



BOSNIA AND HERZEGOVINA

Narrowing the Impunity Gap

Trials before Bosnia's War Crimes Chamber

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I. Introduction	1
II. Policies and Practices of the Prosecution.....	5
A. Overview of recent developments.....	5
1. Progress in bringing forward cases	5
2. Managing the existing caseload.....	5
B. The Special Department for War Crimes’ case selection policy.....	8
C. Investigations	13
1. Recent developments.....	13
2. Promoting greater sensitivity toward witnesses.....	16
D. Regional cooperation	18
III. Fair Trial Rights of Defendants	21
A. Overview of developments in criminal defense support	21
B. Challenges that may affect a defendant’s fair trial rights	24
1. Access to ICTY material	24
2. Quality of defense counsel.....	26
IV. Witness Protection and Support.....	29
A. Protection of witnesses	29
1. The chamber’s use of protective measures	29
2. Witness protection outside of the courtroom.....	35
B. Witness support.....	37
1. Pre-indictment	37
2. Post-indictment	38
V. Administrative Developments at the War Crimes Chamber	39
A. Increased focus on transition to national authorities	39

B. Developments in court management	41
1. Measures to improve efficiency	42
2. Communication between judges	44
VI. The War Crimes Chamber’s Outreach and Communications Strategy	45
A. Overview of developments in outreach and communications.....	45
B. Public awareness about the chamber’s activities	47
1. The court’s interaction with the media.....	47
2. The Special Department for War Crimes’ engagement with the media.....	50
3. Additional initiatives needed to engage the public.....	50
VII. Collaboration with Cantonal and District Courts	54
VIII. Recommendations.....	56
To the War Crimes Chamber	56
To the Judiciary.....	56
To the Court Management Section	56
To the Registrar of the Prosecutor’s Office of the State Court of Bosnia.....	56
To the Special Department for War Crimes	57
To the Criminal Defense Support Section	57
To the State Investigation Protection Agency War Crimes Unit	58
To the State Investigation Protection Agency Witness Protection Unit.....	58
To the Public Information and Outreach Section.....	58
To the Registry.....	59
To the government of Bosnia and Herzegovina	59
To the governments of Serbia and of Croatia	59
To the International Criminal Tribunal for the former Yugoslavia	60
To the international community.....	60
IX. Acknowledgements	61

I. Introduction

The conflict in Bosnia and Herzegovina,¹ which lasted from 1992 to 1995, was characterized by grave violations of human rights such as mass killings, rapes, widespread destruction, and displacement of the population. These violations, including the genocide of between seven thousand and eight thousand Bosnian Muslim men and boys at Srebrenica, seized the international community's attention due to their brutality and scale. In the aftermath, the desire to bring perpetrators to justice for these and other human rights violations committed during the Balkans conflicts resulted in the Security Council establishing the International Criminal Tribunal for the former Yugoslavia (ICTY).²

The ICTY has made progress in trying individuals for the atrocities committed in the former Yugoslavia,³ including Bosnia. However, by the end of its mandate, it will have prosecuted only a limited number of top-level perpetrators of war crimes.⁴ Fair and effective trials of the remaining perpetrators at the domestic level are necessary to further combat impunity in the former Yugoslavia and build respect for the rule of law.

In Bosnia, however, profound deficiencies in the national justice system during and immediately following the conflict severely limited local efforts to combat the rampant impunity for war crimes. The War Crimes Chamber was established in an effort to address these deficiencies and to enable effective war crimes prosecutions in Bosnia.⁵ A joint initiative of the ICTY and the Office of the High Representative,⁶ the

¹ Hereinafter Bosnia.

² United Nations Security Council, Resolution 827 (1993), S/RES/827 (1993), para. 2.

³ Human Rights Watch, *Real Progress in the Hague*, March 29, 2005, <http://hrw.org/english/docs/2005/03/29/serbia10386.htm>. As of December 2006, cases against 100 accused, out of a total of 161 indicted, have been closed. While proceedings against 61 accused remain to be completed, out of this number, 13 have already been tried and are at the appeals stage, 24 are currently on trial, only 14 are in the pre trial stage, four are pending Rule 11 *bis* motions for referral, and the remaining six accused are still at large. See ICTY, "Statement by Judge Fausto Pocar, President, International Criminal Tribunal for the Former Yugoslavia," December 15, 2006, <http://www.un.org/icty/pressreal/2006/p1136e-annex.htm> (accessed January 24, 2007).

⁴ For the purpose of this document, the term "war crimes" will be used to refer to war crimes, genocide, and crimes against humanity.

⁵ See "Security Council briefed on establishment of War Crimes Chamber within State Court of Bosnia and Herzegovina," UN press release, SC/7888, October 8, 2003, <http://www.un.org/News/Press/docs/2003/sc7888.doc.htm> (accessed January 24, 2007); "Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War Crimes Prosecutions," ICTY press release, January 15, 2003, <http://www.un.org/icty/pressreal/2003/p723-e.htm> (accessed January 24, 2007).

chamber's mandate includes trying a limited number of cases of alleged mid- and lower-level perpetrators referred to it by the ICTY. It therefore represents an important component of the tribunal's completion strategy. The chamber also has jurisdiction to try war crimes cases initiated locally; indeed, these cases will make up the bulk of the chamber's caseload. The War Crimes Chamber, together with the Organized Crime and General Crime Chambers, operates within the Criminal Division of the State Court of Bosnia.

The concept underlying the establishment of the chamber is that accountability for the gross violations of human rights that took place during the conflict ultimately remains the responsibility of the people of Bosnia.⁷ Thus, although currently staffed by both nationals and internationals, the chamber is essentially a domestic institution operating under national law. There is an aggressive transition strategy for the phasing out of international involvement within a short timeframe. Since it is ultimately a national institution, the chamber has the potential to make an important impact in fostering public confidence in the rule of law long after international participation in its operation has ceased.

Careful scrutiny of the chamber's operations is essential. The chamber's success or failure as an institution will ultimately be a reflection of the level of commitment —by both the international community and Bosnian nationals—to establishing the rule of law in Bosnia. The chamber's potential to bolster the capacity of Bosnia's cantonal and district courts to try the remaining war crimes cases that fall outside of the chamber's jurisdiction underscores the importance of ensuring the chamber fulfills its mandate fairly and effectively.⁸ Moreover, the lessons learned from this

⁶ The position of high representative was created under the Dayton Peace Agreement to oversee implementation of the civilian aspects of the Peace Agreement. The mission of the high representative is to work with the people of Bosnia and the international community to ensure that Bosnia is a peaceful, viable state on course to European integration. For more information, see www.ohr.int.

⁷ Office of the High Representative, "War Crimes Chamber Project: Project Implementation Plan - Registry Progress Report," October 20, 2004, <http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf> (accessed January 24, 2007), p. 4.

⁸ Pursuant to the Dayton Peace Agreement, the State of Bosnia was divided into two entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska. In addition to the Entities, the Brcko District was established in 2000 as a single administrative unit of local self-government under the sovereignty of Bosnia. The respective entities and the Brcko District are organized separately. The Federation of Bosnia and Herzegovina consists of a number of cantons. Within each canton, there are municipal and cantonal courts that try less and more serious offenses, respectively. The Republic of Srpska consists of a number of administrative districts. As in the Federation, there are a number of municipal courts that exercise jurisdiction over less serious offenses, while the district courts try more serious offenses. In the Brcko District, the Basic Court handles serious offenses.

institution may be very valuable to the extent that this model may be used to address similar violations in other country situations.

In February 2006 Human Rights Watch issued an initial report assessing the chamber's operations, "Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina."⁹ When we conducted the research for that report on the chamber, it was still in the early stages of conducting trials, so we focused primarily on clarifying the chamber's complex legal framework and providing an overview of the various organs associated with its effective functioning. "Looking for Justice" identified accomplishments and made recommendations aimed at improving operations.

