



**Justice for Liberia**  
**The Truth and Reconciliation Commission’s Recommendation for an**  
**Internationalized Domestic War Crimes Court**  
*December 2009*

|   |           |
|---|-----------|
| <b>I. Introduction .....</b>  | <b>1</b>  |
| <b>II. Summary of TRC Proposal for an Internationalized Domestic Criminal Court.....</b>              | <b>2</b>  |
| <b>III. TRC Recommendations Regarding Selection of Persons to be Prosecuted .....</b>                 | <b>3</b>  |
| <b>IV. Composition of the Court .....</b>   | <b>5</b>  |
| A. Composition of chambers and trial experience .....   | 5         |
| B. Appointment procedures for judges and the prosecutor and exclusions from serving at the court..... | 7         |
| <b>V. Definitions of Crimes and Modes of Liability .....</b>  | <b>8</b>  |
| A. War crimes and other serious violations of international humanitarian law.....                     | 8         |
| B. Domestic crimes.....   | 9         |
| C. The death penalty.....   | 10        |
| D. Modes of individual criminal liability.....  | 10        |
| <b>VI. Fair Trial Standards .....</b>   | <b>11</b> |
| A. Key fair trial protections absent from TRC proposal.....   | 11        |
| B. Presumption of innocence.....  | 12        |
| C. Right to counsel.....  | 12        |
| D. Trials in absentia.....  | 13        |
| <b>VII. Witness Protection and Support.....</b>   | <b>13</b> |
| <b>VIII. Communications and Outreach .....</b>  | <b>14</b> |

## I. Introduction

On December 1, 2009, Liberia's Truth and Reconciliation Commission (TRC) issued its final report detailing its findings on the causes and impact of that country's social turmoil between 1979 and 2003. The TRC's report represents a major undertaking on the part of the commission to expose the abuses committed against civilians during Liberia's two devastating armed conflicts, which lasted from 1989 to 1996 and 1999 to 2003.

One of the key recommendations included in the final report is the establishment of an internationalized domestic criminal court to ensure justice for the worst crimes committed. Human Rights Watch fully supports the use of a hybrid international-national accountability mechanism to hold perpetrators of past crimes in Liberia to account. Prosecutions for serious crimes in violation of international law—including war crimes and crimes against humanity—are crucial to ensuring redress for the countless victims of Liberia's brutal armed conflicts. Liberian citizens were subjected to horrific abuses, including summary execution and numerous large-scale massacres, widespread and systematic rape and other forms of sexual violence, mutilation and torture, and large-scale forced conscription and use of child combatants. The violence blighted the lives of tens of thousands of civilians, displaced almost half the population, and virtually destroyed the country's infrastructure. Prosecutions are vital to building respect for the rule of law, especially in a society like Liberia that has been devastated by conflict, thus making justice an important component to establishing sustainable peace.

Human Rights Watch believes it is essential for the Liberian government and the international community to take prompt steps to ensure that prosecutions for serious past crimes committed in Liberia are conducted, and that such proceedings are carried out in accordance with international standards. Toward that end, this memorandum analyzes the strengths and shortcomings of the TRC's proposal for an Extraordinary Criminal Court for Liberia (ECCL) and makes recommendations aimed at ensuring the fairness, effectiveness, and legitimacy of any criminal proceedings. Consistent with this memorandum's focus on the ECCL proposal, it does not cover wider strengths and weaknesses of the TRC's analysis, conclusions, and recommendations that are unrelated to that proposal.

In summary, we believe that the TRC's proposal has many elements that can contribute to fair and effective trials. These include: international and Liberian judges working together to try cases with a majority of internationally-appointed judges serving on each judicial panel; a combination of international and Liberian staff working in the prosecutor's office; a

commitment to witness protection; and plans to conduct outreach to local communities about trials. At the same time, the proposal has a number of significant weaknesses. These include: the recommendation that certain individuals who cooperated with the TRC not be prosecuted; failure to focus on those perpetrators most responsible for serious crimes; no requirement that the judges' bench will have sufficient criminal trial experience; the prosecutor is not appointed by international actors; international crimes and modes of individual criminal liability are not fully defined; a number of crucial fair trial protections are not explicitly provided for; individuals may be excluded from working at the ECCL on the basis of a public perception of involvement in abuses or supporting the conflict; and the death penalty is available as a punishment for some crimes. These weaknesses must be addressed if Liberia's efforts to address serious past crimes are to be fair, effective, and consistent with international standards.

