the Prosecution intends to prove on each separate count (but bearing in mind the presumption of innocence imposed by Article 66 of the Rome Statute);

¹⁶¹ *Milosevic*, *supra* note 64 at para. 50, quoting *Barayagwiza*. See also Gallant, "Jurisdiction", *supra* note 116, p. 797.

¹⁶² Convention on the Status of Refugees (1951) 189 UNTS 138.

¹⁶³ See *supra*, note 84.

- iv Step 4: if the Court is satisfied that any of the allegations in either of Steps (1) and (2) have been proven, then it should balance these against the interests of the international community in allowing prosecution to go forward. The Court should determine both whether a remedy is justified in the circumstances, and if so what form it should take.¹⁶⁴ If the case is one of illegal arrest, then the Article 85(1) procedure implemented by Chapter 10 of the Rules of Evidence and Procedure can be undertaken and the appropriate amount of compensation determined. The other available remedies should be reduction in sentence (to be determined once/if sentence is imposed) or, in the most extreme cases, dismissal. There should be a separate inquiry as regards dismissal, along the lines of “would the administration of international justice be brought into disrepute if the case was dismissed?”¹⁶⁵ While a contextual inquiry should be undertaken as regards both the state acts and human rights violations, proven violation of *jus cogens* human rights norms (e.g. the prohibition of torture) should make weight towards dismissal. For cases which do not reach the high threshold for dismissal, some combination of compensation and reduction of sentence could be imposed, the particulars to be formulated once the case is over.
- 3) The process outlined above should be adversarial, and the Prosecutor should, in his/her discretion, make submissions in support of the prosecution going forward in as unfettered a manner as possible. The burden of proof should be on the accused both to prove violations and to demonstrate why a particular remedy is appropriate in the circumstances;

¹⁶⁴ See Sloan, *supra* note 85, p. 343: “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.”

¹⁶⁵ I am borrowing this formulation from Section 24(2) of the *Canadian Charter of Rights and Freedoms*, *supra* note 155. An alternative formulation could borrow from Article 69(7)(b) of the Rome Statute regarding admissibility of evidence and ask whether a failure to dismiss “would be antithetical to and would seriously damage the integrity of the proceedings.” For a suggestion that this formulation (drawn from its legislative predecessor, Rule 95 of the Rules of Procedure and Evidence for the ICTY and ICTR) could be drawn upon to deal with abuse of process claims before international criminal tribunals, see Knoops, *supra* note 54, pp. 251–254, 263.

- 4) The Assembly of States Parties should enact some form of formalized mechanism to address abduction or other illegality, perhaps by way of amending the Rome Statute to add some kind of complaints-resolution mechanism or at least a sub-forum in which these issues could be discussed, and to which non-state parties could bring complaints. While it is difficult to imagine the state parties adopting anything beyond a fairly toothless kind of “talk shop,” this forum could nonetheless act as a sort of pressure valve, allowing states to engage each other on the issues without having recourse to other measures, e.g. claims before the ICJ.

The above are made as simply modest proposals for a principled manner in which to deal with an extremely difficult issue. They may provide a starting point for engagement and discussion, but it is clear that engagement and discussion must occur if potentially intense and destructive situations are to be avoided. Should the time come when the ICC is more universally adhered to and a full or nearly full universal jurisdiction is effectively in place for its subject matter, the test could be adapted to these changing circumstances.

There is, in fact, some good to be said of *Nikolić*, particularly that in (a) allowing the accused to plead international law violations, and (b) allowing for the possibility of a remedy in the face of extreme human rights abuses, it almost in passing elevated human rights norms beyond issues of state sovereignty in terms of their relative importance. This is consistent with the trend towards making the individual truly the subject, rather than the object, of international law and should be applauded. If *Nikolić* can be read as the Appeal Chamber’s retreat from full engagement with the abduction issue, the practically-minded will concede that the decision was in some ways the most expeditious manner to get to a resolution that would work for the unique context in which the Tribunal operates.

