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Sloan, J. (2003) *Prosecutor v Todorovic: illegal capture as an obstacle to the exercise of international criminal jurisdiction.* Leiden Journal of International Law, 16 (1). pp. 85-113. ISSN 0922-1565

<http://eprints.gla.ac.uk/38254/>

Deposited on: 02 April 2012

Prosecutor v. Todorović: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction

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Abstract

For years the majority of those individuals publicly indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) remained at large due to a lack of co-operation from states whose assistance was required to effect their arrest. In order to assist in this regard, various operations have been undertaken since 1997 by which UN and regional missions have taken steps to assist the ICTY in the difficult task of bringing accused before the Tribunal in The Hague. Such steps were taken in the case of Stevan Todorović, who was captured and transferred to The Hague by means of an operation shrouded in secrecy and alleged to have involved illegal behaviour on the part of the NATO-led Stabilization Force. The following article discusses the nature of Todorović's arrest (based on the limited facts available) and his various attempts to have his indictment dismissed due to the nature of his arrest. In so doing, it considers the state of the law regarding the appropriateness of an international judicial body proceeding with the trial of an individual brought before it by potentially illegal means. Although a plea agreement was reached in the case, with the result that the judicial consideration of the issues is limited, important issues are nevertheless raised in the arguments of the Office of the Prosecution and the defence counsel which are likely to recur in similar cases in the future.

Key words

ICTY; arrest; SFOR; NATO; *male captus bene detentus*

I. INTRODUCTION

Stevan Todorović, a Bosnian Serb, was indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY)¹ on 21 July 1995 for crimes against Bosnian Croats, Bosnian Muslims, and other non-Serbs. He was alleged to have committed these crimes between 1991 and 1993 while he was chief of police in the Bosanski Samac municipality of Bosnia and Herzegovina.² He was charged with crimes against humanity, grave breaches, and war crimes arising from acts of rape, murder, torture, sexual humiliation, and other cruelty.³ On 27 September 1998, after remaining at

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1. Also referred to as 'the Tribunal' or 'the International Tribunal'.

2. He was indicted, along with several others, in what came to be known as the 'Bosanski Samac' or 'Simić' indictment (after Blagoje and Milan Simić, who were among those named in the same indictment).

3. As noted by the Trial Chamber, 'In the Plea Agreement the Prosecution and Stevan Todorović agree on certain facts as being true and constituting the factual basis for the guilty plea'. (See *Prosecutor v. Stevan Todorović*, Sentencing Judgment, Case No. IT-95-9/1-S, T. Ch. I, 31 July 2001, at para. 9.) These included murder, ordering men to perform fellatio on each other, administering repeated beatings, ordering and participating in the unlawful detention and cruel and inhumane treatment of Bosnian Croats, Bosnian Muslims and other

large for almost three years, he was captured and transferred to the Tribunal under circumstances which are – and are likely forever to remain – unclear. It was the circumstances of his capture, coupled with an overriding desire on the part of the ICTY's Office of the Prosecutor (OTP) to keep them secret, that ultimately led to 26 of the 27 counts against Todorović being dropped.

According to Todorović's version of events, as well as various media reports, on the night of 27 September 1998, four armed, masked men burst into Todorović's home in Zlatibor in western Serbia, gagged, blindfolded, and beat him with a baseball bat,⁴ then proceeded to smuggle him out of the country and into Bosnia and Herzegovina.⁵ Within a few minutes of Todorović's arrival in Bosnia and Herzegovina, a helicopter arrived to take him to the base of the NATO-led Stabilization Force (SFOR)⁶ at Tuzla.⁷ Depending on which newspaper accounts (if any) are believed, those involved in his capture were either 'bounty hunters'⁸ paid from a 'CIA slush fund',⁹ or members of the British SAS and/or elite Delta units from the United States.¹⁰ According to one account, his captors had offered to let him go in return for the equivalent of £13,000.¹¹ While some of these reports seem far-fetched and elements may be unfounded, because of the wall of secrecy erected by SFOR and strenuously defended by the OTP, untested allegations and unconfirmed press reports are all we have to inform us of what actually happened on the night of 27 September 1998.

In a complicated series of motions, Todorović set out to show that his capture was illegal and raised the issue of the involvement of the OTP and SFOR. In order to prove this assertion, Todorović repeatedly asked for co-operation from SFOR in the form of the provision of documents and testimony relating to the circumstances of the arrest. This co-operation was not forthcoming. Ultimately, when it became clear that the Trial Chamber was going to require disclosure from SFOR – despite the determined efforts of the OTP and SFOR to prevent this – a deal was reached and a Plea Agreement was entered into between the OTP and Todorović. According to the terms of the Plea Agreement, the OTP would drop all counts but one against Todorović and, in return, Todorović would no longer insist on accessing the SFOR documents and agree to

non-Serb civilians', torture, forcing detainees to sign false confessions and ordering deportations and forcible transfers. *Ibid.*, at para. 9.

4. At his initial appearance before the ICTY on 30 Sept. 1998 he advised the Trial Chamber that he 'did not feel well because he had received a heavy blow with a baseball bat over his head "during the kidnapping"'. See Prosecution Response to the Appeal Brief of the Accused/Appellant Stevan Todorović, filed 4 Aug. 1999, at para. 9, n. 8.
5. See S. Castle, 'Bosnian Police Chief May Escape War Crimes Trial', *Independent*, 16 Aug 2000, 11. See also T. Walker, 'SAS Carried Out Serbian Raid', *The Times*, 11 Nov. 1998, at 15.
6. 'IFOR (now SFOR) was established by NATO in Dec. 1995 pursuant to the Dayton Peace Agreement and under the authority of the United Nations Security Council.' (See *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Case No. IT-95-9-PT, T. Ch. I, 18 Oct. 2000, at para. 39.) 'In 1996, Security Council Resolution 1088 (12 Dec. 1996) authorized the Member States . . . to establish SFOR as the legal successor to IFOR . . .' (*Ibid.*, at 42).
7. *Ibid.*, at para. 11.
8. See Castle, *supra* note 5. See also S. Davids, 'NATO "Gang" Jailed Over Todorović', *Birmingham Post*, 12 Dec. 2000, 9, where it is reported that 'Nine Serbs who were allegedly paid £15,500 by NATO to capture and smuggle [Todorović] into Bosnia, were yesterday jailed for kidnapping.'
9. See J. Swain, 'Serb Snatched by Rogue Bounty Hunter', *Sunday Times*, 23 July 2000, 25.
10. See Walker, *supra* note 5.
11. See Swain, *supra* note 9.

co-operate with the OTP in relation to the provision of information and evidence regarding the events in the former Yugoslavia.¹² As envisaged by the Plea Agreement,¹³ Todorović was sentenced to ten years' imprisonment for the single count to which he pleaded guilty. Despite the protests of OTP officials that 'Absolutely nothing has been sacrificed',¹⁴ in view of the gravity and extent of his crimes, it is fair to say that Todorović got off relatively lightly.

This article considers the nature of Todorović's various motions relating to illegal capture and the legal arguments advanced therein. In doing so, two other matters where similar arguments have been raised before the ICTY – that of *Prosecutor v. Slavko Dokmanović*¹⁵ and *Prosecutor v. Dragan Nikolić*¹⁶ – are touched upon. Finally, the discussion will consider the effects, if any, which the ICTY jurisprudence is likely to have on the functioning of the International Criminal Court (ICC).

2. DOKMANOVIĆ: PRE-TODOROVIĆ

Slavko Dokmanović was the first accused before the ICTY to make a claim of illegal capture.¹⁷ Dokmanović had been charged with grave breaches and violations of the laws and customs of war, and crimes against humanity in a confidential indictment dated 3 April 1996. On 27 June 1997 Dokmanović was arrested after being lured from the town of Sombor, in the Federal Republic of Yugoslavia (FRY),¹⁸ into UN-administered Croatia. The luring was a result of a combined operation by the OTP and the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTEAS).¹⁹ Dokmanović contended that the method of his arrest was tantamount to kidnapping and violated 'the Statute and Rules of the Tribunal, the sovereignty of the FRY, and international law'.²⁰ He further claimed that his right not to be deprived of his liberty and security of person except in accordance with legal procedures had been violated.²¹ While the OTP freely conceded that it had used 'trickery',²² it maintained that its actions were perfectly legal.

12. See Sentencing Judgment, *supra* note 3, at para. 5 *et seq.*

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

14. See J. Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects' (2002) 27 *Yale Journal of International Law* 111, at 127, where he remarked: 'Deputy Chief Prosecutor Graham Blewitt said, rather unconvincingly, that "Absolutely nothing has been sacrificed." But Blewitt acknowledged that there had been a recent decline in the number of arrests by SFOR and that "[he] would not be surprised if [the Todorović case] had something to do with it".'

15. *Prosecutor v. Slavko Dokmanović*, Decision on the Motion for Release by the Accused Slavko Dokmanović, Case No. IT-95-13a-PT, T. Ch. II, 22 Oct. 1997.

16. Case No. IT-94-2-PT, T. Ch. II.

17. For a closer look at the Dokmanović case see M. Scharf, 'The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY' (1998) 11 *LJIL* 369.

18. Consisting of Serbia and Montenegro.

19. Bait for Dokmanović included the possibility of compensation for lands formerly held by him in Croatia as well as promised meetings with an OTP investigator regarding atrocities Dokmanović claimed were committed by Croats in the Vukovar area.

20. See *Prosecutor v. Slavko Dokmanović*, *supra* note 15, at para. 13.

21. In this regard he relied on Art. 9(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR) and Art. 5(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, reproduced and discussed at note 152, *infra*.

22. See *Prosecutor v. Slavko Dokmanović*, *supra* note 15, at para. 57.

The Trial Chamber agreed, finding that the trickery used by the OTP did not amount to ‘a forcible abduction or kidnapping’.²³ Although Dokmanović had been ‘deceived, tricked, and lured into going into Eastern Slavonia’, the conduct was ‘consistent with the principles of international law and the sovereignty of the FRY’.²⁴ Because of its determination that the capture was legal, the Trial Chamber did not have to ‘decide . . . whether the International Tribunal has the authority to exercise jurisdiction over a defendant *illegally* obtained from abroad’.²⁵ This issue was to present itself less than a year later in the *Todorović* case.

3. THE *TODOROVIĆ* CASE

3.1. An overview of the legal process

Upon being presented to the ICTY in The Hague on 30 September 1998, Todorović entered a plea of not guilty to all 27 counts against him, and began a long process of filing motions for his release. The motions filed by Todorović were legion, and only those directly related to the illegal capture will be discussed here.²⁶ Referring to the series of motions that will be discussed below, the OTP noted that

Regardless of the various characterizations given by the Accused to [his] numerous Motions, they all essentially amount to an assertion that the manner in which he was apprehended entitles him to the ultimate remedy of release from the Tribunal’s custody and his repatriation to the Federal Republic of Yugoslavia.²⁷

Todorović’s motions relating to illegal capture came in four waves:

- 1 a motion requesting an evidentiary hearing and disclosure from the OTP;
- 2 motions requesting judicial assistance to compel the production of information from the FRY and SFOR;
- 3 motions requesting his release; and
- 4 a second volley of motions requesting judicial assistance to compel production of information from the FRY, SFOR and the United States.

3.1.1. *The motion for an evidentiary hearing and to compel disclosure from the OTP*

In February 1999 Todorović filed a motion requesting an evidentiary hearing on matters relating to his arrest, detention, and delivery to the Tribunal. He further

23. *Ibid.*

24. *Ibid.* The Trial Chamber emphasized the fact that Todorović left the FRY willingly and was not arrested until he was outside that state.

25. *Ibid.*, at para. 78 (emphasis in original).

