

**ANNOTATED LEADING CASES OF
INTERNATIONAL CRIMINAL TRIBUNALS**

**VOLUME VIII:
THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA 2001-2002**

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Antwerp – Oxford

Distribution for the UK:

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Oxford OX1 4LB
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Schulthess Verlag
Zwingliplatz 2
CH-8022 Zürich
Switzerland
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Fax: + 41 1 261 63 94

Distribution for other countries:

Intersentia Publishers
Groenstraat 31
BE-2640 Mortsel
Belgium
Tel: + 32 3 680 15 50
Fax: + 32 3 658 71 21

Please cite as: ICTY, Judgment, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, T. Ch. II, 15 March 2002, Klip/Sluiter ALC-VIII-755.

Annotated Leading Cases of International Criminal Tribunals
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Cover illustration: Amber Gerris

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Antwerp – Oxford
[http:// www.intersentia.com](http://www.intersentia.com)

ISBN 90-5095-397-2
D/2005/7849/26
NUR 828

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PREFACE

This is the eighth volume in the series “Annotated Leading Cases of International Criminal Tribunals” and contains the most important decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) over the period from 1 September 2001 up to and including 2 August 2002. It is the sixth volume in the series containing decisions of the ICTY, which indicates the abundant output of that institution.

At the time of writing this preface the ICTY President, Judge Meron, has just addressed the UN General Assembly. In his speech he underlined the importance of the completion strategy and pointed to some new initiatives that were developed to comply with the – tight – timetable. He mentioned in this respect the amendments to Rules 28 and 11*bis*. These are indeed remarkable developments. Pursuant to Rule 28, a group of judges will now verify that each new indictment filed by the Prosecutor concentrates exclusively on senior leaders. If this is not the case the indictment will be returned to the Prosecutor. After some ten years of practice the Judges will now submit Prosecutorial policy to significant judicial review. Undeniably, this raises institutional questions, particularly concerning the independence of the Prosecutor in respect of the judicial branch.

The amendment to Rule 11*bis* also constitutes an important element in the ICTY’s completion strategy. The new version of Rule 11*bis* allows cases involving mid- and lower-level accused to be transferred not only to the national jurisdictions of those States where the crimes occurred or the accused was arrested, but also to any jurisdiction willing and able to afford the accused a fair trial. At the time of writing this preface, a trial chamber has been given the task of considering requests for the transfer of cases to Bosnia-Herzegovina, Serbia-Montenegro and Croatia. Indeed, this approach is to be preferred over the simple withdrawal of indictments, which has occurred in the past.

Although fully engaged in its completion strategy, the ICTY was still highly productive in the period covered by this volume. In this period, the ICTY has issued a variety of decisions, including seven judgements, two “complete” trial chamber judgements, two trial chamber judgements on sentencing, one trial chamber judgement on motions to acquit and two judgements from the appeals chamber.

The present volume is in its approach and structure similar to the previous seven volumes. Thus, the book contains the full text of all the decisions and judgements, including separate, concurring and dissenting opinions, as well as annexes to the decisions. As in the previous volumes, the editors have ensured that the decisions are fully identical to the *written* original text as issued by the ICTY Press and Information Office and which bears the signature of the Judges. We are aware that more and more decisions are available on the internet. However, only the written decisions bearing the signatures of the Judges can be considered authoritative versions. In the course of our editorial work on this volume and the previous volumes, we have discovered inconsistencies between the original written version of the decision and the internet version, if the latter is available at all. Much of our editorial efforts involve making the texts in this series identical to the original written version.

We could only include the full text of the decisions in this volume by reducing their original format. Still, we want the reader to be able to identify the page number of the original text, which is throughout the text put in brackets []. We are again very happy that a number of scholars in the field of international criminal law were prepared to write interesting and stimulating commentaries to the decisions.

A few words regarding the selection of decisions may give the user insight into our working method. In principle we select all final judgements. In addition we publish decisions taken at any stage of the procedure which are important for other reasons: because they deal with a specific legal question, because they are representative of a specific type of decision or because they enter new legal waters. Of

course we cannot publish all decisions. As a result we might not publish decisions in which issues have been decided in a way similar or identical to a decision that has already been selected.

The decisions are presented in the different parts of this book and under various headings.

