

Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2002

Part Three. Judicial decisions on questions relating the United Nations and related
intergovernmental organizations

Chapter VIII. Decisions of national tribunals



Copyright (c) United Nations

<i>Procedural and institutional issues</i>	<i>Page</i>
8. Status of United Nations Relief and Works Agency for Palestine Refugees in the Near East area staff (7 May 2002)	470
9. Gratis personnel—Voluntary contribution of services to the Department of Public Information by a private communications company (8 May 2002)	471
10. Gratis personnel—Regime with respect to personnel of the United Nations Monitoring, Verification and Inspection Commission—Security Council resolution 1284 (1999) (11 November 2002)	474
11. Regulations governing the status, basic rights and duties of officials other than Secretariat officials, and experts on mission (ST/SGB/2002/9)—Status of members of the Board of Auditors and their staff—United Nations Financial Regulations (22 November 2002)	476
B. LEGAL OPINIONS OF THE SECRETARIATS OF INTERGOVERNMENTAL ORGANIZATIONS RELATED TO THE UNITED NATIONS	480

Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

CHAPTER VII. DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

International Tribunal for the Law of the Sea

The “*Volga*” Case (*Russian Federation v. Australia*)

Article 292, “Prompt release of vessels and crews”, of the United Nations Convention on the Law of the Sea—Factors determining a reasonable bond for release of a vessel or its crew	483
--	-----

CHAPTER VIII. DECISIONS OF NATIONAL TRIBUNALS

The Netherlands

The Hague District Court

Plaintiff’s complaint that 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 has denied him unhindered and confidential communications with his lawyers representing him before the European Court of Human Rights . .	505
--	-----

Chapter VIII
DECISIONS OF NATIONAL TRIBUNALS

The Netherlands

THE HAGUE DISTRICT COURT

Plaintiff's complaint that 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 has denied him unhindered and confidential communications with his lawyers representing him before the European Court of Human Rights

CIVIL LAW SECTOR—JUDGE HEARING APPLICATIONS FOR PROVISIONAL RELIEF

Judgement in interim injunction proceedings of 26 February 2002,
Given in case number KG 02/105 of:

SLOBODAN MILOŠEVIĆ

Domiciled in Belgrade, Federal Republic of Yugoslavia
Currently residing in Scheveningen in the municipality of The Hague,
Plaintiff,

Procurator litis A. B. B. Beelaard,
Advocates E. Olof and N. M. P. Steijnen, of Zeist

v.

1. 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

With its seat in The Hague,
represented at law by the Registrar of the court,
no appearance entered;

2. THE STATE OF THE NETHERLANDS (THE MINISTER OF JUSTICE AND THE PRESIDENT OF THE HAGUE DISTRICT COURT) with its seat in The Hague, procurator litis Cécile M. Bitter, defendants.

The defendants shall hereafter also be referred to separately as the Tribunal and the State.

On the basis of the documents and the oral proceedings of 12 February 2002, the following facts will be deemed to have been established in this case:

(a) By resolution 827 of 25 May 1993 (Netherlands Treaty Series 1993, 168; “Resolution 827”), the United Nations Security Council, “acting under Chapter VII of the Charter of the United Nations” (“the Charter”), decided to establish an international tribunal “for the sole purpose of the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”. The annex to the resolution includes the Statute (Statute of the International Tribunal; “the Statute”) of the aforementioned tribunal (“the Tribunal”). Article 31 of the Statute provides that the Tribunal shall have its seat in The Hague.

(b) Article 9, paragraph 2, of the Statute reads as follows:

“The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.”

Article 29, paragraph 1, of the Statute includes the following sentence:

“States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”

Article 30, paragraphs 1 and 2, of the Statute reads as follows:

“1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (“the Immunities Convention”) shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

“2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.”

(c) Article II, section 2, of the Immunities Convention states as follows:

“*Section 2.* The United Nations, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every

form of legal process except insofar as in a particular case it has expressly waived its immunity. ...”