26. The OTP described the motions brought by Todorović as ‘many and various’ and the litigation itself as ‘long and tortuous’. See para. 11 of the Prosecutor’s Response to Stevan Todorović’s ‘Notice of Motions for Judicial Assistance’, filed 8 Dec. 1999. In fact, the motions in the case were so frequent and overlapping that the OTP took the extraordinary step of issuing an Annex mapping out the procedural history of the case; see Ann. A to the Prosecutor’s Appeal Against the Trial Chamber’s Decision on a Motion for Judicial Assistance to be Provided by SFOR and Others dated 18 Oct. 2000 or, Alternatively, Application for Leave to Appeal Against that Decision and Request for a Stay of the Decision, filed 25 Oct. 2000.

27. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 8.

requested: the right to give evidence in the matter; a discovery order directed to the OTP to make available all documents in its possession relating to his detention, arrest, and delivery to the Tribunal; his return to the FRY; and dismissal of his indictment.²⁸ He alleged that he was ‘illegally kidnapped by four unknown individuals in the FRY’²⁹ and argued that this raised ‘the issue of the Prosecution’s involvement in an illegal abduction . . .’.³⁰ He argued further that even if the OTP was not involved, the method of capture still went to the legality of his being brought before the Tribunal. The Trial Chamber orally rejected the motion on 4 March 1999 and, on 25 March 1999, issued a short written decision³¹ reaffirming its oral rejection of the Motion and ruling that ‘the Motion does not contain sufficient factual and legal material . . . to warrant an evidentiary hearing’.³² An appeal was denied,³³ with the Appeals Chamber finding in a 13 October 1999 Decision that it had no basis to intervene as there was no abuse of discretion on the part of the Trial Chamber.³⁴

3.1.2. *Motions to compel disclosure from the FRY and SFOR*

On 21 and 22 September 1999, while the above-discussed motion was still under appeal, Todorović brought motions seeking orders from the Trial Chamber for the production of documents and witnesses by the Ministry of the Interior of the FRY and by SFOR.³⁵ He claimed that these materials would be necessary for the evidentiary hearing that would result if he was successful in his then pending appeal.³⁶ On 21 October 1999, in view of the fact that Todorović’s appeal was not successful (and no evidentiary hearing was ordered to take place), the Trial Chamber dismissed the motions.³⁷

3.1.3. *Motions for release*

When it became clear that an evidentiary hearing was not to be ordered by the Appeals Chamber (and that the Trial Chamber was not going to compel SFOR and the FRY to provide documentation and witnesses in support of such a hearing),

28. As summarized by the Trial Chamber in *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Decision Stating Reasons for Trial Chamber’s Order of 4 March 1999 on Defence Motion for Evidentiary Hearing on the Arrest of the Accused Todorović, Case No. IT-95-9-PT, T. Ch. I, 25 March 1999, at 2.

29. *Ibid.*

30. *Ibid.* The OTP denied having ‘prior information of any proposed operation to secure the arrest of the accused, and [stated] that it first learned of the accused’s arrest on 27 Sept. 1998 when it was contacted by SFOR’. (*Ibid.*)

31. *Ibid.*

32. *Ibid.*

33. *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Decision on Appeal by Stevan Todorović Against the Oral Decision of 4 March 1999 and the Written Decision of 25 March 1999 of Trial Chamber III, Case No. IT-95-9-PT, A. Ch., 13 Oct. 1999.

34. *Ibid.* at 2. The Appeals Chamber stressed that the issue before the Trial Chamber was not whether there was a kidnapping and what its legal effects might be, but whether there was an abuse of discretion on the part of the Trial Chamber in deciding not to grant an evidentiary hearing into the alleged kidnapping of the accused.

35. Accused Stevan Todorović’s Motion for an Order Requesting and Ordering the Ministry of the Interior of the Federal Republic of Yugoslavia (Serbia and Montenegro) to Provide Documents and Witnesses, filed on 21 Sept. 1999; Accused Stevan Todorović’s Motion for an Order Requesting and Ordering Security Force for Bosnia and Herzegovina to Provide Documents and Witnesses, filed 22 Sept. 1999.

36. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, Ann. A, at para. 6.

37. See *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Order Denying Motions for Orders of Assistance, Case No. IT-95-9-PT, T. Ch. I, 21 Oct. 1999.

Todorović changed tack somewhat – all the while relying on what he considered to be his illegal capture as the basis of his course of action. On 21 October 1999, some eight days after the Appeals Chamber denied Todorović’s appeal against the Trial Chamber’s decision not to allow the Motion for an Evidentiary Hearing (and the same day it denied his motion to compel disclosure from the FRY and SFOR), Todorović filed a motion asking that he be returned to the FRY.³⁸ Here again he based his request for relief on an assertion that his arrest was illegal, arguing that it was in violation of state sovereignty and contrary to customary international law.³⁹ He attached to this motion a statement setting out his allegations regarding the events surrounding his arrest and delivery to the ICTY.⁴⁰ Shortly thereafter, on 15 November 1999, Todorović filed a habeas corpus motion, yet again basing his claim on allegations of illegal capture.⁴¹ The Trial Chamber issued an oral Decision on 23 November 1999 in which it found that Todorović’s statement ‘was a new circumstance such that it justified ordering an evidentiary hearing on the legality of the arrest and detention of the Accused’.⁴²

3.1.4. *Motions to compel disclosure from SFOR, the United States, and the FRY*

On 24 November 1999, the day after the Trial Chamber ordered an evidentiary hearing, Todorović brought a further motion seeking an order that SFOR provide him with documents and witnesses ‘relating to [his] abduction, kidnapping and detention’.⁴³ In the words of the Trial Chamber, the purpose of the motion was ‘to secure certain information and documents, which the accused believes to be in the custody and control of SFOR, and which will assist him in his motions challenging the legality of his arrest’.⁴⁴ Todorović also sought similar documentation from the OTP.⁴⁵

On 7 March 2000 the Trial Chamber ordered the OTP to provide Todorović with all relevant reports and material in its possession, including the identity of the individuals involved in Todorović’s arrest, as well as to inform him of the steps it had taken to obtain relevant information from SFOR.⁴⁶ On 8 May 2000, following an unsuccessful appeal against the 7 March 2000 Order,⁴⁷ the OTP made the required disclosure. However, in the words of the Trial Chamber, it ‘provided only a one-page report about the arrest of the accused, prepared by the investigator who effected the arrest on 27 September 1998, Mr Ole Brøndum. The Prosecution asserted that,

38. See Notice of Motion for an Order Directing the Prosecutor to Forthwith Return the Accused Stevan Todorović to the Country of Refuge, filed 21 Oct. 1999.

39. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, Ann. A, at para. 7.

40. *Ibid.* His decision to file a statement represented a change, as Todorović had previously been unwilling to file an affidavit or to testify absent special measures; see Prosecution Response to the Appeal Brief, *supra* note 4, at paras. 16 and 17.

41. Accused Stevan Todorović’s Petition for a Writ of Habeas Corpus, filed 15 Nov. 1999.

42. *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Decision on the Application for Leave to Appeal against the Trial Chamber Decision of 7 March 2000, Case No. IT-95-9-PT, A. Ch. (Bench), 3 May 2000, at 3.

43. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, Ann. A, at para. 12.

44. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 59.

45. *Ibid.*, at para. 3.

46. Order on Defence Requests for Judicial Assistance for the Production of Information, issued 7 March 2000.

47. See Decision on Leave to Appeal of 3 May 2000, *supra* note 42.

apart from this report, it had none of the designated material within its custody and control.⁴⁸ Given the OTP's representation that it possessed nothing but this one-page report on the subject of Todorović's arrest, the robust nature of its refusal to provide it from February 1999 to May 2000 seems extraordinary.

This lack of information from the OTP, when combined with SFOR's refusal to co-operate with respect to Todorović's requests,⁴⁹ resulted in the Trial Chamber, on 1 June 2000, ordering that SFOR file a response to the Motion for Judicial Assistance.⁵⁰ A hearing was initially scheduled for 23 June 2000, but, to accommodate requests by SFOR, was twice rescheduled and was ultimately held on 25 July 2000. SFOR, in the end, decided not to attend the hearing.⁵¹ In a filing on the same day as the hearing, 'the Defence specified the relief it sought, including, for the first time, a request for judicial assistance directed at the United States of America'.⁵² And the filings did not end there: in early August 2000, after the hearing and pending the Trial Chamber's decision, Todorović brought another motion requesting judicial assistance from the FRY.⁵³

In its Decision of 18 October 2000⁵⁴ the Trial Chamber ordered what to some was the unthinkable: that by 17 November 2000 SFOR and the North Atlantic Council, as well as the 33 states participating in SFOR, provide Todorović with evidence relating to his arrest, including the identities of the individuals who were involved in his arrest. Furthermore, the Trial Chamber issued a subpoena requiring the testimony of the commanding general of SFOR, 'the highest ranking military officer in the United States of America'.⁵⁵

3.1.5. *The events following the 18 October 2000 Decision*

On 26 October 2000, the OTP filed a document appealing against the 18 October 2000 Decision to the Appeals Chamber and calling on a Bench of the Appeals Chamber

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48. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 4. The OTP's position on this point drew questioning from the Trial Chamber in reply to which it stated that it had complied with all orders of the Trial Chamber and had produced 'every document it ever had in its possession related to the arrest of Mr Todorović'. *Ibid.*, at para. 31.
49. Todorović had received a 'letter from the Office of the Legal Advisor of SFOR, Colonel James M. Coyne, dated 24 March 2000, declining to provide the material sought and stating: "It is the position of SFOR that the ICTY has no authority to order SFOR to disclose any information"'. *Ibid.*, at para. 5.
50. Scheduling Order for Hearing on Defence Motion for Judicial Assistance, issued 1 June 2000, in which SFOR was directed to file a written response by 16 June 2000. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, Ann. A, at para. 22.
51. SFOR did, however, submit a written response to the motion; see SFOR Submission, filed 10 July 2000.
52. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 7. Also on 25 July 2000, Todorović 'filed a *Defence Notice to Trial Chamber as to Specific Relief Sought on Motion for Judicial Assistance* and asked the Trial Chamber to issue an "Order and Subpoena Duces Tecum for the Commanding General of SFOR", an "Order and Subpoena Ad Testificandum Directed to General Shinseki", and a "Request for Judicial Assistance to United States of America"'. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, Ann. A, at para. 28.
53. 'On 1 Aug. 2000 the Accused filed *Accused Stevan Todorović's Motion Requesting Judicial Assistance from the Federal Republic of Yugoslavia [Serbia and Montenegro] to Provide Documents and Witnesses . . .* and a statement in support thereof.' See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, Ann. A, at para. 30.
54. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6.
55. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 22, where he is so described.

to grant it leave to appeal.⁵⁶ On 2 November 2000, a series of communications was received by the Appeals Chamber⁵⁷ from NATO and several of its member states⁵⁸ calling for a review of the Decision and for its stay. On 8 November 2000 the Appeals Chamber suspended the execution of the Decision and requested interested parties, including the OTP, to submit written briefs by 15 November 2000.⁵⁹ Todorović was given until 22 November 2000 to file a written response, and an oral hearing was ordered for 28 November 2000.

