(c) Case Analysis

The Prosecutor v. *Slavko Dokmanović*: Irregular Rendition and the ICTY

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Keywords: abduction; jurisdiction; luring; International Criminal Tribunal for the former Yugoslavia; *mala captus bene detentus*.

Abstract: In the summer of 1997, a member of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia met with Slavko Dokmanović in Serbia in order to lure him into Croatia, where he was ultimately arrested by UN peacekeeping personnel. Dokmanović was the subject of a sealed indictment for his role in the execution of 261 people forcibly taken out of the Vukovar hospital in 1991. The Tribunal rejected Dokmanović's argument that the manner of his arrest violated the sovereignty of the Federal Republic of Yugoslavia (Serbia and Montenegro) and international law. In doing so, the Tribunal focused on the distinction between 'luring' and 'forcible abduction', reckoning that the former was acceptable while the latter might constitute grounds for dismissal in a future case. The article argues that the Tribunal's decision rests on an artificial distinction between luring and abduction which may needlessly discourage future apprehensions undertaken by NATO and UN troops in the territory of the former Yugoslavia. What the Tribunal in *Dokmanović* should have focused on, is that there is no violation of international law where the Security Council or the Tribunal has authorised law enforcement activities, where the state has consented to such activities, or where such activities are necessary under the principle of self-defence. Moreover, even where the manner of apprehension violates international law, the Tribunal may apply the so-called 'Eichmann-exception', while at the same time recognising that the *mala captus bene dententus* principle is generally inconsistent with the modern law of human rights.

1. Introduction

On 3 April 1996, the International Criminal Tribunal for the Former Yugoslavia (ICTY) issued a sealed indictment against Slavko Dokmanović, a Croatian Serb, for his complicity in the greatest single massacre of the 1991 war in Croatia, that of the execution of 261 people forcibly taken out of a

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hospital in Vukovar, eastern Croatia.[1] The same day the indictment was issued, an order for Dokmanović's arrest was secretly transmitted to the United Nations Transitional Administration for Eastern Slavonia (UNTAES),[2] directing the United Nations forces to search for, arrest, and surrender Dokmanović to the ICTY.

Unfortunately, by the time UNTAES received the order for Dokmanović's arrest, he had moved from the Eastern Slavonia region of Croatia to the Federal Republic of Yugoslavia (FRY),[3] which had failed to execute the warrants which remain outstanding for the arrest of the three co-accused in the Indictment against Dokmanović.[4] The ICTY's Office of the Prosecutor (OTP) thus turned to plan B: in June 1997, Kevin Curtis, an OTP investigator, met with Dokmanović at his home in the FRY in an effort to lure Dokmanović into Eastern Slavonia for arrest by UNTAES. Curtis purported to set up a meeting between Dokmanović and General Jacques Klein, the Transitional Administrator of Eastern Slavonia, for the stated purpose of arranging for possible compensation for Dokmanović's property in Eastern Slavonia, which he had been forced to abandon.[5] In accordance with this arrangement, on the afternoon of 27 June 1997, Dokmanović crossed the border into Eastern Slavonia under what he believed was a promise of safe conduct, and voluntarily entered an UNTAES vehicle which was to take him to meet General Klein at the UNTAES base in the town of Erdut. Upon arriving at Erdut, UNTAES soldiers removed Dokmanović from the vehicle at gunpoint and handcuffed him, while a member of the OTP advised him of his rights and the charges against him.[6] Dokmanović was then flown on board an UNTAES airplane to The Hague and handed over to the ICTY for trial.