The ICC, however, as noted earlier, does not have this luxury. It must deal with abduction and illegal rendition in a way that ultimately accommodates, if it does not resolve, the seemingly impossible dilemma—how many eggs to break to make the omelette; how far to relax procedural human rights standards in order to ensure prosecution of the worst transgressors.

V ADDENDUM

On 14 December 2006, the Appeals Chamber of the ICC rendered its decision in an application by Thomas Lubanga Dyilo for the Court to dismiss his case.¹⁶⁶ The decision came to the author's attention too late for consideration of it to be incorporated into the text above, but a few preliminary observations can be offered.

Before a Pre-Trial Chamber, Lubanga challenged the Court's ability to exercise jurisdiction over him under Article 19(2) of the Rome Statute. Similarly to *Barayagwiza*, he alleged that he had been mistreated while incarcerated in the Democratic Republic of the Congo prior to his surrender to the Court, and further that the Prosecutor had been complicit in this mistreatment. He applied for dismissal and release on the basis of the abuse of process doctrine. The Pre-Trial Chamber found that it could grant such a remedy for abuse of process and on the protection of the fundamental rights of the accused in Article 21(3), drawing support from both *Nikolić* and *Barayagwiza*, but dismissed the application for lack of evidence.

While upholding the result reached by the Pre-Trial Chamber, the Appeals Chamber took a significantly different legal approach that stemmed from a restrictive interpretation of the Rome Statute. It found that the question was not one of "jurisdiction" within the meaning of Article 19 but was rather a *sui generis* motion, "a procedural step not envisaged by the Rules of Procedure and Evidence or the Regulations of the Court invoking a power possessed by the Court to remedy breaches of the process in the interests of justice".¹⁶⁷ It then reviewed the doctrine of abuse of process and found that, because the concept is not really known to civilian systems, the doctrine "is not generally recognised as an indispensable power of a court of law, an inseverable attribute of judicial power," and as such was not among any inherent powers the Court may have.¹⁶⁸ The Court held, however, that the imposition of international human rights standards in Article 21(3) gave the Court the power to stay

¹⁶⁶ *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 (OA4), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2) of the Statute of 3 October 2006, 14 December 2006.

¹⁶⁷ *Ibid.*, para. 24.

¹⁶⁸ *Ibid.*, para. 35.

proceedings if the treatment of the accused interferes with, “first and foremost, in the context of the Statute, the right to a fair trial”.¹⁶⁹

This decision partly confirms some of the observations made above.¹⁷⁰ In particular the Court agrees that a human rights-based remedy must be available to the accused under Article 21(3) of the Rome Statute, though based on its treaty interpretation it appears to refuse to characterize this as a “jurisdictional” power. The *mala captus bene detentus* approach has been declined to this extent.

However, in rejecting the use of the abuse of process doctrine the Appeals Chamber has taken a distinctly different tack on its powers than that taken by the ICTY and ICTR. On the whole, by way of a strict interpretation of its powers regarding jurisdiction and process, the Court may have painted itself into a corner on the abduction issue. If it has no access to abuse of process powers, then the justiciability of sovereignty violations in the apprehension of an accused (as opposed to human rights violations) is in doubt. Yet, as argued above, a failure by the Court to deal with this issue when presented is likely to wreak havoc.

A possible solution is to treat the sovereignty violation as a human rights issue. If an individual is abducted in state A by officials/agents of state B, then the arresting parties are acting illegally under the laws of state A and the apprehension itself amounts to, in human rights terms, an arbitrary detention or illegal deprivation of liberty. This is a workable solution that nonetheless leaves the inter-state conflict outside the Court’s purview, and will only cover some situations. Alternatively, perhaps the answer lies in the inherent powers of the Court to which the Appeals Chamber briefly averred, but this is currently far from clear.

¹⁶⁹ *Ibid.*, para. 37.

¹⁷⁰ Footnotes 112–116 and accompanying text.