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Immediate application of amendments to the rules of procedure and evidence under rule 6(d) and the rights of the accused

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

**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
OF THE SPECIAL COURT FOR SIERRA LEONE**

**ISSUE: IMMEDIATE APPLICATION OF AMENDMENTS TO THE RULES OF
PROCEDURE AND EVIDENCE UNDER RULE 6(D) AND THE RIGHTS OF THE
ACCUSED**

**Prepared by Sean A. Stevens
Fall 2005**

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS¹

A. Issues

Rule 6(D) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone allows amendments to the Rules, unless otherwise indicated, to take effect immediately. This is a departure from the rules of the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda, both of which include the provision that the amendments “shall not operate to prejudice the rights of the accused in any pending case.” This memo examines two issues raised by the immediate, or retroactive, application of amendments to pending cases. First, Part III examines what rights are guaranteed the accused under the Statute of the Special Court and whether the retroactive application of amendments would violate them. Second, Part IV addresses whether a rule that is amended to deal with a specific problem arising in a case would violate a defendant’s rights on the basis that it is *ad hominem*.

B. Summary of Conclusions

1. Applying an Amended Rule Retroactively to a Case Currently Pending Could Result in a Violation of the Rights of the Accused, but It Is Not *Per Se* a Violation.

The rights guaranteed the accused in the SCSL Statute are essentially the same as those guaranteed under customary international law. Of primary concern here are: (1) the principle that all are equal before the law; (2) the right to a fair and public trial without undue delay; (3) the principle of *nullum crimen sine lege*; and (4) the right to have adequate time and resources to

¹ Rule 6(D) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone provides that an amendment to the Rules of Procedure and Evidence, “unless otherwise indicated, shall enter into force immediately.” Thus, the general principle at the Special Court for Sierra Leone is that where the Rules are amended part way through a case, the amended rule will immediately apply to the remainder of the proceedings in the case.

1. Are there circumstances in which it would be contrary to the rights of the accused to apply an amendment to the Rules in a case that is already pending at the time of the amendment? (See, in particular, the rights of the accused in Article 17 of the Statute of the Special Court.)

2. In particular, if the Rules are amended for the specific purpose of dealing with a problem that has arisen in a particular case, could the amendment be argued to be contrary to the rights of the accused in that case, on the basis that it is “*ad hominem*”?

prepare a defense. Prohibitions against retroactive rules of procedure and evidence are not guaranteed rights. The right most likely to be violated by Rule 6(D) is the right to a fair trial.

There are some circumstances in which applying an amended rule to currently pending cases does prevent a fair trial, but this is not always the case. In deciding which amendments should be applied retroactively, judges can and strike a balance between the needs of the Special Court and the potential for violations.

2. A Claim That the Immediate Application of an Amendment to the Rules of Procedure and Evidence to a Pending Case Violates the Defendant's Rights on the Basis of *Ad Hominem* Would Likely Not Succeed.

An *ad hominem* attack is one which attacks the speaker rather than his or her arguments. In order for a personal attack to be *ad hominem*, the purpose of the attack must be to undermine the person's arguments or conclusions by discrediting the person. In adherence to international norms and concern for the integrity and effectiveness of the Special Court, the SCSL Statute and Rules provide many protections for the rights of the accused. These protections include, *inter alia*, explicit declarations of a defendant's rights, standards for court officials, and access for the Principal Defender to the amendment process. Due to the difficulty in proving that an amendment was intentionally designed as a personal attack to undermine a person's arguments, and to the multiple layers of protections built into the Special Court, it is not likely that such a claim would be successful.

II. FACTUAL BACKGROUND

The Special Court for Sierra Leone ("the Special Court") was created by agreement between the United Nations (U.N.) and the government of Sierra Leone in order to prosecute persons bearing the greatest responsibility for the atrocities committed during Sierra Leone's

civil war.² The civil war began in 1991 when the Revolutionary United Front (RUF), led by Foday Sankoh, invaded Sierra Leone from Liberia.³ The first of several ceasefire agreements was signed in Abidjan on November 30, 1996, and was supposed to end the conflict through disarmament and integration of the RUF into the political process.⁴

The Abidjan Peace Agreement collapsed in April 1997 when a military coup led by Johnny Paul Koroma and the Armed Forces Revolutionary Council (AFRC) overthrew President Kabbah. The AFRC later joined forces with the RUF, but a third group, the Civil Defense Force (CDF) led by Sam Hinga Norman, was formed to fight the RUF. In February 1998, the Monitoring Group of the Economic Community of West African States (ECOMOG) forced the *junta* from the capital, but fighting continued throughout the country.⁵

On July 7, 1999, the second major ceasefire, the Lomé Peace Agreement, was signed between the government of Sierra Leone and the RUF. This agreement called for the following: an end to the fighting; integration of the RUF into the government; a broad amnesty,⁶ specifically mentioning Foday Sankoh but applying to all members and ex-members of the RUF, AFRC, CDF, and the Army of Sierra Leone (SLA); and a U.N. mission to aid with the disarmament.⁷ This agreement broke down in May 2000 when members of the RUF attacked

² Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002 [hereinafter “the Special Court Agreement.” Reproduced in accompanying notebook at Tab 2.]

³ Rupert Skilbeck, *Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone*, Essex Human Rights Review Vol. 1 No. 1, 66, 67 (2004) [Reproduced in accompanying notebook at Tab 51.]

⁴ Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) (“Abidjan Peace Agreement”), November 30, 1996. [Reproduced in accompanying notebook at Tab 23.]

⁵ Skilbeck *supra* note 3, at 67. [Reproduced in accompanying notebook at Tab 51.]

⁶ When signing the agreement, the Special Representative of the Secretary-General appended a reservation, holding that the U.N. understood the amnesty provisions did not apply to “international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. S.C. Res. 1315, U.N. SCOR, 4186th mtg., U.N. Doc. S/RES/1315 (2000). [Reproduced in accompanying notebook at Tab 19.]

⁷ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (“Lomé Peace Agreement”), July 7, 1999. [Hereinafter the “Lomé Peace Agreement.” Reproduced in

and took hostage members of the U.N. peacekeeping force. Following the arrest of Sankoh and the rescue of U.N. hostages, a final peace agreement was signed in Abuja on November 10, 2000. This time, the U.N. mission sent to aid in the disarmament and implementation of the peace agreement, the United Nations Assistance Mission in Sierra Leone (U.N.AMSIL), was composed of over 17,000 personnel, and in January 2002, President Kabbah was able to declare the civil war over.⁸

At the request of President Kabbah⁹ and pursuant to U.N. Security Council Resolution 1315 (2000)¹⁰ the government of Sierra Leone and the U.N. negotiated the creation of an independent Special Court which would prosecute those bearing the greatest responsibility for the violations of both international humanitarian law and Sierra Leonean domestic law from the breakdown of the Abidjan Peace Agreement in 1996 until the signing of the Special Court Agreement in January 2002.¹¹ Under the Special Court Agreement, the independent Special Court was created by the Statute of the Special Court for Sierra Leone.¹²

For the issues addressed in this memo, two of the SCSL Statute's articles deserve special attention. Article 14, Rules of Procedure and Evidence, adopts the rules of the International Criminal Tribunal for Rwanda (ICTR) with the caveat that the Rules may be amended by the Special Court where they do not adequately provide for specific situations facing the Special Court. In making amendments, the Special Court may be guided by Sierra Leone's Criminal Procedure Act of 1965.¹³ While the Special Court shares many of the characteristics of other

accompanying notebook at Tab 24.]

⁸ Skilbeck *supra* note 3, at 68. [Reproduced in accompanying notebook at Tab 51.]

⁹ *Id.*

¹⁰ S.C. Res. 1315, *supra* note 6. [Reproduced in accompanying notebook at Tab 19.]

¹¹ Special Court Agreement, *supra* note 2 art. 1(1). [Reproduced in accompanying notebook at Tab 2.]

