

**ANNOTATED LEADING CASES OF  
INTERNATIONAL CRIMINAL TRIBUNALS**

**VOLUME I:  
THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA 1993-1998**

**André KLIP and Göran SLUITER (eds.)**

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André Klip and Göran Sluiter (eds.)  
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## PREFACE

In 1993, the Security Council established the International Criminal Tribunal for the former Yugoslavia (International Tribunal), a decision that was both hailed and criticized at the time. Since its establishment, the International Tribunal has issued an impressive number of decisions, judgments and orders, hereby overcoming numerous obstacles to its effective functioning.

It needs to be borne in mind that the International Tribunal would be utterly impotent without the widespread support of the international community. This support is especially required for the arrest of indicted persons and the conduct of investigations by the Tribunal. Initially, support was lacking, but gradually the Tribunal received more and more assistance from states, international organizations and non-governmental organizations. A major challenge for the Tribunal was and still is to obtain the custody over those persons indicted by it. Since the Tribunal cannot hold trials *in absentia*, arrest of indictees is an absolute condition for a prosecution to proceed. The Dayton Peace Agreements entailed a crucial improvement in the arrest of indicted persons, mainly due to the deployment of IFOR and SFOR in Bosnia. As of 31 March 1999, 59 persons are indicted, of which 26 persons are in custody. Although this number is clearly not sufficient, it provides the Tribunal with much work and is likely to produce a huge amount of jurisprudence.

Besides obtaining the custody over indicted persons, much energy was devoted in the early years of the Tribunal's existence to establishing and clarifying its legal framework. The Statute is only a very rudimentary instrument which was further supplemented by the International Tribunal's own Rules of Procedure and Evidence. However, legal questions kept and keep coming up in the cases before the Tribunal. In dealing with these issues, it needs to be borne in mind that there was no useful precedent that could guide the Tribunal in its work. Therefore, it was and is a major challenge to the Tribunal to come up with creative solutions to legal problems in a manner that enables the Tribunal to function effectively and fully respects the rights of the accused.

The case law of the International Tribunal is of great importance, to different fields of law. This is due to the fact that the International Tribunal is an *international criminal* tribunal, prosecuting persons suspected of the most serious international crimes. Thus, the decisions of the Tribunal are relevant for scholars in the fields of international law and criminal law, but also of course in the field of human rights law and humanitarian law.

Besides to scholars in those fields of law, the case law of the Tribunal may also be of utmost interest to political scientists, historians and others interested in the many non-legal aspects of the Tribunal's work, such as the (history of) the conflict in the former Yugoslavia. Deplorably, the importance of the case law of the International Tribunal goes beyond the events of the past in Bosnia. It may be borne in mind that the International Tribunal is also competent to try the crimes committed in Kosovo in 1998 and 1999 as well as other crimes to come. Indeed, it was announced on 27 May 1999 that Slobodan Milosević, the president of the Federal Republic of Yugoslavia, has been indicted by the International Tribunal in respect of events in Kosovo.

The idea for this compilation of cases was born out of contacts with many academics and students who are interested in the work of the Tribunal. We were always happy to advise them as to how and where they could consult the Tribunal's case law. At the same time, however, we thought that it would be very practical and convenient if the most important cases of the Tribunal could be compiled in one book. This would make the most important cases of the Tribunal of the first five years of its existence easily accessible to academics, practitioners and students. Moreover, it would significantly contribute to the wide dissemination of the work of the Tribunal.

The selection of the cases was clearly our most difficult task. In the first years of its existence the Tribunal issued numerous decisions and orders which shaped the law of the Tribunal. Due to a lack of space we had to leave out some important decisions, but those decisions may be included in a subsequent volume. We also did not include decisions in this volume that were issued after April 1998, such as the

Judgment in the Čelebići case (16 November 1998) and the Judgment in the Furundžija case (10 December 1998). They may appear in a subsequent volume.

Nevertheless, we believe that this compilation represents an adequate picture of the most important achievements of the Tribunal in the first years of its existence. In selecting the cases, the importance of the case, for the Tribunal itself and for the outside world, was our crucial criterion. It will not come as a surprise that this book contains many decisions issued in the Tribunal's first case, the prosecution of Tadić (nine out of seventeen decisions). To our regret, we have not yet been able to include all important decisions in the Tadić case, because appeal in this case has not been finalized.

We have divided the cases under five different headings.

