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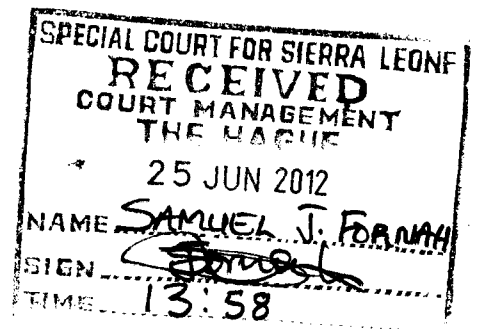
**SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR**

**TRIAL CHAMBER II**

Before: Justice Teresa Doherty  
Single Judge, Trial Chamber II

Registrar: Ms. Binta Mansaray

Date filed: 25 June 2012



**PROSECUTOR**

v.

**Eric SENESSIE**

Case No. SCSL-2011-01-T

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**PUBLIC**

***AMICUS CURIAE BRIEF***

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## I. INTRODUCTION

1. Pursuant to Rules 74 and 77(E) of the Rules of Procedure and Evidence (“Rules”), the Office of the Prosecutor (“OTP”) files this *amicus curiae* brief (“Brief”) in order to assist the Court in the expeditious, effective and just sentencing of Eric Senessie (“the Accused”), as well as assist to develop a more comprehensive jurisprudence on the issue on which the Special Court for Sierra Leone (“SCSL”) and the Residual Special Court for Sierra Leone (“RSCSL”) may draw in the future.
2. This Brief discusses applicable law and sentencing practices in contempt proceedings at the SCSL and other tribunals, focusing especially on Sub-Rule 77(A)(iv) violations since the convictions in the instant case fall under this provision.<sup>1</sup> As discussed in the Application to which this Brief was annexed, the OTP has a strong interest in this Court’s sentencing practice for contempt cases as it is inextricably linked to the continuing need to protect witnesses and to deter similar interference now and in the future.<sup>2</sup>

## II. APPLICABLE RULES

### Article 19

3. Article 19 of the SCSL Statute obliges the Judge or Chamber to take into account the gravity of an offence and the individual circumstances of a convicted person:
  1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of

<sup>1</sup> On 21 June 2012, the Single Judge found the Accused guilty of 8 of the 9 charges set forth in *Prosecutor v. Taylor*, SCSL-03-01-T-1249, Decision on the Report of the Independent Counsel, 24 May 2011, Annex A. Specifically, he was found guilty of contemptuous conduct under Sub-Rule 77(A)(iv) for knowingly and willfully interfering with the Special Court’s administration of justice by offering a bribe to a witness who had given evidence in proceedings before a Chamber as charged in Count 1 (Kabba), Count 3 (TF1-274), Count 6 (TF1-516), and Count 7 (TF1-585) and for otherwise knowingly and willfully interfering with a witness who had given testimony before a Chamber as charged in Count 2 (Kabba), Count 4 (TF1-274), Count 8 (TF1-585), and Count 9 (Gbonda). The conduct was found to be an attempt to persuade the witnesses to recant their testimony in the *Taylor* trial.

<sup>2</sup> Office of the Prosecutor Application for Leave to Make *Amicus Curiae* Submissions, SCSL-2011-01-T-015, 22 June 2012, paras. 9-12.

Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Sub-Rule 77(G)

4. Sub-Rule 77(G) establishes the maximum sentences which may be imposed by a Judge or Chamber depending upon whether the contempt was dealt with summarily under Sub-Rule 77(C)(i) or by way of the procedural guarantees set out in Sub-Rule 77(C)(iii):

The maximum penalty that may be imposed on a person found to be in contempt of the Special Court pursuant to Sub-Rule (C)(i) shall be a term of imprisonment not exceeding six months, or a fine not exceeding 2 million Leones, or both; and the maximum penalty pursuant to Sub-Rule (C)(iii) shall be a term of imprisonment for seven years or a fine not exceeding 2 million leones or both.<sup>3</sup>

Sub-Rule 77(E)

5. Sub-Rule 77(E) applies Parts IV to VIII of the Rules, including the sentencing guidelines set out in Rule 101, to Sub-Rule 77(C)(iii) proceedings. The Sub-Rule provides: "The rules of procedure and evidence in Parts IV to VIII shall apply, as appropriate, to proceedings under this Rule."

Rule 101

6. Rule 101 sets out those factors and considerations a Judge or Chamber shall consider in imposing a sentence:
  - (A) A person convicted by the Special Court, other than a juvenile offender, may be sentenced to imprisonment for a specific number of years.
  - (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 19(2) of the Statute, as well as such factors as:
    - (i) Any aggravating circumstances;

<sup>3</sup> On 31 May 2012, the 18<sup>th</sup> Plenary of Judges amended this rule, increasing the maximum fine for Sub-Rule (C)(iii) proceedings to 20 million Leones. However, as this amendment was not in effect at the time of the conduct at issue in the instant case, this penalty is not available for consideration here.