In Decisions issued by the full Appeals Chamber on 4 December 2000⁶⁰ and by a Bench of the Appeals Chamber on 5 December 2000,⁶¹ the Appeal and Application for Leave to Appeal of the OTP were rejected, the former because the Appeals Chamber held that there was no right of appeal as the motion decided in the impugned decision was not

a preliminary motion as defined by Rule 72(A) of the Rules [of Procedure and Evidence of the Tribunal] and that therefore there can be no right of appeal under Rule 72(B)(i) of the Rules...⁶²

The latter – embarrassingly for the OTP⁶³ – was rejected because the Bench of the Appeals Chamber ruled that the OTP had filed its appeal a day late.⁶⁴

Perhaps anticipating that it was not to succeed in its appeals, by the time the Decisions rejecting the Appeal and the Application for Leave to Appeal were issued, the OTP had already entered into the Plea Agreement with Todorović, dated 28 November 2000. By its terms, Todorović would plead guilty to one count

56. An Appeal to the Appeals Chamber and an Application for Leave to Appeal directed to a Bench of the Appeals Chamber were both contained in a single filing by the OTP marked as having been filed on 25 Oct. 2000 (*ibid.*). The document was, however, determined by the Appeals Chamber to have been filed on 26 Oct. 2000, a difference that proved to be very significant; see note 64 and accompanying text, *infra*.

57. See *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Decision and Scheduling Order, Case No. IT-95-9-PT, A. Ch., 8 Nov. 2000.

58. These included Canada, France, Germany, Italy, the Netherlands, Norway, the United Kingdom and the United States. A communication was also filed on 2 Nov. 2000 by Denmark; however, it did not explicitly state whether it was seeking a review of the Trial Chamber's Decision. *Ibid.*, at 2. For a summary of the arguments raised by the United States in its brief filed before the Appeals Chamber on 15 Nov. 2001, see S. Murphy, 'ICTY Order for Disclosure of Information by NATO/SFOR' (2001) 95 AJIL 401, at 402.

59. See Decision and Scheduling Order, *supra* note 57, at 3.

60. *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Decision on Interlocutory Appeal Filed by Prosecutor on 26 Oct. 2000 from Trial Chamber Decision Dated 18 Oct. 2000, Case No. IT-95-9-PT, A. Ch., 4 Dec. 2000.

61. *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Decision on Application for Leave to Appeal filed by Prosecutor on 26 Oct. 2000 from Trial Chamber Decision dated 18 Oct. 2000, Case No. IT-95-9-PT, A. Ch. (Bench), 5 Dec. 2000.

62. See Decision on Application for Leave to Appeal of 5 Dec. 2000, *ibid.*, at 2. Rule 72(B)(i) of the Rules allows for interlocutory appeals as of right *only* against decisions on preliminary motions challenging jurisdiction.

63. Particularly so, in view of the fact that, as the Appeals Bench points out, provision exists for the request of an extension of time under Rule 127 and the OTP did not ask for such an extension. See Decision on Interlocutory Appeal, *supra* note 60, at 2.

64. A direction by the OTP to the effect that it 'deemed' the relevant dates to be different from those indicated by the Registry found little favour with the Trial Chamber. According to Rule 73(C), an application to a Bench of the Appeals Chamber for leave to appeal must be 'filed within seven days of the filing of the impugned decision'. The OTP felt entitled to 'deem' the date of the decision it was appealing to be 19 Oct. 2000, rather than considering it to have been filed on 18 Oct. 2000, as indicated by the Registry. The OTP further noted its view that its own document was filed in the 'late afternoon of 25 Oct. 2000' rather than on 26 Oct. 2000. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 1, n. 2.

(persecution as a crime against humanity) among the 27 against him and he would agree to

withdraw all motions pending before the Trial Chamber relating to the evidentiary hearing regarding the circumstances of his arrest and his request for judicial assistance. Specifically, he would withdraw the allegations that his arrest was unlawful and that SFOR or NATO was involved in any unlawful activity in relation to his arrest.⁶⁵

On 29 November 2000 the OTP and counsel for Todorović filed a joint motion disclosing the terms of the Plea Agreement to the Trial Chamber.⁶⁶ On 13 December 2000 Todorović entered a plea of guilty to the single count⁶⁷ and, on 31 July 2001, the Trial Chamber sentenced him to ten years' imprisonment less the nearly three years he had spent in custody awaiting the outcome of his case.⁶⁸ No appeal was filed against the Sentencing Judgment, and on 12 December 2001 Todorović was transferred to Spain to serve his sentence.⁶⁹

3.2. The legal arguments

It is clear from Todorović's various motions that his goal was to rely on the nature of his capture and the sensitivities of SFOR, NATO, and the OTP to disclosure of any information relating thereto, in order to obtain his release and the withdrawal of the charges against him. The OTP, for its part, had two goals in the case which were, at times, incompatible. First, it wanted to prevent Todorović from gaining access to SFOR documents in order to ensure the continued co-operation of that organization. Second, it wanted to ensure that justice would be done and that Todorović – and potentially other accused captured in similar circumstances – would be unable to rely on his method of capture as a means to gain his release. The ultimate result in the case (26 out of 27 of the charges against Todorović being dismissed in return for his renouncing his right to access SFOR information) appears to be a vindication of Todorović's strategy and may be an indication that the OTP's desire to ensure that SFOR did not have to disclose any information relating to the capture of Todorović was its primary concern, surpassing all else, including its desire to ensure the accused did not escape justice.⁷⁰

The focus of the arguments that emerged in response to Todorović's motions⁷¹ varied somewhat depending on whether they were being advanced by SFOR or the

65. [Http://www.un.org/icty/glance/index.htm](http://www.un.org/icty/glance/index.htm).

66. See Sentencing Judgment, *supra* note 3, at para. 4.

67. *Ibid.*, at para. 5.

68. *Ibid.*, at para. 117.

69. See *supra* note 65.

70. The OTP's concern with preserving the secrecy of SFOR was so great that it formally requested the Trial Chamber for prior notice of any decision it might make compelling SFOR to provide documents so that the OTP could decide whether to withdraw the indictment altogether. See Prosecutor's Response to the 'Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Move to Dismiss Indictment' filed by Stevan Todorović on 10 Feb. 1999, filed on 22 Feb. 1999, at para. 53.

71. Most arose in his Motions to compel disclosure from SFOR, the USA and the FRY; see section 3.1.4, *infra*.

OTP. In short, the arguments of the OTP and/or SFOR were as follows:⁷²

- 1 that the Tribunal lacked the authority to order the disclosure from SFOR;
- 2 that there was no *prima facie* basis for the Trial Chamber to order a judicial inquiry;
- 3 that concerns regarding SFOR's operational security should prevent the Trial Chamber from making the requested order;
- 4 that, even assuming that the facts were as alleged by Todorović, there should be no disclosure ordered from SFOR because the facts did not entitle Todorović to the remedy sought; and
- 5 that there was no unlawful breach of the FRY's sovereignty.

3.2.1. *Lack of authority on the part of the ICTY to order disclosure from SFOR*

The argument that the Trial Chamber lacked the power to order disclosure occupied the bulk of the Trial Chamber's attention.⁷³ This argument was primarily advanced by SFOR.⁷⁴ The Trial Chamber took it as read that it had the power to issue binding orders on states,⁷⁵ but examined the question of whether it had a similar power against SFOR. In addressing this, the Trial Chamber considered the establishment of SFOR, its relationship with the ICTY,⁷⁶ the scope of Article 29 of the Statute of the ICTY,⁷⁷ and the jurisprudence of the ICTY on similar issues, and concluded that it was 'competent to issue a binding order under Article 29 of the Statute to the 33 participating States of SFOR, and through its responsible authority, the North Atlantic Council, to SFOR itself.'⁷⁸ Judge Robinson, in his Separate, Concurring

72. There was considerable overlap between the arguments of the OTP and SFOR. With the exception of arguments 1 and 3, the arguments are primarily considered herein in the manner they were advanced by the OTP.

73. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at paras. 38-58. The argument occupied at least three-quarters of the Trial Chamber's legal reasoning.

74. Initially the OTP also advanced the argument, but it later capitulated on the point. The OTP had originally 'contended that the power to order SFOR to produce documents was not a power that the Trial Chamber had . . .'. Later, however, it stated that 'although there were potential circumstances under which it would be appropriate for the Trial Chamber to make such an order, it was not appropriate in this particular situation'. *Ibid.*, at para. 31.

75. In support of this finding the Trial Chamber relied on Article 29 of the Statute of the ICTY (which obliges states to co-operate with the ICTY in its investigation and prosecution, including an obligation to arrest and surrender ICTY indictees), Rule 54*bis* of the Rules of Evidence (which provides for orders for the production of documents to be directed to states) and its previous jurisprudence (*Prosecutor v. Tihomir Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108, A. Ch., 29 Oct. 1997). *Ibid.*, at paras. 37 and 38.

76. Which includes a power on the part of SFOR to detain ICTY indictees and transfer them to The Hague. *Ibid.*, at paras. 43-45.

77. Based on a 'purposive construction of the Statute', the Trial Chamber found that 'Article 29 should . . . be read as conferring on the International Tribunal a power to require an international organization or its competent organ such as SFOR to cooperate with it in the achievement of its fundamental objective of prosecuting persons responsible for serious violations of international humanitarian law, by providing the several modes of assistance set out therein.' *Ibid.*, at para. 48.

78. *Ibid.*, at para. 58. The Trial Chamber noted its intention to follow an earlier decision in the Kordić case involving documents requested 'from the European Community Monitoring Mission (ECMM) and then from its responsible authorities, the Presidency of the European Union Council and the Commission of the European Union. When no documents were produced in response to such formal requests, the Trial

Opinion, considered the principle behind the finding:

As a matter of principle ... the Tribunal must be competent to order an arresting authority to produce certain material relevant to the arrest of a person who is challenging the legality of his arrest; otherwise, that person's right under customary international law to mount such a challenge may be seriously prejudiced and even nullified. No legal system, whether international or domestic, that is based on the rule of law, can countenance the prospect of a person being deprived of his liberty, while its tribunals or courts remain powerless to require the detaining or arresting authority to produce, in proceedings challenging the legality of the arrest, material relevant to the detention or arrest; in such a situation, legitimate questions may be raised about the independence of those judicial bodies.⁷⁹

3.2.2. *Absence of a prima facie case*

A second argument – and one that was quickly dispensed with – was the OTP's assertion that there was no prima facie basis for a judicial inquiry. Once again the OTP characterized the defendant's request for information as a 'fishing expedition',⁸⁰ and asserted that

no credible evidence has been put forward to indicate that members of the Office of the Prosecutor or of any other institution, including SFOR, have violated the rights of the accused.⁸¹

In the light of the fact that the OTP had been making the identical argument since Todorović's first motion was filed in February 1999,⁸² it appeared unlikely to win the day. In fact, the argument appeared to do little but antagonize the Trial Chamber, which noted:

The Prosecution sought to argue once more that there is no basis in the evidence to date which entitled Todorović to obtain such material. As the Trial Chamber, in its Order of 7 March 2000, has already held that there *is* such a basis, and as the application by the Prosecution for leave to appeal against that decision was refused, it is not open to the Prosecution to re-agitate that issue now.⁸³

3.2.3. *Arguments relating to SFOR's operational security*

Arguments that to provide the requested disclosure would jeopardize SFOR's operational security were primarily, though not exclusively,⁸⁴ made by SFOR. In response

Chamber issued an Order requiring the various Member States of the European Community at the time of establishment of the ECMM to produce the relevant documents.' *Ibid.*, at para. 54. See *Prosecutor v. Dario Kordić et al.*, Case No. IT-95-14/2-T, Order for the Production of Documents by the European Community Monitoring Mission and its Member States, T. Ch. III, 4 Aug. 2000.

79. *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, and Simo Zarić*, Separate Opinion of Judge Robinson, Case No. IT-95-9-PT, T. Ch. III, 18 Oct. 2000, at para. 7.

80. *Ibid.*, at paras. 2 and 16.

81. *Ibid.*, at para. 16.

82. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at paras. 17–23. The argument was again made and was squarely rejected by the Trial Chamber in its 23 Nov. 1999 Decision to order an evidentiary hearing; it was made yet again by the OTP and again rejected by the Trial Chamber in its Order of 7 March 2000, *supra* note 46.

83. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 59 (emphasis in original).

84. Counsel for Todorović took exception to the OTP's advancing an argument based on SFOR security concerns (*ibid.*, at para. 17), given that the OTP did not represent SFOR nor, presumably, have any special knowledge of

to these concerns, Todorović had signalled a willingness ‘to reach an acceptable resolution that would address both the Defence need for information and SFOR’s concern to protect its security and operational methods’.⁸⁵ Such an approach, which would have seen SFOR engaging with counsel for the accused in a discussion of mutual concerns relating to the information, was rejected by SFOR – to its ultimate disadvantage. In dismissing SFOR’s objections relating to national security, the Trial Chamber noted that ‘It was open to SFOR to make specific objections to the disclosure of particular documents or other material at the hearing... but SFOR chose not to do so.’⁸⁶

3.2.4. *Arguments that the motion should be dismissed because Todorović was not entitled to the relief he sought*

From the start,⁸⁷ the main strategy of the OTP – a strategy later adopted by SFOR – was to attempt to convince the Trial Chamber that there was no need for Todorović to have details of the circumstances surrounding his arrest in order to conduct his defence. This was so, the OTP argued, because it was willing to ‘proceed to a determination of the merits of this action *on the basis of the current record viewed in the light most favourable to the Defence*’.⁸⁸ As such, it argued, there were no facts in dispute, merely the legal conclusions to be drawn therefrom dealing with what an appropriate remedy might be. As to the question of remedy, the OTP asserted that, because Todorović’s allegations were not sufficiently grave, the requested remedy – dismissal of the indictment and immediate release – was unavailable to him. To make such an order would have been an abuse of the Trial Chamber’s discretion⁸⁹ and have the added disadvantage of alienating SFOR (which had shown itself to be a staunch ally of the Tribunal). It would appear that the OTP framed the issues in this way as part of a strategy of refocusing the issues away from the question of whether Todorović had a right to access SFOR documents, instead directing the attention of

the nature of its security concerns. The OTP later modified its approach somewhat, arguing that an order for disclosure would jeopardize the voluntary co-operation of states and organs such as SFOR: ‘Any requirement by the Tribunal that such states and entities disclose such details to the Tribunal may lead to a withdrawal of their willingness to provide such voluntary assistance. This would be contrary to the interests of the Tribunal and would seriously jeopardize its ability to fulfil its mandate.’ See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 21.

85. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 26.

86. *Ibid.*, at para. 60.

87. An argument that the motion should be dismissed because Todorović was not entitled to the requested relief was made by the OTP in response to Todorović’s first motion in Feb. 1999 requesting an evidentiary hearing and disclosure from the OTP; see Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 24 *et seq.* The Trial Chamber, in its Oral Decision of 4 March 1999 and its subsequent Written Decision of 25 March 1999, *supra* note 28, did not, however, address this argument, as it decided the matter on other grounds. See discussion at section 3.1.1, *supra*.

88. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 5 (emphasis in original). The OTP was willing to proceed to a determination of the merits of the case ‘even on the assumption that all facts alleged by the Defence have been proven’. See Prosecution’s Response to the Defence Notice to Trial Chambers as to Specific Relief Sought on Motion for Judicial Assistance, filed 31 July 2000, at paras. 23 *et seq.*, as referred to in Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 5, n. 4. The willingness of the OTP to take the allegations of the accused to be true was ‘solely for the sake of argument in relation to the accused’s Motion. The Prosecution does not otherwise concede or contend that the circumstances surrounding the arrest of the accused and his transfer to the Tribunal involved any violation of international law.’ See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 26.

89. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 5.

the Trial Chamber to the question of the appropriateness of Todorović's requested remedy.

For the OTP's argument to have succeeded, the Trial Chamber would have had to accept both of its aspects: (a) that Todorović's allegations had been accepted by the OTP and therefore his having access to SFOR documentation to advance his defence was no longer necessary; and (b) that on the 'agreed' facts, Todorović's claim to release and dismissal of the charges against him was not sustainable. As we shall see, the Trial Chamber was not convinced by the first argument; as such, it did not consider the second.

This first aspect of the OTP's argument appears to be fundamentally flawed: it asks the Trial Chamber to find disclosure unnecessary because the ultimate remedy is not available on the facts – *but the very purpose of the disclosure is to reveal to Todorović what the facts are*.⁹⁰ The only way in which the argument could be convincing would be if the OTP could satisfy the Trial Chamber that the disclosure could not *under any circumstances* lead to the requested remedy. While the OTP *was* willing to make such an extraordinary assertion⁹¹ (something which is particularly surprising coming from a body which had earlier represented that the extent of the material it possessed on the circumstances of the arrest was a one-page report⁹²), the Trial Chamber appeared to disregard it. The Trial Chamber rejected the argument with the following statement:

This argument proceeds on the assumption that the evidence is complete. That assumption is erroneous, as what Todorović is seeking is further evidence from SFOR which will assist him to obtain the relief which he seeks. Only when Todorović has had the opportunity to present all the available evidence will it be possible for the Trial Chamber to determine whether he is entitled to the relief he seeks.⁹³

Despite representations by the OTP and SFOR that the facts were not in dispute for the purposes of the motions,⁹⁴ it appears to have been obvious to the Trial Chamber that they were – if for no other reason than that all of the facts were not yet available to all of the parties. Even if Todorović's allegations were accepted 'at their highest' by the OTP and SFOR for the purposes of the motions – something which was by no means clear⁹⁵ – he was, nevertheless, not in a position to make fuller or further

90. See S. Lamb, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia', (1999) 70 BYIL 167, where the author, herself a Legal Advisor to the OTP, appears to view this approach as badly flawed. She notes at 211: 'Despite the expressed preference of the Prosecutor that close judicial scrutiny of the facts surrounding arrests effected by multi-national forces be avoided, it would nevertheless be highly undesirable for an ICTY Trial Chamber to abdicate its judicial function in this manner.'

91. In its pleadings, the OTP noted: 'If the remedy is not available to the Accused, then there is no reason to permit the discovery being sought by the Accused since it would amount to nothing more than a 'fishing expedition' that could not under any circumstances, regardless of what information the Accused might obtain from SFOR, lead to his release' (emphasis added). See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 20.

92. See note 48 and accompanying text, *supra*.

93. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 59.

94. See *supra* note 88.

95. The OTP's assertion that it was willing to assume Todorović's allegations to be true, and to take them 'at their highest' was quite misleading. Instead of taking his allegations at their highest, the OTP referred to a carefully drawn list of facts that it was willing to admit for the purposes of the motions and made no concessions additional to these (see *supra* note 88). Important omissions from the OTP's list included the

allegations without having the requested disclosure. Without the full story of what happened surrounding his arrest (information presumably possessed by SFOR and its contributing states, and, perhaps, the OTP), Todorović was disadvantaged; he was only in a position to make allegations relating to conduct of which he had first-hand knowledge. There was nothing to say that disclosure of the full story of his arrest would not show treatment that was significantly worse than he had alleged.⁹⁶ As such, the Trial Chamber correctly observed that it would only be appropriate to turn to the issue of the suitability of the remedy where the evidence was complete.⁹⁷

Despite the finding of the Trial Chamber that the evidence was not complete and despite its decision not to go on to examine the suitability of the remedies requested by Todorović, the arguments by the OTP and SFOR⁹⁸ in this regard warrant analysis.⁹⁹ In short, the OTP argued that Todorović's request that his indictment be dismissed and he be released stemmed from a misunderstanding of the law. Such a remedy was only available in the most egregious situations and the conduct he alleged was not sufficiently egregious.¹⁰⁰ Using the hypothetical example of an accused in a national legal system who was charged with murder and had been illegally beaten by police during arrest, the OTP argued that international norms do not necessarily require that the prosecution be terminated in the face of illegal behaviour. Other remedies may be appropriate and

Withdrawal of the indictment altogether would be required only in extreme cases, where *any* continuation of the trial proceedings would in all the circumstances be fundamentally incompatible with the right to a fair trial and the integrity of the

accused's allegations of collusion between the OTP and SFOR, as well as allegations that the accused was beaten by the forces that captured him. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at paras. 24–26.

96. It might, for example, have come to light upon full disclosure of the facts that there was an extreme disregard of national or international law by SFOR of an even more egregious nature than that alleged by the accused, or that there had been collusion between the OTP and SFOR. Although not made explicit in the Trial Chamber's reasons, insight into the thinking of the judges may perhaps be found in the following passage from the Transcript of the Trial Chamber hearing of 4 March 1999, at 363–4 (as relied upon in Lamb, *supra* note 90, at 211, n. 156):

the case law establishes that in order for the Tribunal to refrain from exercising its jurisdiction, it must be shown that the illegalities taint [...] the whole justice system, but [that has to be established and] isn't that the purpose of the evidentiary hearing? Wouldn't the evidentiary hearing, if granted, assist in showing whether there was any connection between the [Office of the Prosecutor] and the alleged abduction?

97. This was particularly so given that at the core of the OTP's argument on the issue of the availability of the remedy was the assertion that *the treatment of Todorović was not sufficiently egregious to justify the requested relief*; see notes 100–02 and accompanying text, *infra*.

98. Because the bulk of the arguments on the issues relating to remedy come from the OTP, this analysis follows its approach more closely than that of SFOR. Nevertheless, many aspects of the arguments of the OTP and SFOR are identical. Similar arguments were also raised by the United States, in its requests for a review of the 18 Oct. 2000 Decision; see notes 57 and 58 and accompanying text, *supra*.

99. In part due to the fact that in the Nikolić case (see *supra* note 16) the OTP has raised them once again in response to an accused's argument of illegal capture; see notes 172–85 and accompanying text, *infra*.

100. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 27, where the OTP observed: 'The accused's Motion appears to proceed from the assumption that if there is any breach of the fundamental rights of an accused in the criminal justice process, the accused will be entitled to have the indictment dismissed and to be released. This is clearly not the case. In many cases, where there is a violation of the rights of an accused, other remedies may be available to cure any resulting injustice.'

justice system. In each case it is therefore necessary to identify exactly which rights of the accused are said to have been violated.¹⁰¹

To the OTP the ‘question, then, is whether such illegalities in the accused’s forcible removal from the FRY would require that the indictment against the accused be dismissed, and that the accused be released from custody’.¹⁰²

In order to answer its question, the OTP directed the Trial Chamber to the jurisprudence of various national courts in cases of illegal interstate capture – that is, cases where an accused was brought before a court in state A after having been captured in state B by the authorities of state A in a manner that was in violation of state B’s laws and its sovereignty in international law.

Approaches to exercising jurisdiction over a defendant brought before a national court by illegal inter-state capture. As is well known, two approaches exist in national jurisprudence on the question of whether illegal capture in one state affects the ability of the other state properly to exercise its jurisdiction over an accused.¹⁰³ According to one school of thought, it is perfectly proper for a national court to exercise criminal jurisdiction over a defendant who has been illegally captured from another state in violation of the sovereignty of that other state. In support of this approach the OTP relied primarily on the cases of *Eichmann*¹⁰⁴ and *Alvarez-Machain*.¹⁰⁵ In the words of the Israeli Supreme Court in *Eichmann*,

It is an established rule of law that a person standing trial for an offence against the laws of the land may not oppose his being tried by reason of the illegality of his arrest or of the means whereby he was brought to the area of jurisdiction of the country.¹⁰⁶

This approach may be summarized in the Latin maxim *male captus bene detentus* (that is, a person improperly seized may nevertheless be properly detained), the international precedent for which is said to go back to the *Eichmann* case.¹⁰⁷ After the abduction of the Nazi war criminal Adolf Eichmann from Argentina, the UN Security Council adopted a resolution finding Argentina’s sovereignty to have been

101. *Ibid.*, at para. 28 (emphasis in original). An argument that in order to determine the suitability of the accused’s proposed remedy the potential fairness of the trial must be considered ‘in all the circumstances’ with a careful examination of ‘exactly which rights of the accused are said to have been violated’, is not easily reconciled with the OTP’s earlier argument that disclosure from SFOR on the facts surrounding Todorović’s arrest was unnecessary, as the matter could be decided on the limited facts available.