The first is entitled "preliminary matters" and deals with decisions of the Tribunal before the actual proceedings have commenced and which have no direct bearing on subsequent trial proceedings. We have included decisions by the Trial Chamber on Defence motions on jurisdiction and on *non-bis-in-idem* (Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 10 August 1995; and Decision on the Defence Motion on the Principle of Non-bis-in-idem, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 14 November 1995), and the decision by the Appeals Chamber on the Defence Motion on Jurisdiction (Decision on the Defence motion for interlocutory appeal on jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, A. Ch., 2 October 1995). The importance of the jurisdiction cases for the Tribunal is self-evident. Had the Tribunal found it was improperly constituted or could not otherwise exercise jurisdiction, its continuing functioning would be seriously threatened.

The second heading deals with "procedural matters". Although one decision under this heading has been issued before the commencement of the trial (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 10 August 1995), it has a direct bearing on subsequent proceedings and therefore should in our view more aptly be categorized under "procedural matters" than under "preliminary matters". The decisions and orders under this part all relate, in one way or another, to the gathering of evidence, especially testimonial evidence, and the admissibility of evidence. The decisions and orders address fundamental problems of criminal procedure, which arise at the national level as well, but they are dealt with here within the unique framework of an international criminal prosecution. As regards these decisions in the first phase of the Tribunal's work, it is not only interesting to study the approach of the Tribunal to legal issues such as admissibility of hearsay evidence and evidence from anonymous witnesses, but more interesting is to see how the Tribunal arrives at its answers, and which sources of law it applies in the interpretation of its own legal framework.

Number 6 of this compilation contains one decision and two orders. These orders and decision all concern the false testimony of Dragan Opacic and the consequences thereof. We have therefore put these orders and decision under one heading, and will refer to them as "Decisions Relating to the False Testimony of Opacic".

The third heading contains only one decision, but this decision is of crucial importance to the Tribunal's work. It is entitled: "Cooperation with national authorities". Due to a lack of space, we have only included the Appeals Chamber's decision in the Blaskić subpoena case. It reverses to a large extent the Trial Chamber's findings and may very well be studied independently from the Trial Chamber's decision. The Appeals Chamber's decision sets out and clarifies the rules pertaining to state cooperation. Its relevance is not only confined to this Tribunal and the Rwanda Tribunal, but it also has to a large extent influenced the legal assistance regime of the permanent International Criminal Court.

The fourth heading is entitled "Judgment and sentencing". It contains the opinion and judgment and the sentencing judgment by the Trial Chamber in the Tadić case, and judgments provoked by the sentencing of Erdemović.

The Tadić opinion and judgment (Opinion and Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997) is the most voluminous decision in this book. It not only deals with important legal questions, such as the character of the conflict in the former Yugoslavia, but also to a large extent focuses on questions of fact. Its importance cannot be underestimated, also in symbolic terms: it is the first judgment of an international criminal tribunal since Nuremberg and Tokyo.

Tadić was not the first person sentenced by the Tribunal, since Erdemović's sentencing judgment, on an admission of guilt, preceded that of Tadić. Erdemović's sentencing was appealed, especially the validity of his guilty plea was challenged, and his final sentence was pronounced by the Trial Chamber on 5 March 1998.

The separation between the opinion and judgment, on the one hand, and the sentencing judgment on the other, is not the current practice of the Tribunal. From the Čelebići Judgment on, the judgment and the sentencing judgment are combined in a single decision.

Finally, the fifth heading contains a Rule 61 review. The "Rule 61 procedure", which has grown somewhat obsolete since the number of arrested indictees has increased significantly, embodies several functions. It allows the Prosecutor to present the evidence against an indicted person, when custody over this person cannot be obtained. This is particularly necessary since the Tribunal cannot hold *in absentia* trials. Furthermore, the Rule 61 review allows for addressing failures by states to cooperate with the Tribunal, and provides, *inter alia*, for the issuance of an international arrest warrant.

Five Rule 61 reviews have been held up to now. We have chosen to incorporate the Karadžić and Mladić Rule 61 procedure in this book, as an example of such a procedure, and also because the two indictees are generally regarded as the most high-ranking persons indicted by this Tribunal in the context of the Bosnian conflict.

After having made a selection of cases, which by definition is never perfect and always contains some preferences of the editors, we faced the problem as to how to incorporate the cases into a single volume. We tried to achieve an apparently impossible objective: including the original full text of 17 decisions, judgments and orders including separate and dissenting opinions in a single book. Indeed, some of the decisions of the Tribunal are quite lengthy. We succeeded in pulling all 17 decisions, judgments and orders in one book by reducing the letter format and the space between the lines of the original text. As a result, approximately two and a half pages of the original text fit one page of this book. Still we wanted the reader to be able to retrace the format and page of the original text, which can be found throughout the text in brackets [ ].

