
The Interplay Between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law

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Abstract

The trial of Slobodan Milosevic opened before the International Criminal Tribunal for the Former Yugoslavia in February 2002. Milosevic is accused on 66 counts of crimes against humanity, war crimes and genocide allegedly committed in Kosovo, Bosnia and Croatia. The present article examines one particular aspect of the Milosevic trial, namely, his apprehension by the Serb authorities and transfer to the Tribunal in June 2001. Milosevic himself has so far contested unsuccessfully the legality of these actions. The author attempts to determine whether these actions breached the constitutional law of the Federal Republic of Yugoslavia and of the Serb Republic. Moreover, since Yugoslavia has a clear obligation under international law to cooperate fully with the Tribunal, the article, based on the experience of other European federal states, suggests a workable solution to the constitutional obstacles faced by Yugoslavia.

1 Introduction

The transfer of Slobodan Milosevic, the former President of the Federal Republic of Yugoslavia (FRY) and leader of Serbia for some 13 years, to the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹ on 28 June 2001 was hailed as the single most important development in international criminal law, not only in terms of the prosecution of suspected war crimes perpetrators and the trying of former heads of

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¹ The Tribunal was set up in 1993 by virtue of Security Council Resolution 827 of 25 May 1993; 32 ILM (1993) 1159. The Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Socialist Federal Republic of Yugoslavia since 1 January 1991; see Article 1 of its Statute appended to Resolution 827 (1993) and last amended on 30 November 2000.

state but also in terms of the effectiveness of international criminal tribunals. The handing over of Milosevic to the ICTY was by no means a straightforward affair. On the contrary, it was surrounded by serious controversy. On the political front, there has been serious questioning of the strong pressure exerted for the arrest, especially by the US, whose participation in the international aid donors' conference for the FRY was made conditional upon Milosevic's surrender to the ICTY.² On the legal front, the manner in which he was turned over caused significant debate. The latter has raised considerable questions as regards its legitimacy.

The present article is an attempt to assess the wider legal issues involved in the transfer of Milosevic to the ICTY from the perspective of the constitutional orders of both the FRY and Serbia, and to determine whether it was legal or illegal. While commentators have concentrated on analysing the case from the standpoint of international law, an examination from the viewpoint of national constitutional law is also required.

2 The Events Leading to the Transfer of Milosevic to the ICTY

On 24 May 1999, the ICTY indicted Slobodan Milosevic (at the time President of FRY), Milan Milutinovic (President of Serbia), Nikola Sainovic (Deputy Prime Minister of FRY), Dragoljub Ojdanic (Chief of Staff of the Yugoslav Army) and Vljako Stojilkovic (Minister of Internal Affairs of Serbia) for crimes against humanity and for violations of the laws or customs of war allegedly committed against ethnic Albanians in the Yugoslav province of Kosovo during the period of January to late May 1999.³ Three days later, warrants for their arrest were issued and served to Yugoslavia's Federal Ministry of Justice.⁴

At the time, Yugoslavia was not a member of the United Nations, since its claim that it should automatically occupy the seat left by the Socialist Federal Republic of Yugoslavia after its dissolution had not been accepted by the General Assembly, the organ responsible for membership questions. It determined that the FRY ought to apply anew for membership of the UN.⁵ Its application to become a member state was approved by the General Assembly on 10 November 2000 under Resolution 55/12.⁶ Thus, on 22 January 2001, the arrest warrants and orders for surrender were

² The aid conference took place in Brussels on 29 June 2001. The participating 42 states and 25 international organizations announced funding commitments of US\$1.28 billion to support the economic recovery of the FRY.

³ Case No. IT-99-37, 'Kosovo'. See ICTY Press Release JL/PIU/403-E (27 May 1999).

⁴ See ICTY Press Release JL/PIU/404-E (27 May 1999).

⁵ See General Assembly Resolution 47/1 of 22 September 1992, which followed the recommendation made by the Security Council in Resolution 777 of 19 September 1992. Generally see Agora, 'UN Membership of the Former Yugoslavia', 87 *AJIL* (1993) 240.

⁶ This has opened the way for the FRY to join a number of international organizations, including the IMF on 20 December 2000 and the EBRD on 15 December 2000. It has also applied for membership in the Council of Europe on 9 November 2000, which indicated that its cooperation with the ICTY would be of crucial importance in the accession process, and in the WTO on 23 January 2001.

reissued and re-served to the Federal Ministry of Justice. These included a direction that the FRY make enquiries to discover whether the accused had assets located in the Yugoslav territory and, if so, to adopt provisional measures to freeze them.⁷

Of the five accused persons, four remain at large. The fifth, Slobodan Milosevic, was arrested on 1 April 2001, not by virtue of the ICTY charges brought against him but on the basis of federal charges of corruption and abuse of power. At the time, it was reported that Milosevic had received written assurances that his arrest was not a precursor to an eventual transfer to the ICTY.⁸ Although Milosevic was originally detained for one month, his detention was extended by two more months on 30 April 2001.⁹

In late May 2001, Kostunica, the President of FRY and Milosevic's successor, attempted to have a law passed by the Federal Parliament to regulate cooperation between Yugoslavia and the ICTY and to permit the transfer to the ICTY of indicted persons. In this draft law, indictments against Yugoslav citizens were to be dealt with at the local court level, depending on the suspects' place of residence, and this court would be responsible for deciding whether there was a valid basis for extradition.¹⁰ When he failed to have the law passed, Kostunica sought the adoption of a federal government decree, whose purpose was similar to the failed draft law. This time he was successful and the decree was adopted on 23 June 2001. It authorized the federal government to decide on the extradition of suspects to the ICTY and envisaged the possibility for persons, convicted and sentenced by the ICTY to serve their prison sentences in the FRY and in accordance with Yugoslav law.¹¹