102. *Ibid.*, at para. 30. As noted by the OTP, this is the very question left open in the *Dokmanović* case, see section 2, *supra*.

103. A thorough analysis of the different approaches of state courts to illegal inter-state capture is beyond the scope of this discussion. For a good overview of the different approaches to the question of how national courts act in the face of an illegal abduction of an accused, see Lamb, *supra* note 90, 228 *et seq.*

104. *The Attorney-General of the Government of Israel v. Eichmann* (Israel, District Court 1961, Supreme Court 1962), (1961) 36 ILR 5, at 57–76, 304–308; reproduced in part in C. Oliver, ‘The Attorney-General of the Government of Israel v. Eichmann’, (1962) 56 AJIL 805.

105. *United States v. Alvarez-Machain* (USA, United States Supreme Court), 504 US 655 (1992). In addition, the OTP relied on ‘references given in *Oppenheim’s International Law*, Vol. I (9th edn, Jennings and Watts (eds.), 1992), 389 n. 16 [as well as] *Karlsruher Kommentar zur Strafprozeßordnung* (3rd edn, Pfeiffer (ed.), 1993 at 68’ in support of this approach. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 31, n. 9.

106. See Oliver, *supra* note 104, at 835.

107. See M. Scharf, ‘The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal’, (2000) 49 *DePaul Law Review* 925, at 968.

affected and calling for reparations,¹⁰⁸ but not requiring his return. As noted by Scharf, 'Eichmann was subsequently tried, convicted, and executed in Israel without further objection by the international community.'¹⁰⁹

A more recent example of the *male captus bene detentus* approach was the US case of *Alvarez-Machain*.¹¹⁰ Humberto Alvarez-Machain, a Mexican national, was abducted from Mexico by US officials and taken forcibly to the United States to stand trial for kidnapping and murder. His abduction took place without the permission of the Mexican government and without regard to an existing extradition treaty. A majority of the US Supreme Court held that his abduction did not prohibit his trial in the United States and confirmed the existing rule that 'the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction"'.¹¹¹ While conceding that the abduction 'may be in violation of general international law principles',¹¹² the majority of the Supreme Court held that it was not in violation of the extradition treaty between the United States and Mexico.¹¹³ The decision generated criticism in the United States, condemnation by the UN Working Group on Arbitrary Detention, and widespread outrage in the international community.¹¹⁴

The other approach to illegal inter-state capture in national jurisprudence takes the opposite view: if an individual is brought before a court by means of an illegal arrest, it is appropriate for that court to make a determination as to whether it should refuse to exercise jurisdiction.¹¹⁵ The reasoning of this approach is well represented

108. Security Council Res. 196, UN Doc. S/4349 (1960).

109. See Scharf, *supra* note 107, at 968.

110. See *United States v. Alvarez-Machain*, *supra* note 105.

111. *Ibid.*, at 661, where the Supreme Court cites favourably the case of *Frisbie v. Collins*, 342 US 519, 72 S Ct 509 (1952), rehearing denied, 343 US 937, 72 S Ct 768 (1952) where the quoted passage appeared at 552 (US) and 511 (S Ct).

112. *Ibid.*, at 669.

113. Remarkably, the Supreme Court reasoned that the Extradition Treaty was not violated as it made no provision prohibiting its circumvention: 'the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside its terms' (*ibid.*, at 666).

114. See Scharf, *supra* note 107, at 969, where Scharf notes that the UN Working Group on Arbitrary Detention specifically condemned the detention of Alvarez-Machain as being in violation of Art. 9 of the ICCPR. He also points out that in the aftermath of Alvarez-Machain, a resolution was sponsored at the General Assembly calling for an advisory opinion from the ICJ on the extraterritorial exercise of coercive power. See also C. Biblowit, 'Transborder Abductions and United States Policy: Comments on *United States v. Alvarez Machain*', (1996) 9 *New York International Law Review* 105, at 107, where he observed:

Justice Stevens, in his dissenting opinion, described the decision as 'monstrous'. The *New York Times* found the majority's opinion 'astonishing'. The Inter-American Juridical Committee of the Organization of American States criticised the decision; Mexico, and many other countries protested. Rarely has a decision of the Supreme Court on an issue of international law created as great a furor.

115. The following examples of national court cases advocating this approach were relied upon by the OTP (see Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 33, n. 13):

R. v. Hartley (New Zealand, Court of Appeal) [1978] 2 NZLR 199, 77 ILR 330; *State v. Ebrahim* (South Africa, Supreme Court (Appellate Division)) 1991 (2) SA 553, 95 ILR 417; *R v. Horseferry Road Magistrates' Court, ex parte Bennett* (England, House of Lords) [1994] 1 AC 42, 95 ILR 380. See also *United States v. Toscanino* (USA, US Court of Appeals, 2nd Circuit) 500 F 2d 267 (1974); *Stocké v. Federal Republic of Germany* (European Commission of Human Rights, 12 Oct. 1989) 95 ILR 328, 332-3; *García v. Ecuador* (Human Rights Committee), Comm. No. 319/1988, UN Doc. A/47/40 (1994), pp. 287-90; *Celiberti de Casariego v. Uruguay* (Human Rights Committee), Comm. No. 56/1979, Doc. CCRP/C/OP/1, pp. 92-94.

See also Lamb, *supra* note 90, 228, n. 222.

by the British case of *Bennett*,¹¹⁶ which involved a citizen of New Zealand who was alleged to have committed criminal offences in the United Kingdom. He had been traced to South Africa, a country to which the UK Extradition Act (1989) applied, providing a process to bring him before British courts. This process was not followed; rather he was abducted from South Africa – the result, he claimed, of collusion between the South African and British police – and brought to England for trial. The case considered the two approaches to illegal inter-state capture in the context of both the British law and the law of other states,¹¹⁷ and rejected the *male captus bene detentus* approach. A majority of the House of Lords found that courts had the power to refuse to try a case ‘upon the grounds that it would be an abuse of process to do so’.¹¹⁸ It concluded that courts possess the ‘power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused’.¹¹⁹ Were the court to have found otherwise, it would have allowed the executive authority to take advantage of its illegal activity.¹²⁰

In its pleadings, the OTP led by arguing in favour of the *male captus bene detentus* principle. It noted that the practice of exercising criminal jurisdiction over a defendant who had been forcibly abducted from another state in violation of that state’s sovereignty had some support in national jurisprudence.¹²¹ Moreover, it noted that ‘Doctrinal support can also be found for the view that the exercise of criminal jurisdiction in such circumstances is not in itself contrary to international law’.¹²² However, despite this ostensible confidence in the *male captus bene detentus* principle in international law, the OTP carefully avoided going down a path that would have required it to champion the principle.¹²³

Instead it rapidly moved to safer ground. Without conceding that a *male captus bene detentus* approach was untenable before the ICTY,¹²⁴ the OTP advised the Trial

116. *Bennett*, *ibid.*

117. In particular, the court relied on Ebrahim and Hartley (*supra* note 115) in reaching its decision.

118. *Bennett*, *supra* note 115, at 62 (AC).

119. *Ibid.*, at 64 (AC). Although this case involved the circumvention of an extradition procedure, nothing in the reasoning of the House of Lords would indicate that a court’s power to stay the prosecution in the face of an abuse of process was limited to such circumstances. The court expresses no opinion on cases not involving situations where extradition is unavailable. For more on the question of whether an extradition procedure is essential to the reasoning of the court, see notes 128–36 and accompanying text, *infra*.

120. Lord Griffiths stressed that while the courts ‘of course, have no power to apply direct discipline to the police or the prosecuting authorities, . . . they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution’. *Bennett*, *supra* note 115, at 62 (AC).

121. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 31, n. 9, where the OTP relies on Eichmann, *supra* note 104, and Alvarez-Machain, *supra* note 105.

122. *Ibid.*, at para. 31; see also n. 10, where the OTP relied, *inter alia*, on I. Brownlie, *Principles of Public International Law* (5th edn, 1998), 320, and M. Shaw, *International Law* (4th edn, 1997), at 478.

123. Given the widespread condemnation of the principle in international law and the furore surrounding the case of Alvarez-Machain (see notes 110–14 and accompanying text, *supra*), this was undoubtedly a wise move.

124. Although, later, in its appeal of the 18 Oct. 2000 Decision requiring assistance from SFOR (see Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 17), the OTP appears to move away from the *male captus bene detentus* approach, conceding that it is appropriate in some cases for the Trial Chamber to look at the circumstances surrounding the arrest.

The Prosecution . . . notes the concern expressed by Judge Robinson regarding the accountability and control of arresting forces in the field and *acknowledges there may be some circumstances in which a Trial*

Chamber that it would not be relying on the principle as it did not need to do so.¹²⁵ It argued that the requested remedy would be equally inappropriate whether the Trial Chamber accepted the *male captus bene detentus* approach or rejected it in favour of the approach of national courts which have held ‘that a court should decline to exercise criminal jurisdiction over an accused who has been brought within the jurisdiction of the court by means of an irregular rendition’.¹²⁶ This was so, it argued, because ‘the basis of the reasoning in these [latter] cases affords no valid analogy to the situation under consideration by this Trial Chamber in the present case’.¹²⁷ The OTP offered three reasons for this assertion:

- 1 in Todorović’s case there was no violation of an extradition treaty;
- 2 Todorović’s illegal capture was not undertaken by agents of the prosecuting state or organization; and
- 3 there was no violation of Todorović’s right to liberty and security of person.

Each reason will be briefly considered below.

Absence of an extradition treaty. It was argued by the OTP that some of the national court decisions refusing jurisdiction ‘were premised on the fact that the removal of the accused from the other State involved a circumvention of applicable extradition procedures’.¹²⁸ It then noted the absence of extradition procedures in the *Todorović* case. Without explicitly having said so, the implication of the OTP appeared to be that the existence of an extradition arrangement – and its circumvention – was somehow essential to the decisions of the national courts to refuse to exercise jurisdiction; as there was no circumvention of any such agreement with Todorović, the authorities did not apply.

This argument is misleading. It is uncontroversial that ‘the transfer of an accused to the Tribunal by a State authority is not a matter of *extradition*’.¹²⁹ It is equally true to point out, as the OTP did, that ‘the transfer of the accused to the Tribunal therefore cannot have constituted a breach of any rights under any extradition arrangement’.¹³⁰ However, while the reasoning in several of the cases cited was

Chamber may legitimately wish to exercise a supervisory role over the conduct of arrests in the field . . . There may . . . be exceptional cases in which the manner in which an Accused is brought before the Tribunal is so egregious and so shocking to the conscience that it would bring the judicial process into disrepute were a Court to exercise its (otherwise valid) personal jurisdiction over him. (Emphasis added.)

125. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at paras. 31 and 33. This approach was also taken by SFOR (see Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 19) and later by the United States in the brief it filed to the Appeals Chamber on 15 Nov. 2000 (see Murphy, *supra* note 58, at 403, for a discussion of the US position.)

126. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 33.

127. *Ibid.*

128. *Ibid.*, at para. 34. Virtually identical language is used by Lamb, *supra* note 90, at 232, where she discusses application of the national case law to the *Todorović* case.

129. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 34 (emphasis in original). The OTP also pointed out that certain principles of extradition law – including the principle of speciality, the political offence exception and the need for the requested state to be satisfied that a prima facie case has been established – did not apply (*ibid.*, at para. 35). All of this is uncontroversial.

130. *Ibid.*, at para. 35. As there are no extradition procedures in place between the FRY and the Tribunal – or indeed between the Tribunal and any state – there may of course be no claim that such procedures had been breached.

indeed based on the national court's concern at the state's ignoring an established extradition regime (thereby depriving the accused of guarantees afforded by that system),¹³¹ none of the courts held – or implied – that the existence of an extradition treaty was a sine qua non of the determination to refuse jurisdiction.¹³² The argument that national courts' reasoning – reflecting as it does a desire to protect the accused from illegal behaviour on the part of state agents,¹³³ to prevent the abuse of the process of the court,¹³⁴ to safeguard the rule of law,¹³⁵ and to protect an accused's freedom in society¹³⁶ – was contingent on the existence of an extradition regime was not convincingly made by the OTP.

Illegal capture not undertaken by agents of the Tribunal because SFOR, and not the OTP, stands in the position of the state agents who performed the illegal capture. The OTP stressed that the national cases where there was a refusal to exercise jurisdiction 'were premised on the fact that the authorities of the *forum* State [that is, the prosecuting state] were involved in the relevant illegality'.¹³⁷ The OTP argued that this reasoning was inapplicable to the *Todorović* case because the OTP 'had no involvement in any activity relating to the accused's removal from the FRY',¹³⁸ it had not acted illegally, and the conduct of SFOR – legal or otherwise – could not be imputed to it.¹³⁹ While it is indeed true that the participation of agents of the prosecuting state¹⁴⁰ has been an important factor in the reasoning of national courts,¹⁴¹ and while it is also true that different considerations may apply when the illegal arrest is carried out by individuals or authorities other than those representing the prosecuting state, this would only be relevant if the absence of ICTY involvement were beyond doubt.

131. See, for example, Bennett, *supra* note 115, at 62 (AC), where Lord Griffiths stressed the importance of the state not 'flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit'.

132. Indeed, in the Bennett case (*ibid.*), Lord Griffiths made it clear that he was unwilling to express any opinion on a scenario where there was no extradition procedure available.

133. See *supra* note 120.

134. See Hartley, *supra* note 115, at 215–17; cited with approval by Lord Griffiths in Bennett (*supra* note 115, at 60 (AC)).

135. See Hartley, *ibid.*, at 217, where the court held:

We are . . . satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made . . . , the judge would probably have been justified in exercising his discretion under [the statute] or under the inherent jurisdiction to direct that the accused be discharged.

Relyed on by Lord Griffiths in Bennett, *supra* at note 115, at 55 (AC).

136. 'The issues raised by this affair are basic to the whole concept of freedom in society' (see Hartley, *ibid.*); cited with approval by Lord Griffiths in Bennett (*ibid.*, at 54 (AC)).

137. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 36 (emphasis in original).

138. *Ibid.*

139. Both SFOR and the OTP relied on the decisions in *Barayagwiza v. The Prosecutor*, Decision, Case No. ICTR-97-19-AR72, A. Ch., 3 Nov. 1999 and Decision (Prosecutor's Request for Review and Reconsideration), Case No. ICTR-97-19-AR72, A Ch., 31 March 2000, where it was held that the exceptional remedy of dismissal and release was only appropriate where the misconduct was attributable to the conduct of the OTP. Since here it was not, they argued, the remedy was unavailable and an order for disclosure from SFOR would be unnecessary; see Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 14.

140. That is to say, enforcement officials from the same state where the case is being heard.

141. The OTP rightly noted that one of the purposes of courts having the discretion to refuse to exercise jurisdiction when the authorities of that same state had acted illegally 'is to impose a form of discipline and control over the authorities of the forum State' (see Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 37). See also note 120 and accompanying text, *supra*.

Here, however – even assuming that Todorović’s allegations of collusion between the OTP and SFOR would have been proved to be unfounded upon full disclosure of the facts¹⁴² – the divide between SFOR and the Tribunal does not appear to be as great as the OTP and SFOR have represented it to be.

The OTP and SFOR placed great emphasis on their assertion that the OTP alone – and not SFOR – was by analogy to represent the enforcement agents of the prosecuting state in the national cases, with SFOR being treated as analogous to a third party.¹⁴³ However, the nature of the relationship between SFOR and the OTP and, more generally, between SFOR and the Tribunal as a whole, calls such an assertion into question. If one is to analogize the circumstances of Todorović’s capture with the law of interstate capture, it would surely be more apt to liken SFOR to the role of the enforcement agents of the prosecuting state.¹⁴⁴ They have, after all, been charged with effecting arrests on behalf of the Tribunal.¹⁴⁵ Such an approach is reflected in Judge Robinson’s separate decision on the Motion for Judicial Assistance from SFOR and others, where he likens the role of SFOR ‘to that of a police force in some domestic legal systems’, and notes that ‘it virtually operates as an enforcement arm of the Tribunal . . .’.¹⁴⁶ At a minimum, it would appear to be fitting to consider SFOR to be a co-enforcement official, alongside the OTP, given that each has a role in the execution of arrest warrants.¹⁴⁷ A similar argument made by counsel for Todorović was that SFOR was acting as an agent of the Tribunal, because it ratified SFOR’s conduct in obtaining custody of Todorović by proceeding with the case.¹⁴⁸ Of course if SFOR were taken to be part of the ICTY’s enforcement apparatus or an agent of the OTP, then the OTP’s argument fails and the national jurisprudence whereby courts

142. Todorović had made repeated claims that the OTP was involved in his capture (see, e.g., Decision on Motion for Evidentiary Hearing, *supra* note 28, at 2, and Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 33). However, the OTP’s approach was to play down these allegations, at times denying that they existed and, at times, conceding they did exist but denying their veracity. If, as the OTP claimed, it had accepted Todorović’s allegations ‘at their highest’ (see note 95 and accompanying text, *supra*), it is indeed strange that it felt entitled to leave out his allegations against it in this regard.

143. ‘SFOR points out that, in the current case, it is the Office of the Prosecutor, not SFOR, that stands analogous to the agents of a prosecuting State’. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 19. Similarly, the United States, in its brief to the Appeals Chamber in this matter, considered the national jurisprudence regarding cross-border abduction. It noted that ‘when agents of the prosecuting State have not been shown to be complicit, there are no grounds for [discretion on the part of the state court to decline jurisdiction over an individual captured in violation of another state’s law]. In the current case, *the OTP plays the same role as the agents of the prosecuting State, while SFOR and other entities and States have no such role*’ (emphasis added). (See Murphy, *supra* note 58, at 403.)

144. Todorović makes this point when he challenges ‘SFOR’s assertion that it is the Office of the Prosecutor that stands analogous to state officials, asserting instead that it is SFOR, acting pursuant to its mandate from the Security Council of the United Nations, that stands in such a relationship’. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at para. 23 and n. 26, relying on Defence Reply to Submission made by SFOR, filed 17 July 2000, at 2–3.

145. See Decision on Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at paras. 43–45. For a detailed discussion of the powers of arrest of the ICTY and the role of SFOR therein, see Lamb, *supra* note 90.

146. See Separate Opinion of Judge Robinson, *supra* note 79, at para. 6 and n. 2. He concludes: ‘It would be odd if the Tribunal had no competence in relation to the exercise of certain aspects of this quasi-police function’ (*ibid.*).

147. See *supra* note 145.

148. *Ibid.*, at 210, n. 153.

refuse jurisdiction to discourage authorities of the prosecuting state from behaving illegally becomes applicable.¹⁴⁹

No violation of the accused's right to liberty and security of person. A third rationale, according to the OTP, for the refusal of jurisdiction over an accused whose presence was secured by illegal interstate capture was a concern about the accused's right to liberty and security of person.¹⁵⁰ This right is guaranteed by Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the European Convention on Human Rights.¹⁵¹ The OTP argued that this rationale was inapplicable in this case, and gave various reasons for its assertion.

First, the OTP noted that the right to liberty and security of person 'requires that "any measure depriving a person of his liberty must be in accordance with the domestic law . . . where the deprivation of liberty takes place"'.¹⁵² It then discounted this rationale on the basis that there 'is no rule that a person indicted by the Tribunal can be arrested only pursuant to the national law of the place where the person is located'.¹⁵³ Of course it is true that the ICTY is not limited in its functioning by the national laws of the states in which it acts – otherwise any non-co-operative state could legislate at any time to prevent its functioning in that state. But if the OTP is to look to jurisprudence setting out the right to liberty and security at the national level and distil the requirement that the deprivation of liberty must comport with the procedural guarantees where this deprivation takes place, surely the apposite question for the Trial Chamber is whether Todorović had been afforded his procedural rights under the international law governing the functioning of the ICTY, not whether he had been afforded his procedural rights under the law of the FRY.

Second, while conceding that 'Tribunal indictees do enjoy the right to liberty and security of person under international law',¹⁵⁴ the OTP argued that in Todorović's case this right *had* been met. However, the OTP appeared to favour an extremely limited interpretation of the right. It noted that 'such rights are not violated where persons validly indicted for serious violations of international humanitarian law are apprehended in order that they be taken into custody to face trial on such charges'.¹⁵⁵

It described issues relating to the procedure surrounding the arrest warrant¹⁵⁶ – including the fact that it had not been issued to the states involved in the

149. It also becomes very relevant indeed for the defendant to know what SFOR knew, how it acted, whether it paid anyone to carry out its deeds and who its co-conspirators might have been.

150. Here the OTP referred to the cases of García and Celiberti de Casariego, *supra* note 115.

151. Art. 9(1) of the ICCPR provides that 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' Art. 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save . . . in accordance with a procedure prescribed by law.'

152. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 40, where the OTP relies upon the Stocké case, *supra* note 115.

153. *Ibid.*, at para. 41.

154. See Prosecution Appeal and Application for Leave to Appeal, *supra* note 26, at para. 15.

155. *Ibid.*

156. The only arrest warrant relating to Todorović had been directed to the two governing authorities in Bosnia-Herzegovina (the Republic of Bosnia and Herzegovina-Sarajevo and the Bosnian Serb Administration-Pale) with copies of the arrest warrant having been transmitted to IFOR, SFOR's predecessor. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at paras. 25 and 41.

detention and had not specifically authorized an arrest in the country to which the accused had fled – as ‘immaterial’,¹⁵⁷ and appeared content to overlook whether excessive force had been used. In short, the OTP appeared to be asserting that neither the particulars of the arrest warrant nor the nature of the apprehension were relevant to the issue of the right to liberty and security – so long as the indictment was valid. Consideration of the right to liberty and security of person by international bodies both at the European level¹⁵⁸ and the wider international level¹⁵⁹ suggests that the OTP’s approach may be overly deferential to the Tribunal.

A final element of the OTP’s argument against a violation of Todorovic’s right to liberty and security considers the violation of the FRY’s sovereignty. For the purposes of the motions, the OTP conceded that the FRY’s sovereignty had been violated,¹⁶⁰ however, it asserted that

even if the forcible removal of the accused from the FRY as part of his transfer to the Tribunal violated rights of the FRY under international law, it cannot be said to have violated any right of the *accused* to liberty or security of person.¹⁶¹

157. The OTP argued (*ibid.*, at para. 43):

It is immaterial whether or not an arrest warrant had been issued to the particular State or States whose authorities may have been involved in the accused’s detention and transfer to the Tribunal, or whether any such warrant expressly extended to authorizing an arrest in the territory of the FRY. A State does not require an arrest warrant specifically addressed to that State in order to lawfully detain an accused for transfer to the Tribunal.