- (ii) Any mitigating circumstances including the **substantial** cooperation with the Prosecutor by the convicted person before or after conviction;
  - (iii) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute.
- (C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
  - (D) Any period during which the convicted person was detained in custody pending his transfer to the Special Court or pending trial or appeal, shall be taken into consideration on sentencing.<sup>4</sup>

### III. SUBMISSIONS

7. A Court must have the “ability to exercise jurisdiction to prosecute and punish serious violations of humanitarian law as prescribed by its mandate.”<sup>5</sup> The purpose of Rule 77 is to prevent the obstruction, prejudice or abuse of this ability, *i.e.* the administration of justice.<sup>6</sup> In sentencing for a violation of Rule 77, a Judge or Chamber is vested with broad discretion.<sup>7</sup> Nevertheless, in cases of contempt, it is particularly important that the sentence adequately serve the dual purposes of retribution and deterrence.<sup>8</sup>
8. Retribution ensures that conduct that is found to obstruct, prejudice, or abuse the

<sup>4</sup> Rule 101 (emphasis added).

<sup>5</sup> *In the Case Against Florence Hartmann*, IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009 (“**Hartmann Judgement**”), para. 80. *See also Prosecutor v. Šešelj*, IT-03-67-R77.3, Public Redacted Version of “Judgement” Issued on 31 October 2011, 31 October 2011 (“**Šešelj Second Contempt Judgement**”), para. 28; *In the Contempt Case of Milan Tupajić*, IT-95-5/18-R77.2, Public Redacted Version of “Judgement on Allegations of Contempt” issued on 24 February 2012, 24 February 2012 (“**Tupajić Judgement**”), para. 13; *Prosecutor v. Pećanac*, IT-05-88/2-R77.2, (Public Redacted) Judgement on Allegations of Contempt, 9 December 2011 (“**Pećanac Judgement**”), para. 16; *Prosecutor v. GAA*, ICTR-07-90-R77-1, Judgement and Sentence, 4 December 2007 (“**GAA Judgement**”), para. 10 (“maintaining the integrity of the administration of justice is particularly important in trials involving serious criminal offences”).

<sup>6</sup> *Independent Counsel v. Samura*, SCSL-2005-01-18, Judgment in Contempt Proceedings, 26 October 2005, para. 15; Tupajić Judgement, para. 31; *Contempt Proceedings Against Dragan Jokić*, IT-05-88-R77.1, Judgement on Allegations of Contempt, 27 March 2009 (“**Jokić Judgement**”), para. 38.

<sup>7</sup> *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Judgement (AC), 19 July 2011 (“**Hartmann Appeal Judgement**”), para. 167; Pećanac Judgement, paras. 39, 43; Tupajić Judgement, para. 32; *Prosecutor v. Nshogoza*, ICTR-2007-91-A, Judgement (AC), 15 March 2010 (“**Nshogoza Appeal Judgement**”), para. 94; *In the Case Against Vojislav Šešelj*, IT-03-67-R77.2-A, Judgement (AC), 19 May 2010 (“**Šešelj Appeal Judgement**”), para. 37; Jokić Judgement, para. 38.

<sup>8</sup> *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005 (“**Beqaj Judgement**”), para. 58; Tupajić Judgement, para. 31; *Prosecutor v. Kabashi*, IT-04-84-R77.1, Sentencing Judgement, 16 September 2011 (“**Kabashi Judgement**”), para. 11; *see also Prosecutor v. Nshogoza*, ICTR-07-91-T, Judgement (TC), 7 July 2009 (“**Nshogoza Judgement**”), para. 218.

administration of justice is punished<sup>9</sup> and that society's condemnation of the criminal act and of the person who committed it are expressed.<sup>10</sup> Deterrence, both special and general, ensures the protection of the interests of justice by preventing the wrongdoer and others from such action in the future.<sup>11</sup>

9. Pursuant to Article 19 and Rule 101, the Judge or Chamber is obliged to take into consideration the gravity of the offence, the individual circumstances of the contemnor, and other aggravating and mitigating circumstances in imposing an adequate sentence.<sup>12</sup> The Judge or Chamber, however, is not limited to considering these factors alone and is afforded great discretion in assigning weight to any given factor based on the facts of a particular case.<sup>13</sup> In fact, and illustrative of the amount of discretion a Judge or Chamber possesses, no sentence imposed for a Rule 77 offence has ever been modified by an Appeals Chamber of the SCSL or the two *ad hoc* Tribunals.<sup>14</sup>
10. Every case has a "multitude of variables."<sup>15</sup> Yet even when a comparable case under comparable rules is not available, the reasoning applied to other sentences may be of assistance, as noted in Article 19 of the Statute of the SCSL.<sup>16</sup> With this

<sup>9</sup> Tupajić Judgement, para. 31.

<sup>10</sup> Kabashi Judgement, para. 11 (To fulfill the objective of retribution, the Chamber must therefore impose a sentence which properly reflects the personal culpability of the wrongdoer. This purpose is reflected in the obligation that the Chamber has to take into account the gravity of the offences and the totality of the culpable conduct).