## II. Summary of TRC Proposal for an Internationalized Domestic Criminal Court

The TRC calls for the establishment of the “Extraordinary Criminal Court for Liberia,” an “internationalized domestic criminal court” that would be empowered to try individuals accused of war crimes, crimes against humanity, and other serious violations of international humanitarian law, such as recruitment of child soldiers, as well as certain domestic crimes, including economic crimes.<sup>1</sup> In effect, the TRC proposes a form of hybrid international-national war crimes tribunal, similar to the Special Court for Sierra Leone and the Bosnia War Crimes Chamber, both of which try serious crimes and have varying degrees of international involvement in their operations.<sup>2</sup>

The TRC proposes a draft statute for the ECCL, which is contained in Annex 2 of its final report. Under the proposal, eight judges will serve in two chambers—three in the trial chamber and five in the appeals chamber. Three of the judges are to be appointed by the Liberian president, with the remaining five to be appointed by international actors, namely

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<sup>1</sup> The proposed ECCL will have the authority to prosecute “gross violations of human rights (GVHR), serious humanitarian law violations (SHLV) and egregious domestic crimes (EDC) as enumerated by this Statute.” Republic of Liberia Truth and Reconciliation Commission, Final Report (TRC Report), Annex 2, Draft Statute: Extraordinary Criminal Court (Draft Statute), art. 1(2).

<sup>2</sup> See generally Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone*, September 2004, <http://www.hrw.org/en/reports/2004/09/08/bringing-justice-special-court-sierra-leone>; Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, vol. 17, no. 14(A), October 2005, <http://www.hrw.org/en/reports/2005/11/02/justice-motion>; Human Rights Watch, *Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber*, February 2009, <http://www.hrw.org/en/reports/2007/02/11/narrowing-impunity-gap-o>.

the secretary-general of the United Nations, the president of the European Union, and the chairman of the Commission of the African Union.<sup>3</sup> The prosecutor is to be appointed by the Liberian president in consultation with the UN secretary-general, and the prosecutor's office is envisioned to include Liberian and international staff.<sup>4</sup> The proposal also specifies that the registrar is to be a foreign national appointed by a majority of the judges.<sup>5</sup>

In addition to proposing a structure for the court, the report recommends that nearly 40 individuals, "though found to be responsible," not be prosecuted because "they cooperated with the TRC process, admitted to the crimes committed and spoke truthfully before the Commission and expressed remorse for their prior actions during the war[.]"<sup>6</sup> Moreover, the TRC names and recommends over 120 individuals for prosecution in the new court, including persons associated with all the major warring factions.<sup>7</sup>

### **III. TRC Recommendations Regarding Selection of Persons to be Prosecuted**

Any judicial process must be independent and, as such, devoid of influence from any external actors. Accordingly, the TRC's recommendations to prosecute, or not, particular individuals should not be binding on any criminal investigations and prosecutions for serious past crimes.<sup>8</sup> This will keep prosecutions in line with international standards, and position the judicial process to make a significant contribution to restoring the rule of law and addressing the suffering of victims.

The TRC's recommendation that certain persons not be prosecuted on the basis of their cooperation with the TRC significantly undermines the TRC's own recommended ban on amnesties for serious crimes. The TRC's express rejection of amnesties in its report is

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<sup>3</sup> Draft Statute, art. 3.

<sup>4</sup> Ibid., art. 22(4), (5).

<sup>5</sup> Ibid., art. 21(5).

<sup>6</sup> TRC Report, section 12.4.

<sup>7</sup> Ibid., section 12.3.

<sup>8</sup> In this regard the ambiguity of article 1(2) of the draft statute which provides "[t]he Court shall have all of the necessary power and jurisdiction to prosecute persons referred to it by the TRC" is problematic as it may be read to suggest that only persons referred by the TRC can be prosecuted. This is inconsistent with other provisions such as article 22 (1) which bestows on the prosecutor the responsibility to prosecute not only those referred by the TRC but "any other person(s) that the Prosecutor determines committed GVHR, SHLV and EDC . . ." Article 1 (2) should be amended to make clear that the jurisdiction of the court is broader than the prosecution of those referred by the TRC.

important:<sup>9</sup> the prohibition on amnesties for serious crimes is a hallmark of modern international criminal law, and in Human Rights Watch’s experience, setting a precedent of impunity can encourage further abuses.<sup>10</sup> While cooperation with a truth and reconciliation body can make a significant contribution to the truth-telling process and might be an appropriate consideration for reduction of sentences for those found criminally responsible for serious crimes, cooperation with a truth-telling process should not be a basis for enabling an individual to avoid prosecution altogether.<sup>11</sup> This approach risks fundamentally undermining efforts to ensure justice for the worst crimes and threatens to compromise the prosecutor’s independence.

