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**THE SPECIAL COURT FOR SIERRA LEONE**

**Trial Chamber II**

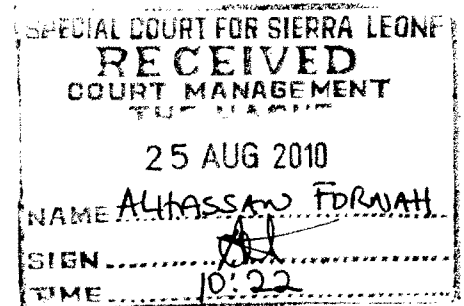
**Before:** Justice Julia Sebutinde, Presiding  
Justice Richard Lussick,  
Justice Teresa Doherty,  
Justice El Hadji Malick Sow, Alternate

**Registrar:** Ms. Binta Mansaray

**Date:** 25 August 2010

**Case No.:** SCSL-03-01-T

**THE PROSECUTOR**  
-v-  
**CHARLES GHANKAY TAYLOR**



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PUBLIC WITH ANNEX A

**DEFENCE MOTION FOR ADMISSION OF DOCUMENT PURSUANT TO RULE 92bis –  
ICTJ REPORT ON LIBERIAN TRUTH AND RECONCILIATION COMMISSION**

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**Office of the Prosecutor:**

Ms. Brenda J. Hollis

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Mr. Courtenay Griffiths, Q.C.

Mr. Terry Munyard

Mr. Morris Anyah

Mr. Silas Chekera

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## I. INTRODUCTION

1. This is the Defence motion to admit into evidence the annexed document, pursuant to Rules 92*bis* of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”).
2. The annexed material is from a report written by the International Center for Transitional Justice, titled “Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia” (“ICTJ Report”). The Defence seek admission of the introductory pages, the Executive Summary, and Section 2 “The Final Report: Merits and Limitations”.<sup>1</sup> This material is relevant to the probative value of Prosecution evidence and exhibits stemming from the Liberian Truth and Reconciliation Commission findings.

## II. APPLICABLE LAW

3. Rule 92*bis* states:
  - (A) In addition to the provision of Rule 92*ter*, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.
  - (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
  - (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.
4. Trial Chamber II has further ruled that the purpose of Rule 92*bis* is to permit the reception of information—assertions of fact (but not opinion) including, but not limited to, written statements and transcripts that do not go to proof of the acts and conduct of the accused—if such facts are relevant and their reliability is “susceptible to confirmation.”<sup>2</sup> However, the reliability of a document is not a bar to admission; information may still be admitted where it is capable of corroboration in due course.<sup>3</sup>

<sup>1</sup> The full ICTJ Report is available online at:

[http://www.ictj.org/static/Publications/ICTJ\\_LBR\\_BeyondTRC\\_pb2010.pdf](http://www.ictj.org/static/Publications/ICTJ_LBR_BeyondTRC_pb2010.pdf).

<sup>2</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-556, “Decision on Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice Under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 Into Evidence”, 15 July 2008, page 4.

<sup>3</sup> *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, “Fofana – Decision on Appeal against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’”, 16 May 2005, para. 26 (“**Fofana Admissibility Decision**”). In the AFRC trial, the Trial Chamber stated that “evidence may be

- 5. The Appeals Chamber of the Special Court for Sierra Leone has ruled that any information not going to proof of the acts and conduct of the accused which is *not tendered through a witness* [emphasis added] should be submitted under Rule 92bis.<sup>4</sup> Furthermore, the Appeals Chamber has found that by its express terms Rule 92bis applies to information tendered “*in lieu of oral testimony*” and the information to be admitted is *not restricted to written statements or transcripts* [emphasis added].<sup>5</sup>

**III.SUBMISSIONS**

- 6. The Defence seeks to admit these materials from the ICTJ Report in order to provide context to Prosecution evidence and exhibits stemming from the findings of the Liberian Truth and Reconciliation Commission (“TRC”).<sup>6</sup> The Prosecution have relied on the various TRC findings, particularly in cross-examining Defence witnesses. However, the reliability and probative value of these findings, and thus the reliability and probative value of admitted Prosecution exhibits from the TRC, is severely undermined by the facts presented in the ICTJ Report regarding the shortcomings and limitations of the Liberian TRC findings.
- 7. Specifically, the ICTJ Report highlights that the TRC report “lacks evidentiary data to support many of its claims and there are inadequate references to substantiate the information on which the conclusions are based”; “the absence of any explicit reference to these sources throughout the narrative makes it difficult

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excluded because it is unreliable, but it is not necessary to demonstrate the reliability of the evidence before it is admitted.” See *Prosecutor v. Brima et al.*, SCSL-04-16-T, “Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92bis”, 18 November 2005, page 2, citing *Prosecutor v. Brima et al.*, SCSL-04-16-T, “Decision on Joint Defence Application for Leave to Appeal from Decision n Defence Motion to Exclude All Evidence from Witness TF1-277”, 2 August 2005, para. 6. In the same AFRC trial, the Trial Chamber considered the reliability of the evidence to be considered at the end of the trial and be evaluated and weighed as a whole, taking into account the context and nature of the evidence as well as the credibility and reliability of the evidence See: *Prosecutor v. Brima et al.*, SCSL-04-16-T, “Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92bis”, 18 November 2005, page 2. See also *Prosecutor v. Norman et al.*, SCSL-04-14-T-447, “Decision on Prosecution’s Request to Admit into Evidence Certain Documents Pursuant to Rule 92bis and 89(C)”, 14 July 2005, page 3.