Immediately following the adoption of the federal government decree, lawyers representing Milosevic challenged its validity before the Federal Constitutional Court on legal grounds (violation of the constitutional provision prohibiting the extradition of Yugoslav citizens) and on procedural grounds (non-participation of Montenegro cabinet ministers in the vote). Moreover, the Court was asked to shelve the decree until it had delivered its final decision.¹² On 28 June 2001, the Court ordered that the decree's implementation be suspended until it had ruled on its constitutionality and ordered the Yugoslav Government to submit its legal arguments in support of its constitutionality by 12 July 2001.¹³ On 6 November 2001, in a short written statement, the Court's Interim President said that: 'The decree on procedures of cooperation with the international criminal tribunal is not in accordance with the

⁷ See ICTY Press Release SJP/PIS/557-e (23 January 2001).

⁸ See Erlanger, 'Yugoslav Chief Says Milosevic Shouldn't Be Sent to The Hague', *New York Times*, 3 April 2001.

⁹ Note that, according to Article 24 of the FRY Constitution of 27 April 1992, the maximum period of detention may not exceed three months from the day of arrest.

¹⁰ See Gee, 'Yugoslavia Drafts War Crimes Law', Associated Press, 23 May 2001.

¹¹ Note that this possibility exists under Article 27 of the ICTY Statute.

¹² See Gall, 'Milosevic Fights Transfer to Hague Trial', *New York Times*, 24 June 2001.

¹³ See 'Milosevic Extradition Decree Suspended', Associated Press, 28 June 2001.

Constitution of the Federal Republic of Yugoslavia and with the law on criminal procedure.’¹⁴

This being the situation at federal level, the government of the Republic of Serbia took things into its own hands. Within a few hours of the Court issuing the injunction, it adopted a decision authorizing its cooperation with the ICTY. On the basis of this decision, which came into force immediately, Milosevic was promptly transferred by government helicopter to the US air base in Tuzla, Bosnia. He was later flown to a military airfield near The Hague, the Dutch capital, where ICTY officials formally arrested him.¹⁵

It should be noted that Milosevic was never actually served with the ICTY indictment and transfer order. When on 27 June 2001 an investigating judge from Belgrade’s district court attempted to present Milosevic with the ICTY documents and ask him how he pleaded to the charges, Milosevic did not participate in the hearing, as he had already applied for the removal of several court officials handling his extradition case.¹⁶ However, in the haste with which he was handed over to the Tribunal such possible procedural irregularities were apparently not taken into consideration.

3 The Applicable Provisions in the Constitutions of the Federal Republic of Yugoslavia and of the Republic of Serbia

A Deportation, Extradition and Surrender of Suspects: A Federal or State Matter?

Since Yugoslavia is a federal state,¹⁷ each member republic may exercise jurisdiction only in those matters which are outside federal competence.¹⁸ Thus, member republics are empowered to conclude international agreements, provided that such agreements are not to the detriment of the federal state or of the other republics.¹⁹ Therefore, the foreign relations of the constituent republics are regulated by two conditions which must apply cumulatively. The first condition is that the matter in question must fall within the republic’s competence; in other words, it must not be the exclusive competence of the federal state. The second condition is that a republic, by pursuing the matter in question, must not act in a way that could cause harm to the federal state or to another republic.

According to Article 77 of the Yugoslav Constitution, there are 12 different areas of activities in which the federal state reserves exclusive competence. The following

¹⁴ See ‘Belgrade Court Further Stymies Cooperation with Tribunal’, *Reuters/New York Times*, 7 November 2001.

¹⁵ See Simons, ‘Milosevic is Given to the UN for Trial in War-Crime Case’, *New York Times*, 29 June 2001.

¹⁶ See ‘Lawyer Says Milosevic Refuses Transfer Hearing’, *Reuters*, 27 June 2001.

¹⁷ It comprises two members, the Republic of Serbia and the Republic of Montenegro; see Article 1 of the FRY Constitution.

¹⁸ *Ibid.*, at Article 6.

¹⁹ *Ibid.*, at Article 7.

three of these activities are of direct relevance to the present examination: human freedoms and human rights enshrined in the Constitution; due process of law before courts of justice and all other state authorities; and international relations. This third area of activity signifies that the federal state retains the general right to act for the country at the international level, to establish diplomatic and consular relations, to conclude bilateral and multilateral agreements with third states, to represent the country before international organizations, and so forth. On the other hand, member republics retain the right to maintain foreign relations in those areas not covered by Article 77, such as education. Thus, a member republic may, for instance, conclude bilateral agreements with third states to promote university student exchanges, or it may join an international or regional organization with education-related objectives.²⁰ In conclusion, there is no question that the issue of relations with the ICTY, a subsidiary organ of an international organization to which Yugoslavia belongs, falls within the exclusive competence of the FRY and that its member republics have no competence in this area.

It should be noted that the Yugoslav Constitution, by endowing the member republics with such extensive powers in the field of foreign relations, is very liberal compared to the constitutions of other European federal states. For example, the Constitution (Basic Law) of the Federal Republic of Germany stipulates that the constituent states (*Länder*) may conclude treaties with other countries, provided that they have the power to legislate on the subject-matter of the relevant treaty and, more importantly, that they have the consent of the federal government.²¹ In Belgium, the federal state, represented by the King, has far-reaching competence in foreign affairs, including the power to conclude international agreements. In contrast, the three communities and three regions which make up the state of Belgium have the power to conclude treaties in areas of rather peripheral importance, such as cultural affairs and the education system.²² In Austria, foreign affairs, including the political and economic representation of the country abroad and the conclusion of international treaties, are the competence of the federal state. The nine provinces of the Federal Republic of Austria may conclude treaties only in those areas which fall within their domain; they can act independently in those areas, but only with neighbouring states.²³

The FRY Constitution resembles the Swiss Confederation's Constitution, which, while stipulating that 'foreign relations are a federal matter',²⁴ also provides that the

²⁰ Cf. Article 7, which stipulates that member republics may, *inter alia*, maintain relations with foreign states and accede to international organizations.