As for the TRC’s recommendations of individuals who should be prosecuted, it should be underscored that, as recognized by the TRC, truth commissions are not a substitute for criminal investigations and cannot be determinative of individual criminal liability, which must be established beyond a reasonable doubt before a properly constituted tribunal.<sup>12</sup> Therefore it is important to emphasize that while the work of the TRC serves as useful starting point to identify potential indictees, it does not replace the need for a criminal investigation into each suspect.

Moreover, as a practical matter and for the development of an effective prosecution strategy, we are concerned by the large number of persons recommended for prosecution. We believe that it would serve the ECCL and accountability process better if prosecutions have a clear focus on high-level perpetrators, including those in the political or military leadership, who tend to be the most difficult for ordinary courts to prosecute.

The proposed mandate does not represent a focus on high-level perpetrators, but rather would make the prosecutor responsible for investigating and prosecuting “persons referred to the Court by the TRC . . . , any persons or members of armed groups or rebel factions the

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<sup>9</sup> See Draft Statute, art. 17 (“The Court shall not recognize any amnesty granted to a person falling within the temporal jurisdiction of the TRC and the criminal jurisdiction—Articles 11 to 13—of this Statute”); art. 37(4) (“The Court may not recognize any amnesty or pardon granted prior to, or after, the adoption of this Statute for persons that the TRC has determined are responsible for committing, or is otherwise accused of, GVHR, SHLV and EDC.”). See also art. 39(3) (“A state enforcing a sentence shall not grant amnesty, pardon or commute the sentence of any convicted and imprisoned person.”).

<sup>10</sup> See generally Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short>.

<sup>11</sup> Indeed, amnesties need not be formalized in law to contribute to encouraging further conflict. Any time criminals are allowed escape accountability—as in situations where courts cannot or will not prosecute—the risk of renewed conflict is heightened. For example, in Afghanistan and Sudan, where amnesties have been de facto rather than de jure, alleged perpetrators have apparently been emboldened to commit further crimes by a sense of immunity from accountability. Human Rights Watch, *Selling Justice Short*, pp. 35-43, 68-74.

<sup>12</sup> In this connection, it should be noted that while the list is largely comprehensive, consistent with Human Rights Watch research, it does appear to omit a few individuals implicated in serious abuses.

TRC has determined are responsible” for crimes under the court’s jurisdiction, and “any other person(s) that the Prosecutor determines committed” crimes under the court’s jurisdiction between January 1979 and October 14, 2003.<sup>13</sup> The lack of a focus on high-level perpetrators creates a risk that the proposed tribunal—which will undoubtedly have limited judicial and prosecutorial resources—could be overwhelmed by its caseload.

Accordingly, we recommend a mandate to prosecute “persons most responsible” for the alleged crimes. According to the United Nations secretary-general, the term “persons most responsible” includes those in the political or military leadership, but also would comprise others down the chain of command who may be regarded as “most responsible” based upon “the severity of the crime or its massive scale.”<sup>14</sup> This would allow a certain degree of flexibility to pursue lower-ranking officials who are, for example, suspected of committing particularly gruesome crimes, including sexual violence crimes, against a large number of victims. It would also allow the pursuit of lower-level officials if considered necessary for the overall prosecutorial strategy.

## **IV. Composition of the Court**

Ensuring that the bench—the judges trying cases—and prosecutor have proper qualifications and experience is crucial to fair, effective trials. As discussed below, the TRC’s proposal has a number of key elements that will contribute toward these objectives. At the same time, the proposal lacks other important elements. Most notably, the requirement that a judge have “expertise in public international law or Liberian criminal law” will not ensure that the bench has sufficient criminal trial experience. Other elements lacking in the report include: key court officials may be appointed by a single member of the Liberian government; the prosecutor is not appointed by international actors; and persons may be excluded from serving at the ECCL based on mere public perception of wrongdoing.<sup>15</sup>

### **A. Composition of chambers and trial experience**

The TRC proposes that each trial and appeals chamber be composed of judges appointed by international actors and the Liberian president, with a majority of judges in each chamber

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<sup>13</sup> Draft Statute, art. 22(1).

