

HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300
Email: hrwnyc@hrw.org

HUMAN
RIGHTS
WATCH

www.hrw.org

Kenneth Roth, *Executive Director*
Michele Alexander, *Development & Outreach Director*
Carroll Bogert, *Associate Director*
Peggy Hicks, *Global Advocacy Director*
Iain Levine, *Program Director*
Dinah PoKempner, *General Counsel*
James Ross, *Senior Legal Advisor*
Joe Saunders, *Deputy Program Director*
Wilder Tayler, *Legal and Policy Director*

PROGRAM DIRECTORS

Brad Adams, *Asia*
Holly Cartner, *Europe & Central Asia*
Peter Takirambudde, *Africa*
José Miguel Vivanco, *Americas*
Sarah Leah Whitson, *Middle East & North Africa*
Jamie Fellner, *United States*
Joseph Amon, *HIV/AIDS*
Peter Bouckaert, *Emergencies*
Bruni Burres, *International Film Festival*
Richard Dicker, *International Justice*
Bill Frelick, *Refugee Policy*
Arvind Ganesan, *Business & Human Rights*
Steve Goose, *Arms*
LaShawn R. Jefferson, *Women's Rights*
Scott Long, *Lesbian, Gay, Bisexual & Transgender Rights*
Joanne Mariner, *Terrorism & Counterterrorism*
Lois Whitman, *Children's Rights*

ADVOCACY DIRECTORS

Steve Crawshaw, *United Nations*
Mariette Grange, *Geneva*
Marianne Heuwagen, *Berlin*
Lotte Leicht, *European Union*
Tom Malinowski, *Washington DC*
Tom Porteous, *London*

BOARD OF DIRECTORS

Jane Olson, *Chair*
James F. Hoge, Jr., *Vice-Chair*
Sid Sheinberg, *Vice-Chair*
John J. Studzinski, *Vice-Chair*
Omar Amanat
Lloyd Axworthy
David M. Brown
Jorge Castañeda
Dorothy Cullman
Edith Everett
Jonathan F. Fanton, *Chair (1998-2003)*
Michael E. Gellert
Richard J. Goldstone
Vartan Gregorian
Wendy Keys
Robert Kissane
Bruce J. Klatsky
Joanne Leedom-Ackerman
Josh Mailman
Susan Manilow
Kati Marton
Linda Mason
Barry Meyer
Pat Mitchell
Joel Motley
Samuel K. Murumba
Catherine Powell
Sigrid Rausing
Victoria Riskin
Kevin P. Ryan
Domna Stanton
John R. Taylor
Shibley Telhami

Robert L. Bernstein, *Founding Chair, (1979-1997)*
Bruce Rabb, *Secretary*

November 17, 2006

To: Secretariat of the Rules and Procedure Committee
Extraordinary Chambers of the Courts of Cambodia

Human Rights Watch respectfully submits comments on three areas of the ECCC Draft Internal Rules. We hope that our views may assist in revising the rules in such a way that they will conform more closely to international fair trial standards. The three areas of concern we wish to address are:

- trials *in absentia*;
- the independence of the Defense Office and the Victims Unit; and
- the public nature of the proceedings.

I. Trials *in Absentia*

Proposed rule 79 (1) of the ECCC Draft Internal Rules states in brackets “The Accused may not be tried *in absentia*.” A footnote accompanying the text correctly states that this reflects international standards. However, it also indicates a dispute over this provision exists between the national law judges and the international law judges. As a translation of the national law judges’ separate paper has not been made available at the time of this writing, this note will simply state Human Rights Watch’s view on this issue. This is not meant to be a comprehensive analysis of the issues surrounding trials *in absentia*, but it does provide some background on the manner in which other legal systems treat the issue.

We believe that allowing trials *in absentia* would seriously undermine the work of the Extraordinary Chambers by casting doubt upon the credibility of the process itself. Trials *in absentia* compromise the ability of an accused to exercise his or her rights under article 14 of the International Covenant on Civil and Political Rights (ICCPR), a treaty which binds Cambodia. The potentially

compromised rights include the right to be present during the trial, the right to defend his or her self through counsel of choice, and the right to examine witnesses. Moreover, since the creation of the ad hoc court for the former Yugoslavia, *all* international and mixed tribunals have rejected trials *in absentia*, making it clear there is an increasing international acceptance of a standard prohibiting these sorts of proceedings.