²¹ See Article 32(3) of the German Constitution of 23 May 1949 as amended.

²² See Article 167(2) in conjunction with Articles 127–130 of the Belgian Constitution of 17 February 1994.

²³ See Article 10(2) in conjunction with Article 16(1) of the Austrian Federal Constitutional Law of November 1920, as last amended in December 1994. Note that the Austrian Constitution does not lay down which are the provinces' domains but operates on the principle of 'what is not expressly federal belongs to the provinces'; see Article 15(1).

²⁴ See Article 54(1) of the Swiss Federal Constitution, which was adopted by referendum on 14 April 1999, in force since 1 January 2000.

26 cantons may conclude treaties within the scope of their powers with foreign countries, on condition that they are not contrary to federal law or to the interests of the Confederation or to the laws of other cantons.²⁵

B The Legality of the Serb Government's Decision to Turn Over Milosevic

The decision adopted on 28 June 2001 by the Serb Government — by a vote of 15 ministers in favour, one minister against and six abstentions to 'transfer' Milosevic to the ICTY—raises a considerable number of legal problems. The first problem concerns the above-mentioned injunction issued by the Federal Constitutional Court, which suspended temporarily the Yugoslav Government decree on cooperation with the ICTY. It should be noted that the Court had the right to order suspension, as Article 132 of the Federal Constitution stipulates that it '[m]ay halt the execution of a given act . . . if irreparable harm is liable to occur'. In order to overcome this injunction obstacle, the Serb Government invoked Article 135(2) of the Serbian Constitution of January 1990. This provision, which was devised and inserted by Milosevic himself, envisages that:

If acts of the agencies of the Federation or acts of the agencies of another republic, in contravention of the rights and duties it has under the Constitution, violate the equality of the Republic of Serbia or in any other way threaten its interests, without providing for compensation, the republic agencies shall issue acts to protect the interests of the Republic of Serbia.

It is very doubtful whether Article 135(2) could have been invoked and applied in the present circumstances. First, it is submitted that the Federal Constitutional Court's decision could not be characterized as an act of a federal agency. Although 'federal agencies' are not defined in the FRY Constitution, they should be regarded as the organs referred to in its Section V, namely, the Federal Assembly, the President of the Republic, the Federal Government, the Federal Public Prosecutor, the National Bank of Yugoslavia and the Federal Court. In contrast, the Federal Constitutional Court is not referred to as a federal organ, but is treated separately in Section VII of the Constitution. Moreover, the injunction ordered by the Court was not by any means a final decision. As already noted, it reserved judgment by giving the federal government the opportunity to defend the constitutionality of the decree. Therefore, it is very difficult to justify Serbia's claim that a mere injunction threatened its interests to such a degree that resort to Article 135(2) was imperative. Furthermore, Serbia failed to show in what way the injunction contravened the rights and duties enshrined in the Constitution. Finally, Serbia did not explain exactly which interests were threatened by the decree and how they would instead be protected by the adoption of the decision to surrender Milosevic to the ICTY.

The second problem surrounding the decision relates to Serbia's exercising jurisdiction over Milosevic. While Milosevic was a citizen of the Serb Republic,²⁶ he

²⁵ *Ibid.*, at Article 56.

²⁶ See Article 47(1) of the Serb Constitution of 28 September 1990.

was at the same time also a national of the FRY.²⁷ Since the ICTY arrest warrants and surrender orders were served to the FRY and not to the Serb Republic,²⁸ it follows that Serbia lacked the necessary legal basis permitting it to surrender Milosevic to the ICTY. The existence of such orders is a strict *conditio sine qua non* for the surrender of suspected criminals.²⁹ Therefore, only the FRY, as recipient of the relevant documents was in a legal position to proceed with the turning over of Milosevic. Furthermore, it had the legal obligation to give effect to them.³⁰

The third problem concerns the fact that both the FRY and Serb Constitutions prohibit the extradition of their nationals.³¹ Apparently, the Serb Government did not consider this crucial issue. In this regard, the decree was clearly unconstitutional, not only on account of the Serb but also on account of the Yugoslav constitutional orders. As far as the former is concerned, Article 119 provides that enactments must be in conformity with the Constitution; in relation to the latter, Article 115 stipulates that member republics' enactments must comply with it. The fourth problem relates to the fact that, as has already been argued, Serbia had no competence to undertake action in relation to an issue of foreign affairs falling within the exclusive competence of the federal state.

The conclusion to be reached is that the Serbian Government's decision to surrender Milosevic to the ICTY lacked any legal basis. Although there were undoubtedly political considerations justifying this course of action, the fact remains that, as is pronounced in Article 1 of its Constitution, Serbia is a democratic state founded upon the rule of the law. In the present instance, the rule of law was clearly violated.

