


2005

## What limitations are there on the permissibility of public statements made by international criminal tribunal prosecutors and judges?

Megan MacKay Saucier

Follow this and additional works at: [https://scholarlycommons.law.case.edu/war\\_crimes\\_memos](https://scholarlycommons.law.case.edu/war_crimes_memos)

 Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Saucier, Megan MacKay, "What limitations are there on the permissibility of public statements made by international criminal tribunal prosecutors and judges?" (2005). *War Crimes Memoranda*. 174.  
[https://scholarlycommons.law.case.edu/war\\_crimes\\_memos/174](https://scholarlycommons.law.case.edu/war_crimes_memos/174)

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

---

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES RESEARCH LAB

---

MEMORANDUM FOR THE  
SPECIAL COURT FOR SIERRA LEONE

---

ISSUE:

WHAT LIMITATIONS ARE THERE ON THE PERMISSIBILITY OF PUBLIC  
STATEMENTS MADE BY INTERNATIONAL CRIMINAL TRIBUNAL  
PROSECUTORS AND JUDGES?



Prepared by Megan MacKay Saucier  
Fall 2005

**TABLE OF CONTENTS**

**INDEX OF AUTHORITIES.....ii**

**I. INTRODUCTION AND SUMMARY OF CONCLUSIONS .....1**

**A. Issues.....1**

**B. Summary of Conclusions.....2**

**1. International documents contain a number of guarantees to ensure a fair trial; under the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Statute for the Special Court for Sierra Leone, and the Special Court’s Rules of Evidence and Procedure, public statements must not interfere with these guarantees.....2**

**2. International norms also contain guarantees to ensure a fair trial; under customary international law, public statements must not interfere with these guarantees.....3**

**3. All officials of the Special Court should strive to ensure that their statements reflect impartiality, fairness, and a presumption of innocence.....4**

**4. Outside of the provisions essential to a fair, impartial trial, there are few limits on public statements.....5**

**II. FACTUAL BACKGROUND.....5**

**III. LEGAL DISCUSSION.....8**

**A. Introduction.....8**

**B. History.....8**

**C. United Nations.....13**

**1. Universal Declaration of Human Rights.....14**

**2. ICCPR.....15**

**D. Special Court for Sierra Leone.....17**

**1. Special Court Statute.....18**

**2. Rules of Procedure and Evidence.....19**

**E. Public Statements.....23**

**F. International Guidance.....28**

**G. United States Guidance.....35**

**H. Importance for the Special Court.....41**

**IV. CONCLUSION.....43**

## **Index of Authorities**

### **Legislation**

1. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, available at <http://www.sc-sl.org/scsl-agreement.html>.
2. Charter of the United Nations, available at <http://www.un.org/aboutun/charter/contents.htm>.
3. International Covenant on Civil and Political Rights, Dec. 19, 1976, 999 UNTS 171, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).
4. Rules of Procedure and Evidence for the Special Court for Sierra Leone, available at <http://www.sc-sl.org/rulesofprocedureandevidence.pdf>.
5. Statute of the Special Court for Sierra Leone, available at <http://www.sc-sl.org/scsl-statute.html>.
6. Universal Declaration of Human Rights, available at <http://www.un.org/Overview/rights.html>.

### **Court and Tribunal Cases**

7. *Depew v. Anderson*, 311 F.3d 742 (2002).
8. *In re: Gridley*, 417 So.2d 950 (1982).
9. *In re: Lacie Russell*, 726 F.2d 1007 (1984).
10. *In re: Charles S. Stevens*, 31 Cal.3d 403 (1982).
11. *MacDonald v. McCarthy*, 1992 U.S. App. LEXIS 14579 (1992).
12. *Martin v. Merola*, 532 F.2d 191 (1974).
13. *Prosecutor v. Sam Hinga Norman*, Case No. 43 I. L. M. 1129, Judgment (SCSL Appeals Chamber 2004).
14. *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Judgment (SCSL Appeals Chamber March 7, 2004).
15. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

16. *Slobodan Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Judgment (ICTY Appeals Chamber November 1, 2004).
17. *State of Connecticut v. Kevin J. Wickes*, 805 A.2d 142 (2002).
18. *United States of America v. William P. McNeill* 728 F.2d 5, (1984).

### **Treatises and Books**

19. GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 3-36 (2000).
20. M. Cherif Bassiouni, *The Nuremberg Legacy: Historical Assessment Fifty Years Later*, In *THE LEGACY OF NUREMBERG* 294 (Belinda Cooper, 1999).
21. Stephen G. Breyer, *A Call for Reasoned Justice*, In *THE LEGACY OF NUREMBERG* 121,124 (Belinda Cooper, 1999).
22. BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY, *INTERNATIONAL LAW* 120-135 (2003).
23. BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 409, 415 (2003).
24. BELINDA COOPER, *THE LEGACY OF NUREMBERG* 115 (1999).
25. Alan Dershowitz, *Afterword*, *HISTORY ON TRIAL* 303-305 (Deborah E. Lipstadt, 2005).
26. Benjamin Ferencz, *Nuremberg: a Prosecutor's Perspective*, In *THE LEGACY OF NUREMBERG* 33-35 (Belinda Cooper, 1999).
27. Justice Richard J. Goldstone, *Forward*, In *THE LEGACY OF NUREMBERG* 7-12 (Belinda Cooper, 1999).
28. William W. Horne, *The Real Trial of the Century*, In *THE LEGACY OF NUREMBERG* 121,124 (Belinda Cooper, 1999).
29. G.C.A. Junne, *International Organizations in a Period of Globalization: New (Problems of) Legitimacy*, In *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 189-220 (Jean-Marc Coicaud & Veijo Heiskanen 2001).
30. GEERT-JAN ALEXANDER KNOOPS, *AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS*, 11, 159 (2003).
31. GEERT-JAN ALEXANDER KNOOPS, *THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW* PAGES 93-97 (2004).

32. Neil J. Kritz, *War Crimes Trials: Who Should Conduct Them—And How*, In THE LEGACY OF NUREMBERG 168-75 (Belinda Cooper, 1999).
33. Bernard D. Meltzer, *Remembering Nuremberg*, In THE LEGACY OF NUREMBERG 24-5, 30 (Belinda Cooper, 1999).
34. GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE *AD HOC* TRIBUNALS 13-18 (2005).
35. Ben Olbourne, *Independence and Impartiality: International Standards for National Judges and Courts*, in THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 2, 97-126 (2003).
36. Diane F. Orentlicher, *A Half Century of Silence: The Politics of Law*, In THE LEGACY OF NUREMBERG 108 (Belinda Cooper, 1999).
37. Timothy Phillips & Mary Albon, *When Prosecution is Not Possible: Alternative Means of Seeking Accountability for War Crimes*, In THE LEGACY OF NUREMBERG 245-6 (Belinda Cooper, 1999).
38. Ruti Teitel, *Nuremberg and its Legacy: Fifty Years Later*, In THE LEGACY OF NUREMBERG 46, 50 (Belinda Cooper, 1999).
39. RAMESH THAKUR & PETER MALCONTENT, FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY 284-92 (2004).
40. Gillian Triggs, *National Prosecutions of War Crimes and the Rule of Law*, In THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 175-91 (Helen Durham & Timothy L. H. McCormack 1999).

### **Journals and Law Review Articles**

41. Michael Bachrach, *The Protection and Rights of Victims Under International Criminal Law*, 34 Int'l Law. 7 (2000).
42. Theodore J. Boutrous, Jr. and Michael H. Dore, *Celebrity Justice: A New Double Standard*, In COMMUNICATIONS LAWYER, Volume 22, No. 3 (2004).
43. Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611 (1987).
44. Dr. Curtis F. J. Doebbler and Professor Michael P. Scharf, *Debate: Will Saddam Hussein Get a Fair Trial?*, 37 CASE W. RES. J. INT'L L. 21 4(2005).

45. Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 A.J.I.L. 359 (2005).
46. Kingsley Chiedu Moghalu, *The Evolving Architecture of International Law: Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21 (2002).
47. Michael Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, Case Legal Studies Research Paper No. 05-31, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=799004](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799004) (2005).
48. Michael Scharf, *The Legacy of the Milosevic Trial*, in *Real Justice of Realpolitik: Can Milosevic Get a Fair Trial* (Ch. 8), MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION (2003).
49. Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. INT'L L. & POL. 535 1, 8-9, 11 (1999).
50. Jennifer Trahan, *Trying Bin Laden and Others: Evaluating the Options for Terrorist Trials*, 24 HOUS. J. INT'L L. 475 6 (2002).
51. Unknown, *Developments in the Law: Fair Trials and the Role of International Criminal Defense*, 114 HARVARD L. REV. 1982.
52. Mark E. Wojick, Benjamin L. Apt, and Cris Revaz, *Public International Law: International Human Rights*, 35 INT'L LAW. 723 (2001).

### **Miscellaneous/Websites**

53. Amnesty International, *Special Court for Sierra Leone: Statement to the National Victims Commemoration Conference*, AFR 51/002/2005 (2005).
54. CIA World Factbook: Sierra Leone, at <http://www.cia.gov/cia/publications/factbook/geos/sl.html>.
55. Frequently Asked Questions, at <http://www.sc-sl.org/faq.pdf>.
56. Human Rights First: *What Should Nigeria do with Charles Taylor?*, at [http://www.humanrightsfirst.org/international\\_justice/w\\_context/w\\_cont\\_09.htm](http://www.humanrightsfirst.org/international_justice/w_context/w_cont_09.htm).
57. Office of the Prosecutor of the Special Court for Sierra Leone, *Press Release on March 16, 2003*, available at <http://www.sc-sl.org/Press/prosecutor-031603.html>.
58. Office of the Prosecutor of the Special Court for Sierra Leone, *Press Release on May 5, 2003*, available at <http://www.sc-sl.org/Press/prosecutor-050503.html>.

59. Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on May 7, 2003, available at <http://www.sc-sl.org/Press/prosecutor-050703.html>.
60. Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on June 5, 2003, available at <http://www.sc-sl.org/Press/prosecutor-060503.html>.
61. Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on September 20, 2004, available at <http://www.sc-sl.org/prosecutor-092004.pdf>.
62. Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on May 11, 2005, available at <http://www.sc-sl.org/Press/prosecutor-051105.pdf>.
63. Sanctuary: Human Rights in Africa, AFR 51/001/2003, at <http://iml.jou.ufl.edu/projects/Spring03/Rowe/sierraleone.htm>.
64. The Special Court Made Simple, available at <http://www.sc-sl.org/specialcourtmakesimple.pdf>.
65. The Special Court for Sierra Leone's Website, at <http://www.sc-sl.org/about.html>.
66. United Nations Member States, available at <http://www.un.org/Overview/unmember.html>.
67. Wikipedia, *Right to a Fair Trial*, at [http://en.wikipedia.org/wiki/Right\\_to\\_a\\_fair\\_trial](http://en.wikipedia.org/wiki/Right_to_a_fair_trial).
68. Wikipedia, *Sierra Leone*, at [http://en.wikipedia.org/wiki/Sierra\\_leone](http://en.wikipedia.org/wiki/Sierra_leone).
69. Wikipedia, *Universal Declaration of Human Rights*, at [http://en.wikipedia.org/wiki/Universal\\_Declaration\\_of\\_Human\\_Rights](http://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights).