A. International Criminal Tribunals

The various international tribunals set up to prosecute violations of international criminal law have all dealt with the issue of trials *in absentia*. One can observe in their practices a definite trend toward disallowing trials *in absentia*.

International Criminal Court (“ICC”)

The Rome Statute of the International Criminal Court, adopted on July 17, 1998, established international standards for the conduct of trials for international crimes such as genocide, war crimes, and crimes against humanity.

Article 63 of the Rome Statute for the ICC prohibits trials *in absentia* except in the narrow circumstances described below. It states:

- (1) The accused shall be present during the trial.
- (2) If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.¹

At the Rome Conference discussing the creation of the ICC, there were three competing perspectives on trials *in absentia*.² Some delegations believed *in absentia* hearings should be impermissible in all cases, except where the accused disrupted the trial. These delegations believed that trials *in absentia* would degenerate into show trials and would quickly discredit the ICC. A second group believed trials *in absentia* were of little practical value because the accused would have the right to a new trial upon appearance before the court. A third group believed that due to the nature of the crimes in the statute, it would often be impossible to compel the appearance of the accused. Thus, for the court to promote

¹ Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002., art. 63.

² Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, (Baden-Baden: Nomos Verlagsgesellschaft, 1999), p. 806.

peace, justice, and reconciliation, it would be necessary to hold trials in the absence of the defendants. The first view prevailed.³

Ad Hoc International Tribunals and the Sierra Leone Special Court

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the Sierra Leone Special Court all ban trials *in absentia*.

Article 20 of the ICTR Statute provides that the accused has the right, “to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing.”⁴ Similarly, article 21 of the ICTY Statute ICTY provides that the accused has the right “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”⁵

The use of trials *in absentia* was a contested issue during the drafting of the ICTY Statute, upon which the ICTR Statute is also based, as a compromise was sought between the different ways civil law, common law, and international jurisdictions deal with trials *in absentia*. The drafters of the statute for the ICTY specifically rejected the French recommendation to allow proceedings *in absentia* with an automatic retrial when the accused is arrested.⁶

The United Nations Secretary General’s Report on the establishment of the ICTY and its statute stated:

A trial should not commence until the accused is physically present before the international tribunal. There is a widespread perception the trials *in absentia* should not be provided for in the statute [of the International Criminal Court for the former Yugoslavia] as this would not be consistent with Article 14 of the International Covenant of Civil and Political Rights, which provides that the accused should be tried in his presence.⁷

Further, in *Prosecutor v. Delalic*, the defendant was not present one morning for unknown reasons and also had not explicitly waived through his counsel his right to

³ Ibid.

⁴ Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), S.C. Res. 955, U.N. Doc. S/RES/955 (1994), as amended, <http://69.94.11.53/ENGLISH/basicdocs/statute.html>, art. 20(4)(d).

⁵ Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), S.C. Res. 827, U.N. Doc. S/RES/827 (1993), as amended, <http://www.un.org/icty/legaldoc-e/index.htm>, art. 21 (4)(d).

⁶ Anne L. Quintal, *Rule 61: The ‘Voice of the Victims’ Screams Out for Justice*, 36 Colum. J. Transnat’l L. 723, 743 (1998).

⁷ Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, May 3, 1993, and Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993): Corrigendum, UN Doc. S/25704/Corr.1, July 30, 1993, Part V.A., para. 101.

be present. In that case, there were multiple defendants, and the Office of the Prosecutor proposed tendering documents as a group and allowing the defense to object later. Rejecting that idea, the court adjourned finding that the right to be present at trial is virtually absolute in the absence of a clear waiver.⁸

It is also notable that two of the most notorious accused whose alleged crimes would be in the jurisdiction of the ICTY, Radovan Karadzic and Ratko Mladic, are not in custody of the tribunal.⁹ Instead of proceeding with trials *in absentia*, the court has delayed their trials with the hope that they will be brought into custody.

Article 17(4)(d) of the Statute of the Special Court for Sierra Leone also provides that the accused shall have the right “to be tried in his or her presence . . .”¹⁰ Rule 60 of the Special Court’s Rules of Procedure and Evidence further states that “an accused may not be tried in his absence, unless: (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.”¹¹ This is consistent with the trend in international courts disfavoring trials *in absentia*.