<sup>4</sup> *Prosecutor v. Taylor*, SCSL-03-01-721 “Decision on ‘Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents’”, 6 February 2009, para. 34.

<sup>5</sup> *Prosecutor v. Taylor*, SCSL-03-01-721, para 30-31. Subsequent to the Appeals Chamber Decision, Trial Chamber II found that: “The effect of Rule 92bis is to permit the reception of information-assertions of fact (but not opinion) including, but not limited to, written statements and transcripts that do not go to proof of the acts and conduct of the accused- if such facts are relevant and their reliability is “susceptible of confirmation”; proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course.”

<sup>6</sup> The Liberian Truth and Reconciliation Commission website is: <http://www.trcofliberia.org>.

to substantiate the validity of the report's factual accounts"; and "factual information... is not always reliably referenced..."<sup>7</sup>

8. The ICTJ Report further states that the constitutionality of the TRC Act and its recommendations is being challenged.<sup>8</sup> The Defence submits that this further limits the probative value of the TRC findings upon which the recommendations are based and should be taken into consideration by the Trial Chamber in its final evaluation of the evidence.
9. The Defence submits that all the criteria for submission of documents under Rule 92bis have been met as elaborated below.

### The Evidence is Relevant

10. The explanation in the ICTJ Report regarding the limitations of the TRC findings is relevant in that it will allow the Trial Chamber to more fully evaluate the reliability and probative value of the Prosecution evidence.
11. The Prosecution has relied heavily on findings from the Liberian TRC in its cross-examination of the Accused and subsequent Defence witnesses. There are seven admitted Prosecution exhibits containing extracts from the Liberian TRC Final Report.<sup>9</sup> These extracts were generally put to the Accused and Defence witnesses to impeach their testimony.<sup>10</sup> Other extracts no doubt will be relied upon by the Prosecution in an attempt to show commonalities in the behaviour between the NPFL and AFRC/RUF,<sup>11</sup> under Rule 93's provision to allow evidence showing a "consistent pattern of conduct".
12. The ICTJ Report Executive Summary provides background context to the Liberian TRC findings. It sets out the core recommendations of the TRC as well as the fact that the adoption of the report was not unanimous among the commissioners. The Executive Summary also gives an indication of how the TRC

<sup>7</sup> ICTJ Report, p. 14.

<sup>8</sup> ICTJ Report, p. 17.

<sup>9</sup> See Exhibits P-412, P-414, P-429, P-451, P-454, P-463, and P-533.

<sup>10</sup> For example, **P-412** (Testimony of Charles Taylor, 11 January 2010, p. 33146), **P-429** (Testimony of Charles Taylor, 14 January 2010, p. 33277; Testimony of DCT-190, 10 June 2010, p. 42476), **P-451** (Testimony of Charles Taylor, 19 January 2010, p. 33678-80), **P-454** (Testimony of Charles Taylor, 20 January 2010, p. 33697), and **P-463A/B/C** (Testimony of Charles Taylor, 20 January 2010, p. 33779; 21 January 2010, p. 33835, 33878; Testimony of DCT-131, 4 May 2010, p. 40522; Testimony of DCT-226, 18 May 2010, p. 41055).

<sup>11</sup> For example, **P-533** (which sets out the types of atrocities committed by the various warring factions in Liberia as well as the percentage of violations by each warring faction) (Testimony of DCT-226, 18 May 2010, p. 41058, 41062-5).

findings have been received by the Liberian public. Section 2 of the ICTJ Report discusses the merits and limitations of the findings of the Liberian TRC. The Defence submits that this information is relevant to the degree of reliance the Trial Chamber will ultimately want to place on the Prosecution's exhibits from the Liberian TRC.

13. Mr. Taylor, during his evidence, challenged the authenticity and factual reliability of the Liberian TRC findings<sup>12</sup> and thus, the ICTJ Report is also relevant in that it corroborates that aspect of the Accused's testimony.

*The Evidence is Susceptible of Confirmation*

14. Rule 92bis also requires the material(s) referred to in this notice to be susceptible of confirmation. The Defence, at this point in time, is only required to show that the reliability of the evidence is susceptible to confirmation and does not have to prove the evidence is actually reliable.<sup>13</sup> The Appeals Chamber in *Norman et al* has further interpreted that "susceptible of confirmation" does not require proof of reliability before admission, but does require that the information is capable of corroboration in due course.<sup>14</sup> This Trial Chamber has noted that reliability is to be assessed at the end of the trial, in light of the totality of the evidence presented at trial, and what weight, if any, should be attached to it.<sup>15</sup>
15. The Defence submits that the facts outlined in the ICTJ Report annexed to this motion are "susceptible to confirmation" as the Trial Chamber can look at the admitted excerpts of the Liberian TRC findings and note for itself that there is no properly-cited basis for its findings. Furthermore, the fact that the constitutionality of the TRC Act and its recommendations is being challenged domestically is also susceptible to confirmation, by resort to those filings.