*“The world rests on three pillars: on truth, on justice, and on peace.”  
~Pirké Avot 1, 18~*

## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. Issues<sup>1</sup>**

The Special Court for Sierra Leone (“SCSL” or “Special Court”) was created by the Government of Sierra Leone and the United Nations; the Special Court’s statute provides a forum for the prosecution of individuals who “bear the greatest responsibility” for the war crimes, crimes against humanity, and other serious violations of international law that were committed during the armed conflict in Sierra Leone after November 1996.<sup>2</sup> To date, only 13 out of the large number of people suspected of committing these crimes have been indicted. In prosecuting these individuals, prosecutors often make public statements emphasizing the importance of the work of the court and the gravity of the crimes that have been charged; also, they often call for indictees at large to be arrested and transferred to the court, reassuring the

---

<sup>1</sup> The prosecutors of international criminal courts and tribunals often make public statements emphasizing the importance of the work of the court or tribunal, emphasizing the gravity of the crimes that have been charged, calling for indictees at large to be arrested and transferred to the court, and reassuring the public of the determination of the institution to see that those responsible for crimes under international law are brought to justice. Such public statements are made more frequently by prosecutors and judges of international criminal courts than by prosecutors and judges in a national system, in view of the circumstances that international criminal courts and tribunals:

- (1) do not have the same enforcement powers as national courts, so that States need to be called upon and persuaded to provide their cooperation;
- (2) do not have funding that is as secure as that of national courts, so that the international community has to be reminded of the importance of their work;
- (3) are intended to play a role in establishing and maintaining peace and reconciliation in regions affected by armed conflict, so that the public needs to be assured of the determination and efforts of the institution in seeing that justice is done.

Bearing in mind the unique circumstances of international criminal courts and tribunals, what limitations are there on the making of such public statements by the prosecutor or the president or the judges of an international criminal court or tribunal, having regard to principles such as the right of an accused to a fair trial, and the independence and impartiality of the prosecutor and judges?

<sup>2</sup> The Special Court for Sierra Leone’s website, available at <http://www.sc-sl.org/about.html> [hereinafter SCSL Website] [Reproduced in the accompanying notebook at Tab 1].

public of their goal to achieve justice. This memorandum examines the limitations on prosecutors and judges in making public statements regarding the indictments and trials of these individuals; such limitations must be designed to ensure such principles as the right of the accused to a fair trial and the necessity for independence and impartiality by the prosecutor and judges.

## **B. Summary of Conclusions**

**1. International documents contain a number of guarantees to ensure a fair trial; under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Statute for the Special Court for Sierra Leone, and the Special Court’s Rules of Procedure and Evidence, public statements must not interfere with these guarantees.**

Treaties and declarations form the textual body of formal, written international law. Among these are two United Nations doctrines—the Universal Declaration of Human Rights (“Universal Declaration”) and the International Covenant on Civil and Political Rights (“ICCPR”)—and two documents of the Special Court itself—the SCSL Statute and the Special Court’s Rules of Procedure and Evidence.

Article 10 of the Universal Declaration mandates a fair trial for every individual. According to this article, everyone is entitled to a fair hearing under an impartial system.<sup>3</sup> Similarly, ICCPR Article 14 commands not only that every individual be given the right to a fair trial, but also that circumstances permit exclusion of certain statements, members of the press, or any other matter that would cause the fairness of the trial to be jeopardized.<sup>4</sup> These provisions

---

<sup>3</sup> Universal Declaration of Human Rights, available at <http://www.un.org/Overview/rights.html> [hereinafter Universal Declaration] [Reproduced in the accompanying notebook at Tab 2].

<sup>4</sup> International Covenant on Civil and Political Rights, Dec. 19, 1976, 999 UNTS 171, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) [hereinafter ICCPR] [Reproduced in the accompanying notebook at Tab 3].

emphasize the importance of a fair trial for an indicted individual, and attempt to ensure that nothing will compromise these rights.

To strengthen the qualifications within these provisions, the documents of the Special Court and the SCSL's Rules of Procedure and Evidence include provisions to guarantee the importance of a fair trial. Specific qualifications for each member of the Special Court include strict obligations of impartiality and fairness. The prosecutors, presidents, and judges cannot make statements that will impinge on the guarantee of a just, unbiased trial.<sup>5</sup> Making such statements would violate the approach international bodies have taken to guarantee certain rights to every individual, and should be avoided.

**2. International norms also contain guarantees to ensure a fair trial; under customary international law, public statements must not interfere with these guarantees.**

In addition to the documents of international law, there are widely accepted practices, norms, and expectations with which the international community expects compliance. Among these is the worldwide ideal of fairness in all trials. The international community expects trials to be fair and unbiased with a presumption of innocence.<sup>6</sup> Moreover, the accepted practice of prosecutors, and the intent of international law, mandate compliance with the norm that public statements should be limited to avoid bias within the court system and risk to the fairness of the trial. Therefore, in order to bolster the legitimacy of the proceedings, officials of a court must strive to uphold these international ideals. If the fair and unprejudiced aspects of the trial are jeopardized, the legitimacy and legacy of the Special Court could also be endangered. The

---

<sup>5</sup> Statute of the Special Court for Sierra Leone, available at <http://www.sc-sl.org/scsl-stature.html> and Rules of Procedure and Evidence for the Special Court for Sierra Leone, available at <http://www.sc-sl.org/rulesofprocedureandevidence.pdf> [hereinafter Special Court Statute and Special Court Rules] [Reproduced in the accompanying notebook at Tabs 4 and 5].

<sup>6</sup> GEERT-JAN ALEXANDER KNOOPS, THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW PAGES 93-97 (2004) [Reproduced in the accompanying notebook at Tab 6].

government of Sierra Leone and the United Nations worked hard to establish a Court that will try individuals and punish the guilty, deterring anyone who might consider committing these crimes in the future.<sup>7</sup> Claims of victor's justice, unfair trial, or bias could cause failure to meet this goal. Court officials should make public statements with the gravity of the impact these statements might have in the forefront of their thought.

**3. All officials of the Special Court should strive to ensure that their statements reflect impartiality, fairness, and a presumption of innocence.**

The limitations of international text and intent restrict officials of the Special Court in certain circumstances from making public statements. Under international law, the right to a fair, impartial trial is paramount. It would be a violation of international law for officials to make any statements that might infringe in any significant way upon these rights. For trials to have legitimacy and binding precedent, the prosecutor, the president, and the judges must guarantee a fair trial. Both treaty law and customary international law dictate that the right to a fair, impartial trial is essential for every individual, no matter how serious the crime with which the individual is charged. Because of this, it is imperative that the members of the Special Court remain impartial at all times and that they restrain themselves from making public statements that may adversely impact the legitimacy, accuracy, and legacy of the SCSL. Officials must respect all limits contained in international law, whether explicit or implicit, when making public statements.

---

<sup>7</sup> See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, available at <http://www.sc-sl.org/scsl-agreement.html> [Reproduced in the accompanying notebook at Tab 7].

**4. Outside of the provisions essential to a fair, impartial trial, there are few limits on public statements.**

Beyond these limitations, officials of the Special Court can make any public statements they desire. As long as the accused individuals have a fair trial and all essential parties maintain their impartiality, the officials are free to speak as they wish. There are times when it is beneficial for officials to issue public statements. Publicizing facets of a case can give the trial legitimacy and set a more binding precedent.<sup>8</sup> In fact, there are occasions when making public statements is mandatory.<sup>9</sup> Besides the aforementioned provisions and international norms, there do not appear to be additional limitations on a prosecutor's ability to make public statements. To the contrary, international law dictates specific times when the prosecutor is actually required to make public certain information.

**II. FACTUAL BACKGROUND**

The Republic of Sierra Leone sits on the West Coast of Africa, south of Guinea and north of Liberia. Despite its rich natural resources, Sierra Leone is an impoverished nation with tremendous political instability. The precarious financial situation makes the preservation of domestic peace difficult, and Sierra Leone has a long history of fighting among conflicting rebel groups, warlords, and youth gangs, involving insurgencies, street violence, looting, arms trafficking, ethnic conflicts, and refugees in border areas.<sup>10</sup> This violence culminated in an eleven-year civil war between the government and the Revolutionary United Front (RUF), with the RUF supported by Mohamar Qaddafi from Libya and Charles Taylor from Liberia. The RUF

---

<sup>8</sup> Neil J. Kritz, *War Crimes Trials: Who Should Conduct Them—And How*, In THE LEGACY OF NUREMBERG 168-75 (Belinda Cooper, 1999) [Reproduced in the accompanying notebook at Tab 8].

<sup>9</sup> The Special Court Made Simple, available at <http://www.sc-sl.org/specialcourtmadesimple.pdf> [hereinafter Special Court Made Simple] [Reproduced in the accompanying notebook at Tab 9].

<sup>10</sup> CIA World Factbook: Sierra Leone, available at <http://www.cia.gov/cia/publications/factbook/geos/sl.html> [hereinafter CIA Factbook] [Reproduced in the accompanying notebook at Tab 10].

entered Sierra Leone with the intent to exploit its rich natural resources and to overthrow the established government. From 1991 through 2002, tens of thousands of people were killed and over two million, or approximately one third of the population, were displaced. Many of these are now refugees in neighboring countries. In addition, children were raped and hundreds of thousands of people were left as amputees.<sup>11</sup>

Throughout this period, Sierra Leone depended heavily on foreign assistance. United Nations peacekeeping forces and contributions from the World Bank and the international community helped force the eventual demobilization and disarmament of the RUF and Civil Defense Force (CDF) combatants. Peace talks took place in Lome, Togo, where the Lome Peace Agreement (“Lome Agreement”) was signed by all parties; this short-lived peace was established on July 7, 1999. National elections were held in May of 2002, and the government gradually is regaining its authority.<sup>12</sup>

Despite the Lome Agreement’s initial success, neither party complied completely with the agreement’s terms. This noncompliance, as well as international pressure for the prosecution of the war criminals and the need to squelch the RUF and CDF, caused the government to consider establishing a criminal tribunal for Sierra Leone under the auspices of the United Nations. United Nations Security Council Resolution 1315 represents the initial attempt by the United Nations and the government of Sierra Leone to create a court with the duty of prosecuting those individuals who had the greatest responsibility for the crimes committed. In 2002, the government of Sierra Leone and the United Nations established the Special Court for Sierra Leone, which oversees the trials of those who organized and perpetrated heinous crimes against

---

<sup>11</sup> Wikipedia, *Sierra Leone*, at [http://en.wikipedia.org/wiki/Sierra\\_leone](http://en.wikipedia.org/wiki/Sierra_leone) [Reproduced in the accompanying notebook at Tab 11].