<sup>11</sup> Tupajić Judgement, para. 31; Šešelj Second Contempt Judgement, para. 77; Pećanac Judgement, para. 39; Kabashi Judgement, para. 11.

<sup>12</sup> *Independent Counsel v. Brima, et al.*, SCSL-05-02-32, Sentencing Judgement in Contempt Proceedings, 21 September 2005 ("**Brima Contempt Judgement**"), paras. 15-16.

<sup>13</sup> Pećanac Judgement, para. 39; Jokić Judgement, para. 38; *Contempt Proceedings Against Dragan Jokić*, IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25 June 2009 ("**Jokić Appeal Judgement**"), para. 40.

<sup>14</sup> The OTP acknowledges that Appeals Chambers have modified the payment schedule for fines, taking into consideration the failure of counsel to make adequate submissions. *See, e.g., Prosecutor v. Marijačić and Rebić*, IT-95-14-R77.2-A, Judgement (AC), 27 September 2006, para. 55; *Prosecutor v. Jović*, IT-95-14 & 14/2-R77-A, Judgement (AC), 15 March 2007, paras. 44-45. It has also overturned convictions for contempt of court. *See, e.g., Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgement (AC), 23 July 2009 ("**Haraqija Appeal Judgement**"), para. 69; *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para. 57. No Appeals Chamber, however, has modified the sentence itself.

<sup>15</sup> Šešelj Appeal Judgement, para. 41.

<sup>16</sup> Statute, Article 19(1) ("In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone"). *See also Prosecutor v. Tabaković*, IT-98-32/1-R77.1, Sentencing Judgement, 18 March 2010 ("**Tabaković Judgement**"), para. 15; *Prosecutor v. Margetić*, IT-

in mind, the OTP sets out below the suggested factors and considerations necessary to determine the severity of a penalty under Rule 77.

i - Gravity dictates the penalty to impose

11. In matters of contempt, Chambers have considered the gravity of the crime most determinative<sup>17</sup> in choosing what penalty to impose. The gravity of the crime should dictate both the type and severity of the penalty so that it adequately serves as retribution for the actions of the Accused and, in turn, has “a deterrent effect which serves to protect the interests of justice.”<sup>18</sup>

*Custodial Sentences*

12. An individual convicted for conduct under Sub-Rule 77(A)(iv) has been found to have knowingly and willfully threatened, intimidated, caused injury, offered a bribe to, or otherwise interfered with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness. Violations of this Sub-Rule “strike at the very heart of the criminal justice system”<sup>19</sup> and warrant “a significant term of imprisonment”,<sup>20</sup> particularly when the contemnor induces or seeks to induce recantation which could potentially lead to the acquittal

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95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007 (“**Margetić Judgement**”), paras. 92-93 (acknowledging the distinct circumstances of the individual case, the Chamber still found similar cases concerning disclosure violations and repeated interference with witnesses of assistance in imposing a sentence, particularly in relation to whether the most adequate penalty was a fine or a term of imprisonment); *In the Matter of Ljubiša Petković*, IT-03-67-R77.1, Redacted Version of Judgement Pronounced on 11 September 2008, 11 September 2008 (“**Petković Judgement**”), para. 77 (noting that no judgement and sentence had yet been delivered for failure to comply with a subpoena, but still finding other sentences and reasoning in Rule 77 cases relevant).

<sup>17</sup> Nshogoza Judgement, para. 216; Nshogoza Appeal Judgement, para. 98; Beqaj Judgement, para. 59; Hartmann Judgement, para. 75.

<sup>18</sup> Beqaj Judgement, para. 58. *See also* Nshogoza Appeal Judgement, para. 98 (“The gravity of a crime does not refer only to a crime’s objective gravity, but also to the particular circumstances surrounding the case and the form and degree of the accused’s participation in the crime”).

<sup>19</sup> *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 (“**Vujin Judgement**”), para. 167. The OTP notes that the Vujin sentence was one of two exceptions where a non-custodial sentence was imposed for witness interference. However, and as noted in para. 16 of this Brief, this was the first contempt case at the ICTY, it was brought under an early version of the rules that did not reflect the criminal nature of serious Rule 77 violations, and the Chamber “anxiously” considered a prison sentence.

<sup>20</sup> *Tabaković Judgement*, para. 12; *Prosecutor v. Rašić*, IT-98-32/1-R77.2, Written reasons for Oral Sentencing Judgement, 6 March 2012 (“**Rašić Judgement**”), para. 17.

of a guilty person.<sup>21</sup>

13. “[T]he seriousness of the offence is axiomatic from the [Court’s] significant reliance on testimonial evidence and its obligation in the Statute and Rules to put in place measures to protect witnesses and ensure the integrity of the proceedings.”<sup>22</sup> Thus, repeated interference and/or the number of witnesses targeted constitute contempt of a higher gravity.<sup>23</sup> In such circumstance, the OTP suggests that any Sub-Rule 77(A)(iv)<sup>24</sup> violation is therefore a particularly egregious Rule 77 violation warranting a custodial sentence.<sup>25</sup>
14. The sentencing practice in other cases has consistently punished Sub-Rule 77(A)(iv) violations with terms of imprisonment,<sup>26</sup> with two distinguishable exceptions discussed at paragraphs 16-17 below. Other Rule 77 contempt cases have also resulted in terms of imprisonment when the gravity of the conduct so

<sup>21</sup> GAA Judgement, paras. 10-11 (declaring, first, that one of the most serious forms of perjury is that which may lead to the acquittal of a guilty person, and second, that the contemnor who induces perjury is, as a general principle, more culpable than the perjurer).

