



SECURITY COUNCIL REPORT UPDATE REPORT



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Expected Council Action

Council members are currently negotiating a draft resolution to facilitate a hearing by the Special Court for Sierra Leone in International Criminal Court (ICC) premises and for the detention in the Netherlands of former Liberian president Charles Taylor for the purposes of his trial by the Special Court. The resolution may also grant exemptions to the travel ban against Taylor and other listed individuals that may be called as witnesses by the Court.

Key Facts

Concerns about the security situation, both for the Court and the whole region if Taylor's trial were held in Sierra Leone, prompted the Special Court last week to seek an alternative venue under rule 4 of its Rules of Procedure and Evidence:

"A Chamber or a Judge may exercise their functions away from the Seat of the Special Court, if so authorized by the President. In so doing, audio or video-link technology, email or other available electronic instruments may be used if authorised by the President or Presiding Judge".

The Special Court has consulted with the three existing international criminal tribunals – the ICC, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both the ICTY and the ICTR reportedly expressed reluctance about assisting because of a lack of available facilities and the need to give priority to their own completion strategies.

The Special Court made a parallel request to the Government of the Netherlands for the holding of proceedings in The Hague. In a 29 March letter, the Netherlands expressed willingness to grant the request, albeit subject to certain preconditions:

- A Chapter VII Council resolution is adopted;
- A headquarters agreement between the host and the Special Court is concluded;
- Arrangements for the transfer of Charles Taylor to another state upon completion of his trial are made prior to the transfer to the Netherlands;

- The Special Court must ascertain that the ICC and/or the ICTY agree to the use of their facilities, including a courtroom and a detention cell.

Key Issues

One of the key issues for the Netherlands is to establish a sound legal basis for the detention of Taylor in their territory. In particular, there is a need to avoid the possibility that Taylor could challenge his arrest, custody and trial by the Special Court before a Dutch court. There was a precedent for this in the case which former Yugoslav president Slobodan Milosevic brought before Dutch courts in 2001. The case was dismissed on the grounds that the ICTY had primacy. But it seems that under Dutch law the Special Court does not have the same status.

The worst possible outcome for the international community would be a mistrial based on an unsatisfactory legal foundation for the trial or the holding of Taylor in custody in the Netherlands or a conflict between Dutch law and international law.

It seems that this concern is the basis for the language in the Dutch Foreign Minister's letter asking that the Security Council establish

“...the necessary legal basis for the Special court to detain and conduct the trial of Mr. Taylor in the Netherlands.”

Clearly, it is insufficient, in terms of the law of the Netherlands, for the Dutch government to simply “give its consent” especially with regards to Taylor's detention. Detention in custody requires a basis in law as opposed to executive action, and it seems that a key requirement of Dutch law for the detention to be lawful is a binding obligation in international law – hence the request for a Security Council resolution under Chapter VII.

The draft resolution contains a provision excluding the jurisdiction of Dutch courts over Charles Taylor, unless the Special Court so agrees. At the time of writing, some Council members were considering the need to broaden this provision to include witnesses, given the possibility that some of them may have committed serious crimes in connection with the conflicts in Liberia or in Sierra Leone. The Special Court was established to try solely those most responsible for serious crimes committed in Sierra Leone.

A headquarters agreement similar to that signed between the Netherlands and the UN on behalf of the ICTY, which grants immunity to witnesses from Dutch law for the purposes of the trial, may also assist in dealing with issues relating to witnesses. However, it seems it would be insufficient for the purposes of validating Taylor's detention. The Dutch letter mentions the signing of such an agreement as a further component of the “necessary legal basis”.

Other issues are:

- The travel ban under the Liberia sanctions regime

The Liberia Sanctions Committee has imposed a travel ban against Taylor as well as other persons that could potentially be called by the Special Court as witnesses. Resolution 1521 provides that the travel ban shall not apply

“...where the Committee concludes that an exemption would otherwise further the objectives of the Council's resolutions, for the creation of peace, stability and democracy in Liberia and lasting peace in the subregion”.

Some members believe that the Committee is the appropriate venue for solving the issue. But the Committee's procedures state that the exemption request shall be made by the Permanent Mission of which the listed individual is a national *on behalf* of the individual.

It seems that Council members are prepared to grant exemptions to Taylor and potential witnesses for the purposes of the trial and the potential execution of a sentence against Taylor. But there is opposition in the Council to solving the issue in the resolution and not through the Committee.

A simpler option – one that would not require Council action – would be for the Special Court to make use of video-link and other technology under rule 4 of its Rules of Procedure.

- Financial issues

There are financial issues involved in the use of ICC facilities. There is consensus that the new resolution should include mention to the fact that no financial burden will be borne by either the ICC or the Dutch government. But the Special Court has struggled with funding, having eventually been supported by a mix of voluntary contributions and funds from the regular budget.

- Agreement from the ICC

Council members are conscious that the ultimate power over the use of ICC facilities lies not with the Council, but with the States Parties to the Rome Statute. The Bureau of the Assembly of States Parties to the ICC met three times this week to consider the Special Court's request, but no response has been agreed upon yet. It seems that a key point is to make sure that no financial burden will be borne by the ICC.

The Bureau consists of a President (currently Ambassador Bruno Stagno Ugarte of Costa Rica), two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

Council Dynamics

It seems that there is disagreement within the Council on the need to invoke Chapter VII in the resolution. Those in favour argue that resolutions dealing with Taylor's trial and the sanctions against him (particularly 1521, 1626 and 1638) were adopted under Chapter VII, and that the Dutch government has preconditioned acceptance to this. Others disagree, arguing that Article 25 of the UN Charter confers a binding nature to all Council resolutions, but it is unclear whether this would be satisfying in terms of the legal requirements of Dutch law.

There is also division inside the Council as to how the ICC should be mentioned in the new resolution. The issue relates to US reservations about the ICC.

Underlying Problems

It seems that there is a possibility that some time may still be needed before Taylor can be transferred. Taylor's initial appearance before the Special Court took place on 3 April, but the Special Court has yet to finalise arrangements for Taylor's subsequent location after the trial, if convicted.

One emerging issue will be the provision of additional security for the Court. For the time being, the 250 UN peacekeepers under the UN Mission in Liberia (UNMIL) that secure the Special Court have been complemented by Swedish and Irish quick reaction contingents originally stationed in Liberia under a UNMIL mandate.

UN Documents

Selected Security Council Resolutions

- S/RES/1638 (11 November 2005) mandated UNMIL to apprehend Taylor.
- S/RES/1626 (19 September 2005) mandated UNMIL to provide security for the Special Court.
- S/RES/1521 (22 December 2003) imposed the travel ban.

Selected Letter

- S/2006/207 (3 April 2006) is the Dutch letter.