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BY WHAT MEANS JUSTICE? THE ACCEPTANCE OF SECRET INDICTMENTS IN THE UNITED STATES AND IN INTERNATIONAL LAW

Colette Retif

I. INTRODUCTION

On August 25, 1999, Austrian police arrested the Bosnian Serb Army's chief of staff, General Momir Talic. He was arrested in Austria while he was attending a conference organized by the Vienna National Defense Academy and the Organization for Security and Cooperation in Europe.[1] He was charged in a secret indictment issued by 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 ("International Yugoslavia Tribunal" or "Tribunal"), with "persecuting civilians 'on political, racial, or religious grounds.'"[2] Although the method which the tribunal used to arrest General Talic, including the element

[1] *See generally* Marlise Simons, *Top Bosnian Serb Officer Arrested for U.N. Tribunal*, N.Y. TIMES, August 26, 1999, at A10.

[2] *Id.*

of secrecy surrounding the indictment and trickery shrouding his invitation to the conference in Vienna, might seem suspect to some, it was completely legal and in accordance with both United States law and international law.

The Tribunal has had difficulty in apprehending many suspected war criminals.[3] This is due in great part to the international community's "unwillingness to actively search for and arrest war criminals within Yugoslavia."[4] Common sense suggests that public indictments tend to warn suspected war criminals allowing them to evade arrest and prosecution. The Tribunal realized that it could solve this conundrum by ceasing to release indictments since an "apprehension will be . . . facilitated if the target is unsuspecting."[5]

Secrecy facilitated the arrest of General Talic. Seemingly ignorant of his indicted status in the international community, General Talic left Bosnia to attend a conference held in Austria.[6] An informant alerted the Tribunal to General Talic's intention to attend, and the Tribunal quickly delivered a warrant for his arrest, as well as a copy of his indictment, to the Viennese police.[7] This was the United Nation's first arrest of such a prominent suspected war criminal.[8]

The Tribunal's technique, of secretly indicting suspected war criminals and then waiting for them to be lured out of their safe-havens into a country in which the Tribunal can assert jurisdiction over them, might appear, at first, to be a questionable reaction to the international community's frustrating inability to apprehend these individuals. It does not seem fair that a suspect is denied the knowledge that he is indeed a suspect and, thus, denied the opportunity to defend himself, by offering evidence or testimony. Furthermore, the fact that General Talic was invited to attend what could be considered a peace conference could be seen to reek of deception and trickery. Are the Tribunal's secret indictments, although successful and techni-

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[3] *See* Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda,* 3 HOFSTRA L. & POL'Y SYMP. 37, 38 (1999).

[4] *See* Walter Gary Sharp, Sr., *In Search of Peace and Justice: War Criminals at Large in the Former Yugoslavia,* 32 INT'L LAW. 489, 489-90 (1998).

[5] Arbour, *supra* note 3, at 39.

[6] *See* Simons, *supra* note 1.

[7] *See id.*

[8] *See id.*

cally respectful of the United Nations' sensibilities, acceptable to the international community in general? Do secret indictments agree with the United States' indictment procedures? Does the Tribunal's method of acquiring jurisdiction accord with the international community's approach to jurisdiction or that held by the United States? The first section of this comment will investigate whether secret indictment procedures and secret indictments are acceptable under United States law. The second part of this comment will discuss whether international law supports the use of such tactics. The third part of this comment will consider what methods United States law condones for the acquisition of jurisdiction over indictees, while the final section will discuss what approach international law takes when considering the legality of methods for the acquisition of jurisdiction.

It appears that the use of these practices does not contradict international law or United States law. In the United States a judge can order that an indictment be sealed for several reasons, not the least of which, is to facilitate the apprehension of those suspects mentioned in the indictment who are not already in custody.[9] The Rules of Procedure and Evidence that govern the Tribunal for the Former Yugoslavia expressly allow for the sealing of indictments where such a measure is necessary to apprehend suspects.[10]

Furthermore, it is a well-accepted principle throughout courts in the United States that the method by which a person is brought into a jurisdiction does not affect the court's jurisdiction over the person as long as he or she is given a fair trial.[11] Although most of the international community does not share the United States' lack of concern over the manner in which jurisdiction over a suspect is obtained, most would support the Tribunal's jurisdiction in this case due to the stature of this par-

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[9] *See* United States v. Smaldone, 484 F.2d 311, 320 (10th Cir. 1973).

[10] *See* 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, *Rules of Procedure and Evidence*, U. N. Doc. IT/ 32/Rev. 18 (July 14, 2000), Rule 53, *reprinted in* 33 I.L.M. 484, 516 (1994), *available at* icty/basic/rpe/IT32_rev18con.htm [hereinafter ICTY Rules of Procedure].

[11] *See* Frisbie v. Collins, 342 U.S. 519, 521-22 (1952).

ticular suspect.[12] As common sense might suggest, merely because a practice is legal does not mean it is just or wise. It must be questioned whether the practice of secretly indicting suspected war criminals and inviting them to attend conferences or other international forums where they are then arrested could have unpalatable results.

