

**ANNOTATED LEADING CASES OF
INTERNATIONAL CRIMINAL TRIBUNALS**

**VOLUME IX:
THE SPECIAL COURT FOR SIERRA LEONE 2003-2004**

André KLIP and Göran SLUITER (eds.)

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Annotated Leading Cases of International Criminal Tribunals

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PREFACE BY THE EDITORS

This is the ninth volume in the series Annotated Leading Cases of International Criminal Tribunals and contains the most important decisions of the Special Court for Sierra Leone (SCSL) rendered in the first two years of its existence – 2003 and 2004. We are pleased to be able to offer this first volume on another international criminal tribunal apart from the ICTY and ICTR. This brings us immediately to the question of the scope of the present series, which deals, as follows from its title, with *international* criminal tribunals. Does the SCSL, which is generally qualified as a mixed national/international tribunal or an internationalised institution, belong in this series?

When we first started working on this series, there was not yet the prospect of the establishment of ‘internationalised’ criminal courts. However, we are now required to consider the activities of various forms of tribunal and hybrid courts. We believe that they should be covered by our series, for a number of reasons.

First of all, the internationalised criminal courts generally directly apply international criminal law, including important general principles, and thus offer a valuable contribution to the development of that particular body of law.

Second, because of their special focus, the status of their jurisprudence is ‘higher’ than that of domestic jurisprudence.

Finally, in spite of their characterisation as hybrid or internationalised courts, these institutions have all been created pursuant to international law and derive their international status on that basis. Within the SCSL, which is the subject of this volume, one notices in various decisions that the Judges underline the international nature of the institution.

We therefore believe that, in addition to the ICTY and ICTR, there are logical reasons for this series to also cover the internationalised courts, such as those for Sierra Leone, East Timor, and, in the future, Cambodia. While this volume deals with the SCSL, the next internationalised courts on our agenda are the Special Panels of the Dili District Court, East Timor.

Some discussion of the preparation of this volume, as well as the volume dealing with the East Timor Special Panels, is in order. We visited the SCSL and the Special Panels in East Timor in March and July 2005, respectively. Those visits allowed us to familiarise ourselves with the work and environment of those new judicial institutions. Furthermore, it enabled us to organise full access to the jurisprudence of those courts with a view to publication. We are very happy with the support we have received from the SCSL and the East Timor Special Panels in our endeavours to ensure regular publication of a selection of their jurisprudence, based on full and unrestricted access. We are indebted to the *Nederlandse Organisatie voor Wetenschappelijk Onderzoek* (Netherlands Science Council) for providing us with the necessary and generous financial support to realise these projects.

We wanted to achieve a timely publication of the early, essentially pre-trial, jurisprudence of the SCSL. Those familiar with our series will notice that the present volume covers the years 2003 and 2004, while the latest volumes dealing with the ICTR (Volume 6) and the ICTY (Volume 8) ended with decisions in 2001 and 2002 respectively. It might be thought that the current focus on the SCSL adds to the (limited) backlog we have in respect of ICTY and ICTR decisions. To a certain degree this is the case – dedicating the present volume to the ICTY or ICTR would have been an option – but we have good reasons for focusing on the SCSL as early as possible, particularly as there is enough interesting jurisprudence to fill a book of this size.

A first important consideration was that the SCSL and its case law are relatively unknown as compared to that of the *ad hoc* Tribunals. The present volume will, hopefully, assist at an early stage in the dissemination of the important work of the SCSL. Furthermore, just as important is the extremely limited life span of the Court. As a result, the SCSL's jurisprudence and, in particular, the commentaries thereto, should be published in a timely manner to maximise their practical value for those working for or with the SCSL.

Since the SCSL is a new and still relatively unknown institution, we wish to guide the reader in sourcing essential documents and further reading material.

The essential documents for the functioning of the Court, such as its Statute, the Rules of Procedure and Evidence and the Agreement establishing the Court, can be found on the Court's homepage <www.scs-l.org> under 'documents'. Two books are particularly informative on internationalised criminal courts in general, paying due attention to various aspects of the SCSL. These are Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press: Oxford 2004) and Kai Ambos and Mohamed Othman (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Max Planck Institut für ausländisches und internationales Strafrecht: Freiburg 2003). Various law journals regularly publish articles concerning the activities of the Court; for example, number 4 of volume 2 (2004) of the *Journal of International Criminal Justice* contains articles on a number of the decisions included in this volume.