<sup>12</sup> CIA World Factbook, *supra* note 10 [Reproduced in the accompanying notebook at Tab 10].

humanity and war crimes in the territory of Sierra Leone after November 30, 1996.<sup>13</sup> The court has a limited budget and narrow time-frames.<sup>14</sup> It consists of the Prosecution, which tries the accused, the Defense, which defends the accused, the Chambers, which presides over the trials, and the Registry, which regulates the fairness of the trial and serves as the Special Court's communication device.<sup>15</sup>

Throughout the history of law, attorneys and politicians have manipulated public opinion as a means to achieve victory. Speeches, articles, and radio and television appearances have been effective methods not only of getting one's message out, but also of persuading the public to support the views of that party. Officials of the Special Court have to be aware of the potential these forms of communication offer. Prosecutors often make public statements emphasizing the importance of the work of the court and the gravity of the crimes that have been charged; also, they often call for indictees at large to be arrested and transferred to the court, thus reassuring the public of their goal to achieve justice.<sup>16</sup> However, occasionally these statements may jeopardize the legitimacy and fairness of the court. This memorandum examines what limitations on the freedom of prosecutors and judges to make public statements regarding the indictments and trials of these individuals are necessary to ensure the right to a fair trial, and the manifestation of independence and impartiality of the prosecutor and judges.

---

<sup>13</sup> GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS, 11, 159 (2003) [Reproduced in the accompanying notebook at Tab 12].

<sup>14</sup> RAMESH THAKUR & PETER MALCONTENT, FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY 284-92 (2004) [hereinafter Thakur] [Reproduced in the accompanying notebook at Tab 13].

<sup>15</sup> Special Court Made Simple, *supra* note 9 [Reproduced in the accompanying notebook at Tab 9].

<sup>16</sup> See Original Question, *supra* note 1.

### **III. LEGAL DISCUSSION**

#### **Introduction**

Sierra Leone has a unique opportunity to create a history of the abuses and strife suffered after 1996. The Special Court needs to contribute to the stability of Sierra Leone's government by helping to rebuild a strong foundation. To do this, the Special Court needs international acceptance and recognition in the eyes of the citizens of Sierra Leone. The Special Court provides a chance for establishing legitimacy by spotlighting the fairness and impartiality of the court. What is said by members of the court, and how it is said, will be dissected by the international community; Special Court officials should make such statements with great care for the fairness and impartiality of the trials it holds.

#### **History**

After World War II, the Allies sought to create a court to try the leaders of terrible crimes committed during the war and to create a rule of law unlike that of the Nazis. After the Nuremberg tribunal, the international community learned that for the purposes of historical record, public perception of the trials is what really matters.

A fair trial is more than just what occurs within the courtroom. Sierra Leone is in a precarious political situation, and has to pay attention to the norms of international documents and customary international law, because a new or reinstated democracy needs legitimacy, which requires a fair, credible, and transparent account of what took place and who was responsible.<sup>17</sup> Criminal trials, particularly those involving the proof and prosecution of widespread, systematic crimes, have the potential to create a comprehensive record of the nature and of the extent of war

---

<sup>17</sup> See Michael Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, Case Legal Studies Research Paper No. 05-31, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=799004](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799004) (2005) [hereinafter *eXile*] [Reproduced in the accompanying notebook at Tab 14].



crimes and crimes against humanity, the manner in which these crimes were planned out and executed, the outcome for the individual victims, the leaders with the greatest responsibility, and those who followed the orders of these leaders.<sup>18</sup> One of the legacies of past war crimes tribunals was the generation of documentation “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future.”<sup>19</sup> An authoritative record of abuses that would endure the test of time and withstand the challenge of revisionism requires proof “of incredible events by credible evidence.”<sup>20</sup>

The developments of Nuremberg influenced greatly the International Criminal Tribunal of Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR). Officials of the Special Court for Sierra Leone have an affirmative duty to uphold the legacy and goals of these international tribunals. International human rights law and institutions continue to be inadequate to prevent or redress many of the most serious human rights violations committed around the world. Signs of progress in one area of the world have often been quickly offset by new reports of mass atrocities in another part and by realizations that there are not enough resources to enforce basic human rights norms.<sup>21</sup>

A new, or reinstated, democracy needs legitimacy, which includes a fair, credible, and transparent account of what occurred within the state and who was responsible.<sup>22</sup> Prosecutors

---

<sup>18</sup> *eXile*, *supra* note 17 [Reproduced in the accompanying notebook at Tab 14].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Mark E. Wojick, Benjamin L. Apt, and Cris Revaz, *Public International Law: International Human Rights*, 35 *Int’l Law*. 723 (2001) [hereinafter Wojick] [Reproduced in the accompanying notebook at Tab 15].

<sup>22</sup> G.C.A. Junne, *International Organizations in a Period of Globalization: New (Problems of) Legitimacy*, In *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 189-220 (Jean-Marc Coicaud & Veijo Heiskanen 2001) [Reproduced in the accompanying notebook at Tab 16].

who express doubt threaten legitimacy. After Nuremberg there arose the issue of “victor’s justice” and the legitimacy of international criminal tribunals with regard to fair, impartial trials.

After the *ad hoc* Nuremberg and Tokyo tribunals, Dutch Judge Rollings who participated in the judicial process stated that the process was illegitimate because it “was only victor’s justice” and “not justice at all.”<sup>23</sup>

A Houston Journal of International Law article discusses concerns about “victor’s justice,” which has been a problem since the *ad hoc* tribunal at Nuremberg following World War II.<sup>24</sup> When trials appear less than legitimate, claims of “victor’s justice” become more credible.<sup>25</sup> This concept is best defined as, “a tribunal where the enemy would be the judge.”<sup>26</sup> To those who have just lost a conflict and their supporters, a war crimes tribunal is something that the countries which decisively win a war inflict on the losers. It is punishment, revenge, spectacle—anything but justice.<sup>27</sup> After a great war, particularly one involving genocide, war crimes, and crimes against humanity, there is usually a victor and a loser. It is of supreme importance that war crimes trials be conducted in a way that comes across to the international community as just and unbiased. This is difficult, as the losers and those who supported the losers inevitably feel threatened and likely will claim unfairness. Especially after one side has lost power, there is the risk of politically motivated prosecutions, and the pursuit of vengeance at

---

<sup>23</sup> Unknown, *Developments in the Law: Fair Trials and the Role of International Criminal Defense*, 114 HARVARD L. REV. 1982 [Reproduced in the accompanying notebook at Tab 17].

<sup>24</sup> Diane F. Orentlicher, *A Half Century of Silence: The Politics of Law*, In THE LEGACY OF NUREMBERG 108 (Belinda Cooper, 1999) [Reproduced in the accompanying notebook at Tab 18].

<sup>25</sup> Jennifer Trahan, *Trying Bin Laden and Others: Evaluating the Options for Terrorist Trials*, 24 Hous. J. Int’l L. 475 6 (2002) [hereinafter Trahan] [Reproduced in the accompanying notebook at Tab 19].

<sup>26</sup> GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE 3-36 (2000) [hereinafter Bass] [Reproduced in the accompanying notebook at Tab 20].

<sup>27</sup> Id.

the expense of justice. This can exacerbate existing divisions within a country, and perhaps lead to an outbreak of violence.<sup>28</sup> A court official's statement, such as the one made by Judge Rollings, could have a devastating impact on the precedents set by an *ad hoc* tribunal, and could bolster claims of "victor's justice." Such an accusation discredits any possibility that the accused will receive a fair trial.

If officials make statements that discredit the legitimacy of the trial, such as that made by Judge Rollings, claims of "victor's justice" present a more serious problem. Tribunals with biased judges could be considered "victor's justice," discrediting the legitimacy of the trial and leading to unfair trials. Although these claims do not change the ultimate outcome of the cases, they could cause a wide-spread feeling of injustice among the loser's supporters and put at risk the peace that international bodies have worked so hard to maintain. An *ad hoc* tribunal needs moral support to ensure that its judgments withstand scrutiny; officials must watch what they say to the public, so they do not damage support networks.

Today, imagery and public statements play an increasingly important role in international relations, and have a great impact on the importance or relevance of global issues. The impact of the tribunals beyond the courtroom, such as the perception of whether trials will bring about fair, impartial results, is now as important as what happens within the courtroom. Deterrence and reconciliation rely on public awareness and perception of the work of the court.<sup>29</sup>

The problems with claims of "victor's justice" jeopardized the legitimacy of the Nuremberg tribunal, and introduced the concept that a fair trial is more than what occurs within a

---

<sup>28</sup> Timothy Phillips & Mary Albon, *When Prosecution is Not Possible: Alternative Means of Seeking Accountability for War Crimes*, In THE LEGACY OF NUREMBERG 245-6 (Belinda Cooper, 1999) [hereinafter Phillips] [Reproduced in the accompanying notebook at Tab 21].

<sup>29</sup> Kingsley Chiedu Moghalu, *The Evolving Architecture of International Law: Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 Fletcher F. World Aff. 21 (2002) [hereinafter Moghalu] [Reproduced in the accompanying notebook at Tab 22].

courtroom. Because of the importance of a public perception of a fair, impartial trial and the legal guarantee of such a trial to every accused individual, the officials of *ad hoc* tribunals must be careful when making public statements. In the international law system, judges must give a punishment that is just, taking into account the evidence and facts of the case. The prosecutor's role is focused not on winning, but on the pursuit of justice.<sup>30</sup> In addition to all of this occurring in the courtroom, these officials have to maintain an impression that the trial is fair and impartial. Therefore, officials of the SCSL have a duty to the Special Court, to the victims of the crimes, and to those accused of having the greatest responsibility for those crimes to take every measure to ensure a fair, impartial trial.

To analyze the limits that international law places upon the making of public statements by Special Court officials, the first step is to examine the texts both of international lawmaking bodies and of the Special Court itself. International law includes numerous treaties and agreements with specific provisions for the right to a just, impartial trial. According to both United Nations treaties and documents of the SCSL, the right to a fair trial is a solid, established right to which every individual is entitled; anything that works against the guarantees of these rights should be avoided.

Secondly, the norms and accepted practices of international law limit the actions of court officials. Customary international law is a general and consistent practice of States followed because of a sense of legal obligation. When customary international law becomes binding, the only way a State can be exempt from following the law is to be a persistent objector, or a State that has established that it does not intend to be bound to such law.<sup>31</sup> Customary international

---

<sup>30</sup> Bass, *supra* note 26 [Reproduced in the accompanying notebook at Tab 20].