<sup>14</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, October 4, 2000, U.N. Doc. S/2000/915, <http://daccess-ods.un.org/TMP/3870835.html> (accessed September 30, 2009), para. 30.

<sup>15</sup> Draft Statute, art. 4(1).

appointed by international actors. This framework is an excellent set-up to ensure the bench's actual and—just as importantly—perceived independence, impartiality, and relevant expertise.

The Liberian armed conflict was characterized by deep fissures along regional, ethnic and economic lines which both predated the armed conflict and continue to undermine national cohesion. Moreover, the Liberian judiciary has long been regarded as “historically weak and unreliable” and people “have had little faith in judicial institutions to protect their interests or fundamental rights.”<sup>16</sup> Cases involving serious crimes tend to be politically charged and involve highly specialized legal and procedural questions relating to emerging issues in international law. In such a charged environment, it is essential that the bench is seen as scrupulously unbiased and possesses relevant expertise.

Past experience in hybrid international-national courts such as the Special Court for Sierra Leone and the Bosnia War Crimes Chamber underscores that having domestic and international judges serve together in panels with a majority of judges appointed by the international community can play an important role in: 1) insulating the bench from domestic political pressures, thereby promoting the actual and perceived independence and impartiality of the judges; and 2) ensuring that judicial panels have adequate understanding of local law, culture, and history, as well as international criminal law and practice.<sup>17</sup> The ECCL proposal will position the bench to reap the benefits of a mixed composition with a majority of international judges.

At the same time, the proposal does not specify that judges should be required to possess previous practical experience trying cases.<sup>18</sup> Our efforts assessing the work of international and hybrid courts—including the ad hoc international criminal tribunals for the Former Yugoslavia and Rwanda, the International Criminal Court, and the Special Court for Sierra Leone—have underscored that judges with criminal trial experience are often better placed to promote effective courtroom management and ensure fair trial rights are upheld while conducting proceedings expeditiously.<sup>19</sup> Accordingly, prior experience in criminal

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<sup>16</sup> TRC Report, sections 1.3-1.4.

<sup>17</sup> Letter from Human Rights Watch to Cllr. Jerome J. Verdier, Chairman of the Truth and Reconciliation Commission of Liberia, June 16, 2009, <http://www.hrw.org/en/news/2009/06/16/letter-liberias-truth-and-reconciliation-commission-prosecution-serious-crimes>, p. 4.

<sup>18</sup> Draft Statute, art. 4.

<sup>19</sup> Human Rights Watch, *Memorandum for the Sixth Session of the International Criminal Court Assembly of States Parties*, November 2007, <http://www.hrw.org/en/node/76660/section/5>; Human Rights Watch, *Bringing Justice*, <http://www.hrw.org/en/node/11983/section/4>.

proceedings—whether as judges, prosecutors, or defense attorneys—is an important qualification that should be required of at least some of the judges in both the trial and appeals Chambers. Indeed, a majority of judges in each chamber should have such experience.

## **B. Appointment procedures for judges and the prosecutor and exclusions from serving at the court**

We are also concerned that the TRC proposal, by placing responsibility for appointments of several judges and the prosecutor in the hands of a single individual in the Liberian government—the president—opens the door to concerns over domestic political maneuvering.<sup>20</sup> Such concerns would be minimized if full discretion is not left in the hands of one official.

In addition, we recommend that the prosecutor be appointed by international actors, such as the UN secretary-general, rather than the Liberian government, as this will better position the prosecutor to be insulated—and be perceived as insulated—from domestic political pressures in conducting what will be extremely sensitive work.<sup>21</sup> Notably, appointment of the prosecutor by the UN secretary-general is mandated for the Special Court for Sierra Leone.<sup>22</sup>

Finally, while the ECCL may be well-served by efforts to exclude those individuals implicated in abuses during the conflict from involvement with the tribunal, proposed requirements that appointments for judicial, registry, prosecutorial and defense counsel positions be withheld where there is a “public perception” that the nominee committed abuses or supported the armed conflict could unjustifiably eliminate qualified Liberian nationals.<sup>23</sup> Facts and evidence, as opposed to public perception, should determine who is eligible to serve in the tribunal. To this end, clear, objective standards and transparent, fair procedures should be used to determine whether an appointee’s past actions should exempt him or her from service.

