

The Special Court for Sierra Leone

By Professor Michael P. Scharf

Introduction

The United Nations and Sierra Leone are about to establish a hybrid international-domestic Court to prosecute those allegedly responsible for atrocities in the Sierra Leone civil war. This will be the third ad hoc international criminal court to be created by the United Nations over the last decade, following the establishment of the war crimes tribunals for the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994.

Background

Since March 1991, the western African country of Sierra Leone has been caught in a bloody civil war. The fighting was temporarily suspended when the Lome Peace Agreement was reached on July 7, 1999, between the democratically elected government of President Ahmed Tejan Kabbah and the rebel Revolutionary United Front (RUF), led by Foday Sankoh. The peace agreement, which was signed by the parties as well as the Special Representative of the U.N. Secretary-General, granted amnesty to the members of the RUF and set up a Truth Commission to document violations of international humanitarian law in lieu of prosecutions.

Soon afterward, however, Foday Sankoh and his followers resumed attacks on the government's forces, as well as on the civilian population. Sankoh was recently captured by government forces and is currently in custody in the Sierra Leonean capital of Freetown.

In an effort to break the cycle of violence and begin the process of reconciliation, the government of Sierra Leone requested the United Nations to establish an international court to prosecute those responsible for atrocities during the civil war. On August 14, 2000, the U.N. Security Council adopted Resolution 1315, which requested "the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court," whose subject matter jurisdiction "should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law," and whose personal jurisdiction would be "over persons who bear the greatest responsibility" for these crimes "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." The Council asked the Secretary-General to produce a detailed blueprint for the special court.⁽¹⁾

The Report of the Secretary-General: A Blueprint for the Special Court

Following the successful completion of negotiations with the Government of Sierra Leone, on October 4, 2000, Secretary-General Kofi Annan issued his report to the Security Council on the Special Court for Sierra Leone.⁽²⁾ As specified in the Agreement

between the United Nations and Sierra Leone,⁽³⁾ the Special Court would differ from the ICTY and ICTR in several notable respects. First, unlike the ICTY and ICTR, which were established by Chapter VII Resolution of the Security Council, the Special Court is a treaty-based court established by the Agreement between the United Nations and Sierra Leone. As a consequence, while it has primacy over domestic prosecutions in Sierra Leone and can issue binding orders to the government of Sierra Leone, the Special Court lacks the power of the ICTY and ICTR to assert primacy over national courts of third States or to order the surrender of an accused located in any third State. This is not expected to hinder the Court's operation since most of the suspected perpetrators are now in custody in Sierra Leone.

A second difference concerns the composition of the Special Court. Unlike the ICTY and ICTR, which are composed exclusively of international judges elected by the U.N. General Assembly, and a Prosecutor selected by the Security Council, the Special Court is to be composed of both international and Sierra Leonean judges, prosecutors and staff. The Special Court is to have two Trial Chambers, each with two judges appointed by the Secretary-General and one judge appointed by the Government of Sierra Leone; and a five-member Appeals Chamber with three judges appointed by the Secretary-General and two judges appointed by the Government of Sierra Leone. The Secretary-General decided against the sharing of the ICTY/R's single Appeals Chamber because this would be "legally unsound and practically not feasible." The Special Court is to have a Chief Prosecutor appointed by the Secretary-General and a Deputy Prosecutor appointed by Sierra Leone in consultation with the United Nations. The Court's Registrar would be appointed by the Secretary-General.

A third difference concerns the Special Court's subject matter jurisdiction. While the subject matter jurisdiction of the ICTY/R is made up of violations of international humanitarian law which are beyond doubt part of customary international law, the Special Court's subject matter jurisdiction extends (in addition to war crimes and crimes against humanity) to certain crimes under Sierra Leonean law, including abusing a girl under 14 years of age, abduction of a girl for immoral purposes, and setting fire to dwelling-houses or public buildings. But unlike the ICTY and ICTR, the Special Court does not have jurisdiction over the crime of genocide, since there was no evidence that the mass killing in Sierra Leone was at any time perpetrated against an identifiable national, ethnic, racial or religious group with the intent to annihilate the group as such. Despite these differences, the Special Court is to be guided by the decisions of the appeals chamber of the Yugoslav and Rwanda Tribunals, and to apply the Rules of Procedure of the ICTR, though the judges have the power to amend or adopt additional rules, where a specific situation is not provided for.