<sup>31</sup> See BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY, INTERNATIONAL LAW 120-135 (2003) [Reproduced in the accompanying notebook at Tab 23].

law not only includes the right to a fair trial, but also emphasizes the importance of the prosecutor's role in the maintenance and establishment of precedent and legitimacy in the international tribunals.<sup>32</sup>

Limiting public statements to those which do not violate the right of the accused to a fair, impartial trial may seem restrictive and firm. Still, these are the only limits that constrain the public statements that officials may make. Though there are both overt textual limitations and intent-implied limitations on the statements that court officials can make, the actual limitations on public statements are not restrictive in the certain circumstances, which follow later. In general, the prosecutor, president, and judges can make any statements that do not directly violate any of the aforementioned rights. Additionally, there are times when these officials are actually required to make public certain information.

## **United Nations**

The United Nations Charter, which is binding international law, requires every member State to fulfill in good faith the obligations assumed in accordance with the Charter in order to receive all of the rights and benefits of membership.<sup>33</sup> Each member State is legally bound to act in accord with the treaties that the United Nations makes and to act to enforce declarations of the United Nations.<sup>34</sup> Sierra Leone is a member nation, obligated to comply in good faith with the United Nations' treaties and declarations.<sup>35</sup>

---

<sup>32</sup> GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE *AD HOC* TRIBUNALS 13-17 (2005) [Reproduced in the accompanying notebook at Tab 24].

<sup>33</sup> Charter of the United Nations, available at <http://www.un.org/aboutun/charter/contents.htm> [Reproduced in the accompanying notebook at Tab 25].

<sup>34</sup> *Id.*

<sup>35</sup> United Nations Member States, available at <http://www.un.org/Overview/unmember.html> [Reproduced in the accompanying notebook at Tab 26].

Among United Nations documents and policies are the Universal Declaration and the ICCPR. The Universal Declaration was adopted by the United Nations General Assembly in December 1948; this declaration sets forth a firm set of basic human rights. It is a statement of principles that governs human rights throughout the world, and reaffirms the importance of the universal enforcement and application of human rights. The Universal Declaration also encourages each constituent State of the United Nations, and the States that are not, to abide by its conditions. The Universal Declaration stresses the importance of providing fundamental rights to every human being and of ensuring that these rights are not violated.<sup>36</sup> Though it is not a legally binding document, the United Nations stresses the Universal Declaration's importance and urges the international community to abide by its provisions.<sup>37</sup>

The Universal Declaration serves as the foundation for the two United Nations human rights covenants that are legally binding—the ICCPR and the International Covenant on Economic and Social Rights (ICESR). Beyond that, the Universal Declaration continues to be cited widely as authority for action by academics, advocates, and constitutional courts.<sup>38</sup> Additionally, while it is not binding by way of being an internationally recognized and accepted treaty, the Universal Declaration has become binding through international common law and practice; the Universal Doctrine's principles are accepted so widely that they have become an integral part of customary international law. The principles laid out in the Universal Declaration

---

<sup>36</sup> Universal Declaration, *supra* note 3, [Reproduced in the accompanying notebook at Tab 2].

<sup>37</sup> Wikipedia, *Universal Declaration of Human Rights*, at [http://en.wikipedia.org/wiki/Universal\\_Declaration\\_of\\_Human\\_Rights](http://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights) [Reproduced in the accompanying notebook at Tab 27].

<sup>38</sup> *Id.*

are so generally accepted that this document may be seen simply as a reiteration of the practical principles of international law.<sup>39</sup>

The right to a fair trial by an impartial court is an essential right in every country that respects the rule of law.<sup>40</sup> Among other rights essential to the quality of human life, it is proclaimed explicitly in the Universal Declaration as a fundamental right as it also is in various other constitutions and declarations throughout the world. The indispensable components, of a an ideal trial include: (1) a competent, neutral, and detached judge; (2) the absence of influence or intimidation of witnesses; (3) and a level playing field in terms of legal representation.<sup>41</sup> In this respect, the Universal Declaration's Article 10 provides that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."<sup>42</sup> The language of this provision emphasizes that every person has the essential right of a fair trial, regardless of the circumstances; this trial must be overseen by an impartial jury or judge.

Similarly, the United Nations treaty, the ICCPR, contains language that indicates the importance of a fair, objective trial. The ICCPR, which took effect in December 1996, is also a United Nations declaration of human rights.<sup>43</sup> Unlike the Universal Declaration, the ICCPR is a legally binding treaty that encourages State parties to uphold the rights of the individual. States must not only incorporate domestic laws that ensure certain human rights to individuals, but also

---

<sup>39</sup> Id.

<sup>40</sup> Wikipedia, *Right to a Fair Trial*, at [http://en.wikipedia.org/wiki/Right\\_to\\_a\\_fair\\_trial](http://en.wikipedia.org/wiki/Right_to_a_fair_trial) [Reproduced in the accompanying notebook at Tab 28].

<sup>41</sup> Id.

<sup>42</sup> Universal Declaration, *supra* note 3 [Reproduced in the accompanying notebook at Tab 2].

<sup>43</sup> BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 409, 415 (2003) [Reproduced in the accompanying notebook at Tab 29].

must work to enforce these rights. They must guarantee and respect the rights mentioned therein. The language of the ICCPR binds State parties to comply with the ICCPR, and to hold other entities to the same standards. Among the guaranteed human rights is the right to a fair trial.

Article 14(1) of the ICCPR States:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.<sup>44</sup>

Aspects of independence and impartiality also are contained in several other ICCPR articles.

These articles include Article 14(3), which states that an accused is “entitled to minimum guarantees in the conduct of his or her defense in full equality;” Article 2, which states that claims are to be “determined by a competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State;” and Article 26, stating that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>45</sup>

These provisions urge the international community to take every step possible to give a fair trial to every accused individual, and to ensure that, if necessary, crucial information be kept private so as to not jeopardize the impartiality and fairness of the trial. The ICCPR is another

---

<sup>44</sup> ICCPR, *supra* note 4 [Reproduced in the accompanying notebook at Tab 3].

<sup>45</sup> Ben Olbourne, *Independence and Impartiality: International Standards for National Judges and Courts*, in *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 2, 97-126 (2003) [Reproduced in the accompanying notebook at Tab 30].



example of the United Nations taking the time and care to provide specifically for the right to a fair, unprejudiced trial.

As these specific provisions demonstrate, the right to a just and impartial trial is so fundamentally important that the United Nations has provided expressly for these rights. These provisions as adopted by State parties should be applicable not only to the States but also to the citizens they are responsible for governing. Officials of a court—the prosecutor, the president, and the judges of the SCSL—are obliged to apply the rules.<sup>46</sup>

Under doctrines of the United Nations, if a court official makes public statements that negatively influence other officials of the court, the impression that the individual in question received a fair trial by an impartial governing body is jeopardized. Officials cannot make statements that will violate the provisions of international doctrines to provide a fair trial. Officials must be aware that statements made to the public could sway the opinions of attorneys or judges who will try the accused. If a statement is made that prejudices the trying body, the accused likely will not receive a fair trial, as the officials who will try him will be biased against the accused from the outset. This violates the provided for protection of the right to fair trial.

### **Special Court for Sierra Leone**

The documents of the SCSL also contain guarantees of rights and imposition of duties. Both the Statute of the Special Court and the SCSL's Rules of Procedure and Evidence provide for protections of the right to a fair, impartial trial and for limitations on the public statements that may violate these rights.

---

<sup>46</sup> ICCPR, *supra* note 4 [Reproduced in the accompanying notebook at Tab 3].

The Special Court was established to give prosecutors the ability to try those with the “greatest responsibility” for the crimes that were committed in Sierra Leone after 1996.<sup>47</sup> When the investigators find evidence that someone may bear the greatest responsibility for crimes that were committed, the Special Court can indict that person. Under SCSL rules, an indictment is an official document by the Prosecutor charging a person with committing serious crimes. In the indictment, the Prosecutor must give the name of the person he is accusing and a short description of the crimes that the person is accused of committing; the indictment then summarizes the evidence against the person charged. A judge approves the indictment only if the crimes are within the Special Court’s jurisdiction. The judge must decide whether the crimes are those with which the Court is supposed to deal.<sup>48</sup>

Indictees have a right to a fair and public hearing.<sup>49</sup> To ensure that trials will not include violations of the previously mentioned human rights, the Statute provides assurances of such rights. Article 17 of the SCSL’s Statute, which describes the rights of the accused, states, “The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.”<sup>50</sup> Additionally, the Statute provides that the accused shall be considered equal before the Special Court, and will be presumed innocent until proven guilty.<sup>51</sup>

The SCSL Statute also provides that judges must be impartial and of the highest moral character. They must perform their functions independently and not accept instructions from any

---

<sup>47</sup> SCSL Website, *supra* note 2 [Reproduced in the accompanying notebook at Tab 1].

<sup>48</sup> Special Court Made Simple, *supra* note 9 [Reproduced in the accompanying notebook at Tab 9].

<sup>49</sup> *Id.*

<sup>50</sup> Special Court Statute, *supra* note 5 [Reproduced in the accompanying notebook at Tab 4].

<sup>51</sup> *Id.*

Government or other source.<sup>52</sup> The prosecutors, too must act as an independent organ of the Court, and are not permitted to receive instructions from any Government or other source. Finally, given the importance of the Registry's role in regulating the fairness of the trial, the Registry set up, in accordance with the Statute, the Agreement, and the Rules, and in consultation with the Office of the Prosecutor, for Prosecution witnesses, and the Defense Office, for the Defense witnesses, a Victims and Witnesses Protection Unit, which provides protective measures for witnesses and victims who appear before the Special Court. Among other jobs, this Unit is to protect witnesses and victims who appear before the Special Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances.<sup>53</sup>

The SCSL Statute provisions make evident the importance of the roles of the particular members of the Special Court in providing a fair and unbiased trial. First, Article 17 delineates the right to a fair trial; it even authorizes the withholding of any information that might cause harm to a witness or victim.<sup>54</sup> Because of this article, prosecutors cannot make public statements that might jeopardize seriously the right of the accused to a fair trial or cause the accused to avoid participation in the trial; if the prosecutor can gather only partial testimony as a result of such violations, it will be impossible to have a complete trial as only incomplete information will be heard, precluding a fair trial.

Similarly, the Special Court's Rules of Procedure and Evidence contain language requiring a fair, impartial trial. The Rules state that the Special Court has the duty of ensuring

---

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Special Court Statute, *supra* note 5 [Reproduced in the accompanying notebook at Tab 4].

that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.<sup>55</sup>

There are specific qualifications for the Special Court's judges. Before judges can take office, they must make a solemn declaration. Each judge states that he or she "solemnly declare[s] that [he or she] will without fear or favor, affectation or ill-will, serve as a Judge of the Special Court, honestly, faithfully, impartially and conscientiously."<sup>56</sup> Also, the SCSL Rules declare that a judge may not sit at any trial in any case where the judge's impartiality may reasonably be doubted. Furthermore, the deliberations of the Chambers take place in private and remain secret. The Chamber may opt for Open Sessions, but all Closed Sessions exclude the public.<sup>57</sup>

As part of his or her role in the trial procedure, the Prosecutor is responsible for the preservation and security of information and evidence that is obtained during the investigations he or she conducts during the course of the trial.<sup>58</sup> In fact, the Chamber is permitted to impose sanctions upon any counsel who obstructs the proceedings or behaves contrary to the interests of justice. Taking into consideration the nature of the crimes committed, the positions of prosecutor and investigator must be staffed with care to appoint individuals who can appreciate and apply these rights.<sup>59</sup>

---

<sup>55</sup> Special Court Rules, *supra* note 5 [Reproduced in the accompanying notebook at Tab 5].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Special Court Rules, *supra* note 5 [Reproduced in the accompanying notebook at Tab 5].