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<sup>20</sup> Draft Statute, arts. 3(1)(i)-(ii), 22(4).

<sup>21</sup> *Ibid.*, art. 22.

<sup>22</sup> Statute of the Special Court for Sierra Leone (SCSL Statute), January 16, 2002, <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>, art. 15(3).

<sup>23</sup> Draft Statute, arts. 4(2), 21(7), 27(5), 22(6).



## V. Definitions of Crimes and Modes of Liability

Trials can only be effective if the proper law regarding crimes against humanity, war crimes, and other serious violations of humanitarian law is applied. The TRC proposes that the ECCL cover some crimes and modes of individual criminal liability that are commonly utilized by international and hybrid criminal courts, but a number of provisions in the proposal are in tension with international standards. Below we highlight a few of the most serious concerns with regard to the TRC's proposal on crimes and liability. Human Rights Watch further recommends that crimes and modes of individual criminal liability for serious crimes in Liberia be drawn more directly from the statutes of international and hybrid courts—such as the International Criminal Court and the Special Court for Sierra Leone—as they better reflect fully internationally-accepted standards.<sup>24</sup>

### A. War crimes and other serious violations of international humanitarian law

While some elements of the TRC's proposed definitions with regard to war crimes and other serious violations of international humanitarian law are in keeping with international standards, other aspects are not. Two listed crimes raise particular concerns:

- *Terrorism*: The proposed statute defines the crime of terrorism to include, among other things, any criminal act that damages property and is intended to “disrupt any public service” or “the delivery of any essential service to the public.”<sup>25</sup> Including this broad language extends beyond the emerging definition of terrorism in international law, which is itself a controversial and undefined concept. We recommend that the crime of terrorism should be defined more narrowly to ensure that the crime consists of acts and threats specifically intended to spread terror among the civilian population.<sup>26</sup>

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<sup>24</sup> The tribunals have also developed rules of procedure and evidence that could serve as important models from which to draw for prosecutions of serious crimes in Liberia. See, e.g., 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, arts. 5-8, 25, 28; SCSL Statute, arts. 2-4, 6; ICC Rules of Procedure and Evidence, ICC-ASP/1/3, [http://www.icc-cpi.int/NR/ronlyres/F1EoAC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www.icc-cpi.int/NR/ronlyres/F1EoAC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf) (accessed December 4, 2009).

<sup>25</sup> Draft Statute, art. 13(11).

<sup>26</sup> The SCSL, for example, was empowered to try individuals for the crime of terrorism, but only within the confines of the Geneva Conventions. SCSL Statute, art. 3. The Geneva Conventions prohibit “acts of terrorism” against persons who do not take direct part or who have ceased to take part in hostilities. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force December 7, 1978, art. 4(2). In particular, the Geneva framework prohibits “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population.” *Ibid.*, art. 13(2).

- *Child soldiers*: As currently drafted, the definition proposed by the TRC for the crime of using, conscripting, or enlisting child soldiers, though comprehensive, applies only in “international armed conflicts.”<sup>27</sup> The prohibition on the use or conscription of children in both international *and* internal armed conflicts is firmly entrenched in international law and practice and therefore, any definition of the crime should include the use of child soldiers in either international *or* internal armed conflicts.<sup>28</sup>

## B. Domestic crimes

In past practice, internationalized and hybrid courts have been empowered in certain instances to prosecute serious domestic crimes. Nevertheless, domestic crimes that are included in such courts’ jurisdiction should not conflict with international standards. In this regard, the TRC’s proposed statute’s treatment of domestic crimes of sexual violence is highly problematic. Specifically, the definition excludes the possibility of rape or sexual assault where the persons in question are married, makes these crimes lesser offenses where the person is a “voluntary social companion” or has previously “permitted sexual liberties to be taken,” and does not cover the possibility of rape between members of the same sex.<sup>29</sup> All sexual activity without valid consent, regardless of the current or prior relationship between the parties in question or their gender, should be criminalized.

Further consideration should also be given to the practical and resource implications of calling for prosecution before the Extraordinary Criminal Court for Liberia for apparently less serious offences graded as “first degree misdemeanor,” such as “Official Oppression.” Similar questions should also be asked about some of the proposed financial offenses, which could be considered more technical in nature and appropriate for prosecution before ordinary domestic courts as is envisaged in the legislation, namely: Fraud on the Internal Revenue of Liberia; Theft and/or Illegal Disbursement and Expenditure of Public Money; Possession, Distribution, Transportation and/or Use of Tools and Materials for Counterfeiting Purposes; Misuse of Public Money, Property or Record.