*The ICTJ Report Factually Notes Deficiencies of the TRC Findings*

16. The Defence accepts that the jurisprudence of Rule 92bis allows the admission of assertions of fact, but not opinion. The content of Section 2 of the ICTJ Report is primarily fact-based, in that it highlights the absence of proper citations and

<sup>12</sup> See, ex, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 11 January 2010, p. 33147.

<sup>13</sup> Fofana Admissibility Decision, para. 27.

<sup>14</sup> Fofana Admissibility Decision, para. 26.

<sup>15</sup> *Prosecutor v. Taylor*, SCSL-03-01-750, "Decision on Prosecution Motion for Admission of Newspaper Articles Obtained from the Catholic Justice and Peace Commission Archive in Monrovia, Liberia", 27 February 2009, para. 27.

support for the TRC findings. Furthermore, it states that the TRC Act is undergoing constitutional challenges. Section 2 does contain some further analysis of the TRC's limitations, which tends toward opinion evidence, but the core aspects of Section 2 are factual.

*The Evidence Does Not Go to Proof of the Acts and Conduct of the Accused*

17. The Defence acknowledges that Rule 92*bis* explicitly excludes written statements or transcripts which go to proof of the acts and conduct of the Accused.<sup>16</sup> The Defence submits that the material offered here self-evidently does not go to proof of the acts and conduct of the Accused, and thus satisfies the requirements of admission through Rule 92*bis*.

**IV. CONCLUSION**

18. For the reasons stated above, the Defence respectfully requests the Trial Chamber, in exercising its discretion, to admit into evidence, pursuant to Rule 92*bis*, the ICTJ Report materials annexed to this motion.

Respectfully Submitted,




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**Courtenay Griffiths, Q.C.**  
**Lead Counsel for Charles G. Taylor**  
 Dated this 25<sup>th</sup> Day of August 2010  
 The Hague, The Netherlands

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<sup>16</sup> There is a distinction between “the acts and conduct of those others who commit the crimes for which the Indictment alleges that the accused is individually responsible” and “the acts and conduct of the accused as charged in the Indictment which establish his responsibility for the acts and conduct of others;” and that only written statements which go to proof of the latter are excluded by Rule 92*bis*. See: *Prosecutor v. Galic*, IT-98-29-AR73.2, “Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)”, 8 June 2002, para. 9. See also *Prosecutor v. Sesay et al.*, SCSL-04-15-1049, “Decision on Defence Application for the Admission of the Witness Statement of DIS-192 Under Rule 92*bis* or, in the alternative, Under Rule 92*ter*”, 12 March 2008, p.2-3., See also *Prosecutor v. Galic*, IT-98-29-AR73.2, “Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)”, 8 June 2002, para. 9.

## TABLE OF AUTHORITIES

### **Prosecutor v Taylor**

*Prosecutor v. Taylor*, SCSL-03-01-T-263, “Public Prosecution’s Second Amended Indictment”, 29 May 2007

*Prosecutor v. Taylor*, SCSL-03-01-T-556, “Decision on Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice Under Rule 92bis for the Admission of the Prior Testimony of TF1-036 Into Evidence”, 15 July 2008

*Prosecutor v. Taylor*, SCSL-03-01-721, “Decision on ‘Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents’”, 6 February 2009

*Prosecutor v. Taylor*, SCSL-03-01-750, “Decision on Prosecution Motion for Admission of Newspaper Articles Obtained from the Catholic Justice and Peace Commission Archive in Monrovia, Liberia”, 27 February 2009

*Prosecutor v. Taylor*, SCSL-03-01-T-827, “Public with Annex A and Confidential Annex B Defence Rule 73ter Filing of Exhibit List (Version VI)”, 10 August 2009

*Prosecutor v. Taylor*, SCSL-03-01-T-828, “Public with Annexes A and B Defence Witness Order and List of Exhibits for the Week 24 August 2009-28 August 2008”, 2010 August 2009

*Prosecutor v. Taylor*, Exhibits: P-412, P-414, P-429, P-451, P-454, P-463, and P-533

*Prosecutor v. Taylor*, Transcripts: 11 January 2010, 14 January 2010, 19 January 2010, 20 January 2010, 21 January 2010, 4 May 2010, 18 May 2010, 10 June 2010

### **CDF**

*Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, “Fofana – Decision on Appeal against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’”, 16 May 2005.

*Prosecutor v. Norman et al.*, SCSL-04-14-T-447, “Decision on Prosecution’s Request to Admit into Evidence Certain Documents Pursuant to Rule 92bis and 89(C)”, 14 July 2005.

### **AFRC**

*Prosecutor v. Brima et al.*, SCSL-04-16-T, “Decision on Joint Defence Application for Leave to Appeal from Decision n Defence Motion to Exclude All Evidence from Witness TF1-277”, 2 August 2005.

*Prosecutor v. Brima et al.*, SCSL-04-16-T, “Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92bis”, 18 November 2005.

### **RUF**

*Prosecutor v. Sesay et al.*, SCSL-04-15-1049, “Decision on Defence Application for the Admission of the Witness Statement of DIS-192 Under Rule 92bis or, in the alternative, Under Rule 92ter”, 12 March 2008.

### **ICTY**

*Prosecutor v. Galic*, IT-98-29-AR73.2, “Decision on Interlocutory Appeal Concerning Rule 92bis(C)”, 7 June 2002.