Thus, the language of international declarations and international treaties, and the provisions of the SCSL, establish the right to a fair and impartial trial for those accused of organizing killings and large-scale human rights violations in Sierra Leone. Officials of the Special Court must refrain from making statements that will in any way jeopardize these rights. Making public statements could prejudice judges, bring into question the legitimacy of the Special Court and its decisions, and lead to biased or inadequate testimony and evidence. Because of the important precedents of convictions and acquittals to be set by the Special Court and the necessity of proving to the international community that the Special Court is legitimate and fair, prosecutors, presidents, and judges must carefully consider their statements to the public. That is the only way to act consistent with the norms and practices of international law.

The provisions of the SCSL Statute evidence the importance of the roles of the particular members of the Special Court to provide a fair and unbiased trial. Article 17 delineates the right to a fair trial; it even authorizes the withholding of any information that might threaten to a witness or victim.<sup>60</sup> Because of this article, prosecutors cannot make any public statements that might put the accused at risk or cause him to not want to participate in the trial. Without essential testimony, it is impossible to have a complete trial.

Also, the SCSL Rules emphasize the important role that Special Court officials play in meeting the obligations for a fair, neutral trial. From the moment a judge begins the trial, the judge must be a disinterested party, unprejudiced with regard to any facet of the upcoming trials. Not only should a fair trial be provided, but a judge must be impartial.<sup>61</sup> A prosecutor or judge

---

<sup>60</sup> Special Court Statute, *supra* note 5 [Reproduced in the accompanying notebook at Tab 4].

<sup>61</sup> Special Court Rules, *supra* note 5 [Reproduced in the accompanying notebook at Tab 5].

cannot make any public statement that will sway a judge, particularly if that judge is already presiding over a crucial case.

The requirements placed upon Special Court officials are unambiguous. Each requirement includes some provision for the impartiality of the official that is of utmost importance. Included in the SCSL Statute are the words “impartiality” and “independent performance.” For a judge or prosecutor to act independently and maintain impartiality, public statements must have limitations. Any statement made that will jeopardize these provisions must be avoided. Public statements which could be overly persuasive or be considered instructions from any “source” would negate the fairness of the trial as required by the SCSL Statute. Any statement that causes a judge to be a biased party or that causes a witness not to testify chips away at the Special Court’s validity.

Included in the Special Court’s Statute is the provision that “the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.”<sup>62</sup> There is an internationally accepted norm of presumption of innocence. All indictees are presumed innocent until proven guilty.<sup>63</sup> Therefore, the Prosecutor cannot make statements of outright guilt that would potentially influence the outcome of the trial and have an impact on the impartiality of the other court officials. This could be perceived as causing prejudice within the court. Public statements made by the Chief Prosecutor of the Special Court show the reasons for limitations on public statements, as well as the benefits making public statements can have.

---

<sup>62</sup> Special Court Statute, *supra* note 5 [Reproduced in the accompanying notebook at Tab 4].

<sup>63</sup> Special Court Made Simple, *supra* note 9 [Reproduced in the accompanying notebook at Tab 9].

## Public Statements

The best approach to examine the importance of these document and expectation imposed boundaries is to review public statements made by prosecutors and judges and the effects these statements have had or likely could have on the right to a fair, impartial trial. Although not little international case law exists concerning which public statements were legally detrimental, there are international journal and news articles that review and condemn public statements that have gone awry. Additionally, recent press statements made by court officials illustrate potential dangers. Finally, examination of United States case law can supplement the gap left by the dearth of international case law on public statements.

Public statements that negatively influence other officials of the court will jeopardize the fair trial right of the accused. Officials cannot make statements about the accused without jeopardizing a fair trial, and must be aware that public statements could sway the opinions of attorneys or judges who may be included in the trial of the accused. If a statement prejudices the trying body, the accused likely will not receive a fair trial. Officials who will try him may be biased against the accused from the outset. This violates the right to fair trial. The making of such statements is an infringement upon this human right. Often, court officials make public statements through press releases. Press statements should be made with great care, because they can seriously damage the fairness and impartiality that are requisites of a just trial provided to all accused individuals.

In a May 11, 2005 Press Release, Special Court Prosecutor Crane said that:

The international community is in the process of making a pivotal decision about the future of West Africa...it will either deliver Taylor for a fair trial and decisively step away from the era of warlordism, *or it will give him a pass for the vast suffering he has inflicted*, and give new momentum to the cycle of violence and impunity. I don't believe that the international community will allow a

*wanted war criminal* to undermine peacekeeping and reconstruction efforts in Liberia and Sierra Leone that have cost billions of dollars and many lives...<sup>64</sup>

Similarly, about the indictment of Samuel Hinga Norman, Prosecutor Crane stated that “Indictments are based on fact and we follow the evidence wherever it leads. We have more than enough evidence to prove beyond a reasonable doubt that Mr. Norman *is guilty* of the crimes alleged in the indictment.”<sup>65</sup> Additionally, on June 5, 2003, Chief Prosecutor Crane “call[ed] on the international community, particularly the United Nations Security Council, to immediately take action regarding this threat to international peace and security, and bring Taylor to justice so that he may answer for the *crimes he has committed* in Sierra Leone.”<sup>66</sup>

These statements, spoken and published to the world, abandon any pretense of a presumption of innocence and could have a strong influence on the other members of the Special Court. If Charles Taylor comes to court with the Chief Prosecutor and the rest of the Special Court officials condemning him, it will be difficult to conduct a fair, impartial trial.<sup>67</sup> States may not want to surrender indictees within their territory if officials make public statements that offend the State or statements that lead the State to believe that the accused will not receive a fair trial. For example, Nigeria has decided not to extradite Taylor because they are not convinced he

---

<sup>64</sup> Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on May 11, 2005, available at <http://www.sc-sl.org/Press/prosecutor-051105.pdf>, *emphasis added* [Reproduced in the accompanying notebook at Tab 31].

<sup>65</sup> Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on May 5, 2003, available at <http://www.sc-sl.org/Press/prosecutor-050503.html>, *emphasis added* [hereinafter May 5, 2003 Press Release] [Reproduced in the accompanying notebook at Tab 32].

<sup>66</sup> Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on June 5, 2003, available at <http://www.sc-sl.org/Press/prosecutor-060503.html>, *emphasis added* [hereinafter June 5, 2003 Press Release] [Reproduced in the accompanying notebook at Tab 33].

<sup>67</sup> See *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Judgment (SCSL Appeals Chamber March 7, 2004) [Reproduced in the accompanying notebook at Tab 34].



will be treated fairly.<sup>68</sup> The Prosecutor must be careful when making public statements to ensure that they do not offend witnesses, victims, or even nations and thereby risk a fair trial.

Still, press statements are an importance source of information.<sup>69</sup> The Special Court should convey messages essential to informing the community of the good of the court and to acquiring support. Using this assistance, the officials can inspire the public to increase political pressure, which should be placed on governments in the region to compel them to carry out the arrests necessary to ensure the effective functioning of the tribunal.

In a Press Release dated March 16, 2003, Prosecutor Crane called on indictees Johnny Paul Koroma and Sam Bockarie to turn themselves in to the Special Court, saying “There is nowhere to hide. Warrants have been put out for their arrests. Koroma and Bockarie should surrender and face the numerous serious charges against them.”<sup>70</sup> Again, in a release on May 11, 2005, Prosecutor Crane welcomed the United States Senate passage of a resolution calling for Charles Taylor’s transfer to face justice at the Special Court. According to this statement, “The people of Sierra Leone...long to see Charles Taylor put on trial.” Similarly, on May 7, 2003, the Prosecutor repeated demands for the arrest and transfer of Johnny Paul Koroma, stating that “I expect the Liberians to honor their international commitments and surrender him to the Court,” and specifically warning Koroma to “Turn yourself in. You are an indicted war criminal and an

---

<sup>68</sup> Human Rights First: What Should Nigeria do with Charles Taylor?, at [http://www.humanrightsfirst.org/international\\_justice/w\\_context/w\\_cont\\_09.htm](http://www.humanrightsfirst.org/international_justice/w_context/w_cont_09.htm) [Reproduced in the accompanying notebook at Tab 35].

<sup>69</sup> William W. Horne, *The Real Trial of the Century*, In THE LEGACY OF NUREMBERG 121,124 (Belinda Cooper, 1999) [Reproduced in the accompanying notebook at Tab 36].

<sup>70</sup> Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on May 7, 2003, available at <http://www.sc-sl.org/Press/prosecutor-050703.html> [hereinafter May 7, 2003 Press Release] [Reproduced in the accompanying notebook at Tab 37].

international fugitive.”<sup>71</sup> After the latter statements, the United Nations Security Council unanimously passed Resolution 1478, which calls on all States to cooperate fully with the Special Court.<sup>72</sup> Finally, Crane stated on September 20, 2004, “I am optimistic that Nigeria will continue to support the Liberian peace process by transferring Charles Taylor to the Special Court for Sierra Leone.”<sup>73</sup>

Making such public pleas and statements may help the Special Court gain custody of any missing indictees and witnesses or victims who could be essential to the trials. If the officials can garner enough support, they can convince individuals and States to help them apprehend the indictees, to come forth with any information they have, and to continue to support the Special Court. According to the Special Court’s Rules, the Prosecutor may request publicly that a State arrest a suspect and place him or her in custody; seize all physical evidence; or take all necessary means to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.<sup>74</sup>

Although there has been some effort to apprehend certain indictees, there has been no sustained policy in this regard, and many key indictees remain at large.<sup>75</sup> Officials can make public statements that may persuade the objecting nations to turn over an indictee or that may

---

<sup>71</sup> Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on March 16, 2003, available at <http://www.sc-sl.org/Press/prosecutor-031603.html> [hereinafter March 16, 2003 Press Release] [Reproduced in the accompanying notebook at Tab 38].

<sup>72</sup> May 7, 2003 Press Release, *supra* note 70 [Reproduced in the accompanying notebook at Tab 37].

<sup>73</sup> Office of the Prosecutor of the Special Court for Sierra Leone, Press Release on September 20, 2004, available at <http://www.sc-sl.org/prosecutor-092004.pdf> [Reproduced in the accompanying notebook at Tab 39].