B. Interim Administrations

In East Timor, the transitional courts operate under rules requiring the accused to be present at trial. Article 30 of the Transitional Rules of Criminal Procedure provides that the accused must be present during the trial. Article 5(1) states that “[n]o trial of a person shall be held *in absentia*, except in the circumstances defined in the present regulation.” Article 5(2) provides that, if at any stage following the preliminary hearing the accused “flees or is otherwise voluntarily absent, the proceedings may continue until their conclusion.” Article 48(2) provides that court may order the removal of the accused from the courtroom and continue the proceedings in their absence if they persist in disruptive conduct.¹²

Similarly, the interim administration in Kosovo passed a regulation in January 2001 prohibiting trials *in absentia* for serious violations of humanitarian law on the basis of the “egregious nature of violations of international humanitarian law and the particular need to ensure the proper administration of justice in cases where such

⁸ *Prosecutor v. Delalic*, International Criminal Tribunal for the former Yugoslavia (ICTY), Case No. IT-96-21, Transcript, November 4, 1997, T. 8967-8976.

⁹ Human Rights Watch, *The Legacy of Srebrenica*, Nov. 7, 2005, <http://hrw.org/english/docs/2005/07/11/serbia11364.htm>.

¹⁰ Statute of the Special Court for Sierra Leone (SCSL Statute), January 16, 2002, <http://www.sc-sl.org/scsl-statute.html>, art. 17(4)(d).

¹¹ Rules of Procedure and Evidence of the Special Court for Sierra Leone (SCSL RPE), March 7, 2003, <http://www.sc-sl.org/scsl-procedure.html>, rule 60(A).

¹² Regulation No. 2000/15 On the Establishment of Panels With Exclusive Jurisdiction Over Serious Criminal Offences, United Nations Transitional Administration in East Timor (UNTAET), U.N. Doc. UNTAET/REG/2000/15, June 6, 2000, <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>, arts. 5, 30, 48(2).

crimes have been committed” and the “rights of the accused, and in particular, the right to a fair hearing.” Article 1 states: “No person may be tried *in absentia* for serious violations of international humanitarian law, as defined in Chapter XVI of the applicable Yugoslav Criminal Code or in the [ICC Statute].”¹³

C. International Law Generally

The trend in international law is to recognize the importance of a defendant’s right to be physically present and to participate in his or her trial. Trials *in absentia* are provided for only in exceptional circumstances or where there has been an explicit, unequivocal waiver of one’s right to be present.

Article 14(3)(d) of the International Covenant on Civil and Political Rights states that everyone shall be entitled “[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”¹⁴ The Human Rights Committee further explained this provision in General Comment No. 13, which states “[t]he accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defense is all the more necessary.”¹⁵ However, it does not define “justified reasons” for holding trials *in absentia*.

Article 6(3) of the European Convention on Human Rights and Fundamental Freedoms specifies that everyone charged with a criminal offense has the right “to defend himself in person or through legal assistance of his own choosing...”¹⁶ The European Court of Human Rights interpreted article 6 of the European Convention on Human Rights and Fundamental Freedoms in *Colozza v. Italy*. It stated, “Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to ‘everyone charged with a criminal offence’ the right ‘to defend himself in person,’ ‘to examine or have examined witnesses’ and ‘to have the free assistance of an interpreter if he cannot understand or speak the language used

¹³ United Nations Interim Administration in Kosovo (UNMIK), Regulation no. 2001/1 On the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law, January 12, 2001, <http://www.unmikonline.org/regulations/2001/reg01-01.html> (accessed November 16, 2006).

¹⁴ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 14(3)(d).

¹⁵ UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994), para. 11 (1994) (on equality before the courts and the right to a fair and public hearing by an independent court established by law).

¹⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, art.6(3).

in court,' and it is difficult to see how he could exercise these rights without being present."¹⁷ Any waiver of the right to be present must be clear and unequivocal.¹⁸

D. Civil Law

Trials *in absentia* may be allowed in civil jurisdictions provided that the defendant's rights are sufficiently protected and there is a right to automatic retrial when a defendant surrenders or is arrested.¹⁹ However, some civil jurisdictions such as Germany do not permit trials *in absentia* where the accused is charged with serious crimes.²⁰ Russia has banned trials *in absentia*. On 1 July 2002, a new Code of Criminal Procedure came into effect which—in contrast to previous law and practice—forbids any type of trial *in absentia*. According to Dmitri N. Kozak, President Putin's Deputy Chief of Staff, the code is intended to give Russia "a criminal procedure that corresponds to that of world standards and of civilized countries."²¹