[http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dcc0c12571b500379d39/a2755cfb491f7363c12571fe004be529/\\$FILE/Galic%20ACD%207-06-2002.pdf](http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dcc0c12571b500379d39/a2755cfb491f7363c12571fe004be529/$FILE/Galic%20ACD%207-06-2002.pdf)



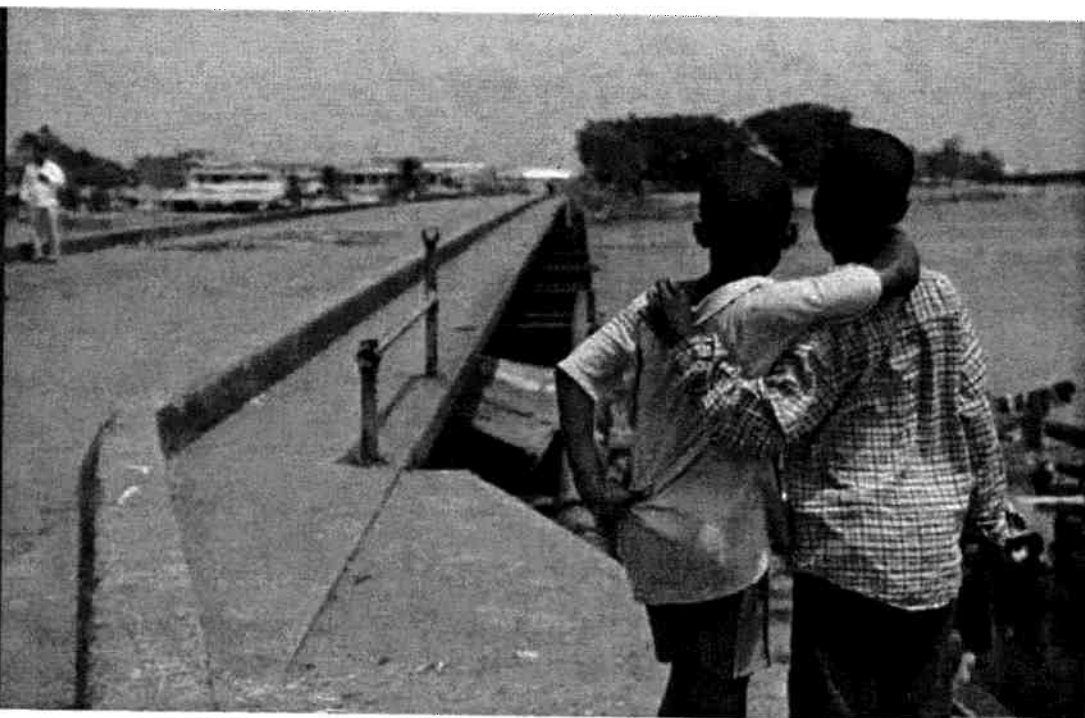
**ANNEX A**

LIBERIA

# Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia

Paul James-Allen, Aaron Weah, and Lizzie Goodfriend

May 2010



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## Executive Summary

The Liberia Truth and Reconciliation Commission (TRC) released its final report in December 2009 after more than three years of operations. The report offers valuable insights into Liberia's turbulent history, including the gross human rights violations committed during the country's 14-year conflict. Between 1989 and 2003, Liberia's brutal conflict resulted in over 250,000 deaths and the displacement of one-third of the population. The report's recommendations cover a range of issues critical to Liberia's post-conflict recovery efforts, which include the need for criminal accountability, reparations, memorialization, and institutional reform.

Among the commission's recommendations are the establishment of an extraordinary tribunal and domestic criminal court to prosecute 124 and 58 individuals respectively for gross violations of human rights, violations of international humanitarian law, and egregious domestic crimes. It also recommends a reprieve from prosecution for 38 individuals who cooperated with the TRC but admitted to committing heinous crimes. The commission further recommends that 49 individuals, including President Ellen Johnson Sirleaf, be lustrated, or ceremonially purified, and banned from public office for 30 years.

In addition, the TRC recommends the establishment of traditional truth-seeking and reconciliation processes through a "Palava Hut" system, the establishment of a Reparations Trust Fund, the observance of a national memorial and unification day, and the protection and promotion of the rights of women and children. Other recommendations include further investigations into the activities of listed individuals with regard to economic crimes, the confiscation and seizure of private and public properties, repatriation of unlawfully acquired monies, and the building of a new culture and integrity in politics, as well as in the administration of justice.

The TRC process has proved controversial from the start. It was born out of a compromise at the peace negotiation table: Liberia's warring factions favored it as a way of avoiding prosecutions; criminal accountability was preferred by some in Liberia's civil society. The final report is innovative in several areas, especially in its attempts to detail violations against women and children, as well as in its documentation of economic crimes. But, while the TRC reached a broad swathe of the Liberian population, including diaspora communities mainly in the United States (U.S.), the report itself is fraught with weaknesses. Many of the challenges the TRC faced in its operation, namely limited technical capacity, poorly coordinated programming, and disharmony among its commissioners, are reflected in the commission's final report, which lacks evidentiary data, coherence between and within sections, specificity, and the unanimous support of all commissioners, two of whom refused to endorse it.