<sup>74</sup> Dr. Curtis F. J. Doebbler and Professor Michael P. Scharf, *Debate: Will Saddam Hussein Get a Fair Trial?*, 37 Case W. Res. J. Int’l L. 21 (2005) [Reproduced in the accompanying notebook at Tab 40].

<sup>75</sup> Justice Richard J. Goldstone, *Forward*, In THE LEGACY OF NUREMBERG 7-12 (Belinda Cooper, 1999) [hereinafter Goldstone] [Reproduced in the accompanying notebook at Tab 41].

encourage individuals to come forward with any information regarding a criminal indicted but not yet apprehended.

In a March 16, 2003 release, Chief Prosecutor Crane responded to allegations the defense made in the case of Samuel Hinga Norman which stated that Norman was mistreated during his arrest.<sup>76</sup> The Prosecutor denied any such damaging claims, stating that “Mr. Norman was treated with respect and in complete compliance with international standards.”<sup>77</sup> Such a statement informs the international community that the indictees are being treated fairly, and dispels rumors of unfairness and black marks on the Special Court’s behavior.

On May 5, 2003, Prosecutor Crane said that through the Special Court, “Together, we will send a signal, regionally and internationally, that impunity for gross violations of human rights will no longer stand in Sierra Leone.”<sup>78</sup> Similarly, on June 5, 2003, Chief Prosecutor Crane stated that “[The court] is gratified by the outpouring of support within Sierra Leone and around the world from all defenders of human rights and supporters of the rule of law.”<sup>79</sup> The SCSL wants all people world-wide to join it in supporting justice and lasting peace in Sierra Leone.<sup>80</sup> Making sympathetic statements may increase funding, because the court would be perceived to be successful and fair. Although the crucial work of the Special Court was initially frustrated by a serious lack of funds, reflecting the financial crisis that the Special Court has had to contend with, it has since brought its work into the open and emphasized to the international

---

<sup>76</sup> See *Prosecutor v. Sam Hinga Norman*, Case No. 43 I. L. M. 1129, Judgment (SCSL Appeals Chamber 2004) [Reproduced in the accompanying notebook at Tab 42].

<sup>77</sup> March 16, 2003 Press Release, *supra* note 71 [Reproduced in the accompanying notebook at Tab 38].

<sup>78</sup> May 5, 2003 Press Release, *supra* note 65 [Reproduced in the accompanying notebook at Tab 32].

<sup>79</sup> June 5, 2003 Press Release, *supra* note 66 [Reproduced in the accompanying notebook at Tab 33].

<sup>80</sup> Special Court Made Simple, *supra* note 9 [Reproduced in the accompanying notebook at Tab 9].

community the importance of supporting these trials. Statements such as the above both request continued support from the world and thank the countries that have been supportive. These statements, which inspire sympathy and a statement of fairness, will help reach the Special Court's goal of creating a record of fair, unprejudiced trials of accused war crimes and will help the outcomes gain strength.

### **International Guidance**

Several international journal and news articles emphasize limitations on public statements by court officials that might negatively impact an accused's right to a fair, impartial trial. These articles address the protection of witnesses from public statements and the due process issues that develop from a court official's improper public statements.

According to the New York University School of Law's Journal of International Law and Politics, the right to a fair trial is a "crucial guarantee in the ever increasing effort to create and maintain standards for human rights at the international, as well as the national level."<sup>81</sup> The author analyzes the ICTY prosecutorial efforts to request witness anonymity and limited disclosure of information about witnesses. The ICTY Prosecutor stated that such protections are "necessary to allay the fears of victims and witnesses that they or members of their family [would] suffer retribution" for their testimony; witnesses may choose not to testify without these protections.<sup>82</sup> As in the SCSL's Statute, the ICTY Statute provides a special obligation to protect victims and witnesses. The Prosecutor in each case cannot make public statements which

---

<sup>81</sup> See Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. Int'l L. & Pol. 535 1 (1999) [hereinafter Stapleton] [Reproduced in the accompanying notebook at Tab 43].

<sup>82</sup> Id.

would violate this witness protection that is regarded by the court as necessary.<sup>83</sup> Certain individuals and information about them are protected by the court for safety and confidentiality reasons.<sup>84</sup> The Prosecutor cannot make statements about certain subjects. If judges believe that it is necessary to withhold certain information from the general public for security and safety of witnesses and victims, the topic is protected by law. Meanwhile, the Prosecutor is responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations.<sup>85</sup>

The prosecutor has a duty to develop complete information about the circumstances surrounding the actions taken by the accused. It is the prosecutor's responsibility to discover enough information to ensure that justice is served.<sup>86</sup> Therefore, the prosecutor seeks out possible victims and witnesses. If a witness refuses to come forward because of fear or anger, the prosecutor may lose information crucial to the prosecution's case. The Registry's Victim and Witness Protection Unit then protects witnesses who testify at trials. Once a witness has been granted anonymity, the prosecution must refrain from making statements about that witness. Public statements that put individuals in danger are prohibited by the language of the SCSL Statute.

Witness anonymity raises some fairness problems, on which public comment has been made. If the defense is deprived of the identity of individuals with knowledge, it may also be deprived of information that enables it to know whether a witness is prejudiced or hostile.

---

<sup>83</sup> Michael Bachrach, *The Protection and Rights of Victims Under International Criminal Law*, 34 Int'l Law. 7 (2000) [Reproduced in the accompanying notebook at Tab 44].

<sup>84</sup> Id.

<sup>85</sup> Special Court Made Simple, *supra* note 9 [Reproduced in the accompanying notebook at Tab 9].

<sup>86</sup> Special Court Statute, *supra* note 5 [Reproduced in the accompanying notebook at Tab 4].

Testimony incriminating an accused may be untruthful or erroneous and the defense will not be able to counter it if it lacks the information allowing it to cast doubt or question the witness's credibility.<sup>87</sup> Additionally, a witness who is not telling the truth could provide evidence that leads to the conviction of an innocent person. Because of this prejudice that can arise from the use of anonymous witnesses and its limitation of the rights of the accused, the ICTY's Deputy Prosecutor admitted publicly that he was "personally very uncomfortable with the notion of going forward with witnesses whose identities are not disclosed to the accused."<sup>88</sup>

Like the statement by Judge Rollings after Nuremberg, this public statement casts doubt on prosecutorial goals and may seem to endanger the anonymity many witnesses and victims desire. If a prosecutor makes offending public statements, witnesses may opt not to come forward, or may decide to withhold information. Similarly, if witnesses or victims feel that their safety may be in jeopardy because of statements the Prosecutor has made or may make, they may not come forward. These lapses in evidence and testimony would deprive the court of possibly essential information to satisfy the guarantee of a fair trial.<sup>89</sup>

The ICTY Deputy Prosecutor's public statement questions the legitimacy of the trial and implies that the actions of the prosecutors of the *ad hoc* tribunals are illegitimate and may jeopardize the right to a fair, impartial trial. *Ad hoc* tribunals have a sense of historical responsibility to establish a historical basis for the prosecution.<sup>90</sup> If a trial is not widely considered to be fair, perceived injustice will remain a blemish throughout history.

---

<sup>87</sup> Stapleton, *supra* note 81 [Reproduced in the accompanying notebook at Tab 43].

<sup>88</sup> *Id.*

<sup>89</sup> Phillips, *supra* note 28 [Reproduced in the accompanying notebook at Tab 21].

<sup>90</sup> Ruti Teitel, *Nuremberg and its Legacy: Fifty Years Later*, In *THE LEGACY OF NUREMBERG* 46, 50 (Belinda Cooper, 1999) [Reproduced in the accompanying notebook at Tab 45].

According to Jennifer Trahan, problems concerning legitimacy may impact the trials themselves. For example, after the September 11 attacks on the United States, Spain would not extradite to the United States eight men charged with complicity in terrorism because it was concerned about statements made indicating that the accused would not receive a fair trial.<sup>91</sup> As the Special Court is currently attempting to convince Nigeria to release Charles Taylor into its jurisdiction, officials must be careful not to make any public statements which would cause a continuation of Nigeria's reluctance to release Charles Taylor.

Inflammatory statements by the prosecutor may challenge the legitimacy of a trial and can fuel the defense's argument against the accused. In the *Milosevic* case, the defense used prosecutorial statements to its advantage.<sup>92</sup> The defense has also made its own influential public statements. Milosevic is on trial for crimes against humanity, and has been representing himself.<sup>93</sup> Milosevic was able to use the trial as a pulpit to appeal to the Serb population.<sup>94</sup> According to a recent poll, 39% of the Serb population rated Milosevic's trial performance as "superior," while less than 25% felt that he was getting a fair trial, and only 33% thought that he was actually responsible for war crimes. Milosevic went from the most hated man in Serbia to the fourth most admired, all because of his self-representation at the ICTY trial. Additionally,

---

<sup>91</sup> Trahan, *supra* note 25 [Reproduced in the accompanying notebook at Tab 19].

<sup>92</sup> *Slobodan Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Judgment (ICTY Appeals Chamber November 1, 2004) [Reproduced in the accompanying notebook at Tab 46].

<sup>93</sup> Michael Scharf, *The Legacy of the Milosevic Trial*, from *Real Justice of Realpolitik: Can Milosevic Get a Fair Trial* (Ch. 8), Michael P. Scharf & William A. Schabas, *Slobodan Milosevic on Trial: A Companion* [Reproduced in the accompanying notebook at Tab 47].

<sup>94</sup> *Id.*

Prosecutors believe that Milosevic supporters in Serbia have withheld official documents and discouraged witnesses from giving evidence.<sup>95</sup>

This demonstrates that public statements can have an impact on the public at large. It also shows that the public is watching and waiting for the outcomes of the cases the tribunals hear—and judging them as much as the chambers themselves. The prosecutors and judges have to take extra precautions to make sure that they inspire an image of fairness and impartiality in the statements they make, knowing that everything they say in court may be made public. Worse, the support Milosevic gained compounded problems already in place for prosecutors. Earlier, they had lost in their attempt to stop Milosevic from representing himself, making them appear weak.<sup>96</sup> In short, public statements—those made within the court, those made by Milosevic, and those made by the Prosecution itself—worked against the Prosecution in this case.

Still, international articles acknowledge that there are benefits to making public statements in protecting the right to a fair, impartial trial. There are times when it is necessary or required to make public statements.

There are limits on what the Prosecutor can keep to himself. Important evidence must be disclosed.<sup>97</sup> In order to make sure that the trial is fair and transparent, the Prosecutor and Defense must share statements, books, pictures, and objects that they plan to use at trial. This means that no one can hide important evidence. It also means that each side can check what the other side is planning to say, to make sure that it is true. As mentioned previously, the only thing

---

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Gillian Triggs, *National Prosecutions of War Crimes and the Rule of Law*, In *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW* 175-91 (Helen Durham & Timothy L. H. McCormack 1999) [Reproduced in the accompanying notebook at Tab 48].



that can be kept secret is the identity of witnesses who could be in danger if their identity were publicized.<sup>98</sup> Additionally, in contrast to the previously discussed articles, press releases, and United States court cases, there are examples of each of these that emphasize the recognition of the necessity and benefit of public statements toward the right to a fair, impartial trial.