Although the French Code of Criminal Procedure allows trials *in absentia*, the French government in its submissions on the question of trials *in absentia* to the European Court of Human Rights in *Krombach v. France* emphasized that "the accused's attendance at his or her trial was essential, both in the accused's interest and in the interest of the victims..."²² The French government went on to describe the important role of the accused at trial:

The accused was called upon to present his or her version of the events and to reply to the questions of the judges, the jurors, and the public prosecutor. He or she could, among other things, challenge the conclusions of the expert witnesses and the depositions of the ordinary witnesses, call witnesses for the defense and request a confrontation with the victims. Lastly, in the event of a finding of guilt, the accused's presence enabled the judges to tailor the penalty to his or her personal circumstances. In the [French] Government's submission, there could be no question of the court trying a faceless defendant whom it had had no opportunity of observing or hearing, as justice could not be done solely on the basis of the submissions of a lawyer...²³

¹⁷ ECHR, *Colozza v. Italy*, (1985) 7 E.H.R.R. 516, para. 27.

¹⁸ ECHR, *Poitrimol v. France*, (1993) 18 E.H.R.R. 130, para. 31.

¹⁹ *Colozza v. Italy*, para. 29.

²⁰ German Code of Criminal Procedure, §§ 230(1), 232.

²¹ Steven Lee Myers, "Russia Glances to the West for its New Legal Code," *New York Times*, July 1, 2002.

²² ECHR, *Krombach v. France*, App. No. 29731/96 [2001], para. 73.

²³ *Ibid.*

In *Krombach*, the European Court of Human Rights confirmed the line of cases holding that proceedings that take place in the accused's absence are not of themselves incompatible with the right to be present at trial in the Convention for the Protection of Human Rights and Fundamental Freedoms *if the accused may subsequently obtain a fresh determination of the charges* (emphasis added). It held the "capital importance that a defendant should appear" applies to both criminal courts and assize courts.²⁴ The court also confirmed that a person charged with a criminal offence does not lose the right to be effectively defended by a lawyer on account of not being present at trial.²⁵

Thus, if a trial *in absentia* is to take place, certain safeguards must be provided which are not contained in the ECCC Draft Internal Rules and which the ECCC, with its temporal restrictions, may not be able to provide. The European Court of Human Rights has found that for a trial *in absentia* to be consistent the defendant's right to be present at trial, the following conditions must be met. First, a defendant must have notification of his or her impending trial.²⁶ Second, a defendant has to unequivocally and explicitly waive his or her right to be present at trial.²⁷ Silence from the defendant after notice has been attempted does not constitute a waiver.²⁸ Third, a defendant must have the right to representation.²⁹ Finally as mentioned above, the defendant must be able to subsequently obtain from a court which has heard him a fresh determination of the merits of the charge.³⁰ Not only are these provisions not in the rules, on the contrary, footnote 137 at Draft Internal Rules 79 (1) indicates that the temporal context of the ECCC means "there is little prospect for retrial once the person is arrested."³¹ In these circumstances, where safeguards cannot be guaranteed to a defendant and where retrial before the ECCC may not be possible because the ECCC may be closed by the time the person convicted *in absentia* is in custody, it is all the more important to explicitly prohibit trials *in absentia*.

E. Common Law

Trials *in absentia* are generally not allowed in common law jurisdictions. For example, the United States Supreme Court has found that when a defendant is absent from the commencement of the trial, he or she cannot be tried *in absentia* because an

²⁴ *Ibid.*, paras. 85 and 86.

²⁵ *Ibid.*, para. 89.

²⁶ *Colozza v. Italy*, paras. 18, 19, 28; ECHR, *Lala v. The Netherlands*, (1994) 18 E.H.R.R. 586, para. 14.

²⁷ *Poitrimol v. France*, para. 31.

²⁸ *Colozza v. Italy*, para. 28.

²⁹ ECHR, *Pelladoah v. The Netherlands* (1995) 19 E.H.R.R. 81, para. 23.

³⁰ *Krombach v. France*, para. 85.