These factors have raised doubts about the viability of the TRC's more controversial recommendations on prosecutions and lustration, with questions about whether and how these can be implemented. Indeed, public reaction to the report has centered on the prosecutions and lustration recommendations.

The public debate has, moreover, overshadowed the many other important issues raised in the report and has failed to take into account the predominant needs of Liberia's victims and survivors—a critical consideration in efforts to advance the report's recommendations for advancing transitional justice.

Because of a lack of transparency and respect for due process in the TRC's procedures, the International Center for Transitional Justice (ICTJ) has serious reservations about how the recommendations on prosecutions and lustration were arrived at and thus questions their validity going forward. In addition, while the TRC report proposes a number of other important recommendations to ensure reparations, memorialization, and community reconciliation, these are often vague and require further clarification.

Despite the TRC's report's deficiencies, it remains essential that Liberia's government and its people—including Liberia's vibrant human rights community, as well as its key international partners—take steps to overcome its limitations. The report does deal with important questions around justice, accountability, and reconciliation that are critical to the country's future. If Liberia is to sustain its new-found democratic order, the nation will need to seriously engage with the numerous critical issues raised in the report and urgently put in place the necessary mechanisms to prevent a repeat of its turbulent history. The TRC's detractors should therefore not be allowed to obstruct the opportunity for addressing the salient issues contained in the report.

In this regard, the president's commitment to a review of the TRC report in her State of the Nation address in January 2010 and her March 2010 request for the Ministry of Justice and the Law Reform Commission to undertake this review are welcome first steps. Progress in addressing the report's recommendations, however, remain slow. In fact, there is real concern that those alleged perpetrators named in connection with criminal accountability will continue to exploit the report's shortcomings in order to head off any effort to address the recommendations. A potential constitutional challenge is also looming that could further frustrate efforts to implement the recommendations of the report.

This is a crucial moment in the history of the Liberian nation. A year and a half from its second post-war elections, and with the gradual reduction in the presence of the United Nations (UN) peacekeeping mission, it is imperative that the country engage in a truly consultative process to address the critical issues of accountability, justice, and national healing raised in the TRC report. These can no longer be ignored if Liberia is to finally overcome its brutal past. The Liberian government should continue to demonstrate the necessary political will to press ahead with measures to help overcome the limitations in the TRC's recommendations. If the anti-TRC forces are allowed to hijack the prospects of proper discussions on the report and how to make progress on the implementation of its recommendations, it will impede the country's hard-won peace and further entrench the culture of impunity that has characterized Liberia's political landscape since its founding in 1847. It would also once again delay vital measures to address the rights of victims, restore confidence in the country's public institutions, and reconcile its people.

It is against this background that this ICTJ report reviews the TRC process, examines its final report, and suggests a number of steps to be taken by the government, Liberia's civil society, and external partners. These suggestions are designed to respond to the opportunities presented by the TRC report and to address the shortcomings of its transitional justice recommendations. ICTJ offers these proposals as a general roadmap on what actors can do in the short-term to begin the process of moving forward with further transitional justice efforts.

## 2. The Final Report: Merits and Limitations

The commission's final report comprises three published volumes and one unpublished volume. The first focuses primarily on legal analysis and was released in December 2008. The second is frequently referred to as the main consolidated report. It was released in its edited form in December 2009, and provides an overview of the commission and its work, a historical review of root causes to the conflict, substantive sections on the nature and pattern of the violations and the impact of the conflict on women, children, and other groups, statistical interpretations of information collected from statements, as well as determinations and recommendations for the way forward.<sup>47</sup> The third volume contains 13 appendices, including the chapters on women, children, economic crimes, statistical analysis, and the diaspora project. At the time of writing, the fourth volume remained unpublished due to a lack of time and financial resources.<sup>48</sup> It is supposed to include transcripts of the TRC-conducted workshops and public hearings.

### Merits of the Report

The report provides important historical information about Liberia's socioeconomic, cultural, and political past, and how certain practices gave rise to the conflict. Similarly, it offers the first comprehensive publicly-available mapping of human rights violations, as provided in the various statistical tables and figures that show where and when different violations occurred, as well as insights into the degree and demographics of affected populations.<sup>49</sup> Detailing these patterns is an important step in understanding the full extent of the nature and impact of the conflict, which can, in turn, provide valuable information on how to respond to the needs arising from it.

The report also offers in-depth information on the experiences of women. It also gives considerable weight to the plight of children as well as Liberia's diaspora communities. Though the main consolidated report, Volume Two, lacks any quotes from victims, the specific appendices in Volume Three on these issues provide a platform for victims' voices from various communities to be heard and their needs to be articulated. These appendices are not without their own limitations, however, which will be discussed later.

The report is the first of any truth commission to extensively explore economic crimes as a key factor in fueling conflict. Its recommendations likewise encompass a broad range of issues that are vital to the reconstruction of the country, including additional transitional justice efforts, further institutional reforms, and nation-building programs.

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47 The edited version differed from its unedited predecessor in several ways. There were some changes to the lists of individuals recommended for prosecution or debarment; additional details were included on reparations policies; and more statistical tables were added. The majority of the content, however, remained the same.