The Special Court's temporal jurisdiction runs from November 30, 1996 to a date to be decided by a subsequent agreement between the parties. Although the civil war and attendant atrocities go back to 1991, the Secretary-General concluded that extending the temporal jurisdiction back that far would create too heavy a burden for the prosecution and the Court.⁽⁴⁾ The 1996 starting date (which corresponded with the first failed peace agreement between the Government and RUF) was selected as this "would have the

benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court."⁽⁵⁾

Asked during a press conference at U.N. Headquarters about how the Court's subject matter and temporal jurisdiction could be reconciled with the amnesty granted under the Lome Agreement, Assistant Under-Secretary General for Legal Affairs, Ralph Zacklin said that the amnesty given by the Sierra Leone Government was for crimes under Sierra Leone law, whereas "international crimes were a different matter." He also pointed out that during the signing of the Lome Agreement, the Special Representative of the Secretary-General had entered a reservation on the amnesty provision.⁽⁶⁾ Given that the Special Court's subject matter jurisdiction includes crimes under Sierra Leone Law that are not international crimes, the better answer would be that the amnesty applied only to domestic prosecutions, and has no application to prosecution before a hybrid international-national judicial body.

The most difficult dilemma for the Secretary-General was how to deal with juvenile offenders, children as young as 14 who committed acts of extreme barbarity. The government of Sierra Leone had initially insisted that those responsible for the most egregious atrocities be brought to trial and punished if found guilty no matter their age. Human Rights groups, on the other hand, were opposed to trials of anyone under 18. Under the compromise that was reached, no one under 15 may be tried by the Special Court, and 15-18 year-old defendants will receive separate anonymous hearings and special counseling and will serve out their terms under parole in demobilization camps or foster homes, rather than a prison.⁽⁷⁾

Unlike the ICTY and ICTR which are not located in the states where the atrocities were committed, the Special Court is expected to be located at the headquarters of the U.N. peacekeeping operation in Freetown, Sierra Leone. This will enable the Court to have ready access to witnesses and evidence. The Special Court is also expected to move more quickly than the ICTY and ICTR, which each took more than two years to become fully operational, in part because the Special Court will have a narrower mandate and fewer defendants, and because the Special Court has the full backing of the government of Sierra Leone.⁽⁸⁾ U.N. officials have said that they expect to start hiring court staff, including prosecutors and defense lawyers by the end of the year.⁽⁹⁾

The cost of the Special Court is estimated at U.S. \$22 million for its first year of operation, compared to the ICTY and ICTR whose annual budgets each exceed \$90 million. This estimated cost does not, however, include funding for detention facilities, investigations, translators, or defense counsel.⁽¹⁰⁾ While Security Council Resolution 1315 had suggested the mechanism of voluntary contributions to fund the Special Court, the Secretary-General has opted instead for assessed contributions from U.N. member states (in which case the United States will be assessed twenty-five percent of the costs) on the grounds that "voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment."⁽¹¹⁾

Endnotes

1. S.C. Res. 1315 (2000), 14 August 2000.
2. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, 4 October 2000, U.N. Doc. S/2000/915.
3. The Agreement is appended to the *Report of the Secretary-General*, *id.*
4. *Id.* at para. 26.
5. *Id.* at para. 27.
6. See U.N. News Release, October 5, 2000. (archived at <http://www.un.org/News/briefings/>)
7. *Report of the Secretary-General*, *supra*, at paras. 32-37.
8. Betsy Pisik, *Annan Proposes a Joint Tribunal*, *The Washington Times*, October 6, 2000, at A13.
9. *Id.*
10. Report of the Secretary-General, *supra*, at paras. 57-63.
11. *Id.* at para. 70-71.

About the Author

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