³¹ ECCC Draft Internal Rules, fn 137

accused has a right to be present at every stage in a proceeding.³² Exceptions to this rule are limited to a situation in which a defendant flees or disappears in the midst of a trial which can constitute a waiver of the defendant's right to be present.³³ A defendant also waives his or her right to be present where a defendant is warned, but his or her continued disruptive conduct requires his or her removal from the courtroom.³⁴

The right to be present at one's trial is a fundamental guarantee and can only be derogated from in certain limited circumstances. We believe the process by which alleged perpetrators of serious crimes are brought to justice will have a real impact on ending impunity for these crimes. If the process is viewed as unfair, this perception will create an additional obstacle to a society transitioning to one characterized by the rule of law and respect for human rights.

II. Independence of the Defense Office and Victims Office

Proposed rules 12(3) and 13(3) present alternative propositions for the registration of foreign attorneys who may appear as counsel for the defense or for victims. The first proposition is "Lawyers admitted to practice law in a foreign country shall register with the Bar Association of the Kingdom of Cambodia in a special list which recognizes the right to represent clients before the ECCC as co-lawyers." The second alternative is for the Defense Unit or the Victims Unit to create and maintain a list of lawyers approved to appear before the ECCC and other professionals approved to be members of their teams. Human Rights Watch strongly favors allowing the Defense Office or Victims Unit to control the list of approved lawyers rather than involving the Bar Association. Our experience with other courts comprised of both national and international staff indicates that allowing the defense office and the victims office to control who is on the list of approved lawyers ensures independence and increases the likelihood that the lists will contain qualified lawyers. It also guards against the possibility that registration will be manipulated for political reasons by outside parties.

A. Selection of Foreign Counsel in Other Tribunals

The Special Court for Sierra Leone

At the Special Court for Sierra Leone, rule 44 on Appointment and Qualifications of Counsel of the Rules of Procedure and Evidence states:

(A) Counsel engaged by a suspect or an accused shall file his power of attorney with the Registrar at the earliest opportunity. Subject to

³² *Crosby v. U.S.*, 506 U.S. 255, 262 (1993).

³³ *Ibid.*

³⁴ United States Federal Rules of Criminal Procedure, rule 43(c).

verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he has been admitted to the practice of law in a State and practiced criminal law for a minimum of five years.

There is no requirement that defense counsel register with the Bar Association of Sierra Leone.

The Special Court for Sierra Leone was the first court Human Rights Watch examined in which it was contemplated that national and international lawyers would work together representing defendants. In our report on the court, we noted that the experience of the ad hoc tribunals demonstrated that investigating, prosecuting, and defending cases involving serious crimes present significant challenges due to the complex issues involved, the evolving nature of international criminal law and trial practice, the need for appropriate treatment of witnesses and victims, and the emotionally charged nature of the proceedings. Because some members of the defense team may not have any previous experience in international criminal law, we found that training for defense counsel and investigators was vital to ensuring quality representation. In our report we recommended that the Defense Office hold mandatory trainings regularly for defense counsel on issues including substantive international law and treatment of witnesses and victims.³⁵ Similarly, allowing the ECCC Defense Unit - and the Victims Unit - to control the list of qualified lawyers ensures that they can mandate training when necessary which will improve the quality of representation.

War Crimes Chamber in Bosnia and Herzegovina

The War Crimes Chamber, which was established in early 2005, provides an excellent example of the function of a defense counsel office. In this hybrid court, the Criminal Defense Support Section acts as the licensing authority for those attorneys who wish to appear before the State Court's War Crimes Chamber by maintaining a list of those eligible to appear as defense counsel and outlining the criteria that defense counsel must meet in order to be included on the list. As at the ECCC, the Criminal Defense Unit in Bosnia is charged with the responsibility of providing training courses for advocates seeking to fulfill the criteria for inclusion on the list and continuing their professional training. Allowing the defense office this degree of control over the quality of defense counsel promotes effective representation of defendants in war crimes cases.³⁶ No requirement for registration with the local bar association exists.

³⁵ Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone*, vol. 16, no. 8(A), September 2004, <http://hrw.org/reports/2004/sierraleone0904/>, pp. 27-28.

³⁶ See Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, vol. 18, no. 1(D), February 2006, <http://hrw.org/reports/2006/ijo206/>, p. 23.