In a pretrial motion, counsel for Dokmanović argued that the manner of Dokmanović's arrest was illegal, violating the Statute and Rules of the ICTY, the sovereignty of the FRY, and international law. In particular, the defense argued that "Dokmanović was arrested in a 'tricky way', which can

1. *See* Prosecutor *v.* Slavko Dokmanović, Decision on the Motion for Release by the Accused Slavko Dokmanović, No. IT-95-13a-PT, T.Ch. II, 22 October 1997. Dokmanović was mayor of Vukovar, the capital of Eastern Slavonia, and administrator of the Ovcara area at the time of the massacre. He is charged with six counts of grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, and crimes against humanity for his role in the massacre.
2. UNTAES was established on 15 January 1996 pursuant to Security Council Resolution 1037, UN Doc. S/RES/1037 (1996), to administer the region of Eastern Slavonia pending its return to the control of Croatia.
3. *See* Prosecutor *v.* Slavko Dokmanović, Decision on the Motion for Release by the Accused Slavko Dokmanović, *supra* note 1, para. 7.
4. The addition of Dokmanović to the Indictment was not disclosed to the FRY.
5. *See* Prosecutor *v.* Slavko Dokmanović, Decision on the Motion for Release by the Accused Slavko Dokmanović, *supra* note 1, paras. 8-10.
6. *Id.*, para. 11.

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only be interpreted as a 'kidnapping'" and that "Dokmanović's arrest violated the sovereignty of the FRY and international law because he was arrested in the territory of the FRY without the knowledge or approval of the competent State authorities".[7]

Trial Chamber II of the ICTY (then composed of Judge Gabrielle Kirk McDonald of the United States, Judge Elizabeth Odio Benito of Costa Rica, and Judge Saad Saood Jan of Pakistan) ruled that Dokmanović had standing to raise these issues.[8] However, it rejected Dokmanović's arguments, concluding that "the means used to accomplish the arrest of Mr. Dokmanović neither violated principles of international law nor the sovereignty of the FRY".[9] In doing so, the Trial Chamber focused on the distinction between "luring" (the means used to arrest Dokmanović) and "forcible abduction", reckoning that the former was acceptable while the latter might constitute grounds for dismissal in a future case.[10] Dokmanović's appeal from this decision was summarily rejected by the Appeals Chamber on the ground that the defense argument was "ill-founded in fact and in law".[11] His trial before Trial Chamber II, consisting of Judge Antonio Cassese (Italy), Judge Richard George May (United Kingdom), and Judge Florence Ndepele Mwachande Mumba (Zambia), began on 19 January 1998, but was terminated before a verdict could be rendered when Dokmanović hanged himself in his cell on 29 June 1998.[12]

This case note examines the validity of the distinction the Trial Chamber drew in the *Dokmanović* case between abductions and luring in the context of apprehending indicted war criminals in the territory of the former Yugoslavia. In addition, it explores the right of the NATO and United Nations forces to exercise law enforcement powers in the territory of Bosnia and Herzegovina, the FRY, and Croatia, under the various Security Council resolutions and international agreements applicable to the territory of the former Yugoslavia. Finally, it analyzes the question of whether the ICTY should apply the *mala captus bene detentus* principle with respect to individuals whose apprehension is found to be in violation of international law.

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7. *Id.*, paras. 16-18.
8. *Id.*, para. 76.
9. *Id.*, para. 88.
10. *Id.*, paras. 67 and 77.
11. *Warcrimes Tribunal Rejects Appeal from Hospital Massacre Suspect*, Agence France Presse, 12 November 1997 (LEXIS, Curnws File).
12. *See Croatian Serb to Stand Trial for Vukovar Atrocity*, Agence France Presse, 19 January 1998 (LEXIS, Curnws File); C. Lucassen, *Serbian Defendant Hangs Self*, The Boston Globe, 30 June 1998, at A2.

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2. MISLEADING DISTINCTIONS AND MISSED OPPORTUNITIES FOR CLARIFICATION

2.1. The exercise of police powers in a state without its consent

The basis for Dokmanović's challenge is the principle that states and international organizations may exercise police powers inside the territory of another state only with the consent of the host state.[13] The unconsented exercise of such powers constitutes an infringement of the sovereignty and territorial integrity of the host state in violation of the UN Charter[14] and customary international law.