(d) The relationship between the Netherlands—as host country—and the Tribunal is laid down in the Agreement of 29 July 1994 between the Netherlands and the United Nations (Netherlands Treaty Series 1994, 189), also referred to as “the Headquarters Agreement”. This Agreement also provides for the practical implementation of certain of the Statute’s provisions. The Netherlands implemented resolution 827 and the Statute by Act of Parliament of 21 April 1994 (Bulletin of Acts and Decrees 1994, 308; “the Implementation Act”). Section 17 of the Implementation Act reads as follows:

“Dutch law shall not apply with respect to deprivation of liberty imposed on the orders of the Tribunal within facilities available to the Tribunal in the Netherlands.”

(e) Article VIII of the Headquarters Agreement stipulates as follows:

“The Tribunal, its funds and assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Tribunal has expressly waived its immunity”

(f) The plaintiff is the former President of the Federal Republic of Yugoslavia.

(g) After the plaintiff’s detention in Belgrade on 1 April 2001 to answer criminal charges, he was transferred to the Tribunal on 29 June 2001 in compliance with the arrest warrant issued by the Tribunal on 22 January 2001. He was taken to the United Nations detention unit (“the detention unit”), a section of Scheveningen prison complex reserved exclusively for the detention of persons being prosecuted before the Tribunal, where he has been held in pre-trial detention since.

(h) The regime applicable to detainees held in the detention unit is laid down in the “Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal (‘the detention rules’)”. Rule 67 provides as follows:

“Each detainee shall be entitled to communicate fully and without restraint with his defence counsel, with the assistance of an interpreter where necessary.

“... .

“All such correspondence and communication shall be privileged.

“... .

“(D) Interviews with legal counsel and interpreters shall be conducted in the sight but not within the hearing, either direct or indirect, of the staff of the detention unit.”

(i) Rules 84 to 88 of the detention rules embody a complaints procedure for detainees held in the detention unit. This procedure is described in further detail in the “Regulations for the establishment of a complaints procedure for detainees (IT/96), issued by the Registrar, April 1995”.

(j) By summons of 14 August 2001, the plaintiff asked the court to order the State (the Ministries of General Affairs and Foreign Affairs) to release him unconditionally (principal claim).

(k) By judgement of 31 August 2001, the President of this court declared that he was not competent to take cognizance of the plaintiff’s claim.

(l) The appeal lodged against this judgement by the plaintiff with The Hague Court of Appeal was removed from the case list at the plaintiff’s request (case list of 17 January 2002).

(m) On 20 December 2001, Mr. Steijnen lodged an application on behalf of the plaintiff with the European Court of Human Rights.

(n) By summons of 25 January 2002, the plaintiff summonsed the Tribunal and others to appear at a sitting hearing interim injunction proceedings on 11 February 2002. By letter of 5 February 2002, the Registrar, on behalf of the Tribunal, stated that the Tribunal would not enter an appearance on 11 February 2002, invoking the Tribunal’s immunity under article VIII of the Headquarters Agreement.

Leave to proceed

Article 105, paragraph 1, of the Charter states that the United Nations shall enjoy in the territory of each of its Members such immunities and privileges as are necessary for the fulfilment of its aims. Article 30, paragraph 1, of the Statute, which forms part of resolution 827, and article IV of the Headquarters Agreement declare the Immunities Convention to be applicable to the Tribunal. Article II of the Immunities Convention and article VIII of the Headquarters Agreement provide that “The United Nations (The Tribunal) ... shall enjoy immunity from every form of legal process, except insofar as in any particular case it [the United Nations/the Tribunal] has expressly waived its immunity”. It follows from this that the Tribunal may invoke its immunity, since it has not waived this immunity in the present case. The plaintiff’s submission that immunity relates only to the Tribunal’s property is incorrect. The only possible conclusion to be drawn from the list in article II of the Immunities Convention and article VIII of the Headquarters Agreement is that the Tribunal itself and its “funds, assets and other property” enjoy immunity in respect of any legal proceedings whatsoever. This stands in the way of granting leave to proceed in the absence of the Tribunal.