“What transpires in the court room is public property.”<sup>99</sup> This assertion stems from the strong presumption that everything that happens in the courtroom, and all records filed in and by the court, will be open to public view and scrutiny. As the courts decide an increasing number of important issues in public life, they become more visible to the public and, of course, the media. Notable judicial decisions must be portrayed accurately to the public so that the public becomes better informed and increases its appreciation of the importance of the court’s work.<sup>100</sup> This openness is crucial in maintaining the public’s trust in the judicial system and allows even “people not actually attending trials [to] have confidence that standards of fairness are being observed.”<sup>101</sup> As many courts have noted, “the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known.”<sup>102</sup> Openness, therefore, “enhances the basic fairness so essential to public confidence in the system.”<sup>103</sup> While court officials have limited means of responding to criticism, they can do certain things to enhance the public's understanding of their work. In the ICTY, and in some

---

<sup>98</sup> Moghalu, *supra* note 29 [Reproduced in the accompanying notebook at Tab 22].

<sup>99</sup> Theodore J. Boutros, Jr. and Michael H. Dore, *Celebrity Justice: A New Double Standard*, in *Communications Lawyer*, Volume 22, No. 3 (2004) [hereinafter Boutros] [Reproduced in the accompanying notebook at Tab 49].

<sup>100</sup> Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 A.J.I.L. 359 (2005) [hereinafter Meron] [Reproduced in the accompanying notebook at Tab 50].

<sup>101</sup> *Id.*

<sup>102</sup> Boutros, *supra* note 99 [Reproduced in the accompanying notebook at Tab 49].

<sup>103</sup> *Id.*

other courts, judges read out an extensive unofficial summary of every judgment they deliver, which is then distributed to the press.

The crimes the *ad hoc* tribunal indictees are accused of committing are so terrible that they are difficult for the mind to grasp; these crimes exterminate whole peoples and compel members of ethnic, religious, or political groups to leave the places where their families have lived for centuries. The cost in human and financial terms is incalculable.<sup>104</sup> There must be some form of accountability for the individuals guilty of these heinous crimes. Considering the gravity of these crimes and the necessity to keep establishing precedent and holding trials of the worst criminals, public statements may, in fact, be beneficial. Nuremberg was groundbreaking in many respects, though it was neither a perfect trial nor a perfect precedent; this tribunal established an indisputable historical record of the wartime atrocities.<sup>105</sup>

All of Sierra Leone, and the rest of the world, can find out what is occurring during the trials. Every word that is said in that courtroom is open to the world. Every word that is said in that courtroom is recorded, and the world can watch.<sup>106</sup> There is not much that could be said about the actual proceedings that the prosecutor or other officials cannot state publicly. With the exception of the aforementioned protections, the Prosecutor may make public statements regarding the happenings in Open Sessions. Also, making proceedings so open gives the public impression that there are no secrets—that the court is as fair and as impartial as possible. An important outcome of Nuremberg is the recognition a criminal, no matter what his crime, is

---

<sup>104</sup> Goldstone, *supra* note 75 [Reproduced in the accompanying notebook at Tab 41].

<sup>105</sup> BELINDA COOPER, *THE LEGACY OF NUREMBERG* 115 (1999) [Reproduced in the accompanying notebook at Tab 51].

<sup>106</sup> Special Court Made Simple, *supra* note 9 [Reproduced in the accompanying notebook at Tab 9].

entitled to as fair a trial as you can give him.<sup>107</sup> This, too, will be one of the most important legacies left by the Special Court. The Special Court should strive to produce a public image of fairness and impartiality; this public appearance can create a strong sense of criminal accountability in the guilty within the international community and ensure that the criminal trial decisions are reached in the most fair way possible.

### **United States Guidance**

United States case law provides few examples of limiting public statements made by court officials in order to guarantee a fair, impartial trial. The majority of limitations rest in potential violations of United States Constitutional guarantees. Although minimally supportive of boundaries on public statements and the right to a fair, impartial trial, United States case law provides a great deal of support for an absence of boundaries. Cases delineate the severity of threat a statement must have on the right to a fair trial in order to be restricted.

The Supreme Court of the United States described the rights of a criminal defendant in the United States:

Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused.* Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom...but...If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered...*Neither prosecutors, counsel for defense, the accused, the witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.*<sup>108</sup>

---

<sup>107</sup> Benjamin Ferencz, *Nuremberg: a Prosecutor's Perspective*, In THE LEGACY OF NUREMBERG 33-35 (Belinda Cooper, 1999) [hereinafter Ferencz] [Reproduced in the accompanying notebook at Tab 52].

<sup>108</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966) [Reproduced in the accompanying notebook at Tab 53].

Additionally, in *Depew v. Anderson*, the United States Court of Appeals for the Sixth Circuit said that there are times in which it is proper to restrict the public statements court officials make. In *Depew*, the prosecutor made public statements that were designed to discredit the defendant's mitigating evidence in violation of the defendant's rights as guaranteed in the Fifth and Eighth Amendments to the United States Constitution. As a general matter, a comment by the prosecution on a defendant's failure to testify violates the Fifth Amendment's protections. When a prosecutor's actions effectively bar the jury's consideration of mitigating evidence, the jury cannot make a fair, individualized determination as required by the Eighth Amendment. As a result, a prosecutor's comments violate the Eighth Amendment when they are so prejudicial as to constrain the manner in which the jury was able to give effect to mitigating evidence.<sup>109</sup> This case also held that while the comments by the prosecutor constitute unreasonable and unfair conduct by the prosecutor, there must be a balance between that conduct of the prosecutor and the alleged or admitted actions of the defendant. In cases such as this, the court cannot ignore the compelling interest of the public, which has every right to expect its criminal justice system to work effectively. Still, public statements made by prosecutors violated the right to a fair, unprejudiced trial.

Another Federal case details occasions when public statements will violate the right to a fair, impartial trial. In the United States case *In Re: Lacie Russell*, the United States Court of Appeals for the Fourth Circuit upheld gag orders to protect a highly publicized criminal hearing from public statements. The measures a judge takes, or fails to take, to mitigate the effects of pretrial publicity may determine whether the defendant receives a trial consistent with the requirements of due process. Publicity attending a trial, potentially inflammatory and highly

---

<sup>109</sup> *Depew v. Anderson*, 311 F.3d 742 (2002) [Reproduced in the accompanying notebook at Tab 54].

prejudicial statements that could reasonably be expected from the witnesses, and the relative ineffectiveness of the considered alternatives, order the strong measure of suppressing the speech of potential witnesses to ensure a fair trial. A gag order is appropriate where the defendant would be denied a fair trial without prohibiting certain extrajudicial statements.<sup>110</sup>

Furthermore, there are limits on what judges can say outside of a courtroom. United States District Court Judge Alcee Hastings was indicted on charges of judicial corruption for publicly criticizing a prosecutorial investigation as “replete with instances of overzealousness, lies, innuendos, misquotes, inaccuracies, media leaks, snide remarks by investigators, unprofessional interrogation, mistakes, and callousness.”<sup>111</sup> Judge Hastings’ statements often offended other judges, lawyers, and members of the public, leading to his eventual indictment. Also, in a California case, *In re Charles S. Stevens*, Justice Stevens was publicly censured for “repeatedly and persistently us[ing] racial and ethnic epithets, and ma[king] racially stereotypical remarks to counsel and court personnel.”<sup>112</sup> Additionally, this limitation on statements dates back to the 1800s when Justice Samuel Chase, was impeached for inappropriate public statements supporting political candidacy made during his reign.<sup>113</sup> All of these statements could deprive the defendant of the right to a fair, impartial trial.

These limitations imposed by United States courts on the public statements of court officials seem to be consistent with international law. A review of the provisions of the United Nations Doctrines, the Special Court documents, and customary international law shows that the

---

<sup>110</sup> *In re: Lacie Russell*, 726 F.2d 1007 (1984) [Reproduced in the accompanying notebook at Tab 55].

<sup>111</sup> Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611 (1987) [hereinafter D’Alemberte] [Reproduced in the accompanying notebook at Tab 56].

<sup>112</sup> *In re: Charles S. Stevens*, 31 Cal.3d 403 (1982) [Reproduced in the accompanying notebook at Tab 57].

<sup>113</sup> D’Alemberte, *supra* note 111 [Reproduced in the accompanying notebook at Tab 56].

United States limits public statements that will influence court and jury members and strip the accused of the right to a fair, impartial trial.

While the limitations are important to maintaining and improving upon a system of international criminal justice, they are finite. In examining the boundaries that exist to restrain the public statements court officials can make, it is important to reemphasize that there are many benefits and necessities of allowing public statements, as long as they do not violate the established right to a fair trial by an impartial jury.

In *State of Connecticut v. Wickes*, a case in which a prosecutor made public statements that attacked a defense witness's credibility, the Appellate Court of Connecticut held that when evaluating a prosecutorial misconduct claim, the record "must disclose a pattern of misconduct pervasive throughout the trial or conduct that was so blatantly egregious that it infringed on the defendant's right to a fair trial."<sup>114</sup> The prosecutor's conduct must "so infect the trial with unfairness as to make the resulting conviction a denial of due process."<sup>115</sup> In determining whether prosecutorial conduct constitutes a denial of due process, the court evaluates whether the conduct was improper, and if it was, then whether the conduct caused substantial prejudice to the defendant. In this case, a prosecutor made statements attacking the defendant's genuineness and discrediting a defendant's testimony. Nevertheless, these statements were held not to deny the defendant a fair trial.<sup>116</sup>

Similarly, in *MacDonald v. McCarthy*, the United States Court of Appeals for the Ninth Circuit affirmed that a prosecutor's public statements did not infect the trial with such unfairness

---

<sup>114</sup> *State of Connecticut v. Kevin J. Wickes*, 805 A.2d 142 (2002) [Reproduced in the accompanying notebook at Tab 58].

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

that the appellant was denied a fair trial. In this case, the prosecutor made public statements, which then lead to inflammatory media coverage of the trial; the defendant brought claims that the prosecutor's statement and resulting media coverage inhibited his right to a fair trial. The court stated that in assessing charges of improper statements by a prosecutor, the court "examines the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process."<sup>117</sup> In determining whether publicity denies a defendant a fair trial, the reviewing court must make an independent review of the record to determine if there was such prejudice that a fair trial was impossible; to establish that publicity violated the defendant's right to a fair trial, courts examine the totality of the circumstances, and the defendant must show that the publicity either caused pervasive hostility within the community such that prejudice is presumed or actually prejudiced jurors such that they could not impartially judge the defendant's guilt.<sup>118</sup>

In *United States v. William P. McNeill*, the defendant challenged the possibility that an impartial jury could be selected. Because of broad media coverage and public statements made by the prosecution, McNeill, who was convicted of mail fraud, claimed that the prosecutor had influenced too many individuals, and the selection of an unbiased jury was impossible. However, the United States Court of Appeals for the First Circuit held that the depth and breadth of the coverage did not approach the evidentiary showing required, and found no clear admission of prejudice from the publicity or reason to doubt jurors' impartiality; it held, also, that there was no misconduct in the prosecutor's handling of publicity about another official's indictment.<sup>119</sup>

---

<sup>117</sup> *MacDonald v. McCarthy*, 1992 U.S. App. LEXIS 14579 (1992) [Reproduced in the accompanying notebook at Tab 59].