48 The TRC Chairman indicated this in a press conference on December 8, 2009.

49 In 2005 UNDP sponsored a conflict mapping project in Liberia which used over 13,000 statements collected throughout the country to detail the nature and pattern of human rights violations that had occurred during Liberia's conflict. This report, however, is not available publicly. A copy is on file with the ICTJ Liberia Office.

The TRC's final report also provides a mechanism through which issues critical to Liberia's recovery and democratic process are placed on the national agenda. In any society recovering from a history characterized by widespread patterns of abuse, responding to the needs of victims and addressing demands for accountability are critical in order to develop faith in the new government, build a culture of respect for human rights, and consolidate confidence in the rule of law.

The report provides real opportunities for a vibrant national debate addressing questions on prosecutions, lustration, reparations, memorialization, and other transitional justice mechanisms. Moving these debates forward requires resources and political will, but questions about whether to pursue these measures can no longer be ignored.

### Limitations of the Report

The TRC report raises issues of critical importance to Liberia's fledgling democracy. However, any effort to advance those issues must first acknowledge the report's limitations. These include the use of data, drafting and policy inconsistencies, and poorly formulated recommendations.

The report lacks evidentiary data to support many of its claims and there are inadequate references to substantiate the information on which the conclusions are based. For example, the report states that the TRC staff used more than 500 primary sources—including testimonies of witnesses at the public hearings and interviews from investigations—to prepare the report. But the absence of any explicit reference to these sources throughout the narrative makes it difficult to substantiate the validity of the report's factual accounts. Facts and allegations should, therefore, have been sourced and referenced.

Additionally, the lack of consistency between different sections of the report has led some observers to question its reliability. Factual information, such as the number of statements collected, is not always reliably referenced and recommendations often appear contradictory.<sup>50</sup> For example, the appendix on children states that, because children under the age of 18 do not have any criminal responsibility for their actions, they cannot be held accountable for crimes committed under international human rights or international humanitarian law and thus "there can be no amnesty extended to children."<sup>51</sup> Yet in the appendix on women, the report recommends that "all child soldiers should be given conditional amnesty with the condition being mandatory rehabilitation."<sup>52</sup>

These contradictions also extend to sections dealing with related thematic content. This can best be illustrated by the report's treatment of women and children. Though the TRC made a concerted effort to recognize the experiences of women throughout its process, the final report's findings are patchy and uneven. For example, key recommendations to the government of Liberia pertaining to women in Section 18.5 focus on the need to provide medical services to women, particularly those who have survived sexual violence. However, this is not linked to later recommendations contained in the appendix on women, which focuses on the provision of free health services to women but also identifies critical recommendations on family reunification and education as further means to provide reparations.

Though the appendices do provide more detailed information regarding the historical background, roles, experiences, and needs of women and children than the main consolidated volume, limitations in some areas of the TRC's statement-taking and data-coding processes curtailed its ability to make comprehensive findings about the experiences of women and children. In defining "sexual abuse" for its statistical analysis, the TRC used a broad definition that included everything from genital touching to forced nudity. Since all forms of sexual violence, aside from rape, have been amalgamated, the resulting statistical reports fail to detail the range of sexual-based violations that women and girls, as well as men and boys, experi-

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50 In some instances the report states that 22,000 statements were taken and coded; elsewhere it claims 20,560 statements were taken but only 17,416 coded, see page xxiv and pages 185-6 respectively of the *Consolidated Final Report*.

51 TRC of Liberia, *Final Report Volume III*, "Title II: Children and the TRC Children Agenda," (June 30, 2009), 105. (Hereafter *Final Report: Volume III, Title II*.)

52 TRC of Liberia, *Final Report Volume III* "Title I: Women and the Conflict," (June 30, 2009), 90. (Hereafter *Final Report: Volume III, Title I*.)

enced at different ages, in different regions of the country, or during different periods of the conflict. The report does, however, disaggregate “rape,” “multiple rapes,” and “gang rape. While this dissection is helpful in understanding the types of rapes perpetrated, the report neglects an analysis of this data that would enable an overall clearer picture of how many women and men suffered from these violations.

The TRC report acknowledges its failure to capture the extent of sexual-based violence against women, which it noted was underreported during the commission’s process. It also acknowledges that the TRC Act anticipated the potential challenges in securing statements from victims of sexual violence and thus the commission repeatedly sought mechanisms to try to capture women’s experiences.<sup>53</sup> Nonetheless, the TRC was ultimately unable to reach the majority of victims of sexual violence, leaving their experiences largely unrecorded. The report also acknowledged that the commission failed to collect adequate information on the experiences of female combatants. This, in turn, has limited the report’s ability to make findings that accurately reflect the multiplicity of roles played by women during the conflict beyond those of victims.

The lack of coherence between the report’s sections is not restricted to the way it dealt with cross-cutting thematic issues, however. Overall, the report lacks important linkages between its inquiry, findings, and recommendations. The report also includes an additional section on “determinations” which is not coherently connected to the other sections. Generally, findings in truth commission reports are used to generate recommendations. Findings are specific conclusions that commissions draw from information collected during periods of inquiry. Recommendations are then meant to address the specific problems or shortcomings that findings identify. The Liberia TRC has, however, added the category of “determinations” without clearly defining how information in this section is different from the findings. Additionally, there is a considerable weak link between the historical narrative of the report and many of the subsequent findings, determinations and recommendations.