Iraqi High Tribunal

In contrast, the Iraqi High Tribunal, established to prosecute violations of international humanitarian law under the Ba'ath party government, had the potential to allow outside interference with accreditation of counsel. Although article 19(4)(d) of the Iraqi High Tribunal Statute permits an accused to hire a non-Iraqi lawyer provided the principal lawyer is Iraqi, the pre-existing Iraqi Law of the Legal Profession required non-Arab lawyers seeking to appear before an Iraqi court to obtain approval from the Ministry of Justice.³⁷ Arab non-Iraqi lawyers were required to obtain approval from the Iraqi Bar Association by demonstrating they were in good standing with their national legal profession.³⁸ Allowing outsiders control over which foreign lawyers were permitted to appear meant that political influences could come into play at the court. Indeed the Minister of Justice at one point repeatedly stated he would refuse to approve non-Arab foreign lawyers who sought to appear in the trial.³⁹ The lack of clarity in the rules about granting permission for lawyers to appear before the Tribunal resulted in the court being arbitrary about whether it allowed foreign lawyers to make appearances in court, flip-flopping from one position to the other. Furthermore, the confusion resulted in delays in the appointment of defense counsel.

The negative experience at the Iraqi High Tribunal, in contrast to the positive experience at the Bosnian War Crimes Chamber, demonstrates the importance of allowing the Defense Office or the Victims Unit to retain control over the accreditation of lawyers appearing before the ECCC. It not only shields the court from possible outside manipulation, it will lead to higher quality defense and victims' counsel since safeguards will be in place to ensure that accredited lawyers are adequately trained and qualified. Ceding that role to outside parties, who may have different agendas, has potentially disastrous implications.

III. Public Hearings

The ECCC draft internal rules should include more unambiguous language favoring public hearings, particularly in the pre-trial phase.

The right to a public trial is a fundamental safeguard of criminal procedure well-established in international human rights law. The Universal Declaration of Human Rights' article 11 unequivocally states that “[e]veryone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”⁴⁰

³⁷ Law of the Iraqi High Tribunal (IHT Statute), Official Gazette of the Republic of Iraq, Number 4006, October 18, 2005, English translation by the International Center for Transitional Justice, <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>, art. 19.4(B); Iraq Law of the Legal Profession, Law No. 173 of 1965, arts. 3A and 3B.

³⁸ Iraq Law of the Legal Profession, Law No. 173 of 1965, arts. 3A and 3B.

³⁹ Iraqi Press Summaries, November 2005- March 2006, on file with Human Rights Watch.

⁴⁰ See also ICCPR, art. 14(1); European Convention for the Protection of Human Rights, art. 6(1), American Convention on Human Rights (“Pact of San José, Costa Rica”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123,

As the European Court of Human Rights held: “This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.”⁴¹ The public nature of the trial therefore is intended to protect the interests of the accused. However, it is also in the interest of judicial authorities to work in this manner so that they will retain popular confidence. The value of a public trial has been summarized as being to “ensure fairness to the defendant, maintain public confidence in the criminal justice system, provide an outlet for community reaction to crime, ensure that judges and prosecutors fulfill their duties responsibly, encourage witnesses to come forward, and discourage perjury.”⁴²

The importance of a public trial is even more pronounced in the context of ad hoc tribunals that seek to address extraordinary violations of human rights. ICTY Appeals Chamber Judge Florence Mumba asserts that even though article 14 of the ICCPR allows for exceptions to the right of the accused to a public trial, public hearings have proven to be an important element of a legitimate judicial system. She finds that public hearings “serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on “framed” trials, and giving the public a chance to suggest changes to the law or justice system.”⁴³ As with other international and hybrid criminal tribunals where widespread public acceptance of the legitimacy of the verdicts is crucial, the ECCC’s over-reliance on closed sessions may do long-term damage to the court’s broader goals.⁴⁴ The procedural rules of other courts trying the same types of crimes, the ICTY, ICTR and the Special Court for Sierra Leone, express a clear preference for the public nature of hearings⁴⁵ and pronouncement of judgment, unlike the ECCC Draft Internal Rules.⁴⁶

entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), art. 8(5).

⁴¹ ECHR, *Werner v. Austria*, November 24, 1997, para. 45.

⁴² Georgetown Thirty-Fifth Annual Review of Criminal Procedure, *Sixth Amendment at Trial*, 35 Geo. L.J. Ann. Rev. Crim. Proc. 608, 609 (2006).

⁴³ Florence Mumba, Ensuring a Fair Trial Whilst Protecting Victims and Witnesses--Balancing of Interests, in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Richard May et al. eds., 2001), pp. 359, 365.