¹² Statute of the Special Court for Sierra Leone [hereinafter "SCSL Statute"]. [Reproduced in accompanying notebook at Tab 21.]

¹³ SCSL Statute, *supra* note 12, at art. 14. [Reproduced in accompanying notebook at Tab 21.]

international tribunals, the U.N. “deliberately chose to establish a Special Court on a different model to existing tribunals.”¹⁴ Since the Special Court’s creation, the judges have unanimously agreed in plenary session that the ICTR rules did not adequately provide for the “principle of fair and expeditious justice.”¹⁵

At issue here is Rule 6, Amendment to the Rules, which differs from the ICTR rules in that, unless otherwise indicated, changes to the rules enter into force immediately.¹⁶ Neither the ICTR nor the International Criminal Tribunal for Yugoslavia (ICTY) allows amendments to the rules to apply to cases pending at the time the change is made. Rule 6(C) of the ICTR Rules of Procedure and Evidence reads: “An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.”¹⁷ Amendments to the ICTY Rules for Procedure and Evidence take effect seven days after the official date of issue, but as in the ICTR, “shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.”¹⁸

Article 17 of the SCSL Statute defines the minimum guaranteed rights of the accused. Four sections or subsections are relevant to the issues at hand. Section 1 states that “[a]ll accused shall be equal before the Special Court.” Section 2 guarantees a fair and public hearing, subject to special considerations for the protection of witnesses. Subsections 4(b) and (c)

¹⁴ Prosecutor v. Sam Hinga Norman, Prosecutor, Case No. SCSL-2003-08-PT, Prosecutor v. Morris Kallon, Case No. SCSL-2003-07-PT, and Prosecutor v. Augustine Gbao, Case No. SCSL-2003-09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, November 4, 2003, para. 10. [Reproduced in accompanying notebook at Tab 27.]

¹⁵ *Id.* at para. 28.

¹⁶ Rules of Procedure and Evidence, as amended at the 6th Plenary May 14, 2005 [hereinafter “Rules.”] Reproduced in accompanying notebook at Tab 18.]

¹⁷ ICTR Rules of Procedure and Evidence, adopted June 29, 1995, amended June 7, 2005. Rule 6(C). [Reproduced in accompanying notebook at Tab 13.]

¹⁸ ICTY Rules of Procedure and Evidence, IT/32/Rev. 36, adopted February 11, 1994, amended December 30, 2000. Rule 6(D). [Reproduced in accompanying notebook at Tab 14.]

provide for “adequate time and facilities for the preparation of [the accused’s] defence and to be tried without delay.”¹⁹

III. RULE 6(D) AND RIGHTS OF THE ACCUSED

In order to analyze the impact of a Rule 6(D) amendment, three things must be determined: first, what rights the accused actually has; second, whether there are circumstances where those rights could be abused; and third, what approaches the Special Court can take to limit the possibility of abuse.

A. What are the rights of the accused?

The rights of the accused are founded primarily in two sources: the SCSL Statute and international law. While the Special Court may look to Sierra Leonean law for guidance, particularly in regard to offences relating to the abuse of girls or wanton destruction of property,²⁰ the Special Court is not bound by that authority.

1. SCSL Statute

The fundamental rights of the accused are found in Article 17 of the SCSL Statute. In considering the impact of an amendment to the Rules under Rule 6(D), four sections or subsections are the most relevant. These sections are as follows:

1. All accused shall be equal before the Special Court.
2. 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. . . .
4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality . . .
 - 4(b). To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - 4(c). To be tried without undue delay.²¹

¹⁹ SCSL Statute, *supra* note 12, at art. 17. [Reproduced in accompanying notebook at Tab 21.]

²⁰ Article 5 of the SCSL Statute allows the Special Court to prosecute people who have allegedly committed certain offences under Sierra Leonean law rather than international law. These include abusing a girl 14 years of age or younger and abduction of a girl for immoral purposes, which are contrary to the Prevention of Cruelty to Children Act, 1926, and setting fire to a dwelling, public building or other buildings under the Malicious Damage Act, 1861. *Id.* at art. 5.

²¹ *Id.* at art. 17 §§ 1, 2, 4(b) and (c).

Other rights are built into the SCSL Statute²² and the Rules,²³ but Article 17 provides the framework against which potential violations of the rights of the accused may be analyzed.

2. International Law

The Special Court's foundation in international law also provides the accused with clearly identifiable rights. The Special Court was created by agreement between the U.N. and the government of Sierra Leone and meets the criteria for a treaty set forth in the Vienna Convention on the Law of Treaties between States and International Organizations ("the 1986 Vienna Convention").²⁴ Also, with the exception of the violations of the Prevention of Cruelty to Children Act and the Malicious Damage Act, the crimes which the Special Court was created to prosecute are "crimes against humanity, war crimes and other serious violations of international humanitarian law."²⁵ Because of its existence as an international tribunal and the nature of the crimes it was created to prosecute, the Special Court operates according to international standards, meaning "it must have the mechanisms and facilities to dispense even-handed justice, providing at the same time all the guarantees of fairness and it must be in tune with international human rights instruments."²⁶

a. Treaty-Based Norms for the Rights of the Accused

²² See for example SCSL Statute, *supra* note 12, at art. 13, requirement that judges be of high moral character, impartiality and integrity, and art. 20, the right to appeal convictions. [Reproduced in accompanying notebook at Tab 21.]

²³ See for example Rules, *supra* note 16, at Rule 39: Conduct of Investigations, Rule 42: Rights of Suspects During Investigation, and Rule 45: Defence Office, creating a dedicated body to ensure the rights of suspects and the accused. [Reproduced in accompanying notebook at Tab 18.]

²⁴ Prosecutor v. Morris Kallon, Case No. SCSL-2004-15-AR72(E), Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), and Brima Bazzy Kamara, Case No. SCSL-2004-16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, March 13, 2004, at paras. 42 and 43. [Reproduced in accompanying notebook at Tab 29.]

²⁵ *Id.* at para. 40.

²⁶ *Id.* at para. 55.

The international community has developed through an array of treaties a widely held set of basic rights for those accused of crimes, whether the crimes are of international or domestic character. These rights include, *inter alia*, equality before the law, freedom from arbitrary arrest or detention, reasonable time and facilities to prepare a defense, a fair and public trial within a reasonable amount of time, an impartial and independent tribunal, and the principles of *nullum crimen sine lege*, or no *ex post facto* laws.²⁷

The prohibition on retroactivity based on the principles of *nullum crimen sine lege* applies only to the crimes for which a person is being charged, not changes to the Rules of Procedure and Evidence. The Rome Statute of the International Criminal Court, however, clearly states in Article 51 that amendments to the rules “shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.”²⁸ Although Sierra Leone has ratified the Rome Statute,²⁹ there are two reasons why the ICC’s prohibition of retroactivity cannot apply to the Special Court. First, under Article 11 of the Rome Statute, the ICC has jurisdiction only over crimes committed after its entry into force.³⁰ Since the statute did not enter into force until July 1, 2002, its provisions could not apply to any of the crimes the Special Court was created to prosecute. Second, and perhaps more important,

²⁷ African [Banjul] Charter on Human and Peoples’ Rights (ACHPR), art. 3 and 7, June 27, 1981, 21 I.L.M. 58 [Reproduced in accompanying notebook at Tab 1]; American Convention on Human Rights, art. 8 and 9, November 22, 1969, 9 I.L.M. 673 [Reproduced in accompanying notebook at Tab 3]; Charter of Fundamental Rights of the European Union (CFREU), art. 20, 47 and 49, December 18, 2000 [Reproduced in accompanying notebook at Tab 4]; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF), art. 6 and 7, November 4, 1950, 312 U.N.T.S. 221 [Reproduced in accompanying notebook at Tab 6]; International Covenant on Civil and Political Rights, art. 9, 14 and 15, December 16, 1966, 999 U.N.T.S. 171, [Reproduced in accompanying notebook at Tab 12]; Rome Statute of the International Criminal Court (“Rome Statute”), art. 22 and 67, July 17, 1998, U.N. Doc. A/CONF.183/9 [Reproduced in accompanying notebook at Tab 17]; Universal Declaration of Human Rights (UDHR), art. 6-11, December 10, 1948, U.N. G.A. Res. 217 (III 1948), [Reproduced in accompanying notebook at Tab 22].