<sup>22</sup> Haraqija Appeal Judgement, para. 75. See also, Beqaj Judgement, para. 60.

<sup>23</sup> Margetić Judgement, para. 86; *Prosecutor v. Jović*, IT-95-14 & IT-95-14/2-R77, Judgement (TC), 30 August 2006 (“**Jović Judgement**”), para. 26. The repeated nature of an offence and/or the number of witnesses may also be considered as an aggravating circumstance if it is not considered in assessing gravity. *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008 (“**Haraqija Judgement**”), para. 107; Petković Judgement, para. 65.

<sup>24</sup> Unlike Sub-Rule 77(A)(ii) violations which may be characterized by less culpable and/or reprehensible motives, effects, and/or risks. See, e.g., Hartmann Judgement, paras. 79, 83.

<sup>25</sup> Under the rules as amended following 17 December 1998, the international courts have consistently imposed terms of imprisonment for violations of Sub-Rule 77(A)(iv). See Rašić Judgement, para. 17 (where the Chamber held that the crimes she was guilty of, would “ordinarily result in a considerable term of imprisonment” due to the fact they were perpetrated before an international criminal jurisdiction and therefore have far-reaching consequences.); Haraqija Judgement, paras. 105, 111 (“Among the possible ways of interfering with the administration of justice, the intimidation of witnesses is particularly grave”); Beqaj Judgement, para. 60 (“the Rules exemplify the crucial importance of the truthful testimony of witnesses and their protection. Acts intended to prevent a witness from giving evidence or influence the evidence that he is to give amount to a serious interference with the due administration of justice”).

<sup>26</sup> **Bribery of witnesses:** Tabaković Judgement, para. 19 (3 months); Rašić Judgement, paras. 1, 36 (12 months. The last 8 months were suspended. This Judgement is currently under appeal); **other interference with witnesses:** Beqaj Judgement, p. 19 (4 months); Haraqija Judgement, paras. 120, 122 (Accused Morina was sentenced to 3 months; Haraqija was found to have induced Morina’s contemptuous conduct on and was sentenced to 5 months; however, Haraqija’s conviction was later overturned on appeal because the Trial Chamber erred in placing decisive weight on untested evidence, see Haraqija Appeal Judgement, para. 69); Margetić Judgement, paras. 1, 2, 50, 61-63, 72-76, 93-94 (journalist published confidential witness list from a prior case on his website and 3 articles about the witnesses. He was fined 10,000 Euros and sentenced to 3 months in prison for violating Rule 77(A), 77(A)(ii) and 77(A)(iv), which was found because his conduct undermined confidence in the tribunal and was likely to dissuade witnesses from cooperating).

warranted.<sup>27</sup>

15. The OTP suggests that imprisonment is not only *warranted* by the gravity of a Sub-Rule 77(A)(iv) offence, but it is also the only *adequate* penalty, as the SCSL maximum fine applicable in this case is inadequate for retributive or deterrent purposes.<sup>28</sup>

#### *Non-Custodial Penalties*

16. In contrast, non-custodial penalties have been imposed for Sub-Rule 77(A)(ii) disclosure violations when the contemnor's specific motive was something other than interfering with witnesses and/or the effect of the contempt was negligible.<sup>29</sup>

<sup>27</sup> Save for the two exceptions noted in paras. 16 and 17 of the Brief. Custodial sentences have been imposed in the following cases: **Disclosure in violation of court orders:** Nshogoza Judgement, para. 233 (10 months); Šešelj Appeal Judgement, para. 42 (15 months); Šešelj Second Contempt Judgement, para. 82 (18 months to be served concurrently with the 15 month sentence imposed in the Šešelj Appeal Judgement. Note that this Second Contempt Judgement is currently under appeal, the *Amicus Curiae* Prosecutor requesting the Appeals Chamber to vacate the sentence of 18 months and substitute a sentence of 3 years imprisonment to commence prospectively (*Prosecutor v. Šešelj*, IT-03-67-R77.3-A, *Amicus Curiae* Prosecutor's Appellant Brief on Sentence, 29 November 2011, para. 49). Also note that the judgement in the third contempt case against the Accused is scheduled to be delivered on 28 June 2012.); Margetić Judgement, para. 94 (3-month sentence in addition to 10,000 euro fine; the Chamber determined that his disclosure also amounted to an interference with witnesses due to its effect and the risk created (see paras. 68-76)); **refusal to testify:** Jokić Judgement, paras. 42-43 (4 months); *Prosecutor v. Milošević, Contempt Proceedings against Kosta Bulatović*, IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005, para. 19 (4 months); Kabashi Judgement, para. 18 (2 months); **false testimony and contempt:** GAA Judgement, p. 6 (9 months), and **failure to comply with a subpoena:** Petković Judgement, para. 80 (4 months); Pećanac Judgement, para. 46 (3 months); Tupajić Judgement, para. 36 (2 months). Rule 77(A)(iv) sentences are noted in fn. 26, *supra*.