As far as the selection of cases is concerned, the reader will notice that the bulk of the decisions, with only a few exceptions, deal with the pre-trial phase. As a result, the book is different in nature from previous volumes and contains, for example, no final judgements. Yet, the pre-trial decisions deal with a variety of fascinating legal questions, involving aspects of procedural law, substantive law, international law and criminal law.

The period covered by this volume is 15 March 2003 to 17 September 2004. Important decisions rendered after 17 September 2004 will be included in future volumes.

The present volume is in its approach and structure similar to the previous eight volumes. Thus, the book contains the full text of all the decisions, 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 identical to the *written* original text issued by the competent Press and Information Office and which bears the signature of the Judges.

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

As in previous volumes, a few words regarding the selection of decisions may give the user an insight into our working method. Although not relevant for the present volume, we select all final judgements. In addition, we publish decisions taken at any stage of the procedure that 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 may not publish decisions in which issues have been decided in a way similar or are identical to a decision that has already been selected.

Since this is the first volume on SCSL case law we have selected more decisions of the same type than usual, for the simple reason that many of the early decisions will be crucial for future determination of issues, as evidenced by ICTY and ICTR case law.

The decisions are presented in separate parts and under different headings.

Part 1 deals with preliminary matters, arising essentially prior to the commencement of the trial. Certain cases also deal with attempts to prevent the substantive trial from starting at all.

Those cases concern various challenges to the Court's jurisdiction. We have distinguished here between different attacks on the legality of the Court's establishment (heading 1), the possible consequences of the 'Lomé amnesty' for the exercise of jurisdiction by the Court (heading 2), lack of jurisdiction on account of non-punishability under international criminal law (heading 3, entitled 'jurisdiction – substantive criminal law') and finally the consequences of Head of State immunity for the jurisdiction of the Court (heading 4). One notices that these challenges to the jurisdiction of the SCSL are more frequent and of a more diverse nature than jurisdictional challenges in the first ICTY and ICTR cases. This has everything to do with the special nature of the Court, as well as the more advanced stage of international criminal law, providing defence counsel with more ammunition with which to craft jurisdiction motions.

Under heading 5 we have grouped decisions dealing with a recurring theme in our series, namely the indictment. In the context of the SCSL, one sees various both challenges to the indictment by the defence and attempts to amend the indictment by the Prosecutor.

Part 2 is the final part of this volume; it is entitled 'procedural matters' and deals with a variety of issues. These decisions may be distinguished from preliminary matters in that by definition they do not arise prior to the commencement of the trial. We have grouped the decisions under a variety of themes.

Under heading 6 the reader will find decisions dealing with requests for provisional release, sometimes in the form of an application for bail. Similar applications are regularly lodged in the ICTY and the ICTR, but the SCSL of course operates within a distinctive (security) context.

In an institution with such a short life-span, joinder of cases is an important matter, particularly in its early stages. The relevant decisions, which are vital for the subsequent organisation of trials, are grouped under heading 7.

Heading 8 contains a number of decisions relating to witnesses, essentially dealing with witness protection. It cannot come as a surprise that the context of the SCSL requires the same degree, or even greater protection for witnesses than under the current security situation underpinning the work of the ICTY and the ICTR.

Disclosure generally gives rise to interesting legal argument, particularly in the early phases of proceedings. We have incorporated a number of decisions in this area under heading 9.

As is the case with the ICTY and the ICTR, some accused before the SCSL have sought to represent themselves or have refused to attend their trials. The repercussions of this in respect of the right to counsel, the right to an effective defence and the right to be tried in one's presence are the subject of heading 10.

As early as the SCSL is in its work, it has already experienced the recusal of a judge, President Robertson, on account of an appearance of bias. This and another situation dealing with the impartiality of judges can be found under heading 11.

Heading 12 is entitled 'decisions concerning an expeditious trial'. It includes several decisions which deal essentially with the Prosecutor's desire to ensure the expediency of the proceedings, in order to avoid the extremely lengthy trials often found in the ICTY and the ICTR. The decisions deal, *inter alia*, with motions for a concurrent hearing of evidence, for judicial notice and for cooperation between the parties.

A fascinating aspect of the SCSL is that it carries out a mandate that is partly concurrent with the Truth and Reconciliation Commission. The desire of that commission to hear as witnesses certain individuals who are, as accused, detained under the authority of the SCSL has resulted in interesting jurisprudence. This – as well as the relationship with national authorities – are the subject of heading 13.