²⁸ Rome Statute, *supra* note 27, at art. 51(4). [Reproduced in accompanying notebook at Tab 17.]

²⁹ Sierra Leone signed the Rome Statute on October 17, 1998 and ratified it September 15, 2000; see <http://www.un.org/law/icc/statute/romefra.htm>.

³⁰ Rome Statute, *supra* note 27, at art. 11(1). [Reproduced in accompanying notebook at Tab 17.]

the provisions of the Rome Statute only apply to cases before the ICC. While most of the crimes alleged in the cases before the Special Court would but for the time element fall under the jurisdiction of the ICC,³¹ the ICC's jurisdiction is not mandatory. That court may exercise its jurisdiction only when an Article 5 crime has been alleged and that crime is referred to the Prosecutor by a State Party or the U.N. Security Council, or an investigation is initiated by the Prosecutor.³² As a signatory to the Rome Statute, the government of Sierra Leone has the discretion of trying these crimes itself, referring the cases to the ICC (although as was discussed above, that is not possible in this case due to the timing issue), or coming up with an alternative solution that still meets international standards. In this case, Sierra Leone chose the third option by entering into an agreement with the U.N.

What this means in terms of the SCSL is that the Special Court has the power to determine what rights the accused have within the framework of the SCSL Statute and the Rules, and whether those rights have been violated. The Special Court's options if it determines that a right has been violated are discussed below. While the rights of the accused enumerated in Article 17 of the SCSL Statute may be less expansive than in some international agreements,³³ they clearly fall within the standards of the Special Court's binding treaty obligations. In other words, nothing in the above mentioned treaties as applied to the Special Court *per se* prohibits the immediate application of amendments to the Rules.

³¹ Article 5 of the Rome Statute limits the ICC's jurisdiction to crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. The violations of the Prevention of Cruelty to Children Act, 1926 and the Malicious Damage Act, 1861 could not be prosecuted in the ICC as such, but those same acts could fall under the rubric of crimes against humanity or war crimes, and thus could still be prosecuted. Rome Statute, *supra* note 27, at art. 5. [Reproduced in accompanying notebook at Tab 17.]

³² *Id.* at art. 15.

³³ The African Charter on Human and Peoples' Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Universal Declaration of Human Rights, provide an additional right of an effective remedy before a national authority if their rights or freedoms articulated in that agreement are violated. ACHPR, *supra* note 27, at art. 7(a), ECPHRFF, *supra* note 27, at art. 13, and UDHR, *supra* note 27, at art. 8. Articles 8 and 9 of the SCSL Statute explicitly reject this possibility. SCSL Statute, *supra* note 12, at arts. 8-9. [Reproduced respectively in accompanying notebook at Tabs 1, 6, 22, and 21.]

b. Customary International Law

The International Law Association defines customary international law as a rule “which is created and sustained by the constant and uniform practice of States and other subjects of international law . . . in circumstances which give rise to a legitimate expectation of similar conduct in the future.”³⁴ Over the last century, many of the rights of the accused have become customary international law. The right to a fair and public trial within a reasonable amount of time, the presumption of innocence, *nullum crimen sine lege*, and adequate time to prepare a defense are all found in just about every international agreement on human rights,³⁵ and it is reasonable to expect that will be the case for decades to come.

International criminal tribunals, however, are still a relatively new phenomenon going back only sixty years, and their processes are still being refined. The Special Court for Sierra Leone is an example of that. Unlike earlier tribunals, the Special Court is treaty-based, independent from the U.N. Security Council.³⁶ It is prosecuting a combination of international and domestic crimes,³⁷ and is made up of a mix of Sierra Leonean and foreign judges.³⁸ Also, the Rules created the Defence Office to ensure the rights of suspects and the accused,³⁹ an innovation for international tribunals resulting from criticisms that other tribunals had failed to provide adequate defense representation.⁴⁰ The result of this experimentation is that while the minimum human rights guarantees are set in stone, the procedures or mechanisms of how to

³⁴ Barry E. Carter, et al., *International Law* (4th ed.), 123, (Aspen Publishers, 2003).

³⁵ See note 28.

³⁶ Prosecutor v. Morris Kallon, et al., Decision on Constitutionality and Lack of Jurisdiction, *supra* note 24, at para. 55. [Reproduced in accompanying notebook at Tab 29.]

³⁷ SCSL Statute, *supra* note 12, at art. 5. [Reproduced in accompanying notebook at Tab 21.]

³⁸ *Id.* at art. 12.

³⁹ Rules, *supra* note 16, at Rule 45. [Reproduced in accompanying notebook at Tab 18.]

⁴⁰ Skilbeck, *supra* note 3, at 79. [Reproduced in accompanying notebook at Tab 51.]

protect those rights remain flexible. The right to a fair trial is thus immutable; the procedures used in that trial are not.

3. Sierra Leone's Laws

A part of the hybrid nature of the Special Court is that it is responsible for prosecuting violations of international humanitarian law as well as certain offences under Sierra Leonean law.⁴¹ The SCSL Statute also indicates that in carrying out its various functions, the Special Court may be influenced by Sierra Leone's laws. Article 14(2) states the Special Court "may be guided . . . by the Criminal Procedure Act, 1965" when amending the Rules of Procedure and Evidence.⁴² In the appellate process, the Special Court is directed to be guided by the ICTY and ICTR on international matters, but to be "guided by the decisions of the Supreme Court of Sierra Leone" when interpreting and applying the laws of Sierra Leone.⁴³

Two very important conclusions can be drawn from these statutory provisions. First, the Special Court is not bound in any way by Sierra Leonean law when interpreting an international issue. Article 14 adopts the ICTR Rules of Procedure and Evidence with the understanding that, where they are not appropriate for Sierra Leone's situation or legal traditions, they should be changed. When amending the Rules, the Special Court *may* be guided by Sierra Leone's laws, but it is not required to do so. This issue was indirectly addressed in the Appeals Chamber's Decision on challenge to Jurisdiction: Lomé Accord Amnesty.⁴⁴ The issue there was whether the Special Court was bound by the Amnesty provision of the Lomé Accord between the government of Sierra Leone and the RUF. Article 9 of the Lomé Accord stated that the

⁴¹ SCSL Statute, *supra* note 12, at arts. 2-5. [Reproduced in accompanying notebook at Tab 21.]

⁴² *Id.* at art. 14.

⁴³ *Id.* at art. 20.

⁴⁴ Prosecutor v. Morris Kallon, Case No. SCSL-2004-15-AR72(E), and Brima Bazzy Kamara, Case No. SCSL-2004-16-AR72(E), Decision on challenge to Jurisdiction: Lomé Accord Amnesty, March 13, 2004. [Reproduced in accompanying notebook at Tab 28.]

government would take steps to provide Foday Sankoh an absolute and free pardon, granted a blanket amnesty to members of the various warring factions for acts done in support of that faction, and ensured no official or judicial action would be taken.⁴⁵ The Special Court held that the Lomé Accord was not a treaty or agreement in the nature of a treaty; that whatever obligations it created were regulated by the domestic laws of Sierra Leone; and that as a result, it did not have any effect on the Special Court.⁴⁶

The second important conclusion to be drawn from the SCSL Statute is that while the Special Court is to be guided by Sierra Leonean law regarding Article 5 crimes, it is not bound by Sierra Leone's Rules of Procedure and Evidence. Article 5 grants the Special Court the power to prosecute crimes relating to the abuse of girls under Sierra Leone's Prevention of Cruelty to Children Act, 1926, and those relating to arson under the Malicious Damage Act, 1861.⁴⁷ While Article 14 allows the Special Court to be guided by Sierra Leone's Criminal Procedure Act, 1965, when amending the Rules,⁴⁸ Article 20, Appellate Proceedings, is more explicit. It states that when interpreting and applying the laws of Sierra Leone, the Appeals Chamber "shall be guided by the decisions of the Supreme Court of Sierra Leone."⁴⁹ Thus, when deciding substantive issues of law regarding the abuse of girls or arson, such as whether the elements of a crime have been proven, the Special Court would look to Sierra Leonean precedent rather than the ICTY or ICTR. The Special Court would not have to defer to Sierra Leone's Rules of Procedure since they are derived from the Criminal Procedure Act, which is not covered by the SCSL Statute.