This follow-up report assesses developments in the chamber now that trials are fully underway and examines progress and concerns in relation to the following areas: 1) policies and practices of the prosecution; 2) fair trial rights of defendants; 3) witness protection and support; 4) administrative developments at the chamber; 5) outreach and communications; and 6) collaboration with the cantonal and district courts. Within each section, we note the accomplishments and make recommendations in relation to those areas where we believe the chamber can improve operations.

Overall, our research indicates that the War Crimes Chamber has made significant progress in fulfilling its mandate and is playing an important role in bringing justice for the atrocities committed during the war. There are concerns, however, regarding aspects of the chamber's operations that could affect the extent of its impact in Bosnia. For example, the prosecution's policy for the selection of cases to date has been problematic. Further, we have concerns regarding the court's broad use of closed sessions and the negative implications that this lack of transparency may have on the public's confidence in the chamber overall. Inadequate outreach and communications efforts to explain the court's work and make it meaningful to the communities most affected by the violations committed may further undercut the chamber's impact on the rule of law. A comprehensive list of recommendations is included at the end of the report.

⁹ Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, vol. 18, no. 1(D), February 2006, <http://hrw.org/reports/2006/ijo206/>.

The report is based primarily on a mission Human Rights Watch conducted in Sarajevo in September and October 2006. During the mission we interviewed various officials associated with the chamber including members of: the Special Department for War Crimes of the Office of the Prosecutor, the Criminal Defense Support Section, the Public Information and Outreach Section, the Witness Protection Department, the Witness Support Office, the judiciary, the Court Management Section, the Registry, and the State Investigation and Protection Agency of Bosnia. We also observed war crimes trial proceedings before the chamber.

Further, we met with a number of officials associated with organizations outside of the chamber, including the Organization for Security and Co-operation in Europe (OSCE), the Bosnian High Judicial and Prosecutorial Council (HJPC), the United Nations Development Programme (UNDP), and the Office of the High Representative (OHR). In addition, we interviewed a number of Bosnian civil society actors to garner their insights on the functioning of the chamber. Between November 2006 and February 2007 we conducted numerous additional interviews in person and by telephone with members of civil society, officials in the chamber and in the ICTY, and received substantial material from officials via email.

Many of the individuals we interviewed wanted to speak candidly, but did not wish to be cited by name, so we have used generic terms throughout the report to respect the confidentiality of these sources.

II. Policies and Practices of the Prosecution

A. Overview of recent developments

1. *Progress in bringing forward cases*

Since beginning its work in March 2005, the Special Department for War Crimes in the Office of the Prosecutor has progressively increased its activities. For example, during the period of January 2005-October 2006, there has been a steady increase in the number of orders issued by prosecutors to criminal investigators to carry out activities relating to the investigation of war crimes cases. Such activities include the taking of statements, searches, and archive research, all of which are central to the successful prosecution of war crimes. These activities provide a measure of insight into both the workload of the department as well as what may be expected of the chamber during an investigation.¹⁰

During the same period, the number of confirmed indictments before the chamber has steadily increased. As of October 2006 the chamber had confirmed a total of 18 indictments involving 32 defendants.¹¹ In addition to cases initiated locally, the chamber has jurisdiction over cases referred to it by the ICTY under Rule 11 *bis* of the ICTY's Rules of Procedure and Evidence. To date, the ICTY has referred five 11 *bis* cases, involving nine accused, to the chamber for trial.

2. *Managing the existing caseload*

At this writing, eight national prosecutors and five international prosecutors work in the Special Department for War Crimes. In light of concerns regarding the existing staffing capacity to handle the current caseload, the department recently received approval to hire six additional national prosecutors.¹² Further, efforts are underway to

¹⁰ For example, as of October 2006, 127 investigative orders had been issued in relation to 333 suspects. Section I for War Crimes & Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Departments for War Crimes and for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, "Registry Quarterly Report," September 2006, http://www.registrarbih.gov.ba/files/docs/REGISTRY_QUARTERLY_REPORT_SEPo6.pdf (accessed January 27, 2007), pp. 16-17 ("Second Registry Report").

¹¹ Second Registry Report, p. 18.

¹² Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, January 30, 2007. This request was approved by the High Judicial and Prosecutorial Council.

hire another international prosecutor, a position that was originally allocated to the department but which remained vacant through 2006.¹³

The department has six prosecution teams (five regional prosecution teams and a sixth team to address allegations arising from the Srebrenica massacre).¹⁴ There are national and international prosecutors on each team.¹⁵ The pressure of the current caseload means that the national and international prosecutors on each team generally manage their own separate portfolio of cases.¹⁶ Cases are assigned based on practical considerations, such as the language of the file. For instance, 11 *bis* cases tend to be assigned to international prosecutors, both because the supporting material for these cases is usually in English and a strong command of English is needed to facilitate communication and cooperation with the Office of the Prosecutor of the ICTY.¹⁷

There are some cases that by their nature and level of complexity foster regular and ongoing collaboration between the national and international prosecutor on each team. For example, in the *Kravica* case, which involves allegations of genocide relating to the Srebrenica massacre, the national and international prosecutors have been working very closely together in investigating and putting forward evidence against the 11 defendants.¹⁸

Effective collaboration between international and national prosecutors is important to build the capacity of national prosecutors to handle complex war crimes cases. Generally, collaboration between international and national prosecutors is not

¹³ Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, November 29, 2006. The absence of the sixth international prosecutor has had a detrimental impact on the capacity of the office to handle cases. See Second Registry Report, p. 21.

¹⁴ Human Rights Watch, *Looking for Justice*, p. 8.

¹⁵ Of the six prosecution teams, four teams have one international and one national prosecutor. One team has two national prosecutors (in addition to an international prosecutor). There is one international prosecutor assigned to two teams, each of which has a national prosecutor. The deputy prosecutor, who is also a national, is not assigned to a specific team. Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, February 2, 2007.

¹⁶ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006.

¹⁷ There are exceptions to this rule, as national prosecutors have handled two 11 *bis* cases referred to the chamber. Second Registry Report, p. 19.

¹⁸ Human Rights Watch separate interviews with three Special Department for War Crimes staff, September 27 and October 2, 2006.

systematic and proceeds informally.¹⁹ Nonetheless, a number of national and international prosecutors interviewed by Human Rights Watch have characterized this collaboration as good to very good.²⁰ This can be attributed in part to the fact that the current complement of international prosecutors has made a two-year commitment to stay with the department.²¹ In addition to helping to develop relationships between national and international prosecutors, continuity in staffing assists in establishing the department's institutional memory in handling challenges that arise in prosecuting complex war crimes cases. A strong institutional memory can promote efficiency in addressing these challenges effectively.

Under the transition strategy outlined by the Registry in October 2005, the phasing out of international prosecutors is scheduled to take place during the period of August 2006–August 2009.²² Indeed, a number of contracts of international prosecutors will expire during 2007 and 2008.²³ We have been informed of concerns about the possibility of losing these prosecutors upon expiry of their contracts and the implications of this loss for the functioning of the department.²⁴ Human Rights Watch shares these concerns.

We believe it is essential to adhere to the principles underlying the transition strategy to ensure Bosnian ownership over all organs of the War Crimes Chamber, including the Special Department for War Crimes. However, it may be necessary to adopt a flexible approach in terms of the extension of the contracts of the existing international prosecutors as considered necessary. Such an approach should still adhere to the overall timeframe established by the transition strategy—the end of involvement of all international staff by the end of 2009—but would allow for the

¹⁹ Human Rights Watch separate telephone interviews with three Special Department for War Crimes staff, Sarajevo, November 29, 30 and December 1, 2006.