This principle finds support in several decisions of the International Court of Justice (ICJ), and its predecessor the Permanent Court of International Justice (PCIJ). In the 1927 *S.S. Lotus* case, for example, the PCIJ held that jurisdiction cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or convention.[15] In the 1949 *Corfu Channel* case, the ICJ recognized that "between independent States, respect for territorial sovereignty is an essential foundation" of international law.[16] And in the 1986 *Military and Paramilitary Activities* case, the ICJ ruled that

> the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.[17]

While none of these cases dealt specifically with the conduct of foreign police or investigators in a state without its permission, the precedent is widely seen as prohibiting such action. Thus, the 1986 Restatement (Third) of the Foreign Relations Law provides that

13. *See* I. Brownlie, Principles of Public International Law 307 (1990).
14. *See* 1945 UN Charter, Art. 2(4).
15. *See* The Case of the S.S. "Lotus" (France *v.* Turkey), Judgment of 7 September 1927, 1927 PCIJ (Ser. A) No. 9, at 18.
16. Corfu Channel (United Kingdom *v.* Albania), Merits, Judgment of 9 April 1949, 1949 ICJ Rep. 4, at 35.
17. Military and Paramilitary Activities (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 106, para. 202.

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> a state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.[18]

This position was confirmed by the UNGA Sixth (Legal) Committee, whose members reached consensus that

> international law prohibits a state from exercising its criminal jurisdiction beyond its territory as contrary to the sovereign equality and territorial integrity of states, unless the other state concerned has given its consent.[19]

Similarly, the Working Group on Arbitrary Detention of the UN Commission on Human Rights has taken the position that a basic principle of international law and international relations is the "respect for the territorial sovereignty of States".[20] Citing the decisions of the PCIJ and ICJ mentioned above, the Working Group concluded that this principle prohibits a state from engaging in unconsented law enforcement activity in the territory of another state.[21]

2.2. The validity of the distinction between luring and abductions under international law

While recognizing that some unconsented law enforcement activities (i.e., abductions) would violate the principle of territorial integrity, the Trial Chamber in the *Dokmanović* case held that luring would not do so. As the Trial Chamber noted, "the Prosecution freely concedes that it used trickery, it was a ruse" and that "it was the intention of the Prosecution from day one to arrest Mr. Dokmanović".[22] However, the Trial Chamber found "that such luring is consistent with principles of international law and the sovereignty of the FRY".[23] In so finding, the Trial Chamber stressed that "there was no actual physical violation of FRY territory in gaining custody of Mr. Dokmanović".[24]

18. Section 432(2) of the 1986 Restatement (Third) of the Foreign Relations Law of the United States, As Adopted and Promulgated by the American Law Institute at Washington, D.C., May 14, 1986, Vol. I (1987).
19. V. Morris & M. Vrailas Bourloyannis, *The Work of the Sixth Committee at the Forty-Eighth Session of the U.N. General Assembly*, 88 AJIL 343, at 357-358 (1993).
20. Report of the Working Group on Arbitrary Detention, UN Commission on Human Rights, 50th Session, Agenda Item 10, UN Doc. E/CN.4/1994/27 (1993), at 139-140.
21. *Id.*, at 139.
22. Prosecutor *v.* Slavko Dokmanović, Decision on the Motion for Release by the Accused Slavko Dokmanović, *supra* note 1, para. 57.
23. *Id.*
24. *Id.*, para. 77.

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As an extraterritorial law enforcement practice, luring is much more common, and apparently somewhat less objectionable than abductions. Unlike abduction by force, weapons are not used to get the suspect to the location where the arrest will occur. Therefore, the risk of injury or damage in the host state is minimized. This does not mean, however, that there was no physical violation of FRY territory as the Trial Chamber concluded. The Trial Chamber's conclusion would only have been correct if the communications between law enforcement officials and the target of the luring were conducted exclusively over the phone, radio, e-mail, or fax. In contrast, an agent of the OTP (Kevin Curtis) did physically enter FRY territory with the purpose of engaging in a law enforcement activity (the luring) without the FRY's permission. Furthermore, while the Trial Chamber found that Dokmanović's decision to leave the FRY and enter Croatia in response to the OTP's deceit was voluntary, a decision based on misrepresentation cannot truly be characterized as a choice made by free will.[25]

There are numerous cases in which states have protested luring as a violation of their territorial integrity and international law.[26] In contrast to the position of the Trial Chamber, most countries do not distinguish between abduction by fraud and abduction by force. In recognition of this trend, in September of 1994, the XVth Congress of the International Penal Law Association adopted a resolution which stated:

> [a]bducting a person from a foreign country *or enticing a person under false pretenses* to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognized as a bar to prosecution.[27]

The Trial Chamber sought to distinguish the many national cases in which courts have "frowned upon the notion of luring an individual into a jurisdiction to effectuate his arrest" on the ground that in such cases there existed an established extradition treaty that was circumvented,[28] while in the *Dokmanović* case there was no extradition treaty in force between the FRY and the Tribunal.[29] The rationale for the distinction is that the circum-

25. *See* J. Paust *et al.*, International Criminal Law: Cases and Materials 436 (1996).
26. *Id.*, at 344-435 (describing such cases involving Canada, Cyprus, and the Bahamas).
27. *Mutual Assistance in Criminal Matters: XVth Congress of International Penal Law Association Adopts Resolutions*, 10 International Enforcement Law Reporter 385, at 386 (1994) (emphasis added).
28. Prosecutor *v.* Slavko Dokmanović, Decision on the Motion for Release by the Accused Slavko Dokmanović, *supra* note 1, para 74.
29. *Id.*, para. 67.

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vention of an extradition treaty undermines the process of international law and fosters its disrespect.[30]

The Trial Chamber's analysis, however, ignores the fact that transfer to the ICTY "is not extradition and does not involve the same state concerns as extradition".[31] The obligation of states to arrest and transfer the accused is a consequence of the establishment of the ICTY by the Security Council acting under Chapter VII of the UN Charter. All states have an obligation to comply with such a decision by virtue of the UN Charter.[32] As indicated in the Secretary-General's report on the Yugoslavia Tribunal,

> an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.[33]

There is no reference to extradition in the Secretary-General's report, the ICTY's Statute, or its Rules of Procedure, and it was not envisaged that states would have to enter into extradition agreements with the ICTY as a prerequisite to surrendering indicted persons to the Tribunal.[34]

Consequently, states have pursued different means to implement their responsibility to surrender indicted war criminals to the ICTY. Twenty states have enacted special legislation on cooperation.[35] A handful of states have entered into truncated extradition agreements with the ICTY.[36] Others have formally stated that no legislation or agreement is necessary to ensure full cooperation.[37] The FRY has neither enacted legislation nor entered into an agreement with the ICTY but has transferred persons to the tribunal on two occasions.[38]

Prior to the luring operation, no request for the surrender of Dokmanović was transmitted to the FRY, which was under a treaty obligation (Article 25 of the UN Charter) to comply with such a request irrespective of the non-

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30. *See* S. Evans, *International Kidnapping in a Violent World: Where the United States Ought to Draw the Line*, 137 Military Law Review 187, at 197 (1992).
31. Amnesty International, International Criminal Tribunals: Handbook for Government Cooperation, AI Index: IOR 40/07/96, at 58 (August 1996).
32. *See* 1945 UN Charter, Arts. 25 and 103.
33. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 126.
34. *See* V. Morris & M. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia 210-213 (1995).
35. *See* Amnesty International Handbook for Government Cooperation, *supra* note 31 (unpaginated Chart on State Cooperation with the Yugoslavia Tribunal).
36. *Id.*, at 59. *See also* R. Kushen & K. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AJIL 510, at 515 (1996).
37. Such states include the Republic of Korea, the Russian Federation, Singapore, and Venezuela. *See* Amnesty International Handbook for Government Cooperation, *supra* note 31 (unpaginated Chart on State Cooperation with the Yugoslavia Tribunal).
38. *Id.*

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existence of an extradition agreement with the ICTY. The luring of Dokmanović *in lieu* of pursuing his surrender from the FRY through the formally established procedure,[39] therefore, raises the same concerns as if the ICTY had acted in circumvention of an operational extradition treaty. That the FRY failed to comply with its obligations to surrender persons to the Tribunal in the past does not alter this conclusion since in the cases cited by the Trial Chamber, luring was likewise used in response to non-cooperation by the host state.[40]

Thus, the distinction the Trial Chamber draws in *Dokmanović* between luring and abduction is, from a legal standpoint, ill-founded. From a practical standpoint, the Trial Chamber's conclusion may turn out to be disastrous if it has the effect of discouraging apprehensions by NATO or other forces of the 'most wanted' indicted war criminals who have been given *de facto* sanctuary in the FRY. As discussed below, contrary to the implication of the Trial Chamber's opinion, abductions from the FRY may be legally justifiable.

2.3. The right of UN and NATO forces to exercise police powers in the former Yugoslavia

The Dayton Peace Accords,[41] Security Council Resolution 1031,[42] and the subsequent agreement of the Bosnian government[43] make clear that NATO

39. The procedure set forth in the ICTY's Rules contemplates a request for surrender transmitted to state authorities, and in the event of non-compliance, a report to the Security Council, which would determine what further action is appropriate. *See* Arts. 20(2) and 21 of the 1993 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 (1993), Annex. *See also* Rules of Procedure and Evidence of the Yugoslavia Tribunal (adopted on 11 February 1994, amended 5 May 1994 and 4 October 1994, revised 30 January 1995, further amended 3 May 1995, 15 June 1995, 6 October 1995, 18 January 1996, 23 April 1996, 25 June 1996, 5 July 1996, and 3 December 1996), Rule 55 (Execution of Arrest Warrants), Rule 56 (Cooperation of States), Rule 57 (Procedure after Arrest), Rule 59 (Failure to Execute a Warrant), Rule 59 *bis* (Transmission of Arrest Warrants), Rule 60 (Advertisement of Indictment), and Rule 61 (Procedure in Case of Failure to Execute a Warrant), UN Doc. IT/32/Rev.10.
40. *See* Prosecutor v. Slavko Dokmanović, Decision on the Motion for Release by the Accused Slavko Dokmanović, *supra* note 1, paras. 62-64.
41. The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accords, 35 ILM 75 (1996)), initialled in Dayton, Ohio in the United States on 21 November 1995 and signed on 14 December 1995 in Paris, consists of a General Framework Agreement, 11 annexes, and various related documents. The parties to the Dayton Accords include the three states which were parties to the conflict in the former Yugoslavia (Bosnia and Herzegovina, Croatia, and the FRY), and the two entities of the state of Bosnia and Herzegovina (the Federation of Bosnia and Herzegovina and the Republika Srpska). The FRY signed the General Framework Agreement on behalf of the Republika Srpska by virtue of an agreement between them on 29 August 1995; the Republika Srpska signed the annexes on its own behalf. In addition, the General Framework Agreement was initialled and later signed by the European Union and the Con-

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forces may lawfully exercise police powers in Bosnia and Herzegovina. Similarly, Security Council Resolution 1037, which with the consent of Croatia and the FRY temporarily placed the administration of Eastern Slavonia under UNTAES, gave the United Nations peacekeeping force the right to exercise police powers in that region of Croatia.[44] Consequently, there is no violation of territorial integrity or the rights of the accused where NATO or United Nations personnel apprehend indicted war criminals in Bosnia and Herzegovina or the region of Eastern Slavonia, Croatia. Such activities conducted in the FRY and other regions of Croatia, however, are another matter.

Yet, even without the consent of the FRY or Croatia, the principle of territorial integrity is not absolute. International law permits a state, for instance, to enter another's territory in self-defense.[45] Thus, a state may justifiably engage in an unconsented abduction or luring operation in another state against terrorists which pose a continuing threat and which are being given sanctuary in the latter state.[46] To the extent indicted war criminals located in the FRY or Croatia constitute a threat to the NATO or United Nations troops stationed in the territory of the former Yugoslavia, this would provide justification for abducting or luring such individuals for purposes of arrest.

Moreover, under the UN Charter, a state may enter another's territory when specifically authorized by the Security Council pursuant to its Chapter

tact Group countries (France, Germany, the Russian Federation, the United Kingdom, and the United States).

42. The Resolution recognizes that the parties to the Dayton Accords are required to cooperate fully with the ICTY and have authorized IFOR "to take such actions as required, including the use of necessary force", to implement the Tribunal's orders. *See* UN Doc. S/RES/1031 (1995), para. 5; *see also* Statements of the United Kingdom and the United States, UN Doc. S/PV.3607 (1996), at 8 and 20.

43. By letter dated 21 December 1995, the Bosnian Minister of Foreign Affairs agreed as follows: "[w]ith regard to the arrest warrant of the International war crimes Tribunal in the Hague concerning the citizens of the Republic of Bosnia and Herzegovina we agree that these tasks be performed, along with our police force, also by members of the IFOR. We also agree that those persons arrested in connection with the warrants of the tribunal be handed over by the IFOR to the International Tribunal for war crimes.", reproduced *in* D. Orentlicher, Responsibility of States Participating in Multilateral Operations With Respect to Persons Indicted for War Crimes, paper presented at the International Conference on Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights, Siracusa, Italy, 16-20 September 1997, at 5.

44. *See* UN Doc. S/RES/1037 (1996); 1995 Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, signed on 12 November 1995, UN Docs. A/50/757 (1995) and S/1995/951.

45. *See* 1945 UN Charter, Art. 51.

46. *See* 1979 YILC, Vol. II (Part One), at 93-94; R. Lillich & J. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 American University Law Review 217 (1977); and O. Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 Houston Journal of International Law 309 and 312 (1989).

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VII powers. Thus, the coalition forces that invaded Iraq during the Gulf War were acting in accordance with international law.[47] Several Security Council resolutions may be read together as giving the NATO force the authority to enter the FRY to apprehend persons wanted by the ICTY.[48] According to the Appeals Chamber in the *Blaskić* case, where the ICTY has made a judicial finding that a state has breached its obligation to arrest persons indicted by the ICTY under Article 29 of the ICTY Statute, and where "the Security Council ha[s] not decided that it enjoyed exclusive powers on the matter", states are permitted to take unilateral or collective enforcement actions.[49]

The FRY has "not executed a single arrest warrant issued to it",[50] including arrest warrants against three persons publicly charged along with Dokmanović with complicity in the murder of 260 civilians and unarmed men following the fall of the city of Vukovar. The then President of the ICTY, Antonio Cassese, brought this non-compliance to the attention of the Security Council so that it could "decide upon the appropriate response".[51] On 8 May 1996, the Security Council issued a statement declaring that it "deplores the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal against [these] individuals", but to date it has taken no further action against the FRY.[52] Under these circumstances, the NATO or United Nations forces may be justified in conducting law enforcement activities in the territory of the FRY notwithstanding the general prohibition against such conduct under international law.

Whether the staff of the OTP may engage in such activities must also be examined. The powers of the Prosecutor enumerated in Article 18 of the ICTY Statute are limited to "the power to question suspects, victims and

47. *See* UN Doc. S/RES/678 (1990), para. 2; *see also* UN Doc. S/RES/940 (1994), para. 4 (authorizing invasion of Haiti to restore the Aristide government).

48. UN Doc. S/RES/827 (1993), para. 4 (requiring states to comply with arrest orders pursuant to Art. 29 of the ICTY Statute); UN Doc. S/RES/1031 (1995) (establishing IFOR); UN Doc. S/RES/1088 (1996) (establishing SFOR as the successor to IFOR); Rule 59 *bis* (A) of the ICTY's Rules of Procedure (authorizing the transmission of arrest warrants to an appropriate authority or international body), *supra* note 39; *see also* J. Burton, *War Crimes During Operations Other Than War: Military Doctrine and Law 50 Years After Nuremberg and Beyond*, 149 Military Law Review 199, at 203-205 (1995) (expressing the opinion that ICTY has the authority to issue orders that are binding on member states, including those participating in the NATO operation in Bosnia and Herzegovina).

49. Prosecutor *v.* Blaskić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, No. IT-95-AR108 *bis*, Appeals Chamber, 29 October 1997, para. 36.

50. Letter dated 24 April 1996 from the President of the International Criminal Tribunal for the Former Yugoslavia addressed to the President of the Security Council, UN Doc. S/1996/319 (1996).

51. *Id.*

52. Statement of the President of the Security Council, UN Doc. S/PRST/1996/23 (1996).

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witnesses, to collect evidence and to conduct on-site investigations".[53] Five days after the Trial Chamber's decision was rendered in the *Dokmanović* case, the Appeals Chamber issued a decision in the *Blaskić* case, in which it confirmed that the ICTY is

> not endowed with enforcement agents of its own, [and therefore] must rely upon the cooperation of States. The International Tribunal must turn to states if it is effectively to [...] have indictees arrested and surrendered to the International Tribunal.[54]

The *Blaskić* opinion makes clear that the officers of the OTP are not authorized to act on their own as an international constabulary. This would suggest that they may not unilaterally arrest indicted persons, but it does not prevent them from participating in operations as an adjunct to the United Nations or NATO. Since the Trial Chamber found that Dokmanović was arrested by the military forces of UNTAES and not by representatives of the OTP,[55] the OTP did not overstep its authority in the case.

2.4. The *mala captus bene detentus* principle

Given its conclusion that the manner of Dokmanović's arrest was not unlawful, the Trial Chamber declared that it "need not decide at this time whether the International Tribunal has the authority to exercise jurisdiction over a defendant *illegally obtained* from abroad".[56] Although the ICTY's Rules provide for the exclusion of evidence if "its admission is antithetical to, and would seriously damage, the integrity of the proceedings",[57] there is no parallel provision for the dismissal of a case where the manner of gaining custody over the accused is found to be in violation of internationally protected human rights. Thus, it remains unclear whether the ICTY would apply the principle *mala captus bene detentus*, meaning a person improperly seized may nevertheless properly be detained.[58] Under this principle, recently reaffirmed by the US Supreme Court in the controversial *Alvarez-Machain* case,[59] a court may recognize jurisdiction over an individual regardless of the method utilized for apprehension.

53. Art. 18 of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 39.
54. Prosecutor v. Blaskić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *supra* note 49, para. 26.
55. *Id.*, para. 51.
56. *Id.*, para. 78.
57. ICTY Rules of Procedure, *supra* note 39, Rule 95.
58. *See* M. Cherif Bassiouni, International Extradition: United States Law and Practice 190 (1987).
59. *See* United States *v.* Alvarez-Machain, 504 US 655, at 669 (1992) (holding that US courts had jurisdiction to try an individual forcibly abducted from Mexico without its consent).

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The *Alvarez-Machain* case was met with widespread criticism throughout the international community.[60] Less than a year after the decision, the United Kingdom's House of Lords emphatically rejected the *mala captus bene detentus* rule as inconsistent with evolving standards of human rights.[61] At about the same time, 21 co-sponsoring states introduced a UN General Assembly resolution that would request an advisory opinion from the ICJ "on the question of the conformity with international law of certain acts involving the extraterritorial exercise of coercive power of a State and the subsequent exercise of criminal jurisdiction".[62] While the resolution seeking an advisory opinion has been repeatedly deferred,[63] the UN Working Group on Arbitrary Detention concluded that "[the] detention of Humberto Alvarez-Machain is declared to be arbitrary, being in contravention of [...] Article 9 of the International Covenant on Civil and Political Rights".[64]

Article 9 of the 1966 International Covenant on Civil and Political Rights provides that everyone has the right to liberty and security of person, that "no one shall be subjected to arbitrary arrest or detention", and that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".[65] The Human Rights Committee, which was established to monitor the implementation of the Covenant, has ruled on several occasions that transborder abductions violate Article 9 of the Covenant.[66] Interpreting a similar provision in the 1950 European Convention for the Protection of Human Rights,[67] the European Court of Human Rights has stated that where state authorities are involved in a luring, the rights of the individual under the Convention are violated.[68]

60. *See generally*, M. Zaid, *Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout*, 19 Houston Journal of International Law 829 (1997).

61. *See* Regina *v.* Horseferry Road Magistrates' Court (Ex parte Bennett), [1994] 1 App. Cas. 42 (Eng. HL 1993) (holding that a New Zealand citizen, forcibly returned to England from South Africa, could obtain a stay of the criminal proceedings against him in England).

62. UN Doc. A/47/249 (1992).

63. *See* V. Morris & M. Vrailas Bourloyannis, *The Work of the Sixth Committee at the Forty-Ninth Session of the U.N. General Assembly*, 89 AJIL 607, at 620 (1995).

64. Report of the Working Group on Arbitrary Detention, *supra* note 20, at 139-140.

65. 1966 International Covenant on Civil and Political Rights, 23 March 1976, 999 UNTS 171, Art. 9(1).

66. *See* Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. A/36/40 (1981), at 176 and 185.

67. *See* 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 312 UNTS 221, Art. 5.

68. *See* Stocke *v.* Germany, Judgment of 19 March 1991, Eur.Ct.H.R. (Ser. A). No. 199 (Annex, Opinion of the Commission, para. 167). The Trial Chamber in the *Dokmanović* case distinguished *Stocke* v. *Germany* on the ground that "there was an extradition treaty between France and Germany, the procedures of which were clearly not followed". *See* Prosecutor *v.* Slavko Dokmanović, Decision on the Motion for Release by the Accused Slavko Dokmanović, *supra* note 1, n. 86.

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In his report on the ICTY (which serves as the legislative history of the Tribunal's Statute), the Secretary-General stated that the ICTY "must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings".[69] The precedent of the Human Rights Committee and the European Court of Human Rights would therefore suggest that the ICTY should dismiss a case where the defendant has been abducted or lured from a state in circumvention of the normal procedures.

While recognizing the appropriateness of the approach of the Human Rights Committee and the European Court of Human Rights for ordinary crimes, the ICTY could choose to adopt an 'Eichmann exception', in the case of "universally condemned offenses", under which the issue of the fugitive's abduction should be "decoupled" from his subsequent trial.[70] The precedent for such an exception derives from the abduction of Adolf Eichmann, the engineer of Hitler's 'Final Solution', from Argentina by Israeli agents. The Security Council adopted a resolution recognizing that the abduction violated international law and requiring Israel to make "appropriate reparation" to Argentina.[71] But the Resolution did not require Eichmann's return, and Argentina settled for a simple apology given the universally condemned nature of Eichmann's crimes.[72] Eichmann was subsequently tried, convicted, and executed in Israel without further objection by the international community.[73]

3. CONCLUSION

The *Dokmanović* case is likely to be among the most important cases tried by the ICTY since at the time of the Vukovar massacre, the Yugoslav army answered solely to Serb leaders, with the President of the FRY, Slobodan Milošević, at the top of the chain of command. "It could be that when all the evidence is in, we will go straight up to Milošević", ICTY Deputy Prosecutor Graham Blewitt was quoted as stating.[74] Unfortunately, the Trial Chamber's decision on the Motion for Release of the Accused, which rests on an artificial distinction between luring and abductions, may needlessly discour-

69. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 106.
70. R. Higgins, Problems and Process: International Law and How We Use It 72-73 (1994).
71. UN Doc. S/RES/138 (1960), para. 2.
72. P. Mitchell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 Cornell International Law Journal 383, at 422-423 (1996).
73. *Id.*
74. N. Mileticich, *UN Court to Try Suspect in Biggest Croatian Massacre*, AAP Newsfeed, 18 January 1998 (LEXIS, Curnws File).

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age future apprehensions undertaken by NATO and United Nations troops in the territory of the former Yugoslavia, especially in the FRY and Croatia.

Even in the absence of an extradition treaty, the exercise of law enforcement activities by foreign agents in the territory of the former Yugoslav republics without the host country's consent potentially violates two distinct international obligations.[75] The first of these is respect for territorial sovereignty. The second concerns the internationally recognized human rights of the accused. In this regard, there is no significant difference between luring and abductions; both are generally objectionable. But this is not the decisive issue.

What the Trial Chamber in *Dokmanović* should have focussed on is that there is no violation of international law where the Security Council or the ICTY has authorized the law enforcement activities in question, where the state has consented to such activities, or where such activities are necessary under the principle of self-defense. Moreover, even where the manner of apprehension violates international law, the ICTY may apply the so-called 'Eichmann exception', while at the same time recognizing that the *mala captus bene detentus* principle is generally inconsistent with the modern law of human rights.

75. P. Mitchell, *supra* note 72, at 410.

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