One example of such problems is the way the report deals with the role of external actors in the Liberian conflict. In the historical narrative, for instance, in describing Liberians United for Reconciliation and Democracy (LURD), the rebel group formed in 1999, the report states it was “a rebel group that had the support of Sierra Leone, Guinea, and the U.S.”<sup>54</sup> The findings, however, do not mention Sierra Leone or Guinea as having played a role in the conflict. Instead, the report finds that Côte d’Ivoire, Libya, and Burkina Faso, and the United States (U.S.) were involved. In the recommendations section, the only state that is mentioned is the U.S. Without explicit linkages between inquiry, findings and determinations, and recommendations, many of the recommendations seem ungrounded.

The viability of a recommendation not only pertains to evidentiary support and linkages to findings, but also whether it can be carried out given available resources and capacities. In best practices, every truth commission recommendation should be directed to a specific implementing agent and contain sufficient specificity, direction, and guidance. Few, if any, of the recommendations meet all of these basic criteria. Many are quite vague and not directed towards actors more specific than “the Government of Liberia” and the “international community.”<sup>55</sup>

The lack of detail will make it difficult to implement many of the recommendations. For example, the recommendations on reparations fail to identify either preliminary beneficiaries or the criteria by which different categories of beneficiaries should be identified. This is not for want of information about victims of the conflict: the Liberia TRC recorded more violations than any other truth commission before it. According to the TRC report, 86,647 victims and 163,615 total violations were identified in statements given to the commission.<sup>56</sup>

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53 TRC of Liberia, *Consolidated Final Report*, 45.

54 *Ibid.*, 167.

55 Sections 18 and 22 of the *Consolidated Final Report* provide recommendations that are directed at “the Government of Liberia” and the “international community” respectively.

56 TRC of Liberia, *Consolidated Final Report*, 185.



Despite this potential wealth of information, it appears that little or none of this unique data has been utilized to assist in making recommendations about how to provide reparations for those who suffered during the conflict. In countries such as South Africa, Sierra Leone, and Timor-Leste, where truth commissions have recommended reparations programs, the reports provided detailed recommendations and guidelines for beneficiaries, policy proposals for their implementation, and an initial list of victims. The truth commission reports from these countries also contained cross-referencing of complicity and responsibility for reparations.<sup>57</sup> In these contexts the state had a basis to implement this aspect of reparations if it wanted to, whether judicially, diplomatically or through economic measures, like taxation and other sources of income.

In specific cases where individuals are directly identified as perpetrators, this should be done within a framework that espouses due process.<sup>58</sup> Where the TRC did get specific about complicity and naming of individuals in its recommendations, it did so for those who it recommended either for prosecutions or public sanction. However, there is little information in the main narrative, findings, or determinations that clearly link these individuals to the crimes for which the TRC recommends they be prosecuted or sanctioned. Less than half of the 227 names of individuals and institutions that appear on the lists for prosecutions are mentioned anywhere else in the report.<sup>59</sup> Only nine of the 49 individuals listed for public sanction appear previously. Where these names are mentioned, in most cases there is little or no supporting information that explains the case for prosecution or sanction. Legal scholars clearly state that when truth commissions name individuals for responsibility in contributing to or committing violations, "the precise nature of the evidence against each named individual in respect of each attributed crime should be made explicit in the final report."<sup>60</sup>

This lack of due process, coupled with the lack of supporting information linking those on these lists with the violations or crimes they allegedly perpetrated, is exacerbated by the fact that the lists are presented without any explanation of the criteria and methodology the TRC used to create them. In the absence of objective criteria, it is impossible to judge whether or not the inclusion or exclusion of certain names has been politicized. Additionally, procedural fairness considerations require the TRC to provide advance notice to those it intended to name, as well as give them the right to reply to this intention prior to the publication of the report. It is unclear to what extent, if at all, the TRC followed these due process considerations in publicly naming the individuals concerned.<sup>61</sup> For these reasons, the lists should only be used as potential reference, but not the basis, from which to carry forward future prosecutorial or vetting efforts.

Implementation of the recommendations is also hampered by the lack of timelines or prioritization plans, which could have served as important elements in facilitating the process of implementation. Not all the recommendations can be implemented simultaneously, even if there were sufficient resources to do so, given the overwhelming amount of work that actors in Liberia are already undertaking. Timelines and prioritization would help actors to know where to begin. In the Sierra Leone truth commission report, for example, recommendations were presented in five prioritized categories.<sup>62</sup>

A further weakness of the recommendations is that they are not well-contextualized or linked to ongoing reconstruction efforts. For example, many of the recommendations regarding health and educational infrastructure are already addressed in Liberia's Poverty Reduction Strategy (PRS).<sup>63</sup> Because the recommendations are not tied to ongoing reconstruction or fundraising efforts, it will not be easy to immediately integrate them into structures and initiatives already in place, which could ease implementation.

57 For detailed reading of the reparations recommendations in the respective reports please refer to [www.etan.org/news/2006/cavr.htm](http://www.etan.org/news/2006/cavr.htm) for East Timor; [www.unicef.org/emerg/files/SierraLeone-TRCReport.pdf](http://www.unicef.org/emerg/files/SierraLeone-TRCReport.pdf) for Sierra Leone; and [www.info.gov.za/otherdocs/2003/trc/rep.pdf](http://www.info.gov.za/otherdocs/2003/trc/rep.pdf) for South Africa.