Under heading 14 the reader will find several smaller decisions that are concerned with the conditions of detention. This is an area of the law of international criminal tribunals deserving of increased attention, as it tends to find its way to litigation only with some difficulty.

Finally, heading 15 includes decisions regarding the right to and scope of appeal. Frequent appeals of a rather expansive nature are a common concern to all international criminal tribunals that wish to expedite proceedings. This is of particular concern given the limited life span of the SCSL.

The productivity of international criminal tribunals makes it difficult to keep up with them, in terms of publication of the most important decisions. The initiation of different and simultaneous investigations at the ICC (Darfur, Uganda and Congo) will undoubtedly increase significantly the amount of jurisprudence in the future. The present volume will therefore soon be followed by volumes ten, eleven, twelve and thirteen. Volume ten and twelve will contain decisions by the ICTR, volume eleven decisions issued by the ICTY. Volume thirteen will contain decisions on the East Timor Special Panels.

We owe acknowledgements to many people without whom we could not have completed this ninth volume. First of all, we wish to thank the people working at the SCSL for assisting us in various ways in the collection of the jurisprudence and by providing for a warm welcome during our research visit in March 2005. They are too many to mention, but Robin Vincent, the Registrar, has assisted us in several ways. We also want to thank Judge Thompson for his valuable assistance with the selection of the cases and for being so kind in writing an additional preface. Although he has assisted us in the selection, the final selection of course remains the sole responsibility of the editors.

Our gratitude also goes to our publisher Intersentia, in particular Hans Kluwer and Isabelle van Dongen, and the Netherlands School of Human Rights Research, which greatly facilitated our work. Steven Freeland from the University of Western Sydney, Australia, offered tremendous help by correcting our English. Since Volume 5, almost three years ago, we have enjoyed the assistance of Marloes Kleijn Hesselink as a student assistant. We thank her for all the work she has done and the enthusiasm with which she did it. We wish her every success in her future career. We welcome Thom Dieben as the new student assistant for this series. 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 dissemination of the important work of the SCSL and provide convenient access to its decisions for practitioners, academics and students.

André Klip and Göran Sluiter
Maastricht/Amsterdam, June 2005

PREFACE BY JUDGE THOMPSON

In a not entirely dissimilar context, I recently had occasion to assert that the emergence of the concept of universal jurisdiction as an effective mechanism of accountability and a robust countervailing force against the culture of impunity unleashed by perpetrators of egregious violations of international humanitarian law attests to the need at the international level, for us to strive unrelentingly and unabatedly to restore that regime of moral imperatives to which, by reason of our continuing quest for higher heights in our modern civilising endeavours, we are obliged to conform. I opined that such a regime of moral imperatives and the rule of law may, in some respects, be validly perceived as logically inclusive and symmetrical regardless of the distinction we contemporary lawyers are apt to make between law and morality.

It is from the same philosophical perspective that I here gratefully accept the kind invitation of the editors, André Klip and Göran Sluiter, to write this abbreviated Preface to the 9th edition of this highly-esteemed publication of decisions of international criminal tribunals covering specifically the decisions of the Special Court for Sierra Leone for the years 2003 and 2004.

Publications of this nature underscore the indispensability of enlightened and informed accessibility to the law especially as it is authoritatively expounded in the laboratories of justice, national or international. It cannot be denied that law reporting is a necessary and effective educational tool in not only acquiring knowledge of the law but also in promoting respect for the rule of law.

During this era in the history of mankind when international criminal justice has gained remarkable momentum as a desirable and viable mechanism of international social control, it is true that publications of this nature do play a prominent and vital role in understanding the intricate jurisprudential norms and processes that are daily being crafted for the purpose of undergirding the evolving supranational jurisdiction for global justice.

It is based on such serious reflection on the theme of international criminal justice and its all-encompassing implications for the international protection and enforcement of human rights that I, with immeasurable judicial pride and pleasure, on behalf of my honourable colleagues, the eminent and learned Justices of the Special Court for Sierra Leone, take this opportunity to welcome this edition of the series Annotated Leading Cases of International Criminal Tribunals as part of the process of the restoration of the rule of law to Sierra Leone, a nation that once embraced this ideal as a vital ingredient of civilized existence.

February 2005

Hon. Justice Bankole Thompson
Trial Chamber I
Special Court for Sierra Leone