158. See, for example, the discussion of the right to liberty and security of the person under Art. 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see *supra* note 151, for the text of this provision) in F. Jacobs and R. White, *The European Convention on Human Rights* (1996), 80, where it is observed: ‘Where, for example, a warrant is required for arrest, the warrant must be in the correct form. Otherwise the arrest will not be lawful under Article 5. Similarly, where force is used in order to effect an arrest, the degree of force used must not exceed that authorized in the circumstances by domestic law.’ See also *Bozano v. France*, Judgment of 18 Nov. 1986, 1989 ECHR (Ser. A) No. 111, where the court considered the case of an Italian national who had been convicted in Italy and had taken refuge in France. Although the French judicial authorities were unwilling to extradite him to Italy, he was taken against his will to Switzerland, which was willing to extradite him to Italy. The European Court of Human Rights found the detention to be unlawful as it was not in accordance with a procedure prescribed by law. Cf. the discussion of the right in R. Reed and J. Murdoch, *A Guide to Human Rights Law in Scotland* (2001), 209, where the authors consider the Commission’s determination that the forcible abduction of ‘Carlos the Jackal’ from Sudan and his transfer to France did not raise any Art. 5 issue (*Sánchez-Ramires v. France*, Decision of 24 June 1996, 1996 DR 86, at 155). However, the authors describe the Commission’s reasoning as ‘unconvincing’ and in sharp contrast to the Court’s approach in cases like *Bozano*. (See also the cases and authorities relied upon by the authors, at 211, n. 18.)

159. Regarding the right to liberty and security of person under Art. 9(1) of the ICCPR (see *supra* note 151, for the text of this provision) the cases of *García and Celiberti de Casariego* (see *supra* note 115), while thin on reasoning, indicate that illegal interstate capture may well be a violation of the right not to be deprived of one’s liberty except on such grounds and in accordance with such procedure as are established by law.

160. For the purposes of the motions only, the OTP conceded that the forcible removal from the FRY without the consent of the national authorities constituted a violation of the sovereignty of that country under international law. See Prosecution Response of 22 Feb. 1999, *supra* note 70, at para. 25.

161. *Ibid.*, at para. 48 (emphasis in original). See also *ibid.*, at para. 32, where the OTP stated: ‘A violation of State sovereignty is a violation of the rights of the relevant State, which is a third party to the proceeding, and an accused cannot normally invoke a remedy in respect of breaches of rights of third parties. To be entitled to a remedy, the accused would need to establish that this violation of a State’s sovereignty also constituted some violation of the accused’s own rights.’

This argument would appear to be an amalgam of the question of whether an individual may claim a remedy for a breach of his or her state's sovereignty¹⁶² with the quite separate question of whether an individual may claim a remedy for a breach of his or her right to liberty and security of person.

3.2.5. *No unlawful breach of the FRY's state sovereignty*

A final argument – that, in the light of the Tribunal's unique position, measures taken by it in the FRY relating to Todorović's arrest did not violate that state's sovereignty – was only made latterly by the OTP and was not considered by the Trial Chamber.¹⁶³ Somewhat confusingly, this argument appears to contradict earlier arguments of the OTP which were premised on the assertion that, for the purposes of the motions, it was willing to concede that the sovereignty of the FRY had been violated.¹⁶⁴ Moreover, the argument would appear to be at variance with the OTP's earlier assertion that the activity surrounding Todorović's arrest could in no way be attributed to the Tribunal.¹⁶⁵ At the heart of this argument is the assertion that because the ICTY is a creation of the UN Security Council under Chapter VII, the ICTY is subject to a specific exception to the Charter's prohibition on interference in domestic affairs.¹⁶⁶ The OTP argued that the powers of the ICTY 'in the legitimate performance of its functions . . . prevail over traditional concerns of state sovereignty'.¹⁶⁷ As such, 'measures taken by this Tribunal under Chapter VII, which would otherwise constitute an illegal breach of the sovereignty of a state, are *lawful*'.¹⁶⁸ If it were otherwise, the OTP argued, then much of the functioning of the Tribunal would result in such breaches of sovereignty.¹⁶⁹

All of this is uncontroversial enough: different considerations regarding state sovereignty must surely apply when a sub-organ of the Security Council established

162. See *Prosecutor v. Dusan Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, AC, 2 Oct. 1995, at para. 55 *et seq.*, where the Appeals Chamber held that individuals may invoke breaches of state sovereignty before the Tribunal in their own right.

163. It was elaborated in the Prosecution Response to Motions for Judicial Assistance, *supra* note 26.

164. See note 161 and accompanying text, *supra*.

165. Surely an argument by the OTP that Todorović's arrest was not an illegal breach of the FRY's sovereignty because the ICTY was, by virtue of its creation under Chapter VII, the beneficiary of a specific exception under Art. 2(7), must be a tacit admission by the OTP that the conduct of the SFOR and/or others in effecting his arrest was Tribunal conduct. Of course such a concession would be entirely at variance with its earlier position. See notes 137–50 and accompanying text, *supra*.

166. Art. 2(7) of the United Nations Charter provides: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; *but this principle shall not prejudice the application of enforcement measures under Chapter VII* (emphasis added).

167. See Prosecution Response to Motions for Judicial Assistance, *supra* note 26, at para. 13, where the OTP relied on the decision in Blaškić, *supra* note 75, for authority. 'The principles barring encroachments upon sovereignty, which form the basis of the complaint raised by the defence, do not occur within the jurisdiction of the Tribunal' (*ibid.*, at para. 21). The OTP also argued in this regard that 'some international laws are not binding on certain international institutions, such as this Tribunal, because some international laws are exclusively designed to regulate conduct between *states* and have no application to international institutions'. *Ibid.*, at para. 13 (emphasis in original).

168. See Prosecution Response to Motions for Judicial Assistance, *supra* note 26, at para. 21 (emphasis in original).

169. The OTP noted that if the normal rules of non-interference with domestic jurisdiction of states applied, then the Tribunal's actions under Art. 1 (which deals with the ICTY's power to prosecute), Art. 7(2) (jurisdiction over sovereign heads of state), or Art. 9(2) (the ICTY's primacy over national courts) of its Statute would all result in breaches of the sovereignty of the FRY (*ibid.*, at paras. 15–22).

as a Chapter VII enforcement measure is carrying out its legitimate functions. However, it would appear that the question that needs to be decided in this case is not whether the powers of the ICTY *in exercising its legitimate functions* prevail over traditional concerns of state sovereignty, but whether the ICTY is indeed exercising its legitimate functions. The sovereignty of the FRY must surely only take a back seat to ICTY action pursuant to a Security Council decision under Chapter VII where the ICTY is acting within the mandate bestowed upon it by the Security Council. Therefore the more appropriate question might be: was the capture of Todorović a legitimate function of the ICTY – even if the accused’s fundamental human rights were violated?¹⁷⁰

In sum, several of the arguments of the OTP were ill-conceived. The argument that Todorović was not entitled to have access to information relating to his arrest seems particularly flawed. However, the OTP’s decision to proceed with such an approach would appear to have been motivated by the hope that the Trial Chamber would have accepted a weak argument in order to prevent alienating SFOR and its powerful participating states. A less independent Trial Chamber might have done so. By taking an approach that there could be no compromise on the issue of disclosure, the SFOR added to its own difficulties by forcing the Trial Chamber’s hand. While the OTP’s approach to the issue of the appropriateness of the requested remedy in the face of illegal capture was problematic in many of its aspects, the issue of how the Trial Chamber should deal with an accused brought before the Tribunal in a similar way remains to be decided. And this is one of the key issues in the *Nikolić* case, currently before the ICTY.

4. NIKOLIĆ : TODOROVIĆ REVISITED

Dragan Nikolić’s allegations of illegal capture have a familiar ring. Nikolić was indicted on 4 November 1994 for crimes against Muslim and other non-Serb detainees at the Susica camp.¹⁷¹ Orders for his arrest were issued on the same day, but he remained at large until 21 April 2000.¹⁷² He alleges that sometime shortly before 21 April he was abducted in Serbia by men who falsely claimed to be police officers, forced into the boot of a car, driven to the border with Bosnia, smuggled across the Drina river by boat, and then handed over to US SFOR soldiers.¹⁷³ His captors were

170. If there were to be a finding that the capture was in conformity with the mandate of the ICTY notwithstanding violations of Todorović’s human rights under international norms, then difficult constitutional questions on possible limitations upon the Security Council’s powers would need to be examined.

171. He was charged with eight counts of crimes against humanity stemming from his alleged involvement in ethnic cleansing and his alleged position as commander of the Susica detention camp. The camp was said to be overcrowded and the detainees were not provided with adequate food or other facilities. Moreover, it is alleged that the detainees were beaten on a regular basis – sometimes to death. Rape and sexual assault are also alleged. (See *Prosecutor v. Dragan Nikolić, Second Amended Indictment*, Case No. IT-94-2-PT, T. Ch. II, 7 Jan. 2002).

172. See Prosecutor’s Response to ‘Defence Motion for Relief based Inter Alia Upon Illegality of Arrest following upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-related Abuse of Process within the Contemplation of Discretionary Jurisdictional Relief under Rule 72’ filed 17 May 2001, filed 31 May 2001, at paras. 4 and 5.

173. Z. Cvijanovic and V. Zimonjic, ‘Belgrade Crackdown: “Bounty hunters strike inside Serbia to seize war crimes suspects”’, *Independent*, 18 May 2000, at 14.

subsequently convicted by a Serbian court for offences relating to the capture¹⁷⁴ and, according to some reports, found to have been acting in return for payment of £31,000.¹⁷⁵ Nikolić was transferred to the ICTY on 22 April 2000. At his initial appearance on 28 April, he pleaded not guilty on all counts.¹⁷⁶

On 17 May 2002, Nikolić brought a motion before the ICTY on the basis of the nature of his capture, requesting that the indictment against him be dismissed and that he be immediately returned to the FRY.¹⁷⁷ He described his capture as ‘pernicious’ and argued that ‘a judicial body set up with . . . the objectives of preserving human rights can have no proper option but to make it plain that jurisdiction will not be entertained in such circumstances.’¹⁷⁸ Nikolić alleged that his apprehension was in violation of the national sovereignty of the FRY and contrary to international human rights norms. Moreover, he argued that these breaches of international and national law resulted in an abuse of process.¹⁷⁹

Given that the Trial Chamber’s decision that Todorović was entitled to disclosure from SFOR and its participating states was the ace in the hole that resulted in his negotiating a favourable plea agreement with the OTP, it might have been expected that Nikolić would follow a similar path and seek potentially embarrassing disclosure from SFOR and its participating states. Surprisingly, he did not. Instead, his counsel requested that the Trial Chamber determine the jurisdictional consequences that would flow from a successful challenge to the legality of the arrest *as a preliminary matter*.¹⁸⁰ Of course the OTP, which along with SFOR had been agitating for this approach in the *Todorović* case, was only too pleased to follow this course.¹⁸¹ Under

174. According to reports relied upon by the OTP itself, on 24 Nov. 2000, seven men were convicted of offences in relation to Nikolić’s transfer to Bosnia and Herzegovina by the District Court in Smederevo. See Prosecution Response to Defence Motion of 17 May 2001, *supra* note 172, at para. 5, citing Agence France-Presse, ‘Seven Jailed by Yugoslav Court for Abducting War Crimes Suspect’, 24 Nov. 2000.

175. See Cvijanovic and Zimonjic, *supra* note 173. The report indicates that the police said that the payment came from ‘unspecified “foreign services”’.

176. He later made a further initial appearance on 18 March 2002 to plead to a second amended indictment, which was confirmed on 15 Feb. 2002.

177. Motion for Relief Based Inter Alia Upon Illegality of Arrest following upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-related Abuse of Process within the Contemplation of Discretionary Jurisdictional Relief under Rule 72, 17 May 2001.