⁴⁵ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ("Lomé Peace Agreement"), July 7, 1999, at art. 9. [Reproduced in accompanying notebook at Tab 24.]

⁴⁶ *Prosecutor v. Morris Kallon, et al.*, Decision on challenge to Jurisdiction: Lomé Accord Amnesty, *supra* note 44, at para. 86. [Reproduced in accompanying notebook at Tab 28.]

⁴⁷ SCSL Statute, *supra* note 12, at art. 5. [Reproduced in accompanying notebook at Tab 21.]

⁴⁸ *Id.* at art. 14.

⁴⁹ *Id.* at art. 20.

B. Are There Circumstances Where Rule 6(D) Would Violate Rights?

Having determined which rights the accused are entitled to, it is now necessary to discuss whether there are circumstances in which an amendment under Rule 6(D) would violate the rights of the accused. This section will discuss the procedure for amending the Rules, the primary concerns with retroactively applying an amendment, an example of how an amendment might violate the defendant's rights, and how the Special Court has addressed this issue.

1. Procedure for Amendment

Rule 6 of the Special Court's Rules of Procedure and Evidence allows for the immediate implementation of changes to those rules. Amendment proposals may be made by a Judge of either the Trial or Appeals Chamber, the Prosecutor, the Registrar, the Principle Defender, the Sierra Leone Bar Association, or any other entity invited by the President of the Special Court to propose amendments. Proposals may be adopted either at a Plenary Meeting of the Special Court, or provided that the Judges approve the amendment unanimously. Unless the Judges decide otherwise, the amendment will take effect immediately and be published by the Registrar.⁵⁰ The Rules have been amended six times since the Special Court was established.⁵¹

2. Concerns With Retroactive Application

As the SCSL Statute and the agreements on human rights discussed above make clear, one of the highest concerns is that the accused are afforded a fair trial. All of the other rights, whether that the trial be public or timely, that the tribunal be impartial, or that the defendant be allowed the proper resources to defend himself or herself, are simply ways of guaranteeing a fair trial. Another major concern is that a person's actions are not criminalized after they are committed. It is from these two perspectives that Rule 6(D) will be analyzed.

⁵⁰ Rules, *supra* note 16, at Rule 6. [Reproduced in accompanying notebook at Tab 18.]

⁵¹ *Id.*

a. Fair Trial

Whenever a rule is changed, there is likely to be a party who is advantaged or disadvantaged by that rule. However, a disadvantage may be so slight as to be insignificant, or the harm done by allowing the rule to remain in place may be so great that justice would not be served. Many of the protections guaranteeing a fair trial are found in the Rules, not the SCSL Statute or Special Court Agreement. For example, the framers of the Special Court Agreement and SCSL Statute have been criticized for their early neglect of adequate defense representation.⁵² The only mention of the defense in the Special Court Agreement is the provisions in Article 14, which discusses defendant's counsel's rights.⁵³ The SCSL Statute goes further by positively stating the rights of the accused in Article 17, particularly the right to have counsel appointed if the defendant can not provide his own, and establishing guidelines for the selection of judges. The lack of provisions for an office of the defense, which in fact was the status quo for international tribunals dating back to Nuremburg, was only rectified by the creation of the Defence Office under Rule 45. The purpose of the Defence Office is to ensure the rights of suspects and the accused.⁵⁴ In its November 2005 online publication "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone," Human Rights Watch stated that the Defence Office continues "to serve a critical function in helping to protect the rights of the accused, and represents an unprecedented and important innovation for international and hybrid tribunals."⁵⁵

⁵² Shilbeck, *supra* note 3, at 79. [Reproduced in accompanying notebook at Tab 51.]

⁵³ Special Court Agreement, *supra* note 2, at art. 14. [Reproduced in accompanying notebook at Tab 2.]

⁵⁴ Rules, *supra* note 16, at Rule 45. [Reproduced in accompanying notebook at Tab 18.]

⁵⁵ Human Rights Watch, "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone", November 5, 2005, available at <http://hrw.org/reports/2005/sierraleone1105/2.htm>. [Reproduced in accompanying notebook at Tab 55.]

Because many of the rights of the accused are found in the Rules, and because there is no explicit ban on retroactive application of an amendment to those Rules, there is the potential for a violation of a defendant's rights.

b. *Nullum Crimen Sine Lege*

Another major concern with the immediate application of amended rules is the principle of *nullum crimen sine lege*,⁵⁶ which prohibits the retroactive punishment of someone whose acts become criminalized after the fact. In *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, the Special Court addressed this issue in relationship to the charges brought against the defendants. There, the defense argued *inter alia* that the Indictment against the Accused included charges of crimes against humanity, which were not part of Sierra Leone's domestic law when they were alleged to have occurred. Furthermore, the Indictment included violations of Common Article 3, Additional Protocol II, which Sierra Leone had acceded to but had not fully incorporated into its own laws. Therefore, the defense argued, all of these charges should be void.⁵⁷ The Special Court disagreed with the defense, noting that the Special Court derives its existence exclusively from U.N. Security Council Resolution 1315 and the Special Court Agreement.⁵⁸ Since the Special Court is therefore an international body and not a part of the judicial system of Sierra Leone, it is not bound by Sierra Leone's laws. The acts for which the accused were charged were already codified in international law prior to being committed,

⁵⁶ Literally "no crime without law."

⁵⁷ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, Case No. SCSL-04-16-PT, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Courts, March 31, 2004, at paras. 2-4. [Hereinafter "*Prosecutor v. Alex Tamba Brima, et al., Motion on Abuse of Process.*"] Reproduced in accompanying notebook at Tab 26.]

⁵⁸ *Id.* at para. 37.

and it was these international laws that the SCSL Statute authorized the Special Court to prosecute. Therefore, there was no issue of *nullum crimen sine lege*.⁵⁹

While the Special Court in *Brima* did not touch on the issue of retroactive application of amendments to the Rules, the same analysis would apply when applied to Rule 6(D). The crimes which the Special Court has the power to prosecute are listed in Articles 2-5 of the SCSL Statute. As discussed above, those crimes are well established in international law. Rule 6(D) derives its authority from Article 14(2) of the SCSL Statute, which states, “The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation.”⁶⁰ However, under Rule 6(D), Judges have the power to amend only the Rules of Procedure and Evidence, not the SCSL Statute or Special Court Agreement, and certainly not the treaties defining crimes against humanity. Therefore, in the context of a Rule 6(D) amendment, the issue of *nullum crimen sine lege* cannot arise, as there is no change in the legality of the alleged acts. The resulting change in procedures might work to the advantage or disadvantage of a defendant (as is discussed below), but there is a violation of his rights only if it results in an unfair trial.

3. Example of Amending the Rules

The following hypothetical example illustrates the potential for a violation of the rights of the accused. Rule 72(A) requires that preliminary motions “be brought within 21 days following disclosure by the Prosecutor to the Defense of all material envisaged by Rule 66(A)(i).” It is within the power of the Special Court to amend this Rule to require preliminary motions be brought within ten days rather than twenty-one. The amended Rule could also be applied to all cases, including those already before the court. If a defendant was already on the eleventh day of

⁵⁹ *Id.* at para. 33.