Each decision, judgment or order is identical to the written original text as issued by the Press and Information Office of the Tribunal. Separate and dissenting opinions, or a declaration, of Judges are included as well. We only have not included some of the annexes to the decisions, because we believed they were not essential to study the judgement or decision. Thus, in the hearsay decision in the Tadić case (Decision on Defence Motion on Hearsay, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 5 August 1996) and in the Tadić opinion and judgment (Opinion and judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997) we have not incorporated the annexes in the book, with the exception of the indictment in the Tadić case.

With respect to the decisions in numbers 2, 4, 6, and 13 the Tribunal has afterwards corrected certain errors, in the decision itself or in the separate opinions, partly spelling errors, by means of a "corrigendum" or an "erratum".<sup>1</sup> For the convenience of the reader, we have already corrected the text pursuant to these corrigenda or errata.

<sup>1</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, A.Ch., 2 October 1995 has amended pursuant to a Corrigendum of 12 February 1996; Decision on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T.Ch.II, 10 August 1995 has been amended pursuant to an Erratum of 15 November 1995; Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, *Prosecutor v. Tadić*, Case No. IT-94-1-T.Ch.II, 5 December 1996 has been amended pursuant to a Corrigendum of 13 January 1997; Joint Separate Opinion of Judges McDonald and Vohrah to the Judgment, *Prosecutor v. Erdemović*, Case No.IT-96-22-A, A.Ch., 7 October 1997 has been amended pursuant to a Corrigendum of 19 November 1997.



We felt that such a compilation of important decisions of the Yugoslav Tribunal, which is especially for the convenience of those who do not study the work of the Tribunal on a day-to-day basis, would not be complete without a short comment on each decision by a competent scholar. We have therefore requested academics with a thorough knowledge of the Tribunal's work to write a short comment to a particular case. These comments set out the, in the eyes of the author, most important aspects of a decision and/or critically appraise the reasoning of the Tribunal in a particular case. Because of the limited space available, the comments by no means focus exhaustively on each issue at stake, but are confined to striking aspects of a decision.

For each decision we have requested one scholar to write a comment, with the exception of the Tadić Opinion and Judgment. This case, because of its magnitude and richness of legal issues, is commented by two authors, one of them focusing on the majority opinion and judgment, the other dealing with Judge McDonald's separate and dissenting opinion.

The comments differ in length, depending on the length and importance of a decision. Regarding the internal references to the case law of the International Tribunal, we use the system of reference used by Trial Chamber III in the case against Kvočka and others: Defence Preliminary Motion, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-PT, T.Ch. III, 15 Jan. 1999, p. 5. Where appropriate we referred to the bilingual (English and French) Judicial Reports of the International Criminal Tribunal for the Former Yugoslavia: *Tadić* (1995) I ICTY JR 353 at para. 94 (iii).

We have given this book the "presumptious" sub-title "Volume I: The International Criminal Tribunal for the former Yugoslavia 1993 – 1998". Hereby we have implicitly taken the duty upon us to compile leading cases in the future, first of all, of the Yugoslavia Tribunal issued after April 1998, and secondly, of other international criminal tribunals. It will definitely take a significant number of years before the permanent International Criminal Court has issued a substantive number of decisions. The Rwandan Tribunal, on the other hand, is a different story. After a difficult start, it has at this date issued several important decisions that beg for wide dissemination and annotation. Therefore, the subsequent volume in this series will be devoted to the Rwanda Tribunal.

We would like to express some words of gratitude to persons and organizations who have been of great help in the publication of this book.

First of all, we would like to thank the commentators, whose contributions will undoubtedly stimulate the debate on legal issues presented by these decisions. It is our view that the case law of the Yugoslavia Tribunal should be more systematically commented upon in law journals, in the field of international and criminal law especially.

We owe many thanks to Mark Mackarel of the University of Dundee for his critical and thorough reading of the comments submitted by our commentators.

We would also like to thank Alies Schipper for being of great assistance in the huge amount of editorial work involved in this publication.

Some words of gratitude concern the publisher, Intersentia, and especially Mr. Hans Kluwer, who has believed in and supported our project wholeheartedly from the very beginning.

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André Klip and Göran Sluiter  
Utrecht, 26 June 1999