<sup>28</sup> The OTP notes that Rule 77(G) was amended by the 18<sup>th</sup> Plenary of Judges on 31 May 2012, increasing the maximum fine for Sub-Rule (C)(iii) proceedings to 20 million Leones. However, this penalty is not retroactively applicable to the instant proceedings. Further, the amended change suggests that the plenary of judges agreed that the maximum penalty was indeed too low.

<sup>29</sup> Hartmann Judgement, paras. 2, 47, 79-80, 90 (The contemnor was fined 7,000 Euros after she published a book and an article that disclosed the contents and purported effect of two confidential Appeals Chamber decisions. The Chamber noted that the contemnor did not interfere with an ongoing investigation or disclose the names of protected witnesses, but it endorsed the view that breaches of confidentiality have a serious impact upon the work of the Tribunal.); Jović Judgement, paras. 1-2, 12, 26, 27 (A newspaper editor published confidential testimony of a protected witness. However, the witness was a well-known politician and had publicly acknowledged his identity as a witness (though not the content of his testimony) before the article was published. The Chamber noted that although the protected witness' self-revelation did not excuse the editor's contemptuous conduct, it did mitigate the gravity. The Chamber imposed a fine of 20,000 Euros, noting the Accused had published parts of the closed session transcripts in 22 editions of the newspaper despite being ordered to cease publication). *But see Prosecutor v. Marijačić and Rebić*, IT-95-14-R77.2, Judgement (TC), 10 March 2006 ("**Marijačić Judgement**"), paras. 1, 2, 40, 45, 48, 52 (The former head of the intelligence branch of the Croatian government provided the name of a protected witness to a journalist along with copies of a confidential prior statement and a transcript of testimony given in closed session. The journalist then published an article revealing the name of the protected witness and quoted "extensively" from the confidential documents. The Trial Chamber found the conduct of both



- There have also been two witness interference cases that resulted in non-custodial penalties, but these exceptions to the practice of punishing witness interference with imprisonment are distinguishable. The first exception occurred in the first contempt case ever tried at the ICTY, in which a former defence counsel for Tadić was found to have manipulated two witnesses and to have put forward a case to the Appeals Chamber which he knew to be false.<sup>30</sup> The Chamber imposed a Dfl 15,000 fine.<sup>31</sup> However, the rule in place at the time of this conduct was subsequently replaced<sup>32</sup> and the new rule is more comparable to SCSL Rule 77—thus the decisions reached under the updated rule are more relevant to the case at hand.
17. The second exception occurred at the Special Court in 2005 and involved the wives and a friend of the three Accused standing trial in the AFRC case.<sup>33</sup> After trial proceedings had concluded for the day, the four women saw a court vehicle with tinted windows passing by and, knowing it was transporting a witness, called out the first name of the protected witness who had been testifying that day and who was riding inside, also uttering words that threatened and intimidated her.<sup>34</sup> Although the contemptuous conduct was “very serious”, the Single Judge found that the contemnors were “very emotionally involved in the trial process”, lacked forethought in their actions, showed genuine remorse, and had assured the Court they would not commit such an act again in the future.<sup>35</sup> He imposed a one-year probationary period in which the contemnors had to respect all conditions imposed

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men to be contemptuous under Rule 77(A)(ii) but said their motive may well have been “to set straight what they perceived to be a misrepresentation by the Chief Prosecutor of the Tribunal of the failure of Croatia to co-operate with the Tribunal”. They were each fined 15,000 Euros.); Haxhiu Judgement, paras. 32, 34, 39 (The contemnor wrote and published a newspaper article which, though not the main subject of the article, disclosed the identity of a protected witness. The Trial Chamber imposed a 7,000 Euro fine.)

<sup>30</sup> Vujin Judgement, paras. 2, 160.

<sup>31</sup> Vujin Judgement, paras. 173-74.

<sup>32</sup> Vujin Judgement, paras. 22, 165. (The ICTY Rule 77 in place when Vujin committed contempt allowed a maximum penalty of Dfl 20,000 and/or 6 months imprisonment, but was updated in December 1998 and the maximum punishment was “substantially” increased.)

<sup>33</sup> Brima Contempt Judgement, para. 22.