⁶⁰ SCSL Statute, *supra* note 12, at art. 14(2). [Reproduced in accompanying notebook at Tab 21.]

the twenty-one day window, the amended rule would prohibit him from filing any preliminary motions. While the SCSL Statute does not specifically ban this retroactive application, it would clearly violate the defendant's right to a fair trial. Also, if another defendant facing similar charges was only on the fifth day of the twenty-one day window, the guarantee that all are equal before the Special Court would be violated.

4. Special Court For Sierra Leone's Balancing Test

The Special Court has recognized that there are circumstances where the rights of the accused could be threatened and that there needs to be some type of evaluation of those circumstances. The Trial Chamber addressed this issue in its response to the defendants' Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts in *Prosecutor v. Alex Tamba, et al.*⁶¹ On this particular issue, the defense challenged the indictments on the grounds that they amounted to an abuse of process. The charges in the indictments, it was argued, violated the principle of *nullum crimen sine lege*. The Trial Chamber rejected the defendants' arguments, in part because the crimes charged were already established under international law, and discussed the issue of fairness in terms of the abuse of process doctrine. Drawing on common law precedent and ICTY rulings, the Trial Chamber laid out the standard of fairness the Special Court would adhere to. The Trial Chamber quoted the Appeals Chamber, saying "[t]he fairness that is involved is not fairness in the process of adjudication itself but fairness in the use of the machinery of justice."⁶² That is, the Special Court is less concerned with a single fair adjudication than with ensuring the process itself is fair. This sense of fairness will allow proceedings which have been lawfully initiated through issuing

⁶¹ *Prosecutor v. Alex Tamba Brima, et al.*, Motion on Abuse of Process, *supra* at note 57, [Reproduced in accompanying notebook at Tab 26.]

⁶² *Id.* at para. 18, quoting *Prosecutor v. Morris Kallon*, Case No. SCSL-04-15-AR72(E), et al., Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, at para. 79. [Reproduced in accompanying notebook at Tab 28.]

an indictment to be terminated if “improper or illegal proceedings” are employed. However, the decision to terminate is a matter of judicial discretion to be exercised when “proceeding with the trial would contravene the court’s sense of justice.”⁶³ In making that decision, the Special Court balances the nature and severity of the crimes alleged against the abuse of process, or unfairness, that continuing the prosecution would engender. The violation would have to reach a certain threshold, such that it undermined “the integrity of the proceedings,” to constitute an abuse of process.⁶⁴

One problem with the process of amending the Rules is that the judges who decide whether the retroactive application of an amended rule is fair are the same judges who amended that rule. While the Principal Defender may propose amendments, only the judges have a say in whether they are adopted. If the proposed amendment is adopted outside of a Plenary Meeting, the decision must be unanimous, but otherwise just requires a majority. Therefore, it is possible to have an objection to an amended rule being applied retroactively heard by judges who were against adopting that amendment. However, since one of the main goals of the Special Court is to provide “a credible system of justice and accountability” and “contribute to the process of national reconciliation and to the restoration and maintenance of peace,”⁶⁵ the appearance of prejudice may be as damaging as actual prejudice.

A second, related, issue is the right to appeal amendments to the Rules. Because the judges who adopted the amendment would be the same judges hearing the appeal, there is no effective challenge to a decision to apply retroactively that amendment. In *Prosecutor v. Sam Hinga Norman, et al.*, the defendants challenged an amended rule that now allows “certain

⁶³ *Id.* at paras. 21 and 22.

⁶⁴ *Id.* at paras. 25 and 26.

⁶⁵ S.C. Res. 1315, *supra* note 6. [Reproduced in the accompanying notebook at Tab 19.]

motions raising jurisdictional questions to be appealed, prior to trial, to the appeals chamber.”⁶⁶ They argued that the amendment violates the guaranteed human right of appeal since the Appeals Chamber decides the preliminary motion. The Appeals Chamber rejected this argument, pointing out that the rights guaranteed by the SCSL Statute include the right to appeal convictions, not every single decision prior to a conviction.⁶⁷ The decision also pointed out that in the common law system, which Sierra Leone’s traditions are derived, jurisdictional questions are sometimes heard in the first instance by the highest court, precluding the opportunity for appeal. That was the position taken by the ICTY and the ICTR, and the Special Court has the same power.⁶⁸ The Special Court would most likely answer any challenge to the retroactive application of an amended rule on the grounds that there is no effective appeal from the decision to apply the rule in a similar fashion. However, such a decision may still give the appearance of unfairness, thus undermining the Special Court’s purpose, if it is based on the idea only a violation of the defendant’s rights that is so egregious that it calls into question the legitimacy of the Special Court would result in a favorable ruling for the defendant.

C. Alternate Approaches

Given that the overriding concern of the Special Court and of international law in this context is to provide a fair trial, and that the immediate application of a Rule 6(D) amendment has the potential to disadvantage the accused,⁶⁹ the next logical question is how to determine whether retroactivity would result in an unfair trial. This section discusses two alternative

⁶⁶ Prosecutor v. Sam Hinga Norman, et al., Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, *supra* note 14, at para. 12. [Reproduced in the accompanying notebook at Tab 27.]

⁶⁷ *Id.* at para. 18.

⁶⁸ *Id.* at paras. 21-22.

⁶⁹ Though it can also work to a defendant’s advantage as the Defence Office is also empowered to propose amendments. In the Special Court’s opinion regarding the validity of the Rule 72(E) and (F) amendments, it said that allowing interlocutory appeals on certain matters safeguarded the defendants’ right to reasonably timely trial.

approaches based on the common law tradition dating back to 1801, which could answer the criticisms of prejudice.

1. *Schooner Peggy*

The first authoritative case in which U.S. courts approached the issue of retroactively applying a new rule to a pending case was *United States v. Schooner Peggy*.⁷⁰ In that case, the U.S. seized an armed French vessel. While the owner's appeal was pending at the Supreme Court, the U.S. entered into a treaty with France. One provision of the treaty was the return of French vessels seized as *Peggy* had been. The Supreme Court reversed the appellate court and ordered the ship returned.⁷¹ In his opinion for the Special Court, Chief Justice Marshall explained that if "a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . the court must decide according to existing laws."⁷² While later courts would expand the scope of *Peggy* to include statutory changes lacking the mandatory language of the treaty with France, that explicit command to apply the treaty retroactively is one of the things that made the case stand out,⁷³ and it is why *Peggy* is relevant to the issue at hand.

Like Marshall's opinion in *Peggy*, the Special Court's Rules explicitly make amendments retroactively applicable to pending cases. Under the *Peggy* model, this is enough. The argument would be that the Rules apply equally to everyone at the same time. While some defendants may be disadvantaged by the outcome of a retroactive application, and others may benefit, the process itself would be fair. Furthermore, the Rules are just one element in the process and other considerations serve to protect the rights of the accused. For instance, the Principal Defender

⁷⁰ Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907 (1962), at 912. [Hereinafter "Prospective Overruling." Reproduced in accompanying notebook at Tab 50.]

⁷¹ *United States v. Schooner Peggy*, 5 U.S. 103 (1801). [Reproduced in accompanying notebook at Tab 40.]

⁷² *Id.* at 13.