²⁰ Human Rights Watch separate interviews with two Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006; Human Rights Watch separate telephone interviews with three Special Department for War Crimes staff, Sarajevo, November 29, 30 and December 1, 2006.

²¹ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

²² Registry for Section I for War Crimes & Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, and Ministry of Justice Prison Project, "Project Implementation Plan Progress Report," October 2005, pp. 17-19.

²³ Second Registry Report, p. 22; Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 1, 2006.

²⁴ *Ibid.*

retention of international prosecutors as necessary in the interim. This approach could in fact facilitate the seamless transition of the department to a fully national institution.

B. The Special Department for War Crimes’ case selection policy

There are literally thousands of war crimes cases emanating from the conflict, some involving multiple defendants, which have not yet been addressed.²⁵ Many of the defendants may be living outside of Bosnia and are therefore beyond the reach of Bosnia’s criminal justice system.²⁶ The Special Department for War Crimes—and the criminal justice system as a whole—is not in a position to handle all of these cases. These limitations emphasize the importance of developing and consistently applying a clear prosecutorial policy for the selection of cases and the manner in which these cases are prioritized. Developing such a policy can help maintain a sense of internal coherence in the work of the prosecution. Communicating to the public, to the greatest extent possible, the details of this policy can also help to manage the public’s expectations regarding the Special Department for War Crimes’ capacity to address war crimes cases. Further, establishing and publishing a clear policy for prosecutions in an ethnically polarized society like Bosnia can help insulate the department from allegations of bias that could otherwise undermine its credibility and effectiveness.

As mentioned above, in addition to those cases referred by the ICTY under Rule 11 *bis*, the Special Department for War Crimes has jurisdiction to select and prosecute its own cases initiated without the involvement of the ICTY. The department’s current strategy for the selection of such cases involves an assessment of whether a case is considered “highly sensitive.”²⁷ Other cases, including those considered “sensitive,” are handled by the cantonal and district courts as appropriate.

²⁵ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

²⁶ The issue of regional cooperation is addressed in more detail below in section II(D).

²⁷ The prosecutor’s strategy for the selection of cases is not legally binding on the court. The court must determine, based on the evidence submitted by the prosecutor, whether there is a “reasonable suspicion” that the defendant committed the crimes alleged in the indictment. See Criminal Procedure Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, 61/04, art. 228 (“Criminal Procedure Code”).

Factors used in assessing whether a case meets the threshold of “highly sensitive” include the nature of the crime alleged and the circumstances of the alleged perpetrator. For example, cases involving allegations of genocide, multiple murders, and persecutions on a widespread and systematic scale may result in a case being considered “highly sensitive.” Similarly, the department may pursue cases involving command responsibility and crimes committed by public officials still in office and law enforcement officials.²⁸ Once a case has been selected for prosecution, there may be other factors that affect its priority in terms of moving forward to indictment and/or trial, such as: whether additional investigations are necessary; difficulties in locating the suspect(s); the availability of witnesses; and the need to implement appropriate protective measures.

Human Rights Watch believes that to date the department has not adequately articulated to the public the criteria for case selection and their application, which has led to significant uncertainty regarding the department’s priorities. Some officials outside of the department expressed concern that there are no clearly defined criteria for the selection of cases.²⁹ Indeed, to one Bosnian official outside of the chamber, it appeared that the department did not have a strategy for addressing war crimes cases.³⁰ Others cited the “highly sensitive” threshold, but indicated that the public is unaware of how this standard is applied in the selection of cases.³¹ According to one civil society actor, without an explanation of how these criteria are applied they are meaningless to the public.³²

There is also the perception that the court is not handling enough cases involving “big fish” perpetrators, meaning high-ranking or otherwise influential defendants.³³ This perception may be reinforced by the indictment of lower-ranking defendants by

²⁸ Orientation Criteria for Sensitive Rules of the Road Cases (Annex to the Book of Rules on the Review of War Crimes Cases), A-441/04, October 12, 2004, pp. 9-11. The Orientation Criteria are guidelines for case selection and are not intended to be exhaustive.

²⁹ Human Rights Watch interview with OSCE staff, Sarajevo, October 3, 2006; Email communication from OSCE staff, Sarajevo, to Human Rights Watch, January 31, 2007.

³⁰ Human Rights Watch interview with HJPC staff, Sarajevo, October 3, 2006.

³¹ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, October 2, 2006; Balkan Investigative Reporting Network, “Justice far from public eyes,” Justice Report, December 25, 2006.

³² Human Rights Watch interview with Bosnian civil society representative, Sarajevo, October 2, 2006.

³³ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, September 26, 2006; Human Rights Watch interview with Bosnian civil society representative, New York, October 24, 2006.

the department for trial before the chamber.³⁴ A staff member in the Special Department for War Crimes acknowledged that the reasons behind the department's selection of certain cases may not be apparent to the public.³⁵

Of course, there may be reasons for the department to pursue cases against lower-ranking defendants; for example, there may be links to a case involving a higher-ranking defendant and/or it may be important for a wider prosecutorial strategy. Maintaining a flexible approach in selecting cases for prosecution can be sensible. However, the importance of maintaining such flexibility as a matter of prosecutorial policy must be clearly and consistently emphasized to the public, even in general terms, to avoid confusion regarding the department's case selection priorities.

Staff members in the Special Department for War Crimes have acknowledged that the absence of a clearly articulated policy regarding case selection is problematic.³⁶ To an extent, it is inevitable that the public will have high expectations for what the court can achieve in bringing justice for the crimes committed during the war. However, the lack of clarity in the current prosecutorial strategy has fueled the development of unrealistic expectations by the public about what can and should be accomplished by the department—and the court—in addressing war crimes cases.³⁷ These expectations cannot reasonably be satisfied, which has in turn led to considerable negative press concerning the department and the court overall.³⁸ For example, in the lead-up to Bosnia's recent general elections, politicians in the Republic of Srpska questioned the objectivity of the department in its case selection process since more than 90 percent of cases before the chamber involved Serb defendants.³⁹ The department has been subject to negative press in the Federation

³⁴ In this regard, we note the confirmed indictment against Radmilo Vukovic who, as a member of the military forces of the so-called Serb Republic of Bosnia in 1992, is charged with war crimes for the beating and repeated rape of one victim over a four-day period. While there is no doubt that the underlying crimes alleged against the defendant in this case are serious, it appears that his indictment may not be consistent with the "highly sensitive" criteria. See *Prosecutor v. Radmilo Vukovic*, Court of Bosnia and Herzegovina, Case No. X-KR-06/217, Indictment, October 13, 2006.

³⁵ Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 1, 2006.

³⁶ Human Rights Watch separate interviews with three Special Department for War Crimes staff, Sarajevo, September 27 and 29, 2006.

³⁷ Human Rights Watch separate interviews with two Special Department for War Crimes staff, Sarajevo, September 27, 2006.

³⁸ *Ibid.*

³⁹ "Court Faces 'Political' Smears," Balkan Investigative Reporting Network, Justice Report No. 26, September 8, 2006; Human Rights Watch interview with Bosnian civil society representative, Sarajevo, September 26, 2006; Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006.

as well.⁴⁰ Moreover, the lack of a clear strategy and the failure to manage expectations has resulted in the department being more vulnerable to pressure from outside organizations, such as victims' groups, to select particular cases for prosecution.⁴¹

Human Rights Watch has been informed of an initiative within the Special Department of War Crimes to develop a strategy document that would clarify the standards used in the selection and management of cases.⁴² In terms of case selection, the proposed strategy document would provide more comprehensive criteria for setting the department's priorities. For example, the document would contain general information about the standards used in deciding whether to open an investigation. Further, the document would include information about charging standards, specifically how the department measures legal standards against practical considerations in deciding whether to press charges against an alleged perpetrator of war crimes.⁴³

The seniority of the defendant and the gravity of the crime(s) alleged, together with other factors such as the availability of witnesses and the quality of evidence, would still play an important role in deciding whether to go forward. However, the strategy document would also articulate other factors for consideration, including the impact of a particular case on the community most affected by the crime(s) alleged and, where possible and appropriate, the extent to which the case at issue advances the development of domestic and international humanitarian law.⁴⁴ The strategy would therefore go beyond the existing criteria used in determining whether a case could be considered "highly sensitive."