<sup>34</sup> Brima Contempt Judgement, para. 23; *Prosecutor v. Brima et al.*, SCSL-04-16-T-237, Decision on the Report of the Independent Counsel pursuant to Rules 77(C)iii and 77(D) of the Rules of Procedure and Evidence, 29 April 2005, Annex B, para. 7. The women were charged with violating Rule 77(A)(iv) (*see* first para. (unnumbered)).

<sup>35</sup> Brima Contempt Judgement, paras. 29, 30, 34.

or face other punishment.<sup>36</sup> Clearly, the isolated incident, lack of forethought and remorse shown in that case are in stark contrast to the bulk of the Sub-Rule 77(A)(iv) cases where there is forethought, a lack of remorse, and repeated interference, all circumstances which support the imposition of a custodial sentence.

18. Pursuant to Sub-Rule 77(G), when proceedings are conducted under Sub-Rule 77(C)(iii) as in the instant case, the maximum fine that may be imposed is 2 million leones, or approximately 370 Euros or 460 US Dollars under current exchange rates. The question becomes whether such a fine, as an alternative to and not in addition to imprisonment, is sufficient to meet the dual goals of retribution and deterrence. In that regard, the lowest fine ever imposed at the ICTY was 7,000 euros,<sup>37</sup> almost 20 times the maximum fine for any contemptuous conduct under SCSL Rule 77.
19. Considering that the average yearly income in Sierra Leone is far below the 2 million Leone maximum fine, the OTP accepts that in some cases where the accused is of very limited means **and** where the offences of which the accused is convicted are less serious than protective measures violations and/or interference with witnesses, a 2 million Leone fine may be warranted and adequate. The latter circumstance is not present in this case.
20. A penalty, however, must not only be retributive for that particular individual, it must also deter future conduct both by that individual, *as well as on the part of all others*.<sup>38</sup> For violations of Sub-Rule 77(A)(iv), the OTP suggests that the 2 million leone fine will have little retributive or deterrent effect on a knowing and willful

<sup>36</sup> Brima Contempt Judgement, paras. 37-40.

<sup>37</sup> Under the ICTY Rules as amended after 17 December 1998, there have been six fines imposed for violations of Rule 77 ranging between 7,000 and 20,000 euros. Hartmann Judgement, para. 90 (7,000 euros); *Prosecutor v. Haxhiu*, IT-04-84-R77.5, Judgement on Allegations of Contempt, 24 July 2008 ("**Haxhiu Judgement**"), paras. 39-40 (7,000 euros); Jović Judgement, paras. 26-27 (20,000 euros); Margetić Judgement, para. 94 (10,000 euro fine in addition to 3 months imprisonment); Marijačić Judgement, para. 53 (15,000 euro fine imposed on each Accused). Moreover, the OTP notes that there was a fine imposed in the first contempt case before any of the international criminal courts pursuant to an ICTY Rule 77 version as amended before 17 December 1998. Even under those circumstances, the minimal fine was roughly equivalent to the minimal fine in euros ever imposed under the post-17 December 1998 versions. See Vujin Judgement, paras. 173-174 (fine of Dfl 15,000 and directed registrar to consider striking contemnor off the list of assigned counsel). The *Beqaj* Chamber estimated that the Dfl 15,000 fine was equivalent to about 7,000 euros, *Beqaj* Judgement, para. 66.

<sup>38</sup> Nshogozza Judgement, para. 216 (emphasis added).

contemnor whose income is significantly greater than the average yearly salary in Sierra Leone. In addition, for those individuals who engage in Sub-Rule 77(A)(iv) conduct, it is likely that they or their supporters could easily pay the maximum fine at its current level. The OTP suggests that these considerations weigh heavily against a fine as the only punishment in cases involving Sub-Rule 77(A)(iv) violations.

ii – Gravity also dictates sentence length

21. In the event that the Single Judge does decide that a prison sentence is the appropriate penalty in this case, she must then determine its length, considering first and foremost, the Prosecution suggests, the gravity of the crimes.<sup>39</sup> The distinction SCSL Sub-Rule 77(G) makes between the maximum prison sentence which may be imposed under Sub-Rules 77(C)(i) (six months) and 77(C)(iii) (seven years) indicates that, at the SCSL, the length of prison sentences imposed for contempt should reflect the extreme gravity of serious Rule 77 violations.<sup>40</sup> So long as the guarantees of due process and rights of the Accused are respected – as required in Sub-Rule 77(C)(iii) proceedings<sup>41</sup> – the corresponding penalty should reflect the extreme gravity of serious Rule 77 violations, including interference with witnesses (Sub-Rule 77(A)(iv)).
22. Other key considerations in assessing gravity include the position of the contemnor,<sup>42</sup> his/her motive,<sup>43</sup> and the continued and repeated nature of offences.<sup>44</sup> Insofar as these factors are not considered in the gravity assessment, they should be

<sup>39</sup> The gravest crimes necessarily require the gravest sentences in order to adequately fulfil the objectives of retribution and deterrence.

<sup>40</sup> Sub-Rule 77(C)(i) where the judge deals summarily with the matter, limits the possible custodial sentence to six months, while a judge in Sub-Rule 77(C)(iii) proceedings may impose a term of imprisonment of up to seven years.