⁷³ Prospective Overruling, *supra* note 70, at 913. [Reproduced in accompanying notebook at Tab 50.]

may propose amendments, which, if approved, would probably benefit defendants. Also, the Rules may be changed only at a Plenary Meeting of the Special Court or by the unanimous approval of all the Judges.⁷⁴

The *Peggy* model, however, is unlikely to be sustainable as a rationale for retroactively applying amended rules. First, *Peggy* was decided long before international standards for the rights of the accused were established. The mere fact that the SCSL Statute allows for retroactivity does not make it legitimate if doing so would violate customary and treaty-based guarantees. Second, a statutory justification lacking a solid policy basis would not be likely to satisfy critics of the Special Court, thus undermining its function of supporting peace and reconciliation. Any change in the Rules which has the potential to prejudice a defendant's case must be accompanied by well reasoned legal and policy arguments in order to avoid the appearance of an unfair trial. Third, because the Rules play such an important role in protecting the rights of the accused, the argument that they are just one of several elements guaranteeing a fair trial is unlikely to receive much credibility. The rights guaranteed by Article 17 of the SCSL Statute would be empty words without the specific provisions provided by the Rules, and the Special Court's ability to change those Rules simply because the SCSL Statute authorized it too would appear arbitrary and capricious.

2. Modern Common Law Approach

The modern trend is a strong preference against retroactivity, but with the understanding that justice is not always served by a bright line rule.⁷⁵ A balancing test weighing several factors can be applied to ensure that changes to the Rules are well reasoned and only applied where they will not result in prejudice towards the defendant. The factors to be considered are: the purpose

⁷⁴ Rules, *supra* note 16, Rule 6(A). [Reproduced in accompanying notebook at Tab 18.]

⁷⁵ Prospective Overruling, *supra* note 70, at 942. [Reproduced in accompanying notebook at Tab 50.]

of the new rule, the element of surprise, and the effect the change will have on the court system.⁷⁶

First, the Special Court should identify the purpose of the new rule. The court “should determine whether on balance those purposes will be served by general retroactive application of the new rule,” and then whether applying the rule retroactively to the case before it would accomplish its purpose.⁷⁷ Unlike in the U.S., where courts make these determinations after the rule has been changed, the Special Court should take these questions into account when deciding whether to adopt the amendment. Rule 6(D) requires that the court indicate at the time they are adopted which amendments do not take effect immediately. As discussed above, since the same people who decide which changes are made are the same who rule on whether such changes are fair, it is practically futile to challenge an amendment once it is adopted. On the other hand, since more judges are involved in the amendment process than in ruling on legal issues, the threat of personal bias affecting the decision is lessened. In the hypothetical example above dealing with the timeframe for filing preliminary motions, the Special Court would first have to determine why the change was necessary. If the reason for decreasing the time limit was that defendants were using the twenty-one days as a means of slowing the proceedings down, an immediate application of that change would be reasonable. However, if when looking at the specific case before the Special Court it was apparent that the new time limit would already have run, applying the new rule would serve no effective deterrent value and would in fact be contrary to the defendant’s rights.

Next, the Special Court must consider the element of surprise. “Will a decision to make the new rule retroactive defeat reasonable expectations and justified reliances that were based on

⁷⁶ *Id.* at 942-950.

⁷⁷ *Id.* at 942.

the assumption of the continued existence of the old rule?”⁷⁸ In the case of the Special Court, the factor of surprise works a little differently than in a traditional court setting. Under Rule 6(D), the issue is not which law was violated, but how to deal with the procedures. As discussed above, the laws with which the accused are charged of violating have not changed. Where the element of surprise does need to be taken into account, though, is with regard to the right to have adequate time to prepare a defense. Again, using the above example, decreasing the time limit to file preliminary motions in such a way that a defendant was prohibited from doing so as soon as the new rule was applied would not only defeat the reasonable expectations created by the earlier rule, it would also violate that defendant’s right to adequate time to prepare a defense. The solution to this problem would not be difficult or cumbersome for the Special Court. Since the Special Court has the discretion of not making the amendment immediately effective, in cases where a retroactive application could be reasonably expected to violate a defendant’s right to a fair trial, all the Special Court has to do is modify the date on which the amendment comes into force. While a similar problem to that of the Special Court’s approach would still exist, i.e. that an unfair application does not have an effective remedy, a reasoned opinion showing that the Special Court has considered the possibility that a right could be in jeopardy and has found that not to be the case would prevent the appearance of arbitrary and capricious decision making.

The final factor for the Special Court to consider under this model is the effect retroactivity will have on the administration of the court system itself.⁷⁹ The application of this factor is different for U.S. courts and the Special Court, but the end result should be the same. The basic principle is that if a retroactive application of a new rule is going to slow down the judicial system, resulting in a greater likelihood across the board of miscarriages of justice, then

⁷⁸ *Id.* at 945.

⁷⁹ *Id.* at 950.

the expected benefit of the new rule is less likely to be justified. In the case of the U.S. courts, the concern is that the volume of cases a new rule creates could overwhelm the system. For example, if following *Mapp v. Ohio* the U.S. courts were forced to rehear every criminal case in which their conviction was obtained through illegally seized evidence, the result would be an impossible burden placed on the court system.⁸⁰ The Special Court's motive in dealing with the amendments to Rule 72(E) and (F), was a slightly different concern. The Special Court, as has already been noted, is different from the ICTY and ICTR in many ways. One of those is funding. "Due to general dissatisfaction with the cost and inefficiency of the [International Criminal Tribunals, the Security Council] refused to support a further *ad hoc* tribunal and were wary of accepting the responsibility of running the court."⁸¹ This has resulted in an expectation that the Special Court will be of a more limited duration and will have fewer sources of funding. In short, the Special Court must work faster with less funding. With this in mind, the Judges decided that Rule 72 as inherited from the ICTR "did not adequately provide for disposal of preliminary motions" and would have significantly, and unjustifiably, delayed the entire Court.⁸² So for the Special Court, the intent in changing Rule 72 to allow interlocutory appeals was to facilitate the completion of a discrete number of cases by pushing up to the Appeals Chamber all the issues that would likely have to be decided there anyway, without wasting the time of the Trial Chamber.

This balancing of the purpose of the new rule and whether it would be achieved with a retroactive application, the element of surprise for those who relied on the old rule, and the effect on the Special Court's ability to carry out its mission of expeditious, effective and fair

⁸⁰ *Id.* Discussing *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.

⁸¹ Skilbeck, *supra*, note 3, at 68. [Reproduced in accompanying notebook at Tab 51.]

⁸² Prosecutor v. Sam Hinga Norman, et al, Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal, *supra* note 14, at para 6. [Reproduced in accompanying notebook at Tab 27.]

administration of justice would be one workable option in allowing the Special Court flexibility in its procedures while still protecting the rights of the accused. The fact that this approach is heavily rooted in the common law tradition⁸³ would pose little burden for the Special Court. Sierra Leone, as a former British colony, inherited the common law system, as evidenced by the Appeals Chamber's quoting the Magna Carta's guarantee of a timely justice in one *Norman* case decision.⁸⁴ As has already been discussed, Article 14 of the SCSL Statute permits the judges to be guided by Sierra Leonean law when amending the Rules.⁸⁵

3. No Perfect Solution

Even considering the factors discussed above that the Special Court could consider when deciding whether it would be fair to retroactively apply an amended rule to a pending case, it is impossible to create a judicial system that guarantees a defendant's rights will be protected in all situations. In the case of the Special Court, three important factors contribute to the dilemma: (1) relatively few indictments, (2) the possibility of violence from the defendants' supporters, and (3) conflicting rights.

The Special Court was designed to quickly and efficiently try those individuals who bore the largest responsibility for the suffering caused by Sierra Leone's civil war. To that end, between March and September 2003, thirteen individuals were indicted on a variety of charges including international and domestic crimes. Of those thirteen, two have since died, resulting in the withdrawal of their indictments, nine are currently detained, and two, Charles Taylor and

⁸³ While this approach was drawn from U.S. cases, the UK and Canada have similar approaches to balancing these competing interests. See for example *R. v. Latif*, 2 CR. App. R. 92 (1996) and *Toronto (City) v. C.U.P.E.*, 2003 SCC 63 (2003). [Reproduced in accompanying notebook at Tabs 34 and 38, respectively.]