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<sup>27</sup> Draft Statute, art. 13(14) (specifying that the criminal conduct in question “took place in the context of and was associated with an international armed conflict.”).

<sup>28</sup> Protocol II, art. 4(3) (c); Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art. 38(2); Rome Statute, art. 8(2) (e) (vii); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002, arts. 3(1), 4.

<sup>29</sup> Draft Statute, art. 14(5)-(6).

While all these offenses merit appropriate prosecution, it is questionable whether the limited judicial and prosecutorial resources of the ECCL would be best used to this end, and why domestic prosecution of such crimes would not suffice. We believe prosecutions in internationalized courts like the proposed ECCL should be focused on the most serious international and domestic crimes relating to violations of human rights. Notably, even if the crimes referred to in the above paragraph were removed from the ECCL's jurisdiction, the "Economic Crime" offense would remain, which deals more specifically with economic gain related to rights violations.<sup>30</sup>

### C. The death penalty

Several of the domestic crimes defined in the draft statute leave open the possibility of the imposition of the death penalty as punishment. For example, the crime of mercenarism found in Article 14(1) of the draft statute explicitly includes the death penalty as a possible form of punishment.<sup>31</sup> Human Rights Watch, in keeping with a large and growing body of international law and practice, believes that the death penalty should never be permitted, as it is an inherently cruel punishment.<sup>32</sup> International and UN-backed hybrid tribunals, including the International Criminal Court, Special Court for Sierra Leone, and the International Criminal Tribunals for Rwanda and the Former Yugoslavia, do not permit the imposition of the death penalty. The death penalty should, therefore, not be available as a punishment for any crime.

### D. Modes of individual criminal liability

The TRC's proposed forms of individual criminal liability differ from international standards in potentially problematic ways, including by providing a "preponderance of the evidence" standard relating to command responsibility (the mode of liability with respect to leaders who did not physically commit crimes but bear responsibility) and by failing to include attempt liability (the mode of liability that assigns responsibility to individuals who intend to

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<sup>30</sup> *Ibid.*, art. 14(11).

<sup>31</sup> In addition, it is unclear whether other domestic crimes included in the Draft Statute may be subject to the death penalty under certain circumstances. The legislature should make clear that the internationalized tribunal may not impose the death penalty for any crimes.

<sup>32</sup> Wherever it is in force, the death penalty is plagued by arbitrariness, unfairness, and racial, class, or other bias, highlighting the necessity of its abolition. It is a violation of fundamental human rights—the right to life and the right not to be subjected to cruel, inhuman, and degrading punishment. The death penalty has been legally abolished by 94 countries, and only a small minority of countries—25 in 2008—continues to carry out executions. See Human Rights Watch, *Papua New Guinea: Don't Regress on the Death Penalty*, July 14, 2009, <http://www.hrw.org/en/news/2009/07/14/papua-new-guinea-don-t-regress-death-penalty>. Moreover, on December 18, 2007, the U.N. General Assembly adopted by a wide margin a resolution calling for a global moratorium on the death penalty. United Nations General Assembly, "Moratorium on the Use of the Death Penalty Resolution 62/149," A/RES/62/149 (Dec. 18, 2007); see also <http://www.un.org/News/Press/docs/2007/ga10678.doc.htm>.

commit a crime but whose plans are not fully executed).<sup>33</sup> Defining crimes properly goes only part of the way towards enabling accountability for human rights abuses; individual criminal liability must also be properly defined. The experience of the International Criminal Court should be considered in achieving this end.<sup>34</sup>

## VI. Fair Trial Standards

Any criminal tribunal that does not adhere to fair trial procedures will eventually see its legitimacy—and therefore its effectiveness—erode away. Basic fair trial standards accepted under international law are articulated in the International Covenant on Civil and Political Rights (ICCPR), to which Liberia is a party.<sup>35</sup> Aside from their inherent value, fair trial standards and procedures help ensure that judicial proceedings are perceived as unbiased by victims and society, as well as perpetrators and their supporters. While the TRC’s proposed statute includes some internationally-accepted fair trial guarantees, a number of crucial protections are not explicitly provided for, while elements of others are lacking or unclear. As with the definitions of crimes and modes of liability discussed above, Human Rights Watch recommends that fair trial standards be drawn more directly from the statutes of international and hybrid courts and the ICCPR in order to fully adhere to international standards.