The strategy would also focus on establishing standards regarding the way in which prosecutors use the tools available to them in managing cases. For example,

⁴⁰ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006.

⁴¹ Human Rights Watch separate interviews with two Special Department for War Crimes staff, Sarajevo, September 27, 2006.

⁴² Human Rights Watch separate interviews with three Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006; Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, January 30, 2007.

⁴³ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, November 30, 2006.

⁴⁴ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006; Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 19, 2006.

Bosnian criminal procedure allows for the use of plea agreements⁴⁵ and immunity⁴⁶ in criminal cases, but as the OHR introduced these tools to the Bosnian justice system through the adoption of the new Criminal Procedure Code in 2003, there is no prior context for their use in criminal proceedings. Also, there are no guidelines provided in the law regarding when these tools can and should be used in war crimes cases.⁴⁷

In complex war crimes cases, offers of plea bargains or immunity to lower-level suspects in exchange for testimony can be very useful in establishing the command responsibility of those in senior leadership positions. However, since the recipients of immunity or plea bargains may have themselves committed serious crimes, it may not be apparent to the public how the use of these tools could ever be considered appropriate. We believe it is essential to clarify the role of immunity and plea bargains in war crimes cases to avoid fueling negative public perceptions—including attempts by those outside of the court to manipulate the public—about their use.

The significant negative perceptions surrounding the department’s work as indicated above underscore the importance of developing a clear prosecutorial strategy for the selection and management of cases. Human Rights Watch therefore strongly urges the department to put forward a strategy document as a matter of priority. Further, to promote transparency, we encourage the department to publish general details of the strategy in a credible, concise document that avoids technical language: outlining, to the greatest extent possible, the department’s priorities and standards in an easy-to-understand public document can help the department better manage external pressure in the selection and management of cases.⁴⁸ More importantly, a strategy can help temper the public’s expectations about what the criminal justice process can offer and could place the department in a better position to satisfy those

⁴⁵ Art. 231.

⁴⁶ Art. 84(3). We note that the Code of Criminal Procedure does not indicate the extent of the immunity available to a witness. It is unclear whether the immunity refers to “use immunity” (which means that the witness would be free from the use of the information provided in a future prosecution, but could still be prosecuted if independent evidence exists of his or her involvement in the criminal offense) or “transactional immunity” (meaning the witness would be protected from prosecution for the offense or offenses at issue). Because of the implications for the witness involved, clarifying the scope of the immunity provided in the law would be more appropriately addressed by the legislative authority.

⁴⁷ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

⁴⁸ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006; Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 1, 2006.

expectations without sacrificing the quality of cases that are put forward. In this way, the department could increase confidence in the rule of law in Bosnia.

The development and publication of such a strategy document could also have a valuable impact on the way in which the cantonal and district courts handle war crimes cases. For example, outlining the factors governing the selection of war crimes cases at the national level can facilitate the development of a complementary strategy in the cantonal and district prosecutor's offices. Similarly, the standards highlighted in the strategy for using important prosecutorial tools such as plea bargains, immunity, and protective measures can assist in the evolution of similar standards at the entity level. The strategy document could therefore encourage enhanced direct and indirect communication between the department and the cantonal and district court prosecutors and facilitate a more consistent approach in the prosecution of war crimes cases overall.⁴⁹

Finally, even with the refinement of the current criteria for case selection, their application could yield a larger number of cases than the department can reasonably handle in light of the numerous grave human rights violations committed during the war. The department may still be required to make difficult decisions regarding case selection due to resource constraints. In this regard, we wish to underscore the importance of effectively managing the department's limited resources to support efforts to promote consistency in the way cases are selected and managed.⁵⁰

C. Investigations

1. Recent developments

In complex war crimes cases, effective prosecutions depend on effective investigations during all stages of case preparation and proceedings. Frequent contact between prosecutors and criminal investigators is essential to effectively manage investigations and build cases for prosecution. As outlined in our earlier

⁴⁹ We note the current debate in Bosnia regarding the applicable sentences of those convicted of war crimes. Under the Criminal Procedure Code adopted in 2003, the maximum sentence is 40 years' imprisonment. By contrast, under the Criminal Procedure Code that was applicable during the conflict, the maximum penalty was the death penalty, which was abolished in 2001, leaving a maximum sentence of 20 years' imprisonment. As this issue is currently being litigated, a detailed analysis of this debate is beyond the scope of this report.

⁵⁰ Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 1, 2006.

report “Looking for Justice,” the War Crimes Unit (WCU) of the Bosnian State Investigation and Protection Agency (SIPA) has primary responsibility for conducting investigations in war crimes cases before the chamber.⁵¹

Human Rights Watch has been informed that the level and manner of cooperation between the WCU and the Special Department for War Crimes has improved significantly.⁵² For example, investigators are now in daily contact with prosecutors in the department.⁵³ There is also increased collaboration between officials in the WCU and prosecutors in the department to make improvements in the conduct of investigations.⁵⁴

However, the WCU’s effectiveness in conducting war crimes investigations continues to be undercut by the shortage of investigators to execute prosecutors’ requests.⁵⁵ SIPA is still critically understaffed, as it is only operating with 57 percent of its projected staff.⁵⁶ Efforts have been made recently to recruit additional staff. There are difficulties in attracting quality candidates in large part because, as identified in “Looking for Justice,” SIPA investigators are still not remunerated at a higher level than law enforcement officials in the entities’ Ministries of Interior.⁵⁷

There have also been inconsistencies identified in the training and experience of investigators, which can affect the progress of an investigation and overall prosecution. For example, some investigators take statements that lack precise language and sufficient detail,⁵⁸ sometimes making it necessary to take additional statements. Further, some investigators, particularly those who are inexperienced, do not always realize when a witness has given an incriminating statement.⁵⁹ If the

⁵¹ Human Rights Watch, *Looking for Justice*, p. 13.

⁵² Human Rights Watch separate interviews with three Special Department for War Crimes staff, Sarajevo, September 27, 29 and October 2, 2006.

⁵³ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006.

⁵⁴ *Ibid.*; Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 1, 2006.

⁵⁵ Human Rights Watch separate interviews with three Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006.

⁵⁶ Human Rights Watch interview with SIPA WCU staff, Sarajevo, September 28, 2006.

⁵⁷ Human Rights Watch telephone interview with SIPA WCU staff, Sarajevo, December 11, 2006. See also Human Rights Watch, *Looking for Justice*, p. 14.

⁵⁸ Human Rights Watch separate interviews with two Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006.

⁵⁹ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 29, 2006.

witness's lawyer is not present when the statement is taken, the statement cannot be used in court. In addition, some WCU investigators rely too heavily on the prosecutor to direct every action required in an investigation, which slows down the investigative process.⁶⁰ This may be because under the previous criminal codes, prosecutors and investigators did not play as central a role in building a successful case for trial, as this was the responsibility of the investigating judge.