⁸⁴ *Prosecutor v. Sam Hinga Norman, et al.*, Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal, *supra* note 14, at para 7. [Reproduced in accompanying notebook at Tab 27.]

⁸⁵ SCSL Statute, *supra* note 12, at art. 14. [Reproduced in accompanying notebook at Tab 21.]

Johnny Paul Koroma, are still at large.⁸⁶ In 2004, the Trial Chamber ordered joint trials for the defendants based on their affiliations during the civil war. This resulted in three separate trials, each with three defendants: the CDF, consisting of Samuel Hinga Norman, Allieu Kondewa and Moinina Fofana; the RUF, consisting of Issa Hassan Sesay, Morris Kallon and Augustine Gbao; and the AFRC, consisting of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu. If Taylor or Koroma are ever detained, they will each be tried separately. Of those currently in custody, their trials all began between June 2004 and March 2005.⁸⁷ The consequence of this is that since all of the trials that are likely to occur have already begun, the amended Rules would have to be applied retroactively to already pending cases if they are going to apply to anyone at all. If they are not applied retroactively, the Special Court effectively will not be able to address any of the unforeseen problems. This would clearly be contrary to the intent of the Special Court Agreement and SCSL Statute's framers when they included Article 14 in the founding statute.

One of the consequences of the defendants being grouped by their civil war affiliations is the appearance of the groups being tried as a whole. It is important to keep two facts in mind. First, as the leaders of the warring factions, it is probable that they still have supporters throughout the country. Second, one of the main considerations in creating the Special Court was the goal of promoting peace and national reconciliation.⁸⁸ If one faction is treated differently than the others, it is likely to promote a fear among their supporters that their faction is being singled out, increasing the likelihood of a resurgence of violence. While the Special Court's purpose is strictly limited to those with the greatest responsibility for the civil war, and

⁸⁶ Special Court for Sierra Leone Completion Strategy, May 18, 2005, at 5. [Reproduced in accompanying notebook at Tab 20.]

⁸⁷ *Id.* at 6.

⁸⁸ S.C. Res. 1315. [Reproduced in accompanying notebook at Tab 19.]

there is no legal grounds for expanding its scope to include all participants in the war short of the U.N. and the government of Sierra Leone amending the Special Court Agreement, anyone fearful that they may be on the “next” list of indictments is not likely to give those limitations much credibility. The Lomé Peace Accord guaranteed Foday Sankoh amnesty, and yet he is currently in custody and on trial.⁸⁹ This concern may motivate the judges to apply all amendments to as many defendants as possible in order to maintain the appearance of impartiality, even if doing so infringes to some extent on a defendant’s rights.

A final reason a perfect solution is not possible is that the rights that are guaranteed can be in conflict with one another. A clear example of this was addressed by the Appeals Chamber in *Norman* when it ruled that amending Rule 72 to allow interlocutory appeals was a legitimate exercise of judicial discretion. The defense alleged that the right to a fair trial was being violated by not being able to appeal a preliminary motion decided by the Appeals Chamber. The Special Court responding by stressing the right to an expeditious trial. In the ICTR, which did not allow appeals until after a person was convicted, the average time for a trial from the Prosecutor’s opening statement to the Trial Chamber’s verdict, was 21.5 months.⁹⁰ The implication of this is clear: a defendant’s rights may at times conflict, and when this happens the Special Court will use its discretion in deciding which right has more weight in that given circumstance.

Given the impossibility of a perfect judicial system, it is likely that policy considerations, rather than pure legal principles, will play some role in determining when to apply amended rules retroactively. This situation has in the past, and almost certainly will in the future, resulted in the Special Court having to choose between a strict adherence to the rights of the accused and the

⁸⁹ While there are solid legal reasons for why the amnesty did not apply to the Special Court, they are unlikely to mitigate a person’s fear that his faction is being persecuted. Lomé Peace Agreement, *supra* note 45. [Reproduced in accompanying notebook at Tab 24.]

⁹⁰ Prosecutor v. Sam Hinga Norman, et al., Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, November 4, 2003, *supra* note 14. [Reproduced in the accompanying notebook at Tab 27.]

broad goals of the Special Court, peace and reconciliation. When this happens again, the Special Court will likely come down on the side of peace and reconciliation.

IV. AD HOMINEM

Ad hominem is a logical fallacy where someone attacks another's argument solely on the grounds that there is something discreditable about the person making the argument. The attacker suggests that his adversary's conclusions are flawed because that person is somehow flawed rather than addressing the facts or arguments set forth. Not all personal attacks are *ad hominem*; there is a requirement that the intent of the personal attack is to discredit the person. Also, not all *ad hominem* attacks are fallacious. When the attack is directed at the deduction or conclusion another comes to, rather than the facts upon which it is made, it is fallacious. However, when the personal attack is aimed at discrediting the facts or evidence used to come to the conclusion, the attack could be a valid argument.⁹¹ For example, in a debate between two history professors, one dismisses the other's conclusions about radical terrorism on the grounds that the second professor is a Muslim. The first professor's attack would be *ad hominem* because it does not address the strengths of the second's argument, but rather he implies that because of his religion, his conclusions are biased and thus unreliable.

Because there is no Restatement of the Law regarding *ad hominem* attacks or no customary international law banning them outright, this section will begin by examining what a defendant would have to prove to demonstrate that his right to a fair trial has been violated by a retroactive rule on the basis that the amendment was *ad hominem*. Then, the SCSL Statute will be examined to determine what measures included to prevent such an abuse of discretion.

⁹¹ Ad Hominem, found at http://en.wikipedia.org/wiki/Ad_hominem. [Reproduced in accompanying notebook at Tab 53.]

Finally, the last section will analyze the likelihood of successfully challenging the retroactive application of an amendment on the grounds that it is *ad hominem*.

A. *Ad Hominem* and Rights of the Accused

Like the issue of retroactivity of amendments to the Rules, there is no explicit right to be free from an *ad hominem* attack. Instead, that right is implied by the widely accepted rights to a fair hearing and to equal treatment before the courts. For a defendant to successfully make a claim that these rights have been violated by an *ad hominem* attack, he would have to show first that the amendment was effectively a personal attack against him with the intent to discredit his deductions or conclusions, or in this case, the defendant's legal defenses. Second, he would have to show that the amendment, when applied retroactively to him, violated his rights either by resulting in an unfair trial or by treating him differently than other defendants in a similar situation.

The first element would be the hardest to prove. Based on the performance of the ICTY and ICTR, the framers of the Special Court Agreement and the SCSL Statute created Special Court on a different model from the earlier tribunals,⁹² taking the lessons learned and building a more efficient court. One of those lessons was that unforeseen problems would arise, potentially violating the defendants' rights if not addressed. Thus, Article 14 of the SCSL Statute adopts the ICTR's Rules of Procedure and Evidence, with the caveat that they may be amended where they do not adequately represent the needs or concerns of the Special Court.⁹³ The difficulty this presents a defendant is that he must show not only that there were no legitimate grounds for amending the Rules, but also that the amendment was adopted with the specific intent of discrediting that defendant. While a defendant may be disadvantaged by a particular

⁹² Prosecutor v. Sam Hinga Norman, et al, Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal, *supra* note 14, at para 10. [Reproduced in accompanying notebook at Tab 27.]