The claims, the grounds on which they are based and the defence

The plaintiff has asked the court—in essence—to make the following orders:

Principally: to order the defendants to enter into consultations with him within 48 hours of the service of this judgement in order to find a solution which will end the Tribunal's violation of his right to correspond with, and consult out of the hearing of other persons, his lawyers in connection with the application he has submitted to the European Court of Human Rights;

Or: to order the defendant named under 2. to urge the Tribunal to enter into consultations within 48 hours of the service of this judgement in order to find a solution which will end the Tribunal's violation of his right to correspond with, and consult out of the hearing of other persons, his lawyers in connection with the application he has submitted to the European Court.

The plaintiff made the following further submissions.

The Tribunal is denying the plaintiff the right to unhindered and confidential communication with his lawyers, including Mr. Steijnen, in the context of proceedings instituted by the plaintiff before the European Court. In so doing, the Tribunal is acting in breach of article 6, paragraph 3 (b) and (c), of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention on Human Rights") and of article 14, paragraph 3 (b), of the International Covenant on Civil and Political Rights. In addition, it is acting in breach of article 21, paragraph 4, of the Statute. It is part of the task of the Dutch courts to examine whether the Tribunal is observing its own regulations concerning the protection of the rights of the accused. For it follows from article 1 of the Convention on Human Rights and article VI, paragraph 2, of the Headquarters Agreement that Dutch jurisdiction is to be maintained in full and that the State of the Netherlands is responsible for protecting human rights within its territory. Furthermore, it follows from article 13 of the Convention on Human Rights that the Dutch courts have a duty to make every effort to prevent the violation of human rights by the Tribunal. The Tribunal cannot take over this duty from the State.

The State presented its defence, furnished with arguments. Where necessary this defence will be discussed below.

The assessment of the dispute

First, the Netherlands has expressly transferred to the Tribunal its competence to take cognizance of claims relating to the deprivation of liberty on the Tribunal's orders within the facilities made available to the Tribunal in the Netherlands, and Dutch law is not applicable in such matters. This follows from articles VI and XX of the Headquarters Agreement, and from section 17 of the Implementation Act. Furthermore, article 9, paragraph 2, of the Statute states that in terms of jurisdiction, the Tribunal has primacy over national courts with regard to the administration of justice. Moreover, article 29, paragraph 1, of the Statute obliges States to cooperate with the Tribunal in the prosecution of accused persons, like the plaintiff in the present case. Finally, it follows from Article 103 of the Charter that regulations made pursuant to the Charter, and therefore those laid down

by the Security Council, take precedence over all other regulations. These provisions mean that the State of the Netherlands has nothing to do with the plaintiff's being deprived of his liberty by the Tribunal. The same applies to the Dutch courts in general, and therefore to the President of The Hague District Court, since the Dutch courts are bound by the above-mentioned regulations. This leads to the conclusion that the Dutch courts are not competent to take cognizance of the plaintiff's claims.

For the record, the court also held as follows. Rules 84 to 88 of the detention rules prescribe a detailed internal complaints procedure. No submission has been made or evidence produced that the plaintiff has submitted a complaint pursuant to this procedure regarding the Tribunal's denial of his right to free communication with his counsel as provided for in rule 67. It is clear from article 7 of the Regulations that such a complaint would be admissible. The plaintiff's contention that the internal complaints procedure is solely concerned with complaints relating to the conditions of detention is incorrect. The plaintiff therefore still has the opportunity to submit a complaint on the basis of the internal complaints procedure which is open to him. In addition, the State advocate has informed the court at this sitting that the Registrar of the Tribunal has given assurances that Mr. Steijnen will not be denied access to the plaintiff in his capacity as the plaintiff's counsel in the application before the European Court, and that he will be allowed to communicate with the plaintiff on a confidential basis.

It follows from the above that the President is not competent to take cognizance of the plaintiff's claim, so that the orders requested must be denied. As the court finds against the plaintiff, the latter will be ordered to pay the costs of these proceedings.

Decision

The President:

Refuses to grant leave to proceed in the absence of the defendant named under 1.;

Refuses to grant the orders requested against the defendant named under 2.;

Orders the plaintiff to pay the costs of these proceedings, amounting thus far to € 896.36 for the defendants, € 193 of which is for court fees.

Judgement given by R. C. Gisolf and pronounced at a public hearing on 26 February 2002 in the presence of the clerk of the court.

AH

[two signatures]