178. See Prosecution Response to Defence Motion of 17 May 2001, *supra* note 172, at para. 7, relying on Motion for Relief based Inter Alia Upon Illegality of Arrest following upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-related Abuse of Process within the Contemplation of Discretionary Jurisdictional Relief under Rule 72, 17 May 2001, at para. 1.

179. *Ibid.*, at paras. 7–10.

180. An agreement was reached between the parties to submit the following questions to the Trial Chamber for resolution:

1. If it can be established by the accused that the accused’s arrest was achieved by any illegal conduct committed by, or with the material complicity of: (a) any individual or organization (other than SFOR, the OTP or the Tribunal); (b) SFOR; (c) the OTP; or (d) the Tribunal, would the accused be entitled to the relief sought?
2. Does SFOR act as an agent of the OTP and/or the Tribunal in the detention and arrest of suspected persons?

See Prosecutor’s Response to Defence ‘Motion to Determine Issues as Agreed Between the Parties and the Trial Chamber . . . and the Consequences of any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention’, Filed 29 Oct. 2001, filed 12 Nov. 2001, at para. 2.

181. In an apparent expression of its dissatisfaction with the approach of the Trial Chamber in the *Todorović* case, the OTP endorsed the approach proposed by Nikolić’s counsel, noting that ‘the determination of the availability or otherwise of remedies ought to be viewed not as a matter which follows exhaustive attempts

this approach, SFOR and its contributing states are safely out of reach of any embarrassing requests for disclosure from the Tribunal – at least until the complicated issues related to remedy are considered. Presumably, if the Trial Chamber finds that the requested remedy is inappropriate, Nikolić will request the Tribunal – which by then may very well be losing patience with the matter – for an order requiring disclosure from SFOR;¹⁸² if the remedy *is* found to be appropriate, the OTP still has the option of making a deal with Nikolić.

When this motion comes before the Trial Chamber, many of the arguments will echo those made in the *Todorović* case. It is already clear, based on the briefs filed in support of the motion, that the OTP will again rely on municipal law analogies involving irregularities in the means by which accused are brought before national courts. Once again there are assertions by the defence that his right to liberty and security of person was violated. And once again the OTP argues that even assuming that violations of international law could be shown to have occurred in the manner of the accused's arrest, the remedies sought were inappropriate in the circumstances.¹⁸³

Given that, as of the date of writing, the motion has not been decided, the *Nikolić* case, as yet, does little to clarify the law on illegal capture. However, absent a last-minute settlement, it would appear that the Trial Chamber, and perhaps ultimately the Appeals Chamber, is likely to address and clarify the issues relating to illegal capture and the appropriate remedies associated therewith. Other indictees who have been brought before the Tribunal by SFOR¹⁸⁴ will, no doubt, be watching these developments very closely indeed.

5. APPLICATION TO THE INTERNATIONAL CRIMINAL COURT

With the entry into force of the Rome Statute of the International Criminal Court¹⁸⁵ and the establishment of the ICC,¹⁸⁶ the difficulties of enforcement of international criminal law will come into sharper relief. How will this nascent court with its

at evidence-gathering but rather, as a necessary preliminary to such measures. This consideration, it is submitted, is particularly pertinent where the evidence-gathering exercise in question may impinge upon the vital national security interests of third States and/or multinational forces in the field. See Prosecution Response to Defence Motion of 17 May 2001, *supra* note 172, at para. 11.

182. Both Nikolić's counsel and the OTP stipulated that the Trial Chamber's determination of the jurisdictional consequences of a successful challenge to the arrest be on a without prejudice basis with regard to any future position it may decide to adopt on the question of disclosure, thereby allowing Nikolić to seek disclosure from SFOR and NATO at a later date if necessary.

183. Relying on the article by Lamb, *supra* note 90, the OTP argued that for the release of the accused to be an appropriate remedy there would need to be, at a minimum, either: (1) 'unambiguous, conscious violations of international legality which can be attributed to the Office of the Prosecutor'; and/or (2) 'violations . . . of such egregiousness or outrageousness that, irrespective of any lack of involvement on the part of the prosecution, the Trial Chamber could not, in good conscience, continue to exercise jurisdiction over the accused'. The OTP argues that it was not involved and that the alleged conduct was not sufficiently egregious. See Prosecutor's Response to Defence Motion for Relief, *supra* note 174, at paras. 31–49. Cf. similar arguments in the *Todorović* case, *supra* notes 100–02 and accompanying text.

184. For a list of accused who have been brought before the ICTY through the intervention of SFOR, see Lamb, *supra* note 90, 167, n. 3.

185. Adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

186. On 11 April 2002 the 60th instrument of ratification was deposited with the United Nations and, according to Art. 126 of the Statute, the Statute entered into force on 1 July 2002.

seat in the Netherlands be able to mete out justice when those it will be seeking to prosecute are scattered about the globe? Will it ever be appropriate for force to be used in a member state which has failed to uphold its obligations in international law to surrender an accused?

The guidance provided by the *Todorović* case and the other jurisprudence of the ICTY is limited. This is so for at least two reasons. First, as discussed, the trinity of cases that has emerged relating to illegal capture offers little precedential value: with the *Dokmanović* case, the Tribunal found the capture not to be illegal; with *Todorović*, the issues of illegal capture and SFOR's possible involvement were forever buried in the 28 November 2000 Plea Agreement; and with *Nikolić*, the issues remain under consideration by the Tribunal. Second, it must be recalled that the jurisdiction of the ICTY arose through Chapter VII of the United Nations Charter, an enviable genesis not shared by the ICC. As such, under the ICC Statute only states parties have an obligation to co-operate, and even then it is an obligation with certain limitations.¹⁸⁷ With the ICTY, on the other hand, states are *obliged* to surrender an accused by virtue of a binding Security Council resolution.¹⁸⁸

Despite its incomplete nature, the jurisprudence of the ICTY on the issue of illegal capture does illustrate one important point: that the principle of *male captus bene detentus* is unlikely to be accepted by international criminal adjudicators. It is telling that neither the OTP nor SFOR were confident enough in the principle to rely on it other than as, effectively, an alternative argument. This may well be a realization by the OTP and SFOR that, in the face of the near-universal condemnation of the approach in international law as illustrated in the aftermath of the *Alvarez-Machain* case,¹⁸⁹ this would be a losing battle.¹⁹⁰ Scharf's conclusion, that 'an international criminal tribunal would have to dismiss a case where the defendant has been abducted in violation of international law',¹⁹¹ appears to be the correct one.

Moreover, the issues which emerged from *Todorović* may prove helpful to the ICC if at some stage its Prosecutor, despairing at the fact that an accused has not been surrendered despite a state party's obligation to do so, looks to creative methods of capture. It would not be unimaginable for a scenario to develop whereby the Security Council, acting under Chapter VII of the UN Charter, determined that international peace and security was threatened, and established a peacekeeping or enforcement operation with a mandate to arrest suspects.¹⁹² Similarly, nothing would prevent the Security Council from calling on a state to surrender an accused to the ICC or face

187. Art. 89(1) provides that 'States Parties shall, *in accordance with the provision of this Part and the procedure under their national law*, comply with requests for arrest and surrender' (emphasis added). For a discussion of the limitations on the obligation of states to surrender accused to the ICC, see S. N. M. Young, 'Surrendering the Accused to the International Criminal Court', (2000) 71 BYIL 317.

188. For a discussion of the obligations of states in relation to the arrest and surrender of individuals indicted by the ICTY, see Lamb, *supra* note 90, at 169 *et seq.*

189. See *supra* note 105.

190. See notes 110–14 and accompanying text, *supra*.

191. See Scharf, *supra* note 107, at 969.

192. Similar to UNTEAS in the *Dokmanović* case or SFOR in the *Todorović* or *Nikolić* cases.

sanctions.¹⁹³ If, in either situation, an accused was arrested contrary to the wishes of his or her state of residence, the lessons from the ICTY jurisprudence – inconclusive though they are at this stage – may afford some assistance.

Perhaps the main lesson for the ICC would be that any body undertaking the task of arresting an individual indicted by it should exercise extreme caution, or the result may well be that the ICC will be obliged to release the individual. Depending on what jurisprudence may emerge from the *Nikolić* case, it may well be that the OTP's approach of distancing itself from the arrest process is misguided. It may be wiser for the ICC to reject this approach in favour of one whereby it becomes involved from the outset in any proposed action to arrest (in the form of the Prosecutor, the Registry, or perhaps even the Presidency), in order to ensure its legality and assess the effect it would have on the eventual trial of the accused.

6. POSTSCRIPT

On 2 October 2002, after the above was finalized, Trial Chamber II of the ICTY issued a Decision dismissing the motion brought by Nikolić on the basis of the nature of his capture.¹⁹⁴ The Trial Chamber divided its reasoning into two parts. First, it considered whether the conduct of the alleged kidnappers could be attributed to SFOR or the OTP. Because the counsel for Nikolić had agreed for the purposes of the motion 'that the apprehension and transportation into the territory of Bosnia and Herzegovina was undertaken by unknown individuals having no connection with SFOR and/or the Tribunal',¹⁹⁵ the Trial Chamber found little difficulty in determining that the conduct of Nikolić's captors could not be attributed to SFOR or the Tribunal.

The Trial Chamber then considered whether 'the illegal arrest in itself constitutes a direct obstacle to the exercise of jurisdiction by the Tribunal',¹⁹⁶ and considered the two approaches taken by national case law regarding illegal interstate capture.¹⁹⁷ While not specifically endorsing either approach, the Trial Chamber identified certain 'core elements',¹⁹⁸ and, based in part on these elements, rejected Nikolić's claims that the FRY's state sovereignty had been violated.¹⁹⁹ Further, the Trial Chamber found that 'the assumed facts provide no indicia' either 'that there was a violation of the human rights of the Accused' or 'a violation of the fundamental principle of due process of law'.²⁰⁰ As with the issue of attributability, we see that the Trial Chamber's rejection of Nikolić's allegations of the violation of FRY's sovereignty

193. As the Security Council did with Libya in the aftermath of the bombing of PanAm Flight 103 over Lockerbie, Scotland, by means of Security Council Res. 748 (1992), UN Doc. S/Res/748.

194. Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 Oct. 2002.

195. *Ibid.*, at para. 20.

196. *Ibid.*, at para. 70.

197. *Ibid.*, at para. 95.

198. *Ibid.*, at Section VII (Conclusions).

199. It distinguished the circumstances of this case from the national case law on three bases: first, the relationship of the FRY to the Tribunal was different from relationships among states since the Tribunal is an enforcement measure under Chapter VII of the UN Charter; second, unlike in the national cases considered, neither SFOR nor the OTP was involved in the capture of the accused; and third, unlike in several of the national cases, with Nikolić there was no circumvention of an extradition treaty.

200. *Ibid.*, at Section VII (Conclusions) (following para. 115).

and his human rights and rights to due process were greatly facilitated by Nikolić agreeing for the purposes of the motion that neither SFOR nor the OTP had any involvement in his capture. But for this concession, the matter may well have been decided differently.

Despite some initial procedural difficulties,²⁰¹ an appeal by Nikolić against this Decision may very well take place. Moreover, there would appear to be nothing to prevent his counsel from following Todorović's path and requesting disclosure of evidence from SFOR and perhaps, ultimately, arriving at a Plea Agreement similar in nature to that reached by Todorović.

201. On 9 Jan. 2003 the Appeal Chamber of the ICTY dismissed an interlocutory appeal by Nikolić for procedural reasons. Nevertheless, the Appeals Chamber may yet deal with the issues raised if Nikolić is able to obtain consent from the Trial Chamber for an interlocutory appeal (under Rule 73).