C The Transfer of Milosevic to the ICTY

The manner in which Milosevic was transferred to the ICTY cannot escape criticism. The moment he was taken out of the Belgrade prison, where, as already mentioned, he had been detained since April 2001 on charges of corruption and abuse of power, in order to be surrendered to the ICTY, he was arrested and detained by the Serb authorities. His arrest and detention were clearly illegal. The Serb authorities lacked any legal power to take these actions. In particular, the ICTY orders and warrants could not offer the required legal basis since, as has been repeatedly noted, they were addressed and served exclusively to the Federal Justice Ministry. This illegality is reinforced by the wording of Rule 55(E) of the ICTY Rules of Procedure and Evidence³² dealing with the execution of arrest warrants: "The Registrar shall instruct the person

²⁷ See Article 17 of the FRY Constitution.

²⁸ See ICTY Press Release JL/PIS/585e (6 April 2001).

²⁹ See Article 20(2) of the ICTY Statute.

³⁰ That it was the FRY which had this obligation was also confirmed in the letter dated 26 April 2001 from the ICTY Registrar to the FRY Justice Minister, reproduced in ICTY Press Release JL/PIS/588e (3 May 2001).

³¹ See Article 17 of the FRY Constitution and Article 47(2) of the Serb Constitution. Note that the former's formulation is wider since it prohibits deportation as well.

³² The Rules were adopted on 11 February 1994 and were last amended on 13 April 2001.

or *authorities to which a warrant is transmitted* that at the time of arrest the indictment and the statement of the rights of the accused be read.³³

Furthermore, it is submitted that Milosevic's deprivation of liberty cannot be justified under the Yugoslav and Serb Constitutions. As far as the Yugoslav Constitution is concerned, his arrest for the sole purpose of being turned over to the ICTY was unconstitutional, since, pursuant to the above-mentioned Article 17, the extradition and deportation of Yugoslav nationals is prohibited. If he were arrested on suspicion of having committed the criminal offences set out in the ICTY indictment, his detention was also illegal. According to Article 24 of the Federal Constitution, a suspect 'may be taken into custody and detained by order of a competent court only when it is necessary for the conduct of criminal proceedings'. Even if the term 'criminal proceedings' were to be broadly interpreted to include proceedings before the ICTY, no competent court ever issued an order against Milosevic.

Naturally, the argument could be advanced that the arrest warrant issued by the ICTY constituted the required 'order by a competent court'. However, ICTY orders and warrants do not have direct legal effect within the territory of the states to which they are addressed. It is for this reason that they are served to the relevant Justice Minister, who is then responsible for executing them pursuant to the domestic legal system. But even if, for the sake of argument, we were to accept the opposite supposition, the Yugoslav Constitution confers upon an arrested person a number of procedural rights that must be strictly observed, for instance, the right to appeal against the arrest order, which must be decided by the competent court within 48 hours.³⁴ From what one can ascertain, these procedural rights were not applied in the case of Milosevic.

The same conclusion is reached if we examine the position under the relevant stipulations of the Serb Constitution. The following provisions are of paramount importance: Article 22(2) guarantees to every individual the right to appeal against decisions affecting his legal rights or interests; Article 12(3) stipulates that the abuse of human freedoms and rights is unconstitutional and punishable; Article 15(2) provides that no one shall be deprived of his or her liberty, except on such grounds and in accordance with the procedure established by law; Article 16(1) stipulates that persons reasonably suspected of having committed criminal offences may be detained only on the basis of a decision of a competent court, and; Article 26(1) provides that, in the event of deprivation or restriction of liberty or similar proceedings, respect for the human being and his or her dignity shall be guaranteed. In particular, it is very difficult to see how this last provision, which is characteristic of a state observing the rule of law, was followed in the case of Milosevic.

³³ Emphasis added.

³⁴ See Articles 24 and 26 of the FRY Constitution.

4 Milosevic Challenges the Validity of His Arrest, Transfer and Surrender to the ICTY

Milosevic sought judicial review of his arrest, transfer and surrender to the ICTY by petitioning both the Tribunal and the Dutch courts. He filed two preliminary motions on 9 and 30 August 2001 before the ICTY, contesting his detention by arguing, *inter alia*, that the arrest warrants were addressed to the FRY authorities and not to the Serb Government, that the latter had no international obligation to cooperate with the Tribunal, that the Federal Constitution does not permit the extradition of Yugoslav nationals and that the applicable federal procedures were unlawfully bypassed. In a written decision issued on 8 November 2001, the Trial Chamber dismissed these arguments, holding that:

[t]he circumstances in which [Milosevic] was arrested and transferred — by the government of the Republic of Serbia, to whom no request was made, but which is a constituent part of the Federal Republic of Yugoslavia, to whom the request for transfer was made — are not such as to constitute an egregious violation of the accused's rights.³⁵

Thus, the ICTY recognized, in principle, that Milosevic had been wrongly arrested and surrendered to it by the Serb Government. However, on balance, the Tribunal did not consider that this fact constituted such a grave violation of his rights as to question the legality of his detention. The Tribunal's conclusion is not at all convincing: it exercised a margin of appreciation without offering adequate justification and legitimized the Serb Government's actions, even though it accepted that they lacked a proper legal basis.