To address these shortcomings, some prosecutors have expressed their preference for working with certain investigators in the same case on an ongoing basis as a means of promoting continuity and efficiency in investigations. As such, they make requests to SIPA for the assignment of the same investigators, although these requests are not routinely satisfied.⁶¹ Officials in the WCU indicated that while consideration is given to an investigator's previous work on a case, there are other factors in determining which investigator will be assigned to a case, including the investigator's level of experience, workload, and overall capacity to handle the request.⁶²

We can appreciate the advantages of using the same investigators in a particular case as a means of ensuring the overall effectiveness of an investigation. However, satisfying all requests for specific investigators may not be possible, particularly in light of the administrative challenges stemming from the WCU's current staffing shortage. Moreover, assigning specific investigators upon request does not address the broader issues underlying the uneven training and experience of investigators.

Human Rights Watch has been informed that the department is working more closely with SIPA to put in place a training program aimed at improving the skills of all investigators and informing them of the prosecution's specific needs in taking statements. There has already been one meeting at the managerial level, and there are plans to create standards in taking statements for implementation at the officer

⁶⁰ Human Rights Watch separate interviews with three Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006.

⁶¹ Human Rights Watch separate interviews with two Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006.

⁶² Human Rights Watch telephone interview with SIPA WCU staff, Sarajevo, December 11, 2006.

level.⁶³ This training will likely be coordinated by the European Union Police Mission (EUPM).⁶⁴ The training may include some involvement by the department, but such involvement may not be possible in light of the current workload.⁶⁵ We urge the Special Department for War Crimes to participate in these trainings to the greatest extent possible to ensure that the weaknesses identified in taking statements are adequately addressed.

Further, we note that prosecutors have started providing background material to investigators on a more consistent basis.⁶⁶ Examples of background material include details about the crime alleged, a list of possible witnesses, suspects and/or names that may be relevant, and information about the type of details the prosecutor needs to prove certain elements of the case. Providing such material in advance can help a new investigator understand the history of an investigation, and can assist him or her in going beyond the immediate parameters of the prosecutor's request to make further inquiries as appropriate. This improves the efficiency of investigations.⁶⁷ We welcome the development of this practice and encourage its continued and consistent implementation.

2. Promoting greater sensitivity toward witnesses

Many witnesses continue to face considerable trauma when recounting the details of the crimes committed against them and their families and the suffering they have endured. Further, since the end of the war, many witnesses have developed a sense of “witness fatigue” as a result of having to repeatedly provide details from their testimonies to law enforcement and other officials dealing with their cases. Sensitivity in dealing with all witnesses, and particularly those who have been victims of crimes committed during the conflict, is therefore essential to minimize trauma and preserve a victim's dignity. The level of sensitivity of law enforcement authorities in their approach to witnesses who have suffered trauma may also have a

⁶³ Human Rights Watch separate telephone interviews with two Special Department for War Crimes staff, Sarajevo, November 29 and December 1, 2006.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, November 29, 2006.

⁶⁷ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

direct impact on the level of cooperation and willingness of the victim to cooperate throughout an investigation and trial.

Officials in SIPA's WCU have informed Human Rights Watch that they are cognizant of the difficulties faced by some witnesses in providing statements to investigators. To address issues relating to witness trauma and fatigue, the WCU encourages sensitivity by investigators in the manner in which questions are asked and the way witnesses are handled.⁶⁸ The WCU has also organized training sessions for investigators on appropriate interview techniques for dealing with witnesses who have lost their entire families.⁶⁹

However, at this writing, the WCU had not organized any formal training sessions on how to deal with victims of sexual violence.⁷⁰ Instead, officials indicated that investigators cooperate informally with nongovernmental organizations (NGOs) dealing with traumatized female victims in taking statements.⁷¹ Further, although there is only one female investigator, efforts are being made to recruit additional female investigators.⁷²

The lack of standardized training in dealing with victims of sexual violence may result in differential treatment between victims. While SIPA's cooperation with NGOs is important in dealing with such victims, this cooperation presently operates on an ad hoc basis. Moreover, such cooperation cannot be a substitute for investigators themselves being sufficiently trained in approaching victims with sensitivity. Indeed, we have been informed by a representative of one NGO working with victims of sexual violence that her organization has received a number of complaints from witnesses about the WCU's lack of sensitivity toward traumatized female victims of sexual violence.⁷³

⁶⁸ Human Rights Watch interview with SIPA WCU staff, Sarajevo, September 28, 2006.

⁶⁹ This training was held in November 2006. Human Rights Watch telephone interview with SIPA WCU staff, Sarajevo, December 11, 2006.

⁷⁰ Human Rights Watch interview with SIPA WCU staff, Sarajevo, September 28, 2006; Human Rights Watch telephone interview with SIPA WCU staff, Sarajevo, December 11, 2006.

⁷¹ Human Rights Watch interview with SIPA WCU staff, Sarajevo, September 28, 2006.

⁷² *Ibid.*; Human Rights Watch telephone interview with SIPA WCU staff, Sarajevo, December 11, 2006.

⁷³ Email communication from Bosnian civil society representative, Sarajevo, to Human Rights Watch, October 31, 2006.

We recommend putting in place a training program to improve the level of sensitivity used in working with female and male victims of sexual violence. Further, while recruiting additional female investigators is a positive development, these investigators must still be appropriately trained to ensure that they approach traumatized witnesses in a sensitive manner. Requiring adequate training for all investigators would help to ensure that victims are consistently treated with dignity and respect.

D. Regional cooperation

As outlined in “Looking for Justice,” a number of cases within the chamber’s jurisdiction involve victims, witnesses, and/or defendants who have relocated to other countries in the former Yugoslavia, namely Serbia and Croatia. The prosecution must therefore rely heavily on cooperation with the authorities in these and other states in order to obtain evidence, locate witnesses and, in some cases, arrest defendants in relation to proceedings before the chamber.⁷⁴ To that end the authorities in Bosnia, Serbia and Croatia continue to share evidence in war crimes investigations and proceedings in their respective jurisdictions.⁷⁵

However, the situation with respect to defendants who are citizens of countries that do not permit the extradition of nationals remains unchanged. In particular, the ban on the extradition of nationals remains enshrined in the constitutions of Serbia and Croatia. While there is no such ban in the Bosnian constitution, it is not permitted under the Criminal Procedure Code.⁷⁶

⁷⁴ The obligation of states to prosecute grave breaches of international humanitarian law is outlined in each of the Geneva Conventions. In particular, see Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted August 12, 1949, 75 U.N.T.S. 31, entered into force October 21, 1950, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted August 12, 1949, 75 U.N.T.S. 85, entered into force October 21, 1950, art. 50; Geneva Convention relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 U.N.T.S. 135, entered into force October 21, 1950, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

⁷⁵ Human Rights Watch, *Looking for Justice*, pp. 19-21. For example, Croatia and Serbia have recently signed an agreement on cooperation in war crimes cases. The agreement does not address the issues of transfer of proceedings or extradition. Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006. See also Davor Konjikusic, “Croatia, Serbia co-operate in processing war criminals,” *Southeast European Times*, November 7, 2006, http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2006/11/07/feature-03 (accessed January 25, 2007).

⁷⁶ Art. 415(1)(a).

In some war crimes cases it may be possible to transfer proceedings initiated in Bosnia to the jurisdiction where the defendant resides. This option is unavailable, however, when the underlying offense is punishable by more than ten years' imprisonment and would therefore not apply to the most serious crimes committed during the conflict.⁷⁷ As a result, there is an "impunity gap" for those nationals who cannot be extradited and against whom proceedings cannot be transferred. In most cases, it is the direct perpetrators who benefit from this gap as opposed to senior leaders, many of whom have been tried by the ICTY.⁷⁸ Prosecution of direct perpetrators may resonate more profoundly with victims than the senior officials tried by the ICTY. This could make a significant contribution to the respect for the rule of law throughout the region.