<sup>41</sup> Sub-Rule 77(E) binds “proceedings” under Rule 77 to Parts IV to VIII of the Rules, but the only mention of “proceedings” under Rule 77 occurs in Sub-Rule 77(C)(iii). Therefore, only Sub-Rule 77(C)(iii) “proceedings” are bound by Parts IV to VIII of the Rules, which include Rules concerning the rights of the Accused and due process. These rights and guarantees are necessary in all criminal proceedings.

<sup>42</sup> Haraqija Judgement, para. 115.

<sup>43</sup> Margetić Judgement, paras. 86, 88.

<sup>44</sup> Nshogoza Judgement, para. 222; Petković Judgement, para. 65; Margetić Judgement, para. 86; Jović Judgement, para. 26.

considered as factors in aggravation.<sup>45</sup> Note, that as discussed at paragraph 16 regarding Sub-Rule 77(A)(ii) penalties, motive can also mitigate the gravity of the contemptuous conduct, as circumstances warrant.

23. Other considerations which may affect the length, and in turn, the adequacy of a term of imprisonment, include aggravating and mitigating circumstances, whether a global or individual sentence better suits the crimes, and whether multiple sentences should be served consecutively or concurrently.

*Aggravating and Mitigating Circumstances*

24. Individual circumstances of the contemnor should be considered, including both aggravating and mitigating factors.<sup>46</sup> Aggravating factors must be proven beyond a reasonable doubt; mitigating factors on a balance of probabilities.<sup>47</sup> However, the weight to be assigned to any given factor is in the discretion of the Judge or Chamber.<sup>48</sup>
25. Aggravating factors which justify a more severe penalty for Rule 77 violations include: the background and former position of a contemnor,<sup>49</sup> other reprehensible behaviour such as false claims for fees,<sup>50</sup> expected and/or actual financial gain from contemptuous conduct,<sup>51</sup> a particularly vulnerable witness,<sup>52</sup> lack of remorse and the indication of an intention to continue acting in contempt of Court,<sup>53</sup> and a contemnor's criminal record.<sup>54</sup> In the event that any of these or other factors are found, the imposed sentence should be increased accordingly.
26. Even when there are mitigating factors proven on a balance of probabilities, no Judge or Chamber has ever mitigated a penalty from a term of imprisonment to a fine. Such circumstances, however, are relevant in determining the length of an

<sup>45</sup> See, e.g., Haraqija Judgement, para. 107; Rašić Judgement, para. 18 (the persistent and repetitive nature of the criminal conduct was considered as an aggravating factor rather than one going towards gravity).

<sup>46</sup> Beqaj Judgement, para. 59; Haraqija Judgement, para. 104.

<sup>47</sup> Haraqija Judgement, para. 104; Beqaj Judgement, para. 63.

<sup>48</sup> Jokić Appeal Judgement, para. 40.

<sup>49</sup> Nshogoza Judgement, para. 223; Hartmann Judgement, para. 83; Rašić Judgement, para. 18.

<sup>50</sup> Nshogoza Judgement, para. 224.

<sup>51</sup> Hartmann Judgement, para. 83.

<sup>52</sup> Beqaj Judgement, para. 62.

<sup>53</sup> Šešelj Second Contempt Judgement, para. 79.

<sup>54</sup> Tabaković Judgement, para. 13.

individual sentence. Factors considered in mitigation when determining the severity of a penalty for Rule 77 violations include guilty pleas,<sup>55</sup> current and past cooperation with the Court,<sup>56</sup> remorse which the Judge or Chamber accepts as genuine,<sup>57</sup> good character,<sup>58</sup> lack of a prior record in any jurisdiction,<sup>59</sup> pressure from superiors and demonstrated reluctance to commit contempt of Court,<sup>60</sup> apologies to witnesses,<sup>61</sup> attempts to rectify one's own wrongdoing and/or mitigate the effects,<sup>62</sup> voluntary appearance,<sup>63</sup> demonstrated commitment to "international justice and success of the [Court],"<sup>64</sup> and good faith reliance on the advice of counsel.<sup>65</sup>

27. Family or personal circumstances, such as dependant spouse and children and/or the health of the contemnor have been given limited weight in consideration of a sentence.<sup>66</sup> Chambers have also declined to take career prospects<sup>67</sup> and the existence of additional motives for the Accused's behaviour into consideration.<sup>68</sup> Ill health should be considered in mitigation only in exceptional circumstances or rare cases.<sup>69</sup> Finally, mistake of law can never be a mitigating circumstance or valid

<sup>55</sup> GAA Judgement, para. 12; Tabaković Judgement, para. 12; Brima Contempt Judgement, paras. 32-33; Rašić Judgement, para. 20.

<sup>56</sup> Rašić Judgement, para. 26 (giving little weight to cooperation which cannot be considered "substantial"); GAA Judgement, para. 12; Tabaković Judgement, para. 12; Hartmann Judgement, para. 83; Haxhiu Judgement, para. 35; Nshogoza Judgement, para. 229.