⁴⁴ Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes*, 31 Yale J. Int’l L. 477, 495 (2006) (stating, “Milosevic in particular became adept at manipulating perceptions of unfairness when the Tribunal held in camera sessions. As the Trial Chamber prepared to go into closed session to hear the testimony of a protected witness verifying various intercepts, Milosevic interrupted to attack the Tribunal while his words would still appear on record: Milosevic: Well, I would like to say while we’re still in public session that I categorically oppose this kind of practice, hearing some kind of secret witnesses.”).

⁴⁵ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY RPE), IT/32/Rev. 38, June 13, 2006, rule 78; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR RPE), June 7, 2005, rule 78; SCSL RPE, rule 78.

⁴⁶ ICTY RPE, rule 98 *ter*(A); ICTR RPE, rule 88(A); SCSL RPE, rule 88(A).

Given the value of public hearings, parts of the ECCC Draft Internal Rules should be reconsidered in order to ensure greater transparency to the public. First, even though rules 83 and 108 provide a presumption of public hearings during the trial and appeal proceedings except where public order and victim protection might be prejudiced, there is no such presumption during the entire Pre-Trial phase. Rule 77 explicitly states that all pre-trial appeal and petition hearings shall occur *in camera*, while rule 18 states that hearings on disagreements between co-investigating judges will also be *in camera*, unless the disagreement related to a decision against which a party to the proceedings would have the right to appeal to the Pre-Trial Chamber under the rules. In the latter situation, the chamber could still reject the request, but no reasons are specified for why the chamber could be allowed to deny a public hearing. At a minimum, rule 18 should give specific instances of when the chamber might be able to deny a public hearing where the decision affects a party to the proceeding.

In other rules the ECCC does not explicitly deny public hearings, but is unclear as to whether they would be allowed. For example, rule 7 on the recusal and disqualification of judges and rule 66 on the provisional detention of the accused are unclear as to whether they are open hearings. In both instances, the ECCC should consider unambiguously providing for a public hearing as these are issues that are of material interest to the public and affect the integrity of the process.

The reforms adopted by the French Parliament, Loi of 15 June 2000, exemplify the growing appreciation of the importance of the right of the accused to a fair and equitable criminal process within civil law systems. Influenced by the jurisprudence of the European Court of Human Rights, “notions of equality of arms and of open debate are increasingly cited as guarantees of fairness and incorporated into the various stages of criminal procedure” within the French legal system.⁴⁷ A key example is the introduction of public hearings before the *chambre d’instruction* at the request of the accused, unless this threatens the security of the instruction or a third party.⁴⁸ As a legal system that is modeled after the French one, the ECCC’s rules should be revised to incorporate these acknowledgements of the centrality of public hearings to effective and legitimate criminal justice.

Human Rights Watch believes the ECCC should revise the aforementioned rules and provide a presumption that hearings are public during the pre-trial phase, in the same way as it does for the trial and appeal phases. In a civil law system where many key decisions are decided during the pre-trial phase it is particularly important

⁴⁷ Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process*, 51 Int'l & Comp. L.Q. 781, 785 (2002).

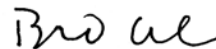
⁴⁸ *Ibid.* In *Reinhardt and Slimane-Ka d v. France* and in *Kress v. France* the European Court of Human Rights held that certain aspects of appellate procedure before the Court of Cassation and the Council of State did not afford litigants the right to a “fair and public hearing” as guaranteed by Article 6(1) of the European Convention. Martin A. Rogoff, *Application of treaties and the decisions of international tribunals in the United States and France*, Maine Law Review 2006 Symposium, 58 Me. L. Rev. 406, 458 (2006).

that the proceedings be accessible and transparent to the public wherever possible. The exclusion of the public should be strictly limited to the extent necessary to protect the interests of victims and justice. The ICTY has supported this, explicitly stating that the determination of how the balance is struck should be made on a case-by-case or individual basis for each witness, thus implying that “blanket” bans on non-public hearings are impermissible.⁴⁹

We hope that our comments prove helpful with your deliberations.



Richard Dicker
Director
International Justice Program



Brad Adams
Director
Asia Division

⁴⁹ See *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness R, July 31, 1996. On page 4 of this decision, the Tribunal stated: “How the balance is struck will depend on the facts in each case.”