### A. Key fair trial protections absent from TRC proposal

Crucial fair trial guarantees that are not explicitly included in the TRC’s proposal but must be ensured in any criminal prosecutions for serious crimes include the accused person’s rights to:

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<sup>33</sup> See Draft Statute, art. 15. We note that the proposed statute acknowledges attempt liability with regard to the crime of genocide in art. 12. However, as a general principle of criminal law, attempt liability should be a form of individual criminal responsibility for all crimes under the tribunal’s jurisdiction. See Rome Statute, art. 25(3) (f).

<sup>34</sup> The Rome Statute makes superiors individually responsible for crimes committed by persons under their control where they were aware of the crimes and failed to either prevent the crimes or submit the matter for investigation and prosecution. Rome Statute, arts. 25(3) (b) and 28. Under the Rome Statute, individuals can be held criminally responsible for committing a crime with or through another person, inducing the commission of a crime, assisting in the commission of a crime, or contributing to a crime that is committed by a group that shares a common purpose. *Ibid.*, arts. 25(3) (a), (c), and (d). With regard to attempt liability, the Rome Statute imposes criminal liability on an individual who takes a “substantial step” towards committing a crime, but is prevented from completing the crime because of circumstances outside of the individual’s control, provided the individual did not voluntarily abandon the attempt to commit the crime. *Ibid.*, art. 25(3) (f).

<sup>35</sup> See United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (accessed Oct. 28, 2009).

- Be informed of his or her right to legal assistance of his or her choosing;
- Have adequate time and facilities for the preparation of his or her defense;
- Be tried without undue delay; and
- Examine the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.<sup>36</sup>

These minimum guarantees should be ensured for prosecutions of serious crimes committed in Liberia.

## B. Presumption of innocence

International standards, as enshrined in the ICCPR, require that the presumption of innocence for those being tried under international law be absolute and unambiguous.<sup>37</sup> The TRC properly proposes that accused persons appearing before the ECCL “shall be considered innocent of a crime until guilt has been established beyond a reasonable doubt by a final verdict of the Court.”<sup>38</sup> However, this provision is inconsistent with language immediately following it, which distinguishes between “alleged perpetrators” and “perpetrators,” with the latter being those “that the TRC has determined are responsible for committing” serious crimes.<sup>39</sup> This proposed distinction is not appropriate as it risks creating the impression of two classes of accused persons: one that enjoys the right to a presumption of innocence, and a second that would come to the ECCL subject to a presumption of guilt, as predetermined by the TRC.

## C. Right to counsel

The ICCPR requires that the right to effective defense counsel remain absolute and unambiguous.<sup>40</sup> The TRC’s proposed statute is unclear on this point as certain provisions

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<sup>36</sup> See, for example, SCSL Statute, art. 17.

<sup>37</sup> 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(2).

<sup>38</sup> Draft Statute, art. 24. See ICCPR, art. 14(2) (“Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”).

<sup>39</sup> Draft Statute, art. 25(1) (“The term perpetrator refers to those persons that the TRC *has determined are responsible* for committing [human rights violations and egregious domestic crimes]”) (emphasis added).

<sup>40</sup> ICCPR, art. 14(3) (d) (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal

suggest only that the ECCL “*may*” appoint and retain defense counsel for the accused while other provisions mandate that the accused “*will* be provided a qualified counsel by the Court” in the event that he or she is not able to afford defense counsel.<sup>41</sup> There should be no ambiguity in the guarantee of all accused persons’ access to capable and effective counsel, even if indigent.

#### D. Trials in absentia

The TRC’s proposal, which states that the “[c]ourt may make judgments in absentia,” could be read to permit *trials* in absentia, i.e., where the accused is not present at his or her own trial.<sup>42</sup> Trials in absentia compromise the ability of an accused person to exercise key rights under article 14 of the ICCPR, including the right to defend him or herself, and the right to examine witnesses.<sup>43</sup> By compromising these key rights, trials in absentia could well give rise to questions of fundamental fairness, and should be explicitly prohibited.