II. The Integral and Long-standing Use of Secret Indictments in United States Law

Regardless of the results that the practice of secretly indicting war criminals may have on future peace talks, it remains a fact that United States law allows indictments to be kept secret.[13] Courts throughout the United States frequently seal indictments.[14] Secrecy is one of the major characteristics of grand jury proceedings from which indictments arise[15] and one that has withstood the test of time.[16] Federal grand jury deliberations and hearings are conducted in secrecy.[17] According to Federal Rules of Criminal Procedure for the United States District Courts,

> a grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes record for testimony, an attorney for the government, or any person to whom disclosure is made . . . shall not disclose matters occurring before the grand jury . . . A knowing violation of Rule 6 may be punished as a contempt of court.[18]

This prohibition covers the disclosure of any and all information that may expose what occurred before this body.[19] Very limited exceptions to this secrecy rule exist. Federal Rules of Criminal Procedure for the United States District Courts, Rule 6(e)(3)(A)(i), states that, it is permissible for disclosure to be

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[12] *See generally* Stephan Wilske & Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation Of International Law in the Aftermath of United States v. Alvarez-Machain*, 5 U. Chi. L Sch. Roundtable 205 (1998).

[13] *See* Fed. R. Crim. P. 6(e)(E)(4).

[14] *See* United States v. Richard, 943 F.2d 115, 118 (1st Cir. 1991).

[15] *See generally* Fed. R. Crim. P. 6.

[16] *See* United States v. Kahaner, 203 F. Supp. 78, 86 (S.D.N.Y. 1962).

[17] *See* Barnett v. Dillon, 890 F. Supp. 83, 88 (N.D.N.Y. 1995).

[18] Fed. R. Crim. P. 6(e)(E)(2).

[19] *See* United States v. Armco Steel Corp., 458 F. Supp.784, 790 (W.D. Mo. 1978).

made to "[a]ttorney[s] for the government for the use in the performance of such attorney's duty."[20] According to the Rule 6(e)(3)(C)(iii), it is also acceptable for government lawyers to share information about occurrences in one grand jury with another grand jury.[21] These exceptions, however, cannot be exercised without a very strong showing that the information sought to be disclosed is indeed critical to the party seeking its disclosure.[22]

This strict secrecy is essential for the proper functioning of the grand jury and, therefore, should be carefully enforced.[23] Strict secrecy is necessary for many different reasons.[24] If these proceedings were made public, many people would cease volunteering information for fear of retaliation.[25] Moreover, the reliability of information gathered from witnesses appearing before the grand jury might also be seriously affected by their fear of retribution.[26] Furthermore, if grand jury proceedings were made public, knowledge of the proceeding might facilitate suspects' tampering with witnesses and members of the grand jury, or cause suspects to flee outside of the courts' jurisdiction, avoiding indictment.[27] In addition, secrecy protects the reputations of unindicted suspects.[28] Once the proceedings have finished, the record may be disclosed, when necessary, for the furtherance of justice.[29] The shroud of secrecy that protects grand jury proceedings in progress does not automatically extend over to indictments that may be produced by this body.[30] Disclosure of grand jury proceedings can even be made to the defendant himself if deemed necessary by the court.[31]

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20 FED. R. CRIM. P. 6(e)(3)(A)(i).

21 *See* FED. R. CRIM. P. 6(e)(3)(C)(iii).

22 *See In re* Grand Jury Proceedings, 942 F.2d 1195, 1198 (7th Cir. 1991).

23 *See* Armco Steel Corp., 458 F. Supp. at 790.

24 *See generally* Douglas Oil Company v. Petrol Stops Northwest, 441 U.S. 211 (1979).

25 *See* United States v. Rose, 215 F.2d 617, 628 (3rd Cir. 1954).

26 *See id.*

27 *See id.*

28 *See id.*

29 *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940).

30 *See* United States v. Ahmad, 329 F. Supp. 292, 298 (M.D. Pa. 1971).

31 *See* United States v. Badger Paper Mills, Inc., 243 F. Supp. 443 (E.D. Wis. 1965).

Although grand jury proceedings and the indictments that may be issued may be made public, disclosure does not have to occur. According to the Federal Rules of Criminal Procedure for the United States District Courts, "[r]ecords, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as necessary to prevent disclosure of matters occurring before a grand jury."[32] An indictment may also be sealed.[33] The Federal Rules of Criminal Procedure for the United States District Courts state that the Federal Magistrate to whom an indictment is returned may direct that the indictment is kept secret until the defendant is in custody or has been released pending trial. Furthermore, an indictment may be sealed "[f]or any legitimate prosecutorial objective or where the public interest otherwise requires it".[34] Many United States courts have cited the concern that the defendant might flee, as a reason for keeping an indictment secret after it is issued.[35] These courts have determined that the government has reasonable prosecutorial need to apprehend indictees.[36] In order to facilitate the arrest of such persons, the government must request that the court seal the indictment.[37] An indictment can also be sealed in order to facilitate the apprehension of a defendant who is not within the jurisdiction of the court at the time the indictment is issued and whose expected return to the jurisdiction would not occur if he became aware of the existence of the indictment.[38]

III. The Developing Acceptance and Use of Secret Indictments in International Law

There are no standardized rules of procedure in international law. Thus, there are no clear documents that can be referred to in a discussion of whether international law condones the use of secret indictment procedures and/or secret indict-

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[32] Fed. R. Crim. P. 6(e)(E)(6).