58 ICTJ Briefing, *Essential Best Practices for Truth Commissions*, (ICTJ Africa Program, December 2009): [http://www.ictj.org/static/Publications/ICTJ\\_SDN\\_briefing\\_AUPD-TJRC\\_pb2009.pdf](http://www.ictj.org/static/Publications/ICTJ_SDN_briefing_AUPD-TJRC_pb2009.pdf).

59 The TRC recommendations include lists of 26 individuals and 19 institutions or state actors to be tried for economic crimes; 58 persons to be tried for egregious violations of domestic law through domestic prosecutions; and 124 to appear before an extraordinary criminal court. See sections 16, 13, and 12, respectively, of the *Consolidated Final Report*.

60 Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press: New York, 2006), 283.

61 *ibid.*, chapt. 7.

62 For detailed reading of the recommendations of the Sierra Leone TRC, refer to *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Vol. II* (Truth and Reconciliation Commission, Sierra Leone, 2004).

63 "Liberia Poverty Reduction Strategy," available at <http://www.lifitiberia.gov.lr/doc/prs.pdf>.

In summary, the TRC report contains many limitations that expose it to challenges. But these weaknesses do not negate the fact that the report and the issues its recommendations raise constitute a significant, government-sanctioned basis from which further work to address the causes and legacies of Liberia's conflict can be taken forward. The issue of accountability for past crimes that the TRC was designed to address is one that continues to be important for Liberia's recovery and reconstruction process.

### Questions of Constitutionality

One of the main challenges to the TRC report relates to questions about the constitutionality of both the TRC Act and its recommendations. Ultimately, the key question regarding constitutionality has to do with the purported binding effect of the TRC's recommendations. Article 48 of the TRC Act states that "all recommendations shall be implemented," but there is a legal argument to be made that the recommendations of a truth commission should never be binding on a government as such a requirement is counter to the separation of powers doctrine.

Regardless, this should not be seen as invalidating the entire act either legally or politically. According to Article 2 of the Constitution, "any laws, treaties, statutes, decrees, customs and regulations found to be inconsistent with [the constitution] shall, to the extent of the inconsistency, be void and of no legal effect." Even if the TRC recommendations cannot bind the government as matter of law, they should still be placed on the political agenda of the nation for the reasons discussed below.

Constitutional challenges against truth commissions are not unusual. Previous truth commissions, notably in Indonesia and South Africa, faced constitutional challenges during their tenure. In Indonesia in September 2004, a group of six civil society organizations asked the Constitutional Court to declare the amnesty provision of the act establishing the TRC unconstitutional.<sup>64</sup> In South Africa, both the statute and the report were challenged by different interest groups and political parties after the release of the preliminary report.<sup>65</sup>

To date, two main actions have been taken to challenge the constitutionality of the Liberian TRC. First, in January 2010, Senator Isaac Nyenabo sponsored a bill calling for amendments to certain provisions of the 2005 TRC Act.<sup>66</sup> In a radio interview, Nyenabo claimed his bill was intended to make implementation of some of the TRC recommendations easier by addressing the act's constitutional weaknesses in order to preempt court challenges.<sup>67</sup> A few weeks later, what he supposedly sought to prevent occurred when a group of individuals, whose names have been recommended for prosecutions by the TRC report, initiated a court case. They filed a class action against the TRC in the civil court demanding a declaratory judgment rendering the act and the final report unconstitutional.<sup>68</sup>

The litigation challenges the validity of the report on the grounds that the TRC arrived at some of its recommendations without respecting the fundamental principles of due process, particularly the presumption of innocence. It calls on the court to declare the TRC report unconstitutional because some of its findings, determinations, and recommendations have "given rise to confusion, fear, uncertainty and apprehension in the Liberia public and around the world," which creates a "likelihood of this disrupting the constitutional system."<sup>69</sup> As of April 2010, the court had not set the case down for hearing.

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64 "ICTJ written submission: Legality of Truth and Reconciliation Commission," (Amicus Brief to the Indonesian Constitutional Court, July 2006), available at <http://www.ictj.org/static/Asia/Indonesia/testimony.eng.pdf>.

65 "Legal Challenges," vol. 1, chapt. 7 of the *Final Report of the Truth and Reconciliation Commission of South Africa* (presented to President Nelson Mandela on October 29, 1998); and "Legal Challenges," vol. 6, sec. 1, chapt. 4 of the *Report of the Amnesty Committee of the Truth and Reconciliation Commission of South Africa Report* (March 21, 2003).

66 For detailed reading of the constitutional challenges please refer to "A Bill to amend certain provision of the Act that established the Truth and Reconciliation Commission (TRC) of Liberia," (Jan. 14, 2010). Senator Nyenabo is one of the 49 individuals recommended for public sanctions in the TRC report.

67 The interview was aired on an UNMIL radio program, run in collaboration with ICTJ, called "Let's Face It: Bah-tunee," on January 22, 2010.

68 For detailed reading of the Petition please refer to *Jucante Thomas Woewiyu et al Vs The Truth and Reconciliation Commission through its Chairman, Jerome J Verdier, Class Action: Petition for Declaratory Judgment*, (Feb. 1, 2010).

69 *Ibid.*