## VII. Witness Protection and Support

Witness protection is essential to ensure the physical and mental well-being of victims and witnesses, as well as the effective functioning of the judicial process. Witnesses and victims face serious ongoing risks, including threats to their personal safety and that of their families, and may be in need of psychological and social support even after testifying.<sup>44</sup> Without such support, witnesses may not come forward, hampering the ability of the prosecution and defense to conduct a full and fair trial. By calling for the enactment of a witness protection statute, the TRC is in keeping with the important developments in

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assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”).

<sup>41</sup> Compare Draft Statute art. 25(3) (“alleged perpetrators have the right to request and have present defense counsel at any and all questioning. If the perpetrator or alleged perpetrator is deprived of liberty, he/she has the right to request the presence of defense counsel, if he/she is not able to afford defense counsel due to his/her financial circumstances, he/she will be provided a qualified counsel by the Court”) with art. 27(3) (“If a perpetrator or alleged perpetrator fails to, or is not able to, engage a defense counsel on his/her own, defense counsel may also be engaged ex officio or by [the alleged perpetrator’s legal representative or relatives]. The court *may* also appoint and retain defense counsel for the accused.”) (emphasis added).

<sup>42</sup> Draft Statute, art. 25(6).

<sup>43</sup> ICCPR, art. 14. See Letter from Human Rights Watch to the Secretariat of the Rules and Procedure Committee of the Extraordinary Chambers of the Courts of Cambodia, November 17, 2006, <http://www.hrw.org/en/news/2006/11/17/extraordinary-chambers-courts-cambodia>. Moreover, since the creation of the ad hoc court for the former Yugoslavia, international and hybrid tribunals have rejected trials in absentia, making it clear that there is an increasing international acceptance of a standard prohibiting these sorts of proceedings. *Ibid.*

<sup>44</sup> See Human Rights Watch, *Judging Dujail: The First Trial Before The Iraqi High Tribunal*, <http://www.hrw.org/en/node/11112/section/5>, November 2006; Human Rights Watch, *Justice in Motion*, pp. 20-27.

international criminal practice to ensure witness protection and support.<sup>45</sup> Toward that end, below are several key elements that experience has shown should be ensured to achieve adequate witness protection and support:

- Pre-trial and post-trial risk assessments for each witness;
- In-court protective measures based on the risk assessments and duly authorized by the ECCL on an individual basis;
- Safe transportation to and from the court and safe accommodation during court attendance;
- Access to psychosocial support, including counseling;
- Post-trial follow-up and threat monitoring; and
- Relocation arrangements—including international relocation agreements—for the most at-risk witnesses.<sup>46</sup>

By implementing these measures, the ability to secure essential testimony of at-risk witnesses and victims will be enhanced by assuaging fears about additional mental or physical trauma as a result of testimony.

## VIII. Communications and Outreach

An effective outreach and communications strategy is essential if trials are to have resonance with the local population, including by managing possible frustration as a result of a lack of understanding of the legal process.<sup>47</sup> The TRC report acknowledges the importance of disseminating information about the ECCL to the wider public.<sup>48</sup> Important experience to date can be drawn from the Special Court for Sierra Leone, which has a robust, innovative communications and outreach program. Notably, an effective outreach and

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<sup>45</sup> TRC Report, section 12.6 (“The TRC recommends the immediate enactment of a comprehensive Witness Protection Statute for the express purpose of securing protection; domestic or external for witnesses of the court [sic.]”). Compare SCSL Statute, art. 16(4) (“The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide . . . protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.”).

<sup>46</sup> Human Rights Watch, *Judging Dujail*.

<sup>47</sup> *Ibid.*

<sup>48</sup> See Draft Statute, art. 44 (“This Law, after enactment, shall be published without delay in at least three newspapers in the Republic of Liberia.”).

communications program should be empowered to implement initiatives that will serve to maximize public understanding of trials for serious crimes and impact. In this regard, outreach and communications could:

- Develop materials explaining the role of the judge, the prosecutor, and the defense counsel in a fair trial, and basic explanations of complex legal issues like jurisdiction and challenges to the tribunal's establishment;
- Base staff in the countryside in order to tap into local social networks to disseminate information including through workshops, trainings, and screenings of specially prepared video or audio materials; and
- Conduct workshops with the Liberian legal profession about the ECCL and international criminal law generally, in order to prevent misperceptions among this important constituency and strengthen the legal community's understanding of fair trials, rule of law, and the important role of international standards.<sup>49</sup>

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<sup>49</sup> Human Rights Watch, *Justice in Motion*, pp. 28-33; see also Human Rights Watch, *Bringing Justice*, pp. 33-35.