<sup>118</sup> *Id.*

<sup>119</sup> *United States of America v. William P. McNeill*, 728 F.2d 5 (1984) [hereinafter *McNeill*] [Reproduced in the accompanying notebook at Tab 60].

The court held in this case that a court can only properly presume prejudice when the publicity from a case has been so prejudicial and inflammatory that it so “saturates the community from which the defendant’s jury is drawn as to render it virtually impossible to obtain an impartial jury.”<sup>120</sup>

According to the United States Court of Appeals for the Second Circuit, a “breach of prosecutorial responsibility does not amount to a ‘deprivation of...rights, privileges or immunities secured by the Constitution and laws,’ 42 U.S.C. 1983.”<sup>121</sup> The decision, following a case concerning remarks made by prosecutors to the media, warned prosecutors to “be more circumspect” in their public statements, which the court deemed a “worthy goal.”<sup>122</sup> Although concurring Justice Lumbard stated that “It was the plaintiffs’ constitutional right to have the prosecutor refrain from making any statements not relevant to their indictment and arrest which might prejudice their obtaining a fair trial,” he also stated that the improper statements of the prosecutor do not necessarily render impossible the selection of an impartial jury.<sup>123</sup>

Additionally, United States law specifically requires a lawyer in the pretrial phase of a criminal matter to announce, *inter alia*, the name, address, age, residence, occupation, and family status of the accused; the identity of investigating agencies and the length of the investigation; the nature, substance, or text of the charged; and references to public records of the court in the

---

<sup>120</sup> Id.

<sup>121</sup> *Martin v. Merola*, 532 F.2d 191 (1974) [Reproduced in the accompanying notebook at Tab 61].

<sup>122</sup> Id.

<sup>123</sup> Id.



case.<sup>124</sup> This list, however, is not all-encompassing. Comments made by prosecutors to the media have been held not to essentially infringe on the accused's right to a fair trial.

Finally, the Florida Supreme Court held that Judge Gridley, a Ninth Judicial Circuit judge, made public speeches about religion and against the death penalty that did not violate ethical canons. The Court stated that "There is no doubt that a judge in an appropriate forum may express his protest, dissent, and criticism of the present state of law as long as he does not appear to substitute his concept of what the law ought to be for what the law actually is, and as long as he expresses himself in a manner that promotes public confidence in his integrity and impartiality as a judge."<sup>125</sup>

As long as the court officials abide by the provided boundaries, they can speak to the press and the public, and make any public statement they desire. Not many statements, according to United States case law, violate an accused's right to a fair, impartial trial.

### **Importance for the Special Court**

Sierra Leone, like any state struggling to guarantee security to its citizens, must persuade citizens that their rights can be secured at law. Sometimes that means that war crimes trials must be conducted. Prosecuting and punishing violators can give significance to the victims' suffering and serve as a remedy for injuries.<sup>126</sup> Moreover, prosecutions help restore the dignity of victims and prevent private acts of revenge by those who, in the absence of justice, might take retribution into their own hands.<sup>127</sup> Just as prosecution and punishment can reinforce the value of law by

---

<sup>124</sup> *McNeill*, *supra* note 119 [Reproduced in the accompanying notebook at Tab 60].

<sup>125</sup> *In re: Gridley*, 417 So.2d 950 (1982) [Reproduced in the accompanying notebook at Tab 62].

<sup>126</sup> Amnesty International, Special Court for Sierra Leone: Statement to the National Victims Commemoration Conference, AFR 51/002/2005 (2005) [Reproduced in the accompanying notebook at Tab 63].

<sup>127</sup> Alan Dershowitz, *Afterword*, HISTORY ON TRIAL 303-305 (Deborah E. Lipstadt, 2005) [Reproduced in the accompanying notebook at Tab 64].

displacing personal revenge, failure to punish former leaders suspected of responsibility for widespread human rights abuses encourages cynicism about the rule of law and distrust toward the political system.<sup>128</sup>

The individuals on trial are accused of being those with the greatest responsibility for many of the crimes committed in Sierra Leone. If their trials are considered invalid, the validity of the Special Court may be questioned, causing the precedents it sets to be marred and giving future defendants ammunition for attacking the fairness of the Special Court. Officials of the Special Court must be careful when making public statements; the wrong words to the wrong audience can bring potentially damaging claims of an unfair, biased trial, detrimental to the legitimacy and lasting legacy that the Special Court hopes to bring to the international community. It has been suggested that the frequency with which horrendous war crimes are committed is a consequence of globalization and that modern means of communication and the dissemination of malicious propaganda assist politicians in achieving reprehensible ends.<sup>129</sup> Too much publication can lead to spreading of the wrong ideas, or of negative views of the court and its purpose.

If the accused is not convicted as a result of an inappropriate statement by the prosecution, the loss could be devastating. If a world-infamous criminal is allowed to go free, the crimes that criminal committed will be trivialized; where the conviction and punishment of a criminal would serve as deterrence for others who might desire to commit similar crimes, his acquittal would show major flaws in the international trial system.<sup>130</sup> Additionally, if such a

---

<sup>128</sup> Stephen G. Breyer, *A Call for Reasoned Justice*, In *THE LEGACY OF NUREMBERG* 121,124 (Belinda Cooper, 1999) [Reproduced in the accompanying notebook at Tab 65].

<sup>129</sup> Wojick, *supra* note 21 [Reproduced in the accompanying notebook at Tab 15].

<sup>130</sup> *eXile*, *supra* note 17 [Reproduced in the accompanying notebook at Tab 14].

criminal is punished, but the prosecution is viewed as illegitimate, he may become a martyr for his cause and cast doubt on the legitimacy of the court.

Finally, the Special Court is funded by over 30 governments world-wide who want to help Sierra Leone in prosecuting its criminals and easing the suffering of the victims; these governments pay for the operation of the Special Court.<sup>131</sup> Controversial statements by court officials can jeopardize the court in regard to this support. Since its beginning, the Special Court has been hindered by a lack of support from individual states and the broader international community. That lack of support caused the SCSL a serious shortfall in funding.<sup>132</sup> The officials of the Special Court must be careful of the public statements they make so that they do not offend those who are willing to fund the SCSL. They must balance the politics of money with the assurance of a fair, impartial trial.

#### **IV. CONCLUSION**

When crimes reach such a magnitude that they offend all of humankind, they are crimes not merely against the state, but against humanity. Every nation has a right to intervene and insist that those who are responsible for committing these crimes and their accomplices be held accountable in a court of law.<sup>133</sup> Courts serve as a forum for appealing to humanity to allow all people, regardless of their race or creed, to live in peace and dignity; they are part of an evolutionary process for a more humane and just society.<sup>134</sup> Institutions, much like historic events, are shaped by people and affected by all the factors that bear on human motivations and

---

<sup>131</sup> Frequently Asked Questions, at <http://www.sc-sl.org/faq.pdf> [Reproduced in the accompanying notebook at Tab 66].

<sup>132</sup> Thakur, *supra* note 14 [Reproduced in the accompanying notebook at Tab 13].

<sup>133</sup> Ferencz, *supra* note 107 [Reproduced in the accompanying notebook at Tab 52].

<sup>134</sup> *Id.*

interactions. Dominating events, the behavior of actors, and personal and personality factors ultimately influence decisions and outcomes.<sup>135</sup>

Trial before an international tribunal could create the strongest statement that war crimes are universally condemned, and would be the most likely to result in widely accepted judgments.<sup>136</sup> Also, the treatment of defeated enemy leaders and war criminals can make the difference between war and peace. If this job is done well, as after World War II, it can lay a foundation for a durable peacetime order. However, if it is botched, it can lead to an unstable, short term settlement.<sup>137</sup> As discussed within this memorandum, the weight of the outcomes should influence the officials of the Special Court for Sierra Leone to restrict the public statements they make, checking to ensure that they do not infringe upon any accused's right to a fair trial or influence any party that should be essentially neutral.

International law and the Statute of the Special Court have a number of guarantees to ensure the right to a fair, impartial trial. These provisions must be fully implemented in practice to make certain that every trial before them is held with the highest standards of fairness. Bearing in mind the nature and scope of the crimes committed, as well as the huge proportion of the population affected directly by these widespread crimes, it is crucial to maintain the standard that there is no presumption of guilt of those indicted and that every individual is deserving of a fair trial.<sup>138</sup> Every official of the Special Court, be it the prosecutor, the president, or the judges,

---

<sup>135</sup> M. Cherif Bassiouni, *The Nuremberg Legacy: Historical Assessment Fifty Years Later*, In THE LEGACY OF NUREMBERG 294 (Belinda Cooper, 1999) [Reproduced in the accompanying notebook at Tab 67].

<sup>136</sup> Trahan, *supra* note 25 [Reproduced in the accompanying notebook at Tab 19].

<sup>137</sup> Bass, *supra* note 26 [Reproduced in the accompanying notebook at Tab 20].

<sup>138</sup> Sanctuary: Human Rights in Africa, AFR 51/001/2003, at <http://iml.jou.ufl.edu/projects/Spring03/Rowe/sierraleone.htm> [Reproduced in the accompanying notebook at Tab 68].

should make every effort to guarantee that this presumption and the right to a just, unbiased trial are reflected in all public statements and to maintain a high degree of impartiality.

Still, although there are textual and intentional limits on what the prosecutor, president, and judges can say, as long as these statements allow the individual in question to have a fair trial by an impartial prosecution and chambers, these limits are finite.

In sum, public statements can be hugely detrimental or immensely advantageous to the legitimacy and perceived success of the Special Court of Sierra Leone. The court of public opinion is constantly watching and judging whether the statements a court official makes are prejudicial and, therefore, jeopardize the right to a fair impartial trial. Therefore, the prosecutor, the president, and the judges must make such statements with great care to ensure that every announcement they make complies with the international norms of a fair and impartial trial for all. The prosecutors and staff of the tribunals have utilized skill, energy, and tenacity to combat the worst crime of all—the crime of silence and indifference.<sup>139</sup> Now, they must use their skills wisely, and bring individuals accused of being the worst criminals the world has ever seen to justice, fairly and impartially.

---

<sup>139</sup> Bernard D. Meltzer, *Remembering Nuremberg*, In *THE LEGACY OF NUREMBERG* 24-5, 30 (Belinda Cooper, 1999) [Reproduced in the accompanying notebook at Tab 69].