CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 77631/01
by Slobodan MILOŠEVIĆ
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 19 March 2002 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ *Section Registrar*,

Having regard to the above application lodged on 20 December 2001,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Slobodan Milošević, is a national of the Federal Republic of Yugoslavia (hereinafter "the FRY") born in 1940. He is currently detained in the United Nations Detention Center in The Hague, Netherlands. He is represented before the Court by Mr N.M.P. Steijnen, a lawyer practising in Zeist (Netherlands).

A. The circumstances of the case

I. Background to the case

The facts of the case, as apparent from public information and the documents submitted by the applicant, may be summarised as follows.

The applicant was indicted, together with others, by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (hereinafter "the ICTY"). On 24 May 1999 a judge of the Trial Chamber of the ICTY, finding that there was a *prima facie* case against the indictees, confirmed the indictment and issued a warrant for their arrest. The applicant was then the President of the FRY.

In September 2000 the applicant was voted out of office. On 6 October 2000 he relinquished the position of President of the FRY. He was subsequently arrested on charges brought under FRY domestic law.

On 29 June 2001 the applicant was transferred to The Hague, despite an order of the Constitutional Court of the FRY suspending his surrender to the ICTY pending consideration of its legality.

On 3 July the applicant made an initial appearance before the Trial Chamber, during which he was formally charged and invited to plead guilty or not guilty. The applicant refused to enter a plea but attempted to argue that the ICTY was an unlawful institution. The presiding judge refused to hear his arguments. Noting the applicant's refusal to plead, the Trial Chamber *ex officio* entered a plea of not guilty on his behalf. It also ordered his detention on remand.

On 9 August 2001 the applicant lodged a preliminary motion arguing, in so far as is relevant here, that the ICTY was illegal.

At a status conference on 30 August 2001, the applicant attempted to make an oral statement to the effect that the ICTY lacked a legitimate basis. He was prevented from so doing by the presiding judge, who invited him to make it in writing in the form of a preliminary motion. The applicant did so.

On 6 September 2001, the applicant having refused to be represented before a tribunal which he considered illegal, the Trial Chamber appointed three practising lawyers as *amici curiae* to defend the applicant's interests. On 19 October 2001 the *amici curiae* submitted a brief supporting the applicant's preliminary motions of 9 and 30 August.

On 30 October 2001, at a second status conference, the Trial Chamber gave an oral decision rejecting the applicant's preliminary motions. The *amici curiae* made oral submissions concerning the proposed conduct of the trial. The applicant was allowed to speak uninterrupted. He alleged that the ICTY Prosecutor was biased, since she had failed to bring prosecutions in connection with the military intervention by NATO member States on the territory of the FRY which took place in 1999. He also complained about the conditions in which he was detained, and in particular about the lack of privacy.

The Trial Chamber's decision rejecting the applicant's preliminary motions was published in writing, with reasons, on 8 November 2001.

The indictment of 24 May 1999 has been amended on two occasions, and two further indictments have been brought. The applicant has consistently refused to plead, and pleas of not guilty have been entered on his behalf.

On 30 January 2002 a hearing was held before the Appeals Chamber of the ICTY, the purpose of which was to decide whether the various indictments should be heard in separate sets of proceedings. The applicant submitted a request for his release and promised to appear for any hearings.

On 1 February 2002 the Appeals Chamber of the ICTY decided that the three indictments should be heard in a single set of proceedings.

The applicant's trial opened on 12 February 2002.

It was reported on 27 February 2002 that the applicant had repeated his request for release to the Trial Chamber, and on 6 March 2002 that it had been refused.

2. Proceedings before the President of the Regional Court of The Hague

The applicant brought summary civil proceedings (*kort geding*) against the Netherlands State before the President of the Regional Court (*arrondissementsrechtbank*) of The Hague. He sought an order directed against the State for his unconditional release; in the alternative, for him to be returned to the FRY; in the further alternative, for the State to make representations to "the so-called Tribunal" (i.e. the ICTY) and other competent international bodies and institutions for his release; in the still further alternative, for the State to make representations to "the alleged Tribunal" (again, i.e. the ICTY) and other competent international bodies and institutions for his return to the FRY. He argued, essentially, that his transfer to the ICTY was illegal as a matter of the domestic law of the FRY; that the ICTY itself lacked a basis in international law, having been set up by a resolution of the Security Council of the United Nations (to wit, resolution no. 827 of 25 May 1993) and not by a multilateral treaty; that the ICTY was the handmaiden of NATO and therefore not an independent and impartial tribunal in the sense of Article 6 of the Convention; that the actions of the Security Council and the ICTY were discriminatory; and that

he was entitled to immunity as a former head of state. In view of these considerations the Netherlands State was acting unlawfully by allowing him to be detained and remain in detention on its territory,

A public hearing was held on 23 August 2001.

The President of the Regional Court gave judgment on 31 August 2001. He found that the ICTY did in fact have sufficient legal basis; that it offered sufficient procedural guarantees, as found by the European Court of Human Rights in its *Naletilić v. Croatia* decision (no. 51891/99, 4 May 2000); and that, the Kingdom of the Netherlands having lawfully transferred its jurisdiction over the ICTY's indictees to the ICTY, the courts of the Netherlands were not competent to consider the applicant's request for release.