[33] *See* United States v. Richard, 943 F.2d 115, 118 (1st Cir. 1991).

[34] United States v. Lakin, 874 F.2d 168, 170-71 (8th Cir. 1989).

[35] *See* United States v. Smaldone, 484 F.2d 311, 320 (10th Cir. 1973).

[36] *See* United States v. Davis, 598 F. Supp. 453, 455-56 (S.D.N.Y. 1984).

[37] *See id.*

[38] *See id.*

ments.[39] A review of international documents suggests that the use of secret indictment procedures and/or secret indictments may be acceptable to the international community. Article 16 of the London Charter,[40] which set forth the rules of procedure and evidence applicable to be used in Germany after World War II, suggests that secret indictment procedures and secret indictments might have been acceptable to the international community at the time. Under its terms "[a] copy of the indictment and all the documents lodged with the indictment . . . shall be furnished to the defendant at a reasonable time before the trial."[41] This article leaves open the possibility that secret indictments and sealed indictments would have been acceptable under the phrase "a reasonable time before trial."[42] A grand jury type of proceeding and any subsequent indictment arising from such a proceeding could have been kept secret from an indictee for any legitimate judicial purpose as long as he was informed of its content while he still had enough time before trial to prepare a defense against the charges contained in the indictment. Since the rules were "essentially devised by Americans and based on American law"[43] this supposition is quite reasonable.

Article 17 of the United Nations Security Council's Resolution 955 Establishing the International Tribunal for Rwanda (Rwanda Resolution) describes the proper procedure for the investigation and preparation of an indictment for that tribunal.[44] According to Article 17:

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source . . . The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

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[39] *See* Evan J. Wallach , *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L. 851, 882 (1999).

[40] London Agreement of August 8, 1945, 59 Stat. 1544, 15500, *available at* www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm [hereinafter London Agreement].

[41] *See id.* at art. 16(a).

[42] *Id.*

[43] Wallach, *supra* note 39, at 853.

[44] *See Security Council Resolution 955 Establishing the International Tribunal for Rwanda*, November 1994, S.C. Res. 955, 49 U. N. SCOR, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598. [hereinafter ICTR Resolution].

2. The Prosecutor shall have the power to question suspects, victims and witnesses. . .
3. If questioned, the suspect shall be entitled to counsel of his or her own choice. . .
4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment . . . The indictment shall be transmitted to a judge of the Trial chamber.[45]

This article fails to mention whether or not the determination of whether a suspect should be indicted is to be held secret.[46]Article 18 of that same resolution describes the proper review of the indictment. Under this Article, "the judge of the Trial Chamber to whom the indictment has been transmitted shall review it [and] [u]pon confirmation of an indictment, the judge may . . . issue such orders for the arrest, detention, surrender or transfer of persons . . ."[47] Article 18 does not clarify whether an order to seal an indictment would be acceptable under the powers granted to the presiding judge.[48]

Article 19 describes the commencement and conduct of trial proceedings.[49] According to this article, "[a] person against whom an indictment has been confirmed shall, pursuant to an order or arrest warrant of the International Tribunal for Rwanda, be taken into custody, [and] immediately informed of the charges against him or her . . . ."[50] Article 19 only stipulates that the indictee be informed of the substance of the indictment upon arrest.[51]

It appears that a war criminal could be secretly indicted under the terms of Article 17 and that his indictment could be sealed under Article 18 and Article 19. The failure of Resolution 955 to clearly address the issue of secret indictments or secret indictment procedures allows for the argument that such indictments and procedures might be acceptable to, or at least, not in direct contradiction to, the terms of this resolution.

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45 *Id.*

46 *See id.*

47 *Id.*

48 *See id.*

49 *See id.*

50 ICTR Resolution, *supra* note 44.

51 *See id.*

The actual use of secret indictments, and secret indictment procedures, to facilitate arrests in Rwanda[52] supports this argument. The fact that these techniques were used there, and that their use received very little attention from the international community,[53] suggests the international community is willing to accept secret indictments as legitimate judicial practices.

The Rome Statute of the International Criminal Court also does not explicitly address the acceptability of secret indictments or stipulate whether the process that gives rise to indictments on the international level must, or even can, be held in secret.[54] The terms set forth and language used in Article 54, which addresses the duty and powers of the Prosecutor with respect to investigations, and Article 57, which addresses the functions and powers of the Pre-Trial Chamber, however, suggest that the use of secret indictment procedures and sealed indictments would be acceptable under this statute.[55] According to Article 54:

> (A) The prosecutor shall: (b) take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court [and]. . .
>
> (B) The prosecutor may: (e) agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and (f) take necessary steps, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.[56]

Article 57 further states:

> 3. In addition to its other functions under this Statute, the Pre-Trial Chamber may: (c) [w]here necessary, provide for the protection and privacy of victims and witnesses, the

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[52] *See* Arbour, *supra* note 3, at 37, 41.