The submission of a second petition was foretold in mid-July 2001, when a Canadian lawyer claiming to represent Milosevic told a news conference in Amsterdam that his transfer to The Hague was 'outright kidnapping' and that he intended to file an action contesting not only the legality of his arrest but also his confinement in the ICTY Detention Centre.³⁶ In mid-August 2001, Milosevic lodged an action before the District Court of The Hague requesting that The Netherlands be ordered to release him from custody and to allow him to return to Yugoslavia on the following six grounds: (a) he was the victim of kidnapping, organized jointly by Serb and Dutch officials; (b) The Netherlands ought not to have admitted him on its territory on account of the pending appeal before the Federal Constitutional Court; (c) the ICTY was unlawfully established, because, pursuant to the UN Charter, the Security Council lacks the power to create such tribunals; (d) the ICTY is not an 'impartial tribunal', as this term is understood in the context of Article 6 of the

³⁵ See *Prosecutor v. Slobodan Milosevic*, Decision on Preliminary Motions, 8 November 2001, para. 51. It is difficult to see how this pronouncement is reconciled with the argument put forward by the ICTY President that Milosevic's arrest and transfer to the Tribunal '[a]ttests to the resolve of the authorities of Serbia to comply with its international obligations'; see Judge Jorda's address to the UN General Assembly on 26 November 2001 reproduced in ICTY Press Release JD/PIS/640-e (27 November 2001).

³⁶ See 'Milosevic to Ask Dutch Court to Rule on Arrest', Agence France Presse, 12 July 2001.

European Convention on Human Rights;³⁷ (e) the ICTY had no legal basis for abolishing the immunity of heads of state; and (f) only Dutch courts have the competence to adjudicate issues relating to the legal protection of individuals located on Dutch territory.

The District Court of The Hague, as was perhaps to be expected, held that it was incompetent to rule on the action.³⁸ Based on the *Tadic* case,³⁹ the Court reaffirmed the ICTY's competence to rule on its own jurisdiction. In relation to the fourth ground, the Court invoked the jurisprudence of the European Court of Human Rights and, in particular, *Mladen Naletilic v. Croatia*, where the ICTY was held to be 'an international court, which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence'.⁴⁰ Finally, the Court considered that The Netherlands, as the Tribunal's host state pursuant to the Headquarters Agreement concluded with the United Nations on 29 July 1994,⁴¹ has transferred its jurisdiction to take cognizance of the action for release to the ICTY.

It should be noted that, in its submissions, the Dutch Government maintained that all matters pertaining to the detention of suspects by the ICTY belong to the exclusive competence of the Tribunal and that, as the host state, its role is restricted to the arrival, transit and departure of persons surrendered to the ICTY. However, it is submitted, that this limited competence enjoyed by The Netherlands touches upon the action's first and fifth grounds. Should the Dutch Government have examined the legality of Milosevic's surrender to the Tribunal? There is no straightforward answer to this question. If answered in the affirmative, it would imply that The Netherlands ought to have examined, *inter alia*, the decision of the Serb Government. This could have meant interfering with the internal affairs of another country, which is not sanctioned under international law. Most probably, the speed with which Milosevic was transferred to The Hague took the Dutch Government by surprise. It is equally possible that it did not wish to get involved in such a politically 'heavy' case. Notwithstanding these considerations, it is submitted that the District Court could have determined, at least as a side issue, whether Milosevic's presence on Dutch territory was lawful or unlawful. It is rather unfortunate that the judgment of the District Court preceded the ICTY's decision on the preliminary motions, for, it is

³⁷ Note that although The Netherlands ratified the Convention in August 1954, the FRY has not signed it yet.

³⁸ Case KG 01/975, ELRO No. AD3266, Judgment of 31 August 2001, reproduced in 41 *ILM* (2002) 86. See Press Release of the District Court, The Hague, in the Case of Slobodan Milosevic dated 31 August 2001; and Klip, 'Request to Release Milosevic Refused', 17 *International Enforcement Law Reporter* (2001) 485. On 20 December 2001, Milosevic sought a reversal of the judgment before the European Court of Human Rights (Application no. 77631/01), which was declared inadmissible in March 2002.

³⁹ *Tadic*, Case No. IT-94-1-T, 'Prijeedor', Decision of 10 August 1995 on the Defence Motion on the Jurisdiction of the Trial Chamber; and *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, 35 *ILM* (1996) 35.

⁴⁰ Application No. 51891/99, Judgment of 4 May 2000, reported in Information Note No. 18 on the Case Law of the Court, May 2000, at 19.

⁴¹ Published in the Dutch Official Gazette (*Tractatenblad*), No. 189 of 1994.

submitted, the latter indicated strong reservations as to the appropriateness of the Serb Government's decision, which opened the way for the turning over of Milosevic.

5 The Illegal Apprehension of ICTY Suspects: Fact or Fiction?

Regardless of the outcome of these actions, there have always been allegations that mercenaries and paramilitaries hunted down individuals indicted by the ICTY. In late July 2000, Yugoslav authorities detained a number of people, who were suspected of operating on behalf of Western intelligence agencies with instructions to enter its territory and kidnap, among others, Milosevic. The circumstances of this incident were rather unclear. Four Dutch nationals, two Canadian nationals and two British nationals were detained. These last were working with the UN Interim Administration Mission in Kosovo.⁴²

The three governments involved as well as the ICTY denied the accusations made by the Yugoslav authorities.⁴³ The incident was brought to the attention of the UN Security Council, which, in its customary fashion, expressed concern about the detention of the foreign nationals and called upon the FRY to respect its international obligations.⁴⁴ Finally, no formal charges for attempted kidnapping or other serious crimes were brought against the foreign detainees, although the Dutch nationals were sentenced to 30 days imprisonment for entering the country illegally.⁴⁵

While it is difficult to distinguish fact from fiction in this incident, there have been at least three cases in which defendants on trial before the ICTY claimed that they were arrested in an illegal manner and challenged the validity of the proceedings on that ground. The first such case concerned Slavko Dokmanovic, who was accused of participating in the killing of some 260 Croats in November 1991.⁴⁶ He filed a preliminary motion for his release, alleging that he had been kidnapped and illegally arrested and that, in effect, his fundamental rights had been violated. In particular, he maintained that he had been lured from Serbia, where he 'took shelter' after the war, by ICTY investigators, who, acting together with representatives of the UN Transitional Authority in eastern Slovenia, persuaded him to come to that part of Croatia, which at the time was under UN transitional administration, for conversations. Following his arrival there, he was met by officials from the ICTY Prosecutor's Office and was promptly arrested on 27 June 1997, despite the assurances he had been given of safe conduct and freedom from arrest during the visit.