The applicant lodged an appeal against this judgment, but withdrew it again as of 17 January 2002.

B. Relevant domestic law

Article 289 § 1 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) provides that all cases where a speedy and provisionally enforceable decision is required in the interests of the parties shall be heard in summary proceedings by the President of the Regional Court, who shall set a hearing date on a working day.

Article 295 provides for an appeal against the President's judgment to the Court of Appeal (*gerechtshof*), and for a further appeal – on points of law – to the Supreme Court (*Hoge Raad*).

Article 292 provides that a provisionally enforceable decision taken in summary proceedings shall not prejudge the merits of the case.

COMPLAINTS

The applicant complained under Article 5 § 1 of the Convention that his detention on Netherlands territory, with the active connivance of the Netherlands authorities, lacked a basis in Netherlands domestic law, and that a procedure prescribed by Netherlands domestic law was not followed. In this connection, he argued that, firstly, the ICTY's very establishment under a resolution of the United Nations Security Council was unlawful; secondly, the manner of his transfer from the FRY to The Hague was also unlawful; and thirdly, that he enjoyed immunity from prosecution as a former head of state. Consequently, the co-operation of the Netherlands authorities with the ICTY in keeping him detained was similarly unlawful.

He complained under Article 5 § 2 about the additional charges brought against him by the Prosecutor of the ICTY long after he was first transferred to The Hague.

He complained under Article 5 § 4 of the Convention that he had been prevented from challenging the legality of his detention, since at his initial appearance, and subsequently at status conferences, he had not been allowed to challenge the legitimacy of the ICTY itself and since the ICTY's procedure only provided for the possibility of "provisional" release.

He complained under Article 6 § 1 of the Convention that the ICTY was not an "independent and impartial tribunal established by law". It was a body subsidiary to the Security Council and illegally established by that organ. Moreover, it was discriminatory. This was reflected not only by its nature as an *ad hoc* tribunal whose jurisdiction was limited *ratione loci* (the territory of the former Socialist Federative Republic of Yugoslavia) and *ratione temporis* (from 1991 onwards), but also by what he claimed was the ICTY's Prosecutor's one-sided policy of prosecuting "mainly Serbs" – the Court understands this to mean persons of Serb ethnic origin, irrespective of their nationality – and allowing alleged criminals of different ethnic origin to go free, and her failure to bring prosecutions in connection with the military intervention by NATO member States on the territory of the FRY which took place in 1999.

He complained under Article 6 § 1 of the Convention that the ICTY's procedure was not "fair", as was reflected by the failure of the ICTY's Prosecutor to prosecute those responsible for the aforementioned military intervention by NATO member States. Furthermore, it united in a single organ "administrative, legislative and judicial functions", since it had the power to make and amend its own rules and delegated similar powers to its Registrar. More generally, the applicant complained that the aggregate of the failings alleged prevented any trial before the ICTY from ever being "fair".

He complained under Article 6 § 2 of the Convention that the ICTY's Statute provided for the prosecution of "persons responsible" or "persons presumed responsible" for specified crimes – which in his submission reflected a presumption of guilt even before the start of every trial.

He complained under Article 6 § 3 (c) of the Convention that the ICTY had appointed "*amici curiae*" to defend his interests, thereby usurping his right to defend himself, and impeded his contacts with counsel of his choice.

He complained under Article 10 of the Convention of restrictions on his contacts with the press and the media.

He complained under Article 13 of the Convention that the only "remedy" available against the other violations he alleged was that offered by the ICTY itself.

Referring generally to the allegations of discrimination outlined above, he also complained under Article 14 of the Convention.

THE LAW

Article 35 of the Convention, in relevant part, provides as follows:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law...
>
> 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings."

The Court notes at the outset that it is not clear whether all the complaints now before it were also made at the domestic level. To the extent that they were not, there has been failure to exhaust the available domestic remedies (see, among many other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 66).

To the extent that the complaints were made at the domestic level, the applicant has not pursued his appeal against the judgment given in summary proceedings on 31 August 2001 by the President of the Regional Court to a conclusion. It thus appears that also in this respect domestic remedies have not been exhausted. The question therefore arises whether the remedies available to the applicant were for some reason inadequate or ineffective in the particular circumstances of the case, or whether there existed special circumstances absolving the applicant from the requirement to exhaust them.

The applicant alleges that the judgment given by the President of the Regional Court of The Hague clearly shows that there are no domestic remedies available which are adequate and effective. In his submission this is borne out by the fact that the President of the Regional Court found in that judgment that the Netherlands courts had no jurisdiction to entertain his various claims.

However, the applicant did not make use of the opportunities offered by Netherlands law to challenge this finding; he withdrew his appeal to the Court of Appeal and in so doing also deprived himself of the possibility of lodging a subsequent appeal on points of law to the Supreme Court.

The Court reiterates that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see, among many other authorities, the above-mentioned *Akdivar and Others v. Turkey* judgment of 16 September 1996, p. 1210, § 66-67; *Muazzez Epözdemir v. Turkey* (dec.),

31 January 2002, no. 57039/00; and *T.A. and Others v. Germany* (dec.), no. 44911/98, 19 January 1999).

In these circumstances the Court concludes that the case must be rejected in its entirety for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President