Part 1 deals with “preliminary matters”, essentially arising prior to the commencement of the trial. As in previous volumes, this part contains a number of decisions on the jurisdiction of the Tribunal, decisions relating to provisional release and decision concerning (the form of) the indictment. All those matters can be considered “usual” pre-trial matters.

Although to a certain degree these pre-trial matters have become somewhat routine, the decisions included clearly illustrate the present stage of the ICTY’s development and also continue to address new legal issues, as is the case, for example, with the decision on preliminary motions filed by Milošević.

Part 2 is entitled “procedural matters” and deals with a variety of issues. A number of those headings have in common the endeavours by the Tribunal, in particular the Prosecutor, to expedite proceedings as much as possible. Thus, under the heading “joinder and separation of trials” the Trial Chamber and Appeals Chamber respond to the wishes of the Prosecutor to join cases/trials. Under the next heading “fair trial, preparation of defence and length of proceedings” we have grouped decisions dealing with proposed procedural measures to reduce the length of the proceedings and which also address tensions in this respect with the rights of the accused.

Heading 6, entitled “witnesses”, contains one decision dealing with protective measures and a decision relating to the interesting question of whether or not journalists enjoy evidentiary privileges when called as a witness. Admissibility of evidence is a recurring theme in our series and also the title of the next heading. Quite a few decisions under this heading concern the admissibility of Rule 92*bis*-statements; this Rule has been adopted with a view to expediting proceedings, but the exact scope of its application remains unclear. The final heading of Part 2, “Counsel”, contains no less than nine decisions and orders regarding various aspects of the appointment, assignment and functioning of defence counsel. Interesting questions raised in these decisions/orders include the appointment of *amici curiae* in the Milošević case and the possible conflict of interests arising when persons previously employed by the Prosecutor subsequently wish to work as defence counsel.

Part 3 contains a number of judgements and constitutes by far the largest part of this volume. As mentioned above, judgements are by definition included in this series because of their importance, both from a factual and legal perspective.

Under heading 9 we have incorporated judgements from the Trial Chamber in the Krnojelac case and the case against Kvočka and others. Judgements handed down by the Appeals Chamber in the case against Kunarac and others and in the case against Kupreškić and others have also been included. Finally, as a new phenomenon this heading contains a judgement on defence motions to acquit in the case against Sikirica and others.

Heading 10 contains two sentencing judgements handed down by the Trial Chambers in the Celebici case (Mucić, Delić and Landžo; Delalić was acquitted) and the case against Sikirica and others.

The final heading of this volume is entitled “review and early release” and is new to this series. With time progressing, the question of early release is becoming more relevant, even for mid-term sentences. Two orders from the ICTY President dealing with requests for early release are included (dealing with the convicted persons Kolundžija and Kos). The heading also contains a decision on motion for review in the Tadić case. There is no better way to illustrate the complexity and length of ICTY proceedings than this case. The first substantive decision of the ICTY was issued in the Tadić case on 10 August 1995 (the

first decision in Volume I of this series) and the last decision in that case is dated 30 July 2002 (the final decision in volume VIII of this series).

The productivity of the ad hoc Tribunals makes it difficult to keep up, in terms of publication of their most important decisions. This volume will therefore soon be followed by volumes nine and ten. Volume nine will, contrary to what was stated in the preface of volume seven, contain decisions issued by the Special Court for Sierra Leone, essentially covering the pre-trial phase. Volume ten will then be dedicated to the ICTR, which also has significantly increased its output. The ICTY will thus have to wait until volume eleven. However, since both volumes nine and ten will appear in 2005, we expect the backlog of ICTY decisions to be fairly limited.

We owe acknowledgements to many persons without whom we could not have completed this eighth volume. These include our publisher Intersentia, in particular Hans Kluwer and Isabelle van Dongen, our student assistant Marloes Kleijn Hesselink, who assisted with the corrections of the text and the Netherlands School of Human Rights Research, which greatly facilitated our work. Christian Chartier and his staff from the ICTY Press and Information Office have helped us in obtaining all the hard copies of decisions. Steven Freeland from the University of Western Sydney, Australia, offered tremendous help by correcting our English. Last but not least, we wish to thank the distinguished authors for their commentaries to the decisions.

We hope that this volume will contribute to the further dissemination of the important work of the ICTY and that it will provide access to its decisions to practitioners, academics and students.

André Klip and Göran Sluiter
Maastricht/Amsterdam, November 2004