⁹³ SCSL Statute, *supra* note 12, at art. 14(b). [Reproduced in accompanying notebook at Tab 21.]

amendment, even one arising from a problem first encountered in his case, the Special Court is unlikely to accept the argument that the amendment was intended to prejudice a defendant's case if there is a valid reason for changing the rule. The second element, on the other hand, would be fairly easy to prove if the defendant could establish that there was a specific intent to undermine his case. Such an intent would clearly demonstrate that defendant was being treated differently, and unequally, than the other defendants, violating Article 17(1) of the SCSL Statute. This abuse would certainly reach the threshold of undermining "the integrity of the proceedings" the Special Court set in *Brima*.⁹⁴

B. Statutory Safeguards for the Rights of the Accused

In requesting the Secretary-General to negotiate an agreement creating an independent tribunal for Sierra Leone, the U.N. Security Council recognized that "a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration of peace."⁹⁵ With those concerns in mind, the Special Court Agreement, SCSL Statute and Rules were drafted with the intention of creating a court that was, and was perceived to be, expeditious, effective and impartial. Provisions to ensure that the rights of the accused were protected were included in each of the three above mentioned documents.

1. Impartial Judges

In discussing the Statute of the Iraq Special Tribunal, M. Cherif Bassiouni states that the basis for the judges' compensation should be fully articulated "to avoid the taint of preferential

⁹⁴ Prosecutor v. Aex Tamba Brima, et al., Motion on Abuse of Process, *supra* note 57, at para. 26. [Reproduced in accompanying notebook at Tab 26.]

⁹⁵ S.C. Res 1315, *supra* note 6. [Reproduced in accompanying notebook at Tab 19.]

ad hominem determinations, which violate the principles of a judiciary's independence.”⁹⁶ At the heart of his point is that the appearance of impropriety could undermine people’s faith in the independence of the system and the impartiality of the judges, resulting in an unfair trial. Alleging that a rule is amended as an *ad hominem* attack on a specific defendant implies that the judges adopting the amendment have some bias or that there is a specific outcome of the trial they desire. Therefore, it is necessary to ensure that the judges appointed to the Special Court are impartial in order to maintain the court’s integrity.

Article 13 of the SCSL Statute requires that the judges appointed to the Special Court be of “high moral character, impartiality and integrity who possess the qualifications required . . . for appointment to the highest judicial offices.”⁹⁷ Their independence was strengthened by two facts. First, as an international body, the Special Court is outside of Sierra Leone’s judicial system and is therefore unlikely to be influenced by the kinds of political pressures that domestic politics can place on the judiciary. Second, as an entity created by treaty between the U.N. and Sierra Leone, the Special Court is not a creation of the Security Council. Its hybrid nature, combining international and Sierra Leonean laws *and* jurists, is designed to build confidence within Sierra Leone, thus aiding in the “national reconciliation and restoration of peace.” The inclusion of judges from outside of Sierra Leone provides a majority that is unlikely to have any personal ties to the defendants or the victims of Sierra Leone’s civil war, and the Sierra Leonean judges provide a counter to any criticism that the Special Court is simply the tool of foreign powers.

2. Professionally Responsible Prosecutors

⁹⁶ M. Cherif Bassiouni, Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, 38 Cornell Int'l L.J. 327 (2005), at 371. [Reproduced in accompanying notebook at Tab 45.]

⁹⁷ SCSL Statute, *supra* note 12, at art. 13(1). [Reproduced in accompanying notebook at Tab 21.]

Like judges, the Prosecutor is to be of high moral character, possess the highest level of competence, and have extensive experience in criminal law.⁹⁸ Furthermore, the Rules enable the Special Court to exercise its power of contempt to punish “any person who knowingly and willfully interferes with its administration of justice.”⁹⁹

3. Officials Authorized to Propose Amendments

As discussed above, amendments to the Rules may be proposed by a Judge, the Prosecutor, the Registrar, the Principal Defender, the Sierra Leone Bar Association, or any person invited to do so by the President of the Special Court. While the judges are the only ones with the authority to approve amendments, the Rules do provide the Principal Defender a voice in how the Special Court’s procedures develop.

4. Judgments in Writing

A final important safeguard built into the SCSL Statute is that the Special Court’s judgment is required to have a reasoned opinion in writing.¹⁰⁰ This does two things to protect the defendant’s rights. It makes public the reasons why the court ruled the way it did, decreasing the likelihood that any judgment is made arbitrarily. It also provides a record for appeal, allowing a convicted defendant to challenge the legal reasoning of the Trial Chamber.

C. Challenges to Retroactive Amendments

Given the multiple layers of protections afforded by the SCSL Statute and the Rules, the Special Court’s own motivations for wanting to maintain the image of impartiality, and the capability of the Special Court to protect the rights of the accused even while applying an amended rule to a pending case, it is very unlikely that a defendant could successfully argue that

⁹⁸ *Id.* at art. 15.

⁹⁹ Rules, *supra* 16, at Rule 77(A). [Reproduced in accompanying notebook at Tab 18.]

¹⁰⁰ SCSL Statute, *supra* note 12, at art. 18. [Reproduced in accompanying notebook at Tab 21.]

an amendment was contrary to his rights because it was directed *ad hominem*. Since neither the SCSL Statute nor international law as it applies to the Special Court *per se* prohibit the retroactive application of a new rule, the defendant would have to show a violation of a fundamental right, such as the right to a fair trial or equal protection before the court. As discussed above, this would require the defendant prove the amendment was intended to discriminate against him. Finally, any violation of his rights, when balanced against the nature and severity of act being prosecuted, would have to be so egregious that continuing to prosecute the case would undermine the integrity of the Special Court.

V. CONCLUSION

A brief examination of the SCSL Rules of Procedure and Evidence makes it clear that, at least in the abstract, retroactive application of amended rules to currently pending cases could violate the rights of the accused. The important thing is to realize which rights are actually affected and whether there are ways of minimizing the likelihood of a violation, or the damage caused when one occurs. The two most important things to understand about the rights at stake in the application of a Rule 6(D) amendment are the right to a fair trial and the principle of *nullum crimen sine lege*. While the accused has a right to a fair trial, that does not automatically prohibit changing the Rules in the middle of a case. If the new rule can be applied in a way that balances the severity and nature of the crime charged against the harm that would be done by not applying the new rule, the Special Court is likely to allow the retroactive application so long as the violation of a defendant's rights is not so egregious that it threatens the integrity of the Special Court.

Threatening the integrity of the Special Court is a fairly difficult standard for a defendant to prove, and while it may be legally sound, such a standard could threaten the overall goals of

the Special Court. The appearance of unfairness may be as damaging to a lasting peace as actual bias. In order to prevent this from happening, the Special Court should ensure that decisions on when to retroactively apply an amended rule fully address: the purpose of the new rule and how applying it accomplishes that purpose; to what extent the element of surprise has been taken into account; and the effect the rule will have on the court's administration. By clearly articulating these considerations, the Special Court can help ensure that its decisions are not perceived as arbitrary and capricious, or even worse, as specifically aimed at persecuting one group of defendants.

The principle of *nullum crimen sine lege* prohibits punishing a person for acts that were criminalized only after they were committed. Rule 6(D) does not violate this principle. The acts for which the defendants have been charged are defined in the SCSL Statute, not the Rules, and the Special Court has no authority to amend the SCSL Statute. Furthermore, all of the crimes the Special Court was created to prosecute either were already well established crimes under treaty and customary international law or belong to that small included group of violations of Sierra Leone's laws, also well established during the period the SCSL Statute covers.

A claim that a person's human rights were violated based on an *ad hominem* argument is likely to fail because of the difficulty in proving the amendment was intended as a personal attack aimed at undermining that person's legal arguments and because of the multiple layers of protections built into the Special Court. The biggest difficulty would be in proving that the Special Court specifically intended the new rule to damage the defendant's case. A second difficulty is the lack of standards for what constitutes an *ad hominem* argument and how they should be applied to international law. The only way to make such an argument is by showing the *ad hominem* attack violated some other, clearly defined, right.

The purpose of the Special Court is much greater than just to try individuals for their criminal acts. What is at stake is a sustainable peace and national reconciliation following a decade-long civil war. In making its decisions, the Special Court is likely to be influenced by more than just legal considerations. Issues of policy will likely have an impact. The two guiding principles will remain the right to a fair trial, and the furtherance of peace and national reconciliation in Sierra Leone.