<sup>57</sup> Rašić Judgement, para. 21 (unambiguous, extensive, sincere expressions of remorse have been considered in mitigation); Kabashi Judgement, para. 17 (the Chamber held that the Accused's remorse was reduced in its mitigating weight by the fact that he failed to appear to face his charges for more than four years); GAA Judgement, para. 12; Tabaković Judgement, para. 12.

<sup>58</sup> Haraqija Judgement, para. 109; Brima Contempt Judgement, para. 34; Hartmann Judgement, para. 85; Haxhiu Judgement, para. 35; Nshogoza Judgement, paras. 230-1; Jokić Judgement, para. 40. However, Chambers have refused to mitigate sentence on the basis of un-documented examples of the Accused's past conduct, Kabashi Judgement, para. 15.

<sup>59</sup> Haraqija Judgement, para. 109; Brima Contempt Judgement, para. 32; Hartmann Judgement, para. 83; Haxhiu Judgement, para. 35

<sup>60</sup> Haraqija Judgement, para. 110-1.

<sup>61</sup> Haraqija Judgement, para. 111.

<sup>62</sup> Tabaković Judgement, para. 12.

<sup>63</sup> Brima Contempt Judgement, para. 32; Rašić Judgement, para. 27.

<sup>64</sup> Hartmann Judgement, para. 84.

<sup>65</sup> Jović Judgement, para. 39

<sup>66</sup> Haxhiu Judgement, para. 35; Margetić Judgement, para. 89; Kabashi Judgement, para. 16; Tupajić Judgement, para. 34.

<sup>67</sup> Haraqija Judgement, para. 117.

<sup>68</sup> Kabashi Judgement, para. 13.

<sup>69</sup> Rašić Judgement, para. 30. The Chamber considered this in mitigation in *Kabashi* where the Accused suffered from Post-Traumatic Stress Disorder and an anxiety disorder which seemed to worsen in a

defence, otherwise, “orders would become suggestions and a Chamber’s authority to control its proceedings, from which the power to punish contempt in part derives, would be hobbled.”<sup>70</sup>

28. There is conflicting jurisprudence on whether age, when not health-related,<sup>71</sup> may be considered in mitigation. This depends on the individual circumstances of the case.<sup>72</sup>

#### *Global versus Individual Sentences*

29. A Judge or Chamber must also determine whether to impose a single “global” sentence or separate sentences for each count, and has a broad discretion in so choosing.<sup>73</sup> Separate sentences, however, make for a more transparent, articulate decision in keeping with the Accused’s rights and providing him with a clearer basis for appeal on sentencing should he choose to do so.<sup>74</sup> If the Court opts for separate sentences, it must then “indicate whether multiple sentences should be served consecutively or concurrently.”<sup>75</sup>

#### IV. CONCLUSION

30. The factors and considerations listed above indicate that a term of imprisonment has been the penalty most often deemed appropriate for violation of Sub-Rule 77(A)(iv). The OTP suggests that the length of that imprisonment must reflect the

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detention environment, *Kabashi Judgement*, para. 14. *See also* *Pećanac Judgement*, para. 42 (note that the information relating to the Accused’s health conditions was redacted).

<sup>70</sup> *Hartmann Judgement*, para. 65, citing *Jović Judgement*, para. 21. This was upheld on appeal, *see Hartmann Appeal Judgement*, para. 147.

<sup>71</sup> *See Haraqija Judgement*, para. 117, *contra Rašić Judgement*, para. 19.

<sup>72</sup> Note that, e.g. in *Rašić*, a number of other novel grounds were also considered in mitigation including the fact the Accused was not the original instigator of the broader criminal conduct, her job inexperience at the time of the crimes, the lack of personal benefit from the crimes, and her good behaviour in detention. *See Rašić Judgement*, paras. 19, 27.

<sup>73</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1251, Sentencing Judgement, 8 April 2009, para. 18.

<sup>74</sup> An option made available through Sub-Rule 77(J). This Court has in fact opted for separate sentences when it felt this would better reflect the culpability of the Accused for each conviction. *See Prosecutor v. Fofana & Kondewa*, SCSL-04-14-T-796, Sentencing Judgement, 9 October 2007, para. 97. Also, *see Margetić Judgement*, para. 94 (the Chamber imposed both a fine and term of imprisonment to reflect the Accused’s responsibility for violating protective measures (10,000 euro fine) and by way of this protective measures violation, interfering with a witness (3 months imprisonment)).

<sup>75</sup> *Prosecutor v. Fofana & Kondewa*, SCSL-04-14-A-829, Judgment (AC), 28 May 2008, paras. 546-47.

gravity of the interference and its criminal nature and also fulfill the retributive and deterrent objectives paramount in contempt sentencing. The OTP further suggests that for such serious violations, any fine should in most cases be in addition to an appropriate length of imprisonment, and not in lieu of such.

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For the Office of the Prosecutor,



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