After a public hearing into the circumstances of the arrest and a long deliberation

⁴² See UN Press Release SG/SM/7509 — PKO/93 (10 August 2000).

⁴³ See 'UN Tribunal Denies Sending Assassins to Yugoslavia', Reuters, 1 August 2000.

⁴⁴ See Department of Foreign Affairs and International Trade of Canada, 'Canada on the United Nations Security Council 1999–2000', *Weekly Report*, 7–11 August 2000.

⁴⁵ See Ministry of Foreign Affairs of The Netherlands, Press Release, 11 August 2000.

⁴⁶ Case No. IT-95-13a, 'Vukovar Hospital'.

by a Trial Chamber, the defence motion was rejected on 27 October 1997. The Chamber, by brushing aside his allegations rather lightly, concluded that he had been legitimately arrested and that no principles of international law had been violated. This was the first decision by an international tribunal ruling on the legality of an arrest by an international authority. Dokmanovic was tried, found guilty and on 28 June 1998, a week before he was due to be sentenced, he committed suicide.⁴⁷

The second case concerned Stevan Todorovic, who was accused, *inter alia*, of persecuting Bosnians on political, racial and religious grounds.⁴⁸ He was detained by SFOR (the NATO Stabilization Force operating in Bosnia) and transferred into ICTY custody in September 1998.⁴⁹ He pleaded not guilty to all counts of the indictment. On 11 February 1999, he brought a motion to have the indictment dismissed on the grounds that his arrest was unlawful and that SFOR or NATO forces were involved in illegal activities relating to his arrest. According to press reports, he claimed that Serb mercenaries abducted suspects inside Serbia and delivered them to SFOR in exchange for large sums of money.⁵⁰ Furthermore, on 24 November 1999, he filed a 'Notice of Motion for Judicial Assistance', requesting that the Tribunal order SFOR and other security forces to provide not only relevant documents but also witnesses to be examined by the defence in order to prove the illegality of his arrest.

On 18 October 2000, a Trial Chamber stirred the waters by granting Todorovic's motion. It ordered SFOR and NATO to disclose specific documents and information and also subpoenaed General Shinseki, at the time Commanding Officer of SFOR, to provide evidence in his personal capacity.⁵¹ On 2 November 2000, certain NATO countries, which were involved in Bosnia, sought a review of the decision, probably because they were alarmed at the prospect of revelations being made. On 8 November 2000, the Appeals Chamber ordered that the decision be suspended pending the outcome of the review.⁵² However, events prevented the Appeals Chamber from ruling on its validity; this was unfortunate as it could have indicated the ICTY's willingness to deal seriously with allegations of malpractice in the arrest of suspects.

On 29 November 2000, Todorovic and the Office of the Prosecutor struck a plea agreement, whereby Todorovic would plead guilty to only one charge and withdraw not only his motion for the indictment's dismissal but also the motion for judicial assistance. In return, the Prosecution would withdraw the remaining 26 counts of the indictment and agree to seek a prison sentence between five and 12 years.⁵³ On 19

⁴⁷ See ICTY Order of 15 July 1998 Terminating Proceedings Against Slavko Dokmanovic.

⁴⁸ Case No. IT-95-9, 'Bosanski Samec'.

⁴⁹ See ICTY Press Release CC/PIU/346-e (30 September 1998).

⁵⁰ See O'Kane, 'Ruling Puts Arrests in Question', *Guardian*, 21 October 2000.

⁵¹ See ICTY Press Release XT/PIS/536-e (20 October 2000). For discussion, see Murphy, 'Contemporary Practice of the United States Relating to International Law', 95 *AJIL* (2001) 387, at 401–404.

⁵² See ICTY Press Release JL/PIS/539-e (10 November 2000).

⁵³ See ICTY Press Release JL/PIS/549-e (13 December 2000).

January 2001, the Tribunal accepted this agreement.⁵⁴ The remaining counts of the indictment were withdrawn on 26 February 2001.⁵⁵ Todorovic was tried, found guilty and sentenced to 10 years' imprisonment.⁵⁶

The third case, currently pending, concerns Dragan Nikolic, who is charged with the illegal detention of over 8,000 Muslim civilians in a camp in eastern Bosnia.⁵⁷ On 17 May 2001, his lawyer filed a motion asking for the dismissal or negation of the indictment on the grounds that he had been 'kidnapped' in eastern Serbia, illegally transferred by bounty hunters to Bosnia, and handed over to SFOR in exchange for a sum of money. His lawyer implied that he had been arrested as part of the US State Department's Rewards Program for Former Yugoslavia War Criminals. Created in October 1998, this programme offers rewards of up to US\$5 million to those providing information leading to the arrest or conviction of persons indicted by the ICTY.⁵⁸ It runs along the lines of the State Department's Rewards for Justice Program, whereby the US Secretary of Justice may offer up to US\$5 million for information leading to the arrest or conviction of terrorists or drug traffickers.⁵⁹ The official version of NATO tells a different story: Nikolic was arrested by SFOR commandos at an unidentified location in northern Bosnia and was then transferred to the ICTY.⁶⁰ To date, it has not been determined how Nikolic's motion concerning his arrest should proceed.⁶¹

Admittedly, the persons in these three cases were apprehended in a different manner to the way in which Milosevic was handed over. However, the question arises whether the ICTY can tolerate instances of the accused person's legal and procedural rights not being observed or being infringed. If the ICTY were to rule that an accused's rights were violated, this would not automatically result in the termination of the proceedings against the person/s in question. The ICTY, like any other court of justice, would then have to determine whether the violation was so grave as to compromise the accused's position to such an extent that it would be clearly improper to proceed with the case. As we have seen in its decision of 8 November 2001, the Tribunal held that this was not the case in the Milosevic proceedings. Nevertheless, the ICTY has a duty to review all such accusations and allegations in an open-minded manner and without fear of uncovering instances where the relevant procedures were not followed.