The important consequences of bringing those responsible to justice for the serious crimes committed during the war underscore why the authorities in Bosnia, Croatia, and Serbia must take affirmative steps to address the legal obstacles for their prosecution. Human Rights Watch has been informed, however, that the political will to change the current situation—both for the transfer of proceedings and the extradition of nationals—in Bosnia, Croatia, and Serbia is lacking.⁷⁹ Ultimately, war crimes trials should take place where the crimes occurred. We therefore wish to emphasize that the transfer of proceedings should be considered a short-term measure since the logistics of maintaining close cooperation between authorities where a case has been transferred to ensure a fair and effective trial can be very complex. Further, conducting a war crimes trial in the jurisdiction where the offense was committed offers an important opportunity for victims to see justice being done.

We strongly urge the authorities in Bosnia, Croatia, and Serbia to come to an agreement regarding the transfer of proceedings and ultimately the extradition of

⁷⁷ Art. 412(4). For example, under the Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 3/03 ("Criminal Code"), the offenses of genocide (art. 171), crimes against humanity (art. 172), and war crimes against civilians (art. 173) are punishable by more than 10 years' imprisonment and therefore cannot be transferred to another jurisdiction once proceedings have been initiated before the WCC. Criminal Code offenses that could be transferred include membership in a group aimed at instigating the perpetration of genocide, crimes against humanity and war crimes (art. 176(2)), marauding the killed and wounded in the battlefield (art. 178), unjustified delay of the repatriation of prisoners of war (art. 182), and the destruction of cultural, historical and religious monuments (art. 183).

⁷⁸ "Prosecutor at OSCE Permanent Council Urging to End War Crime Impunity Gap," ICTY press release, September 7, 2006, <http://www.un.org/icty/pressreal/2006/p1106-e.htm> (accessed January 25, 2007).

⁷⁹ Human Rights Watch separate interviews with two Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006.

nationals in war crimes cases, provided that the death penalty will not be imposed, to ensure that defendants who have committed war crimes do not enjoy impunity simply by virtue of their citizenship. To that end, we look to the international actors, including the European Union, to similarly urge the authorities in Bosnia, Croatia, and Serbia to address this obstacle in regional cooperation as a matter of priority.

III. Fair Trial Rights of Defendants

A. Overview of developments in criminal defense support

Justice must be done and seen to be done to make an effective impact on the rule of law. It is therefore necessary to ensure that defendants are afforded a fair trial, a right enshrined explicitly in Bosnia's constitution⁸⁰ and incorporated via the European Convention on Human Rights (ECHR)⁸¹ and the International Covenant on Civil and Political Rights (ICCPR), to which Bosnia is a party.⁸² An important component of a fair trial is the "equality of arms," which refers to the principle that every party must be afforded a reasonable opportunity to present his or her case under conditions that do not place the party at a substantial disadvantage vis-à-vis the opponent.⁸³

There has been an improvement in the past year with respect to the representation of indigent defendants appearing before the chamber. Human Rights Watch expressed concern in "Looking for Justice" about the quality of representation available to indigent defendants since payment of defense counsel by the state under the law was not required until the end of proceedings.⁸⁴ The Office of the High Representative has since amended the law to require the payment of defense counsel at regular intervals during the course of proceedings.⁸⁵ We look forward to the meaningful implementation of this provision so that ex officio defense counsel are adequately and regularly paid for services rendered in relation to defendants before the chamber.

⁸⁰ The General Framework Agreement for Peace in Bosnia and Herzegovina, signed December 14, 1995, Annex 4, The Constitution of Bosnia and Herzegovina, art. II(3)(e), http://www.ohr.int/dpa/default.asp?content_id=379 (accessed January 26, 2007) ("Bosnian constitution").

⁸¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8 and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, art. 6(1); *Ibid.*, art. II(2).

⁸² 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, art. 14(1), entered into force March 23, 1976. Bosnia succeeded to the ICCPR on March 6, 1992.

⁸³ European Commission of Human Rights, *Kaufman v. Belgium* (App. 10938/84); (1986) 50 DR 98, p. 115; European Court of Human Rights, *Delcourt v. Belgium*, Judgment of 17 January 1970, Series A No. 11, para. 34. See also Human Rights Watch, *Looking for Justice*, p. 22.

⁸⁴ Human Rights Watch, *Looking for Justice*, pp. 24-26.

⁸⁵ Decision of the High Representative: Enacting the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, 46/06 ("OHR Law on Amendments to the Criminal Procedure Code").

In terms of substantive legal support, the Criminal Defense Support Section, known by its Bosnian acronym OKO (*Odsjek krivicne odbrane*), was established to provide support to defendants appearing before the War Crimes Chamber to ensure equality of arms in relation to the prosecution. In terms of assistance offered to defense counsel, OKO continues to develop the training and general assistance it provides. National staff members now formulate the agendas and conduct all of the trainings in the local languages. The training will continue even after international staff members have been transitioned out of OKO. Beginning in early 2007, OKO will be headed by a national director, although a contingency fund will be available for the employment of international consultants on short-term contracts as needed for the first six months of 2007.⁸⁶

The focus of training offered by OKO has broadened to include Continuing Legal Education (CLE). OKO will devise the criteria that must be satisfied in order to obtain CLE credit and establish the number of credits needed to maintain membership on the list of advocates who can appear before the chamber. This training will begin in early 2007.⁸⁷ OKO has indicated it will make efforts to ensure the participation of lawyers based outside of Sarajevo in these sessions.⁸⁸

OKO offers a range of assistance to defense counsel. For example, every morning there is a meeting where senior lawyers in OKO present summaries of the trials monitored the previous day to identify substantive issues that may impact on the defense. Further, OKO staff can assist defense counsel in preparing legal arguments by researching issues relating to international humanitarian law for use in court briefs.⁸⁹

In addition, OKO provides important assistance to defense counsel in accessing and researching material in the possession of the ICTY. This includes accessing the Evidence Disclosure Suite (EDS), which contains all non-confidential material

⁸⁶ However, if there is no need for assistance from international consultants, these funds will not be used. Human Rights Watch interview with OKO staff, Sarajevo, September 26, 2006.

⁸⁷ Human Rights Watch interview with OKO staff, Sarajevo, September 26, 2006; Email communication from OKO staff, Sarajevo, to Human Rights Watch, December 16, 2006.

⁸⁸ Human Rights Watch telephone interview with OKO staff, Sarajevo, November 21, 2006.

⁸⁹ *Ibid.*

entered into evidence in cases before the ICTY, and the Judicial Database (JDB), which consists of non-confidential ICTY orders and decisions as well as judgments. It also includes liaising with the ICTY to obtain information outside of these databases, such as statements from protected witnesses or statements not entered into evidence. Together with the CLE training, this manner of assistance is considered more sustainable over the longer term than drafting legal briefs for defense attorneys on novel legal issues.⁹⁰

Overall, the assessment of OKO's work has been positive. One national defense counsel expressed his satisfaction with the trainings provided by OKO.⁹¹ Others have indicated that OKO has done a good job of raising the skill level of defense counsel appearing before the chamber.⁹² There is also good cooperation between OKO staff and those defense counsel who use its services.⁹³

Human Rights Watch appreciates OKO's strong commitment to the transition process and its focus on providing sustainable assistance. Since OKO manages the list of approved counsel that can appear before the chamber, most lawyers are aware of OKO's role in providing training to satisfy the requirements in order to be included on the list. However, Human Rights Watch has been informed of concerns that many national lawyers are unaware of the extent of services OKO can provide.⁹⁴ For example, defense counsel often ask prosecutors in the Special Department for War Crimes for information that would otherwise be available on the EDS. This has led to a perception that defense counsel appearing before the chamber do not use the assistance provided by OKO to access ICTY materials.⁹⁵

OKO should make more efforts to inform defense counsel about the range of services available. One possible means of publicizing the work of OKO could involve

⁹⁰ Ibid.