[53] *See id.*

[54] *See generally* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (September 1998), *reprinted in* 37 I.L.M. 999, *available at* http://www.un.org/law/icc/.

[55] *See id.* at art. 57.

[56] *Id.* at art. 54.

> preservation of evidence . . . and the protection of national security information.[57]

Procedures that may result in an indictment that are held in secret, as well as sealed indictments, protect witnesses, evidence, and the confidentiality of information. They also serve to ensure the privacy of witnesses. It would stand to reason that they might be acceptable under the terms of the Rome Statute as long as the indictee, once arrested, is "informed promptly and in detail of the nature, cause and content of the charge . . . . " in accordance with Article 67 of the same statute.[58]

The Rules of Procedure and Evidence for the International Yugoslavia Tribunal directly address the propriety of secret indictments and make certain statements which could be used in support of secret indictment procedures. Under Rule 52 of these rules, "[u]pon confirmation by a Judge of a Trial Chamber, the indictment shall be made public."[59] It appears from this rule that it is standard practice for indictments to be made public. There are, however, exceptions to this rule. Rule 53 describes the circumstances in which non-disclosure of an indictment may be permitted.[60] Rule 53 states:

> (A) When confirming an indictment the judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.
> (B) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no public disclosure of an indictment, or part thereof, or of any particular document or information, if satisfied that the making of such an order is in the interests of justice.[61]

The existence of Rule 53 and its acceptance of secret indictments make clear that secret indictment procedures could take place under the terms of this statute.

Since common sense suggests that sealing an indictment would accomplish very little if the indictment procedure had been conducted publicly, it can be assumed that Rule 26 implies

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[57] *Id.* at art. 57.
[58] *Id.* at art. 67.
[59] ICTY Rules of Procedure, *supra* note 10, at Rule 52.
[60] *See id.* at Rule 53.
[61] *Id.* at Rule 53.

an acceptance of secret indictment proceedings. This assumption is supported by other parts of these rules of Procedure and Evidence for the International Yugoslavia Tribunal. According to rule 39, which describes the conduct of investigations:

> In the conduct of an investigation, the Prosecutor may: (ii) undertake . . . matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial;[and] (iv) request such orders as may be necessary from a Trial Chamber or a Judge.[62]

This language suggests that indictment procedures could be held in secret if this was deemed necessary for completing the investigation. Such might be the case if there was cause to worry that knowledge of an indictment procedure could cause suspects to destroy evidence or harm witnesses necessary for completing the investigation.

The International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) has, in fact, begun to exercise the option of keeping indictments sealed accorded to them by Rule 53.[63] Since 1997, the ICTY has begun to use secret indictments almost exclusively.[64] The ICTY's reliance on secret indictments was to avoid a continued failure to arrest indictees.[65] The ICTY formerly used public indictments, but this proved problematic.[66] Many indictees who had been publicly indicted would flee to avoid arrest and prosecution.[67] Louise Arbour, the ICTY's former chief prosecutor,[68] admitted that the ICTY had begun to use secret indictments because of the difficulties encountered in arresting indictees after indictments were made public.[69] The public nature of the indictments informed many indictees of their criminal status in the international community and allowed many to evade capture. Countries who had a self interest in aiding these men were facilitating their evasion

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[62] *Id.* at Rule 39.

[63] *See* Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57 (1999).

[64] *See id.*

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *See* Simons, *supra* note 1, at A10.

[69] *See* Arbour, *supra* note 3, at 39.

and avoidance of prosecution.[70] Arbour, who is one of the major figures in international law, clearly voiced her acceptance of these means as a way to promote the capture of war criminals.[71]

IV. The Permissive Acceptance Of Questionable Methods of Attaining Jurisdiction in United States Law

An important problem arises when a person is located beyond the jurisdiction of the court issuing an indictment and is *not* likely to voluntarily come into the area in which the court has jurisdiction regardless of his knowledge of the indictment. United States law and international law differ on what means are acceptable to gain jurisdiction over an indictee. The standing principle of law in the United States regarding the manner in which jurisdiction over an indictee can be achieved is referred to as the Ker-Frisbie doctrine.[72]

This doctrine states that a court may assert jurisdiction over an indictee regardless of the manner in which his presence in the jurisdiction of the court in which he was tried was attained.[73] This includes issuing an indictment even if the person's presence in the jurisdiction was a result of his having been abducted from another state.[74] The jurisdiction of a court is, therefore, not impeded by the fact that the Federal Kidnapping Act was disregarded in the capture of the indictee.[75] A court can even assert its jurisdiction over an indictee who has been "[i]llegally carried, against his will, into the United States."[76] If during the course of an ensuing trial, an indictee is accorded all the rights traditionally given to a defendant during the course of the trial, he cannot invalidate its results by claiming that the court did not have jurisdiction over his person because of the method by which the court obtained jurisdiction over his per-

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[70] *See id.*

[71] *See id.*

[72] *See generally* Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952); United States v. Alvarez-Machain, 504 U.S. 655 (1992).

[73] *See generally Ker*, 119 U.S. at 436.

[74] *See* Beachem v. Attorney General of Missouri, 808 F.2d 1303, 1304 (8th Cir. 1987).

[75] *See Collins*, 342 U.S. at 511-12.

[76] *Ker*, 119 U.S. at 440.

son.[77] "Nothing in the Constitution requires a guilty person rightfully convicted to escape justice because he was brought to trial against his will."[78]

This does not mean that the indictee cannot make a valid complaint against the manner in which his presence was obtained. If government officials were instrumental in obtaining an unwilling indictee's presence in the jurisdiction in which his indictment was issued through such means as abduction, the indictee can file a complaint charging these officials with violating his right to Due Process contained in the fifth and fourteenth amendments of the United States Constitution. An indictee brought into the jurisdiction of a court by force can file a section 1983 civil suit for deprivation of rights afforded him by the Constitution—namely that of Due Process.[79] If the indictee can show that the means used to acquire his involuntary presence in the court's jurisdiction resulted in physical injury, he is entitled to collect damages.[80] Under this statute, such an indictee can receive nominal damages even if he cannot prove that he received any actual injury.[81]

Even if he succeeds in proving that an abrogation of his due process rights did, however, occur, the indictee will not be able to use this as a means of avoiding a legitimate trial.[82] Courts of appeal have allowed lower courts to assert jurisdiction over an indictee over whom jurisdiction was questionably obtained even though they do not approve of the use of sordid methods of attaining jurisdiction.[83] In the case of *United States v. Matta-Ballesteros*, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's assertion of jurisdiction over a defendant whose presence in the court's jurisdiction had been attained through his kidnapping from Honduras. The defendant was charged with violence in the aid of racketeering, kidnapping a federal agent, and conspiring to kidnap a federal agent.[84] Some courts, possibly as a result of their sense of un-

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[77] *See id.*
[78] *Frisbie*, 342 U.S. at 522.
[79] *See* Brown v. Nutsch, 619 F.2d 758, 763 (8th Cir. 1980).
[80] *See id.* at 764.
[81] *See id.* .
[82] *See* Ker v. Illinois, 119 U.S. 436, 440 (1886).
[83] *See* United States v. Matta-Ballesteros, 71 F.3d 754, 763 (9th Cir. 1995).
[84] *See id.*

easiness in allowing illegal actions to result in convictions, have modified the Ker-Frisbie doctrine to greater or lesser extents[85] in cases in which government officials were involved in the malfeasance, which resulted in an indictee's unwilling presence in a jurisdiction. Several courts developed and applied tests by which they judged whether the means used to achieve jurisdiction invalidated a resulting conviction.[86] The court deciding the case of the *United States v. Toscanino*, determined that a new test had to be developed which would embody the judicial system's newly expanded view of the protection afforded an alleged criminal.[87] An earlier decision by the Supreme Court of the United States, in *Rochin v. California*, asserted that due process protected not only a defendant's right to a fair trial but also protected certain rights before and during arrest.[88] The court in *Toscanino* asserted that this expanded protection of due process could not exist simultaneously with the lax approach taken by the Ker-Frisbie doctrine and, therefore, that the doctrine needed to be modified.[89] This court decided that where jurisdiction had been attained by "[t]he government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights" due process requires a court to divest itself of jurisdiction.[90] In *Toscanino,* an Italian citizen, charged with conspiracy to bring narcotics into the United States, was kidnapped, tortured and drugged by government officials, in an effort to bring him back into the United States for trial.[91] The court held that the methods used to attain jurisdiction over the defendant were of the type which could result in a dismissal of a conviction, and that the defendant was entitled to a hearing to decide if such remedial action should be taken.[92]

Other courts disagree with the *Toscanino* court's broad modification of the Ker-Frisbie doctrine. These courts argue that the extension of due process protection only necessitates a

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[85] *See generally* United States v. Gengler, 510 F.2d 62 (2nd Cir. 1974); United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974); *Matta-Ballesteros*, 71 F.3d 754.

[86] *See id.*

[87] *See Toscanino*, 500 F.2d at 275.

[88] *See generally* Rochin v. California, 342 U.S. 165 (1952).

[89] *See Toscanino*, 500 F.2d at 275.

[90] *Id.*

[91] *Id.* at 270-71.

[92] *See id.* at 275-76.

more limited adjustment of the doctrine. The court in *United States v. Gengler*, as the court in *Toscanino* had, asserted that the method in which jurisdiction over a defendant is attained could no longer be ignored when considering the validity of an ensuing conviction.[93] The court in *Gengler,* however, held that convictions resulting from trials in which jurisdiction over an indictee had been achieved by "torture, brutality and similar outrageous conduct" could no longer be upheld.[94] Yet, the *Gengler* court asserted that other irregularities would not invalidate a conviction.[95] According to *Gengler*, *Rochin v. California*'s extension of due process protection only protects people from government actions before and during arrest which "'offend the cannons of decency and fairness which express the notions of justice of English-speaking peoples', 'shock the conscience' and 'offend a sense of justice.'"[96]

The "cannons of decency and fairness which express the notions of justice of English-speaking peoples"[97] mentioned by the *Gengler* court may have been the "jus cogen norms." "Jus cogen norms" are . . . preemptory international laws which enjoy the highest status within customary international law and cannot be preempted by treaties.[98] In other words, these laws appear to be the universal truths that all civilized countries must accept and which cannot be circumvented by national law.[99] An example of such a jus cogens is the ban on extra-judicial killing that is a "norm of international law so fundamental that it is binding on all members of the world community."[100]

According to courts in the United States, the rights constituting these norms of international law are very limited.[101] They "[e]ncompass only such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhumane or degrading punishment . . . and the right not to be arbitrarily

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[93] *See* United States v. Gengler, 510 F.2d 62, 65 (2nd Cir. 1974).

[94] *See id.*

[95] *See id.*

[96] *Id.*

[97] *Id.*

[98] *See* United States v. Matta-Ballesteros, 71 F.3d 754, 764 (9th Cir. 1995).

[99] *See* Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997).

[100] *Id.*

[101] *See id.*

detained,"[102] "genocide, and slavery."[103] Together these rights form the standard of human rights accepted by the world community.[104] According to United States jurisprudence, abduction does not "rise to the level of other jus cogens norms such as torture, murder, genocide, and slavery."[105]

In *United States v. Alvarez-Machain*, the United States Supreme Court reaffirmed the Ker-Frisbie Doctrine.[106] The Supreme Court upheld the conviction of a Mexican citizen, who had been abducted from Mexico to the United States to stand trial for crimes in connection with the abduction and murder of a United States Drug Enforcement Administration special agent and his pilot.[107] This reaffirmation was particularly strong since an extradition treaty exists between the United States and Mexico.[108] The existence of this treaty seemingly supported the indictee's argument that the court issuing his conviction did not have jurisdiction over his person because he had not been properly extradited from Mexico in accordance with the terms of the treaty.[109] The Supreme Court held that if a treaty did not expressly or implicitly prohibit prosecution of those whose presence was obtained by means other than those mentioned in its terms such prosecution could occur.[110] The court concluded that since the treaty between the United States and Mexico did not expressly or implicitly prohibit prosecution of those whose presence was obtained by means other than those mentioned in its terms, the Ker-Frisbie doctrine could be applied, and under its terms the finding of jurisdiction would stand.[111]

Although the use of deception as a means for the acquisition of an individual's presence is not acceptable in civil cases[112]

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[102] *Id.*

[103] Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1987).

[104] *See id.*

[105] Siderman de Blake v. Republic of Argentinia, 965 F.2d 699, 717 (9th Cir. 1992).

[106] United States v. Alvarez-Machain, 504 U.S. 655 (9th Cir. 1992).

[107] *See generally id.*

[108] *See id.*

[109] *See id.*

[110] *See Alvarez-Machain*, 504 U.S. at 666.

[111] *See id.* at 668.

[112] *See generally* Tickle v. Barton, 95 S.E.2d 427 (W. Va. 1956).

it can be easily deduced from the United States' disregard for the manner in which jurisdiction over an indictee is attained by a court, formally expressed in the terms of the Ker-Frisbie doctrine and reaffirmed in the Supreme Court's decision in *Alvarez-Machain*, that the courts in the United States would be allowed to assert jurisdiction over indictees brought into their jurisdiction by deception. Since United States' courts' jurisdiction is not dependent on the manner in which it was attained, the use of deception would not affect the assertion of jurisdiction by a court. Moreover, if the courts do not consider the abduction of an indictee, which can be asserted to be a more serious infringement of the individual's rights than the use of deception, they are not likely to consider any lesser infringement as a reason for denying a court jurisdiction over an indictee.

Indeed, even the courts that attempted to modify the Ker-Frisbie doctrine would not overturn a conviction on the grounds that the indictee was lured into the jurisdiction in which he was later convicted. The right to be free from the threat of abduction is not held by the United States as a "jus cogen norms" and, therefore, is not beyond consideration for use in apprehending an indictee. If abduction would be an acceptable means then it stands to reason that deception would not "shock the conscience" or be forbidden under "jus cogens norms."

V. The More Limited, But Still Liberal Approach Toward Attainment of Jurisdiction in International Law

In contrast to United States law, international law is much more favorable to the use of judicial scrutiny of the means used to achieve jurisdiction than the United States and generally condones the reversal of convictions by courts whose jurisdiction was achieved through the use of dishonest tactics.[113] Therefore, it appears, that international law, generally, does not approve of the United States' use of the Ker-Frisbie doctrine since it allows for jurisdiction in cases where there has been an abduction or where some other questionable means have been

[113] *See generally* Wilske, *supra* note 12.

used to achieve jurisdiction over a defendant.[114] Customary international law must be relied upon in an effort to ascertain international law's approach to such a situation.[115] This type of law, which in the past was frequently referred to as the law of nations, is the result of the general assent of civilized nations.[116] "The norms of [the] law of nations are found by consulting [the] juridical writing on public law, considering the general practice of nations, and referring to judicial decisions recognizing and enforcing international law."[117] Diplomatic papers, such as statements, press releases, declarations and acts, as well as the practice of international organizations can also be used as sources for customary international law.[118]

A review of documents related to international law reveals the existence of a dislike, common to the international community, of some methods of attaining jurisdiction powerful enough to affect the validity of convictions attained through the use of such means. The Restatement Third of Foreign Relations states that an abductee must be returned to the nation from which he was abducted if his abduction was the result of one nation's invasion of the sovereignty of another.[119] The United Nations Charter and the Charter of the Organization of American States require nations to honor the sovereignty that nations have over their territory and the people found within their territory.[120] One of the most important rules of international law is that every country is sovereign within its borders and that one state may not exercise its power in another state by extracting a person found within the first state's borders without the first state's permission.[121] Inter-state abductions are contrary to a basic tenent of international law.[122] Abductions of people from the territory of one state by agents of another state are con-

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[114] *Id.*

[115] *Id.*

[116] *See* Filartiga v Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

[117] Doe v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997).

[118] *See* Wilske, *supra* note 12, at 212.

[119] *See* Leigh Ann Kennedy, *Jurisdiction in Violation of an Extradition Treaty: United States v. Alvarez-Machain*, 27 CREIGHTON L. REV. 1105, 1120 (1994).

[120] *See id.*

[121] *See* Jonathan A. Gluck, *The Customary International Law of State-Sponsored International Abduction and the United States Courts*, 44 DUKE L. J. 612, 614 (1994).

[122] *See id.*

demned by the international community, in large measure because they violate the sovereignty of the state from which the person is snatched.[123] The international community also considers the right to be free from abduction as one of the rights constituting customary international law.[124] The Restatement Third of Foreign Relations, the United Nations Charter and the Charter of the Organization of American States, all clearly suggest that international law does not support a court's jurisdiction regardless of the means by which it was achieved.[125]

When the holding of foreign courts are scrutinized, it becomes clear that they, as a whole, no longer adhere to the principle of "male captus, bene detentus", which means "improperly captured, properly detained." This rule had the same effect on foreign courts' jurisdiction as the United States' Ker-Frisbie doctrine had on courts in the United States.[126] Under the terms of "male captus, bene detentus," a court could maintain jurisdiction over a person regardless of the manner in which such jurisdiction was attained.[127]

Courts throughout the world only recently ceased following the doctrine of "male captus, bene detentus." Courts in Zimbabwe began to overrule cases supporting the use of "male captus, bene detentus" in 1992.[128] Similarly, South African courts had followed the doctrine until they suddenly reversed themselves in the holding in *State v. Ebrahim*.[129] Courts in both these countries are now strictly prohibited from asserting jurisdiction over a defendant whose presence in the court's jurisdiction was a result of malfeasance.[130] Courts in Costa Rica must investigate any contention that jurisdiction was improperly attained and can no longer assert jurisdiction over a defendant if the defendant can prove his presence in the presiding court's jurisdiction was a result of an abduction by Federal agents.[131]

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123 *See* Kennedy, *supra* note 118, at 1120.
124 *See* Gluck, *supra* note 120.
125 *See* Kennedy, *supra* note 118, at 1120-21.
126 *See generally* Wilske, *supra* note 12.
127 *Id.*
128 *See id.* at 221.
129 *See id.* at 219-20.
130 *See id.* at 220-21.
131 *See id.* at 228.

England also adhered in the past to the principle of "male captus, bene detentus." An English court held "the strict view that pre-trial police malpractice could generally have no effect on (a) trial".[132] Recently, however, there has been a move within England to take a more active interest in police conduct before trial.[133] Courts throughout England now frequently remove jurisdiction from lower courts when the method with which the presence of a defendant was acquired is questionable.[134]

France, Switzerland, New Zealand, and Australia all allow their courts to investigate the methods that were used when a defendant was apprehended in a foreign jurisdiction.[135] All four countries allow a court to dismiss a case or a conviction if a court attained jurisdiction through questionable means.[136] Courts in these countries need not do so, however, if they do not believe that the exercise of jurisdiction in such a case would offend justice.[137] In any of these countries, even those that prohibit the exercise of jurisdiction over abductees, a court can maintain jurisdiction if the abductee is an international war criminal.[138]

Common sense suggests that the international community's willingness to make an exception to its general opposition to the attainment of jurisdiction through the use of questionable means such as abduction would allow them to accept the use of deception as a means of procuring jurisdiction over an indictee. Although abduction and deception, when used against an individual in order to induce him into taking certain actions are both invasions of an individual's rights, it can easily be asserted that abduction of a person is a more serious violation of rights than is the use of deception. If the international community accepts the use of physical force involved in the abduction of certain international indictees it would be very hard for them to take offense to the use of deception as a means of acquiring ju-

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[132] Andrew L.T Choo, *Ex Parte Bennett: The Demise of the Male Captus, Bene Detentus Doctrine in England?*, 5 CRIM. L. F. 165 (1994).

[133] *See id.* at 179.

[134] *See id.*

[135] *See* Wilske, *supra* note 12, at 222-28.

[136] *See id.*

[137] *See id.*

[138] *See id.* at 230.

risdiction over such an individual. As a result, it can be asserted with some assurance that the international community's recent retreat from the principle of "male captus, bene detentus" would not affect the jurisdiction of an international court over an indictee of international stature who has been brought within the court's jurisdiction by deception.

VI. CONCLUSION

After an investigation of the acceptability of the use of secret indictment procedures and indictments as well as the use of deception as a means of acquiring jurisdiction over an indictee, it appears that the ICTY's use of these methods, as part of an effort to bring General Momir Talic to trial for the war crimes he is alleged to have committed as the chief of staff of the Bosnian Serb army are acceptable under both United States law and international law. General Talic was purposefully kept ignorant of his indictment by the secrecy in which the indictment proceeding was held, and the ICTY's decision not to disclose the existence of the indictment does not violate any tenants of United States law. In fact, such tactics, if necessary for the proper functioning of a Grand Jury or the apprehension of an indictee, are legally sanctioned by the Federal Rules of Criminal Procedure.[139] Based on the ICTY's failure to capture many of the Yugoslavian leaders suspected of war crimes, after it had made public their indictments,[140] one can see that secrecy was an essential element in the capture of General Talic and, therefore, acceptable under United States law.

It can also be deduced from the terms of international documents such as the London Charter[141] and the Rwanda Resolution[142] that the international community, both inplicity and explicitly, supports the use of secret indictment procedures and secret indictments. Particularly relevant to General Talic's situation is the fact that the international community, under the terms of the Procedure and Evidence for the International Yugoslavia Tribunal, explicitly condones the use of secret indictments and, by inference that of secret indictment procedures in

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139 *See* FED. R. CRIM. P. 6(e)(E)(4).

140 *See* Arbour, *supra* note 3, at 39.

141 London Agreement, *supra* note 40, at art. 16(a).

142 *See* ICTR Resolution, *supra* note 43.

the arrest of suspected Yugoslavian war criminals.[143] Therefore, it exemplifies that the international community clearly gave its assent to the use of secrecy in the capture of General Talic.

Moreover, the use of the invitation from the Vienna National Defense Academy and the Organization for Security and Cooperation in Europe to attend a peace conference as the means by which to secure the General's presence in Austria, a country whose police would willingly execute the warrant for arrest which arose from the indictment of General Talic, also did not contradict either United States or international law. Under the terms of United States law, known as the Ker-Frisbie doctrine, a court need not inquire into the manner in which an indictee's presence in its jurisdiction occurred.[144] Therefore, the use of an invitation as bait to secure the presence of a criminal suspect in the jurisdiction of the prosecuting court, even if interpreted as deceit and trickery, would not be taken into consideration in deciding the validity of any ensuing prosecution.

Although the international community frequently no longer follows the practice of the "improperly captured, properly detained"[145] it too would accept the use of the invitation to this peace conference as an acceptable method with which to capture a suspected and indicted war criminal. Even countries which hold that their courts must inquire into the method by which jurisdiction is acquired over an indictee if it is alleged that the means used to capture the indictee are suspect would not deny a court's jurisdiction over an indicted war criminal merely because he was induced to leave the sanctuary of his own country and venture into another to attend a peace conference to which he had been invited. The use of an invitation to capture a suspected war criminal would probably be seen as a perfectly reasonable tool in the effort to have justice done.

The assertion that the method used by the ITCY to arrest General Talic is acceptable to both United States law and international law does not answer all the questions that the use of such tactics produce. It does not answer the question whether

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[143] ICTY Rules of Procedure, *supra* note 58, at Rule 53.

[144] *See generally* Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952); United States v. Alvarez-Machain, 504 U.S. 655 (1992).

[145] *See generally* Wilske, *supra* note 12.

the combination of secretly indicting war criminals and then luring them into a country where a warrant for their arrest can easily be enforced is a wise method to use in the quest to apprehend war criminals. Although the international community supports the use of this method, deception and trickery should not be used as a means of acquiring jurisdiction. One need only reflect on the horrendous effect that a general employment of secret indictments and fictitious invitations could have on future peace talks between, for instance, the Israelis and the Palestinians. What new developments in peace negotiations between these two peoples could be stifled if Mr. Arafat thought that he might be the target of a secret indictment, due to his ties with terrorist factions, which could result in his arrest, if he were to attend a peace conference happening outside of the Palestinian territory?

Moreover, the international community should refrain from any feeling that it has found the solution to the Gordian knot. Although it succeeded in capturing a major Yugoslavian war criminal through the combination of secret indictment and false pretense it does not seem likely now that many major Yugoslavian suspected war criminals will be as careless as to venture out of their home territory for such unimportant business. The effectiveness of the use of secret indictments will probably slowly fade as the likely targets of such indictments take greater caution to avoid capture, regardless of their actual knowledge of their having been indicted by a war crimes tribunal. The continued success of such tactics is dependent on the carelessness, ill-preparedness, or stupidity of an indictee, and if there is one thing which can be generally asserted about suspected war criminals it is that they are evil but generally not stupid.