⁵⁴ See ICTY Press Release JL/PIS/556-e (19 January 2001).

⁵⁵ On 27 March 2001, the Appeals Chamber declared that the November 2000 request for review had become moot and vacated the decision of October 2000.

⁵⁶ See ICTY Press Release JL/PIS/608-e (31 July 2001).

⁵⁷ Case No. IT-94-2, 'Susica Camp'.

⁵⁸ See s. 2202 of the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277; 112 Stat. 2681 (1998). The Program has targeted, *inter alia*, Milosevic, Radovan Karadzic (the former Bosnian Serb leader) and Ratko Mladic (Commander of the Bosnia Serb forces between 1992 and 1995).

⁵⁹ The Program was established by the Act to Combat International Terrorism 1984, Public Law 98-533; 98 Stat. 2708; 22 USC 2708.

⁶⁰ See Klarin, 'The Tribunal's Illegal Detention', *Institute for War and Peace Reporting*, 26 May 2001.

⁶¹ Note that, by virtue of an order of 13 June 2001, Nikolic was refused leave to reply to the Prosecutor's response to his motion.

6 How is the Conflict between International Obligations and National Constitutional Law to be Solved?

The ICTY has always held that the FRY was obligated under international law and, in particular, under Article 25 of the UN Charter, Article 29(2) of its Statute⁶² and the 1995 Dayton Peace Agreement,⁶³ to implement and give effect to the Tribunal's orders relating to Milosevic.⁶⁴ This issue falls within the more general question of whether a conflict between national law and international obligations may ever prevent the fulfilment of the latter. Although the UN Charter does not envisage such a clash,⁶⁵ it is an undisputed fact that the correlation between the enjoyment of rights and benefits and the fulfilment of duties, manifested as a Charter principle in Article 2(2), imposes a clear mandate upon member states to observe their obligations.

This mandate has not only been incorporated in the FRY Constitution, which requires the federal state to '[f]ulfil in good faith the obligations contained in international treaties to which it is a contracting party', but can also be observed because ratified treaties and generally accepted rules of international law form a constituent part of the Yugoslav legal order.⁶⁶ Thus, it is submitted that the issue under consideration could be viewed and treated as a discord of domestic law. However, since the conflicting provision, namely, the prohibition of extraditing nationals, is a constitutional one, this issue may only be resolved by means of a constitutional revision. And this leads us to the next question.

7 Is there a Solution to the Constitutional Question of Cooperation between FRY and ICTY?

The constitutional problem faced by Yugoslavia is a given. On the one hand, the extradition and deportation of nationals is prohibited. On the other hand, as already mentioned, the FRY has a clear obligation to give effect to ICTY arrest warrants and orders for surrender issued against its citizens. It should be noted that Yugoslavia is not the only European federal state which has faced difficulties in terms of cooperation with the ICTY on account of the existence of constitutional constraints. Austria and Germany are among those states which had to find a solution for this problem.

In Austria, paragraph 12(1) of the Federal Act on Extradition and Legal Assistance of 4 December 1979, which holds equal ranking with the Constitution, bans the

⁶² The relevant sections read: 'States shall comply without undue delay with any request for . . . the arrest or detention of persons [and] the surrender or the transfer of the accused to the International Tribunal.'

⁶³ Reproduced in 35 *ILM* (1996) 89; see generally Szasz, 'The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia', 90 *AJIL* (1996) 301, at 313–314.

⁶⁴ See, *inter alia*, ICTY Press Release SB/PIS/584e (4 April 2001).

⁶⁵ Article 103 deals solely with the conflict between Charter obligations and obligations assumed by international treaties and agreements.

⁶⁶ See Article 16 of the FRY Constitution.

extradition of Austrian nationals.⁶⁷ This strict prohibition was overcome through the promulgation in 1996 of the Federal Act on Cooperation with International Courts, whose paragraph 5 provides that Austrian citizenship shall not constitute an obstacle to the handing over of Austrian nationals to an international court.⁶⁸ Thus, Austria did not choose to revise the relevant prohibitive provision in order to solve the problem but, on the contrary, restricted its application through the adoption of a conflicting provision. It is submitted, however, that this solution could lead to the introduction of discrimination on the basis of whether the extradition of an Austrian citizen is sought by an international court or by a state with which Austria has not signed a bilateral extradition treaty.

On the other hand, Germany, whose Federal Constitution stipulates in Article 16(2) that no German national may be extradited to a foreign state, resorted to a constitutional amendment. In particular, the Federal Act on Amendment of the Constitution of November 2000 inserted the following provision to Article 16(2):

By virtue of an act of Parliament it is possible to promulgate regulations for the extradition [of citizens] to another member state of the European Union or to an international court of justice, in deviation from constitutional provisions, as long as fundamental principles of the rule of law are guaranteed.⁶⁹

It should be noted that German law considers the safeguarding of the fundamental principles of the rule of law during extradition and deportation proceedings to be of the utmost importance. In many cases, the Federal Constitutional Court has ruled that, even though Germany always aims at cooperation with other states in the area of extradition, this cooperation must be guided, on the one hand, by the minimum compulsory conditions under international law which German courts must observe pursuant to Article 25 of the Constitution, and, on the other hand, by the relevant constitutional principles that are not open to amendment.⁷⁰

The German solution appears to be the most appropriate for Yugoslavia under the circumstances.⁷¹ First, it provides the legislative authorization to promulgate a

⁶⁷ *Bundesgesetz von 4 Dezember 1979 ueber die Auslieferung und die Rechtshilfe in Straftaten*, published in the *Federal Official Gazette*, No. 529 of 1979.

⁶⁸ *Bundesgesetz ueber die Zusammenarbeit mit den internationalen Gerichten*, promulgated on 24 May 1996 and published in the *Federal Official Gazette*, No. 263 of 13 June 1996. So far, this Act applies only to the ICTY and to the International Criminal Tribunal for Rwanda, which was set up under Security Council Resolution 955 of 8 November 1994. When the International Criminal Court begins its operation, this Act will also apply to it, as Austria ratified the Rome Statute on 28 December 2000.

⁶⁹ *Gesetz zur Aenderung des Grundgesetzes (Artikel 16)* of 29 November 2000, published in the *Federal Official Gazette*, 2000, I, at 1633. For discussion of the constitutional amendment, see Zimmermann, 'Die Auslieferung Deutscher an Staaten der Europaeischen Union und internationale Strafgerichtshoefe', 56 *Juristen Zeitung* (2001) 233; and Werle, 'Konturen eines deutschen Voelkerstrafrechts — Zum Arbeitsentwurf eines Voelkerstrafgesetzbuches', 56 *Juristen Zeitung* (2001) 885.

⁷⁰ See, *inter alia*, the recent decision of the Federal Constitutional Court of 16 February 2001, Case 2BvR 200/01, published in 21 *Neue Zeitschrift fuer Strafrecht* (2001) 446.

⁷¹ Note also the approach taken in Switzerland, where Article 25(1) of the Federal Constitution makes extradition to a foreign authority conditional upon the consent of the Swiss citizen, whose extradition is sought.

relevant Act in the event that the question of extraditing nationals arises. Secondly, it does not negate the fundamental constitutional principle of non-extradition but, rather, it sets out in an exhaustive fashion the cases where this principle is infringed. Thirdly, promulgation of the relevant Act is dependent upon the satisfactory protection of the basic principles of the rule of law. Fourthly, it is always possible to seek judicial review of the relevant Act.

8 Conclusions

Notwithstanding the gravity of the crimes for which Milosevic has been accused and shall be tried before the ICTY, it is an undisputed fact that he was entitled to a measure of protection equal to that afforded to any other Yugoslav and Serb citizen under the respective constitutional orders. The application of protective legal provisions can never be selective; it must be universal. All persons are equal before the law, not only when the legal system works in their favour but also when it operates to their detriment. Serbia has a rather flexible constitutional order. Article 3(1) of its Constitution stipulates in bold terms that: 'In the Republic of Serbia everything shall be permitted unless it has been prohibited by the Constitution and law.' As has been shown, the extradition of its nationals constitutes such a prohibition. It is precisely here that the dilemma lies: how to overcome the legal constraints when the armoury is short of appropriate weapons. And the usual answer to such dilemmas is to employ political means, which may very well bring about the desired results but, at the same time, violate the rule of law.

There can be no doubt that the Serb Government was heavily influenced by political considerations when it resolved to hand over Milosevic to the ICTY. In giving the reasons for the decision authorizing cooperation with the Tribunal, the government's spokesman argued that, had the decision not been adopted, a large number of donors would not have participated in the international donor's aid conference, which took place in Brussels on 29 June 2001.⁷² Moreover, the fact that at the time Milosevic was referred to as 'Serbia's most valuable export commodity'⁷³ is characteristic not only of the prevailing political climate but also of Serbia's actual intentions.

It is equally true that Milosevic has been indicted at both national level (for the crimes of corruption and abuse of power) and at international level (for crimes against humanity, war crimes and genocide).⁷⁴ Although all these accusations could have potentially been adjudicated by the competent FRY courts, this would not be

⁷² See Serbia Ministry of Information, Press Release No. 24217 (29 June 2001).

⁷³ Quoted in Klarin, 'Belgrade's Tribunal Volte-Face', *Institute for War and Peace Reporting*, 28 June 2001.

⁷⁴ On 8 October 2001, Milosevic was further indicted, *inter alia*, for crimes against humanity allegedly committed in the territory of today's Croatia (Case No. IT-01-50-I, 'Croatia'), and on 22 November 2001 for genocide allegedly committed in Bosnia and Herzegovina (Case No. IT-01-51, 'Bosnia and Herzegovina'). Note that, in September 2001, the Supreme Court of Kosovo, whose majority comprises UN-appointed judges, ruled that 'the exactions committed by Milosevic's regime [against Kosovo's ethnic Albanians] cannot be qualified as criminal acts of genocide'; see 'Kosovo Assault "Was Not Genocide"', BBC, 7 September 2001.

acceptable to the ICTY, which, based on Article 9 of its Statute,⁷⁵ considers that it is the only competent tribunal to try accused persons at international level. However, this does not mean that the Yugoslav courts should suspend or terminate pending proceedings against Milosevic. Provided that his defence rights are observed, Milosevic ought to be tried for corruption and abuse of power and for the commission of any other offences for which he may be indicted in the future.

⁷⁵ It provides that, while the ICTY and national courts have joint competence to prosecute persons, the former shall have primacy over the latter.