⁹¹ Human Rights Watch interview with defense counsel, Sarajevo, September 26, 2006.

⁹² Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006; Human Rights Watch interview with court staff, Sarajevo, October 3, 2006; Human Rights Watch interview with OHR staff, Sarajevo, October 3, 2006.

⁹³ Human Rights Watch interview with defense counsel, Sarajevo, September 26, 2006; Human Rights Watch telephone interview with former OKO staff, Copenhagen, November 16, 2006.

⁹⁴ Human Rights Watch telephone interview with former OKO staff, Copenhagen, November 16, 2006.

⁹⁵ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

preparing a package of information for distribution at a training seminar. This package could include a selection of translated briefs that have already been provided to lawyers, memoranda on aspects of law that have been researched, and examples of assistance provided in accessing ICTY information. For those lawyers who attend seminars in Sarajevo, OKO staff could also provide a tour of the office and an overview of the services offered.⁹⁶ Greater awareness of OKO's many services could further improve the caliber of defense counsel and positively influence the overall quality of representation in war crimes proceedings before the chamber.

B. Challenges that may affect a defendant's fair trial rights

1. Access to ICTY material

The ICTY has accumulated a wealth of information and evidence in relation to its cases including witness statements, documentary and physical evidence, as well as audio and video recordings. In addition to facilitating domestic war crimes prosecutions, this material can be extremely useful for defendants, particularly where there are overlapping witnesses in proceedings before the ICTY and the chamber. For example, a witness may have provided a statement in a case before the ICTY that is inconsistent with his or her testimony before the chamber. Such a discrepancy could have an effect on the witness's credibility and, depending on the nature of the discrepancy and the role of the witness in the trial, on the outcome of the trial.

As outlined above, OKO facilitates access to the ICTY's electronic databases and acts as a liaison with the ICTY to obtain material not in these databases, such as statements from protected witnesses. For such statements, it may be necessary to alter the protective measures that were originally afforded to the witness so that the statement can be released to other parties, including prosecutors and/or defense counsel involved in war crimes proceedings in other jurisdictions. The Trial Chamber of the ICTY has the authority to alter these protective measures based on a motion of the ICTY prosecutor or the defendant appearing before the tribunal (or his or her defense counsel).⁹⁷

⁹⁶ Human Rights Watch telephone interview with former OKO staff, Copenhagen, November 16, 2006.

⁹⁷ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev38, June 13, 2006, <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf> (accessed January 25, 2007), rules 75 and 2; ICTY, Case

Since defendants appearing before the chamber are not parties to ICTY proceedings, to obtain material related to protected witnesses OKO must make a request to the Office of the Prosecutor (OTP) of the ICTY.⁹⁸ Unlike the Special Department for War Crimes, OKO does not have a formal Memorandum of Understanding with the OTP of the ICTY outlining the terms of cooperation.⁹⁹ Therefore, the manner of cooperation between OKO and the OTP of the ICTY proceeds on an ad hoc basis.¹⁰⁰ We are concerned that this informal manner of operation may invite inconsistencies in addressing individual cases (for example, in terms of the time and the level of scrutiny afforded to each request).

Further, the prosecution's obligation vis-à-vis protected witnesses may conflict with the interests of the defense. In order to process a request relating to the statement of a protected witness, the OTP of the ICTY must first consult with the witness to obtain his or her consent to release the statement.¹⁰¹ If the witness does not consent, the Trial Chamber could still decide to release the statement if there is an overriding interest in doing so; otherwise, the tribunal could be "held hostage" by a witness's unreasonable refusal.¹⁰² However, the option of approaching the court directly to release the statement is not available to a defendant outside of the ICTY since he or she lacks standing to make such a motion. So, the defendant appearing before the chamber must rely on the OTP of the ICTY (through OKO) to make a request on his or her behalf. The OTP has the discretion to refuse to do so, however.

This issue proved problematic in the *Simsic* case that was recently tried before the chamber.¹⁰³ Defense counsel obtained uncertified copies of statements given by witnesses in a separate trial before the ICTY. The statements revealed significant inconsistencies with the testimony of the same witnesses in proceedings before the

No. IT-05-85-Misc 2, President of the Tribunal's Decision on Registrar's Submission on a Request from the Office of the Chief Prosecutor of Bosnia and Herzegovina pursuant to Rule 33(B), April 6, 2005 ("Miscellaneous Decision").

⁹⁸ *Prosecutor v. Jankovic*, ICTY, Case No. IT-96-23/2, Decision on Rule 11 *bis* Referral, (Appeals Chamber), November 15, 2005, para. 51.

⁹⁹ For more details on the Memorandum of Understanding, see Human Rights Watch, *Looking for Justice*, pp. 16-19.

¹⁰⁰ Human Rights Watch interview with OKO staff, Sarajevo, September 26, 2006.

¹⁰¹ Miscellaneous decision, para. 15.

¹⁰² *Prosecutor v. Kordic and Cerkez*, ICTY, Case No. IT-95-14/2, Judgment (Trial Chamber), February 26, 2001, Annex IV: Procedural History, para. 20.

¹⁰³ In July 2006 the defendant was found guilty of crimes against humanity and sentenced to five years' imprisonment. *Prosecutor v. Boban Simsic*, Court of Bosnia and Herzegovina, Case No. X-KR-05/04, Decision (First Instance), July 11, 2006. The verdict is currently under appeal.

chamber and were used by the defense in cross-examination. However, because the statements were not certified, they could not be admitted into evidence under Bosnian law. Since the witnesses did not consent to the release of their statements, the OTP of the ICTY initially refused to provide certified copies and indicated it was not in a position to make a motion to the Trial Chamber to alter the protective measures.¹⁰⁴ Certified copies of the statements were eventually provided by the ICTY to the defense on the basis that it was in the “interests of justice” to do so.¹⁰⁵

Inconsistent access to valuable material in the ICTY’s possession, including potentially exculpatory material, can have a significant impact on a defendant’s fair trial rights. ICTY officials have acknowledged that the lack of standing for outside defense counsel to address the court directly to seek an alteration of protective measures creates difficulties.¹⁰⁶ Human Rights Watch has been informed that there are efforts underway to amend the Rules of Procedure and Evidence to grant national judicial authorities standing to make applications to the tribunal to seek an alteration of protective measures.¹⁰⁷ We look to the ICTY to ensure this amendment is appropriately drafted, proposed to the relevant body and implemented as soon as possible. In the interim, we urge the ICTY to cooperate with OKO in a consistent and efficient manner to provide requested material.

2. Quality of defense counsel

The new Criminal Procedure Code in Bosnia, which was adopted in 2003, introduced complex elements of the adversarial system, including the cross-examination of

¹⁰⁴ *Prosecutor v. Boban Simšić*, Court of Bosnia and Herzegovina, Case No. X-KR-05/04, Motion to Suspend the Proceedings for Failure to Disclose Evidence, May 12, 2006, paras. 3-9.

¹⁰⁵ Human Rights Watch interview with OKO staff, Sarajevo, September 26, 2006.

¹⁰⁶ Human Rights Watch separate telephone interviews with two ICTY staff, The Hague, November 28 and December 8, 2006.

¹⁰⁷ *Ibid.* Under such an amendment, defense counsel could request the judges in the chamber to make a request to the tribunal on its behalf. Such an amendment would also permit judges in the chamber to make requests in relation to other matters. The importance of providing standing to judicial authorities was underscored in the recent *11 bis* referral case of *Prosecutor v. Zeljko Mejakic*. In that case, the ICTY referral bench stated that the protective measures provided to witnesses would continue even after transfer to the War Crimes Chamber. Under Bosnian law, however, protective measures can only be applied with the witness’s consent and 30 of the 55 witnesses who were granted protective measures by the ICTY indicated they no longer wanted these measures. Since the court did not have standing to make a motion to the ICTY in relation to these witnesses, the preliminary proceedings judge was forced to adopt a compromise position and grant the same protective measures on a provisional basis until the question of the alteration of protective measures could be resolved by the ICTY. See *Prosecutor v. Zeljko Mejakic et. al.*, ICTY, Case No. IT-02-65, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 bis (Trial Chamber), July 20, 2005.

witnesses.¹⁰⁸ A good cross-examination requires maintaining control over a witness to maximize the amount of favorable testimony admitted through the witness, while simultaneously limiting the witness's ability to provide unfavorable testimony. When used effectively, testimony provided on cross-examination can discredit a witness by revealing inconsistencies in his or her testimony and thus bolster a party's case.

Human Rights Watch notes concerns regarding the quality of defense counsel, particularly in the ability of some counsel to conduct effective cross-examination.¹⁰⁹ Cross-examination by defense counsel is often very poor and undirected.¹¹⁰ Further, many defense counsel seem to lack forensic focus and basic advocacy skills.¹¹¹ There is a perception that defense counsel need more training in the adversarial system.¹¹² Human Rights Watch has been informed that while OKO initially planned to provide advocacy training to defense counsel, these plans were not implemented because of funding constraints.¹¹³ As such, OKO has not yet provided to defense counsel training on cross-examination.

The ability to conduct cross-examination can, in some instances, have a significant impact on the outcome of a case. To a certain extent, improvements in conducting cross-examination can only be achieved through experience in the courtroom. However, in light of the concerns expressed regarding the ability of defense counsel to cope with this important element of the adversarial system, it is apparent that defense counsel would benefit from practical training on cross-examination. OKO has indicated to Human Rights Watch that it plans to offer training on cross-examination in 2007, although the format and number of sessions to be provided remains uncertain.¹¹⁴ We urge OKO to ensure that there are enough sessions offered on cross-examination on an ongoing basis to provide defense counsel with as many opportunities as possible to refine their skills outside of the courtroom. We further encourage OKO to ensure its curriculum covering cross-examination is adequate to

¹⁰⁸ See, for example, Criminal Procedure Code, art. 262.

¹⁰⁹ Human Rights Watch separate interviews with three Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006; Human Rights Watch telephone interview with former OKO staff, Copenhagen, November 16, 2006.

¹¹⁰ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

¹¹¹ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006.

¹¹² Human Rights Watch interview with court staff, Sarajevo, October 2, 2006.

¹¹³ Human Rights Watch telephone interview with OKO staff, Sarajevo, January 16, 2007.

¹¹⁴ *Ibid.*

prepare defense counsel for some of the challenges that may arise during court proceedings. To the extent financial support is an issue, we urge the donor community to ensure that OKO has sufficient funding to conduct this essential training.

IV. Witness Protection and Support

A. Protection of witnesses

Witnesses, who themselves may be direct victims, can face serious risks in providing testimony in war crimes trials. In light of the chamber's location in the country where the crimes occurred and the challenge of concealing a witness's identity in a small country like Bosnia, the risks for witnesses appearing before the chamber can be particularly acute. These risks underscore the importance of ensuring effective protective measures for witnesses before, during, and after trial. The availability and use of such measures—both inside and outside of the courtroom—is discussed in more detail below.

1. The chamber's use of protective measures

In addition to promoting the safety of witnesses, the appropriate use of protective measures in court can minimize the trauma associated with providing testimony during proceedings. Minimizing trauma can be an important factor in maintaining a witness's dignity during proceedings and preserving the overall quality of his or her testimony. To date, judges in the chamber have used a variety of measures available under the law to protect witnesses in the courtroom, including allowing witnesses to testify via video-link or behind a screen, using facial and voice distortion, and assigning pseudonyms.

For witnesses appearing before the chamber, some judges have started assigning new pseudonyms to those protected witnesses who testified before the ICTY. This practice assists in preventing the unintended disclosure of these witnesses' identities that could otherwise result from the repetition of the same pseudonym—and the same identifying information—in proceedings before the chamber.¹¹⁵ We welcome this practice and encourage its consistent adoption in all cases involving witnesses who previously testified before the ICTY and who want to use a pseudonym in proceedings before the chamber.

¹¹⁵ Human Rights Watch interview with court staff, Sarajevo, September 29, 2006. The increased visibility of proceedings before the chamber means that additional measures may be necessary than those used in proceedings before the ICTY to protect a witness's identity, even where a pseudonym is used.

In addition, a working group has been formed to address issues relating to the court's use of protective measures; it includes representatives of the judiciary, the Registry, and the Witness Support Office.¹¹⁶ The working group was established to address the obligation outlined under article 25 of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses that the court "adopt rules of procedure ensuring the appropriate use of the means to protect witnesses."¹¹⁷ The group analyzes protection issues in the application of the law and proposes strategies to deal with specific challenges. These proposed strategies are given to the presidents of all panels hearing cases, who then circulate them to the judges on their panels and provide feedback to the group. In this way, the working group aims to promote consistency in the use of protective measures in court and fosters communication between national and international judges in this important area.¹¹⁸

Despite these positive developments, we have concerns regarding the court's broad use of closed sessions, meaning the exclusion of the public and the media from trial proceedings. To date, at least two war crimes trials against two defendants have been held almost entirely in closed session.¹¹⁹ One defendant, Nedo Samardzic, was accused of killings, forced relocations of persons, deprivations of liberty, sexual slavery, rapes, and persecution of Bosnian Muslim inhabitants on national, religious, ethnic, and sexual grounds.¹²⁰ The other defendant, Radovan Stankovic, was accused of having committed, incited, aided and abetted the enslavement, torture, rape, and killing of non-Serb civilians.¹²¹ The latter case was the first one referred to the chamber by the ICTY under the Rule 11 *bis* procedure.

The right to a public trial is one of the fundamental safeguards of criminal procedure.¹²² In Bosnia, there is a presumption in the law that the trial will be held in

¹¹⁶ Human Rights Watch interview with court staff, Sarajevo, October 3, 2006.

¹¹⁷ Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, *Official Gazette of Bosnia and Herzegovina*, 21/03 ("Law on Protection of Witnesses"); Human Rights Watch telephone interview with court staff, Sarajevo, November 20, 2006.

¹¹⁸ Human Rights Watch telephone interview with court staff, Sarajevo, November 20, 2006.

¹¹⁹ In both cases, OSCE monitors were permitted to attend the closed sessions of the trial in order to ensure compliance with international human rights standards.

¹²⁰ *Prosecutor v. Nedo Samardzic*, Court of Bosnia and Herzegovina, Case No. X-KR-05/49, Indictment, December 28, 2005.

¹²¹ *Prosecutor v. Radovan Stankovic*, Court of Bosnia and Herzegovina, Case No. X-KR-05/70, Indictment, December 7, 2005.

¹²² ICCPR, art. 14(1); ECHR, art. 6(1); Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 11.

public.¹²³ The public nature of the trial is intended primarily to protect the interests of the accused.¹²⁴ The right to a public trial is not absolute, however. For example, both the ICCPR and the ECHR indicate that the press and the public may be excluded from all or part of a trial for reasons such as public order or national security, or when required to protect the privacy of the parties.¹²⁵ Similar exceptions are found under Bosnian law,¹²⁶ although Bosnian law clearly states that the least severe measure possible should be used.¹²⁷ The need to protect the privacy of the parties may be particularly relevant in cases involving victims of sexual violence.¹²⁸

In addition to the defendant's right to a public trial, trials that seek to address extraordinary violations of human rights serve a broader purpose and should, to the greatest extent possible, be made public. An open trial can maintain public confidence in the criminal justice system, provide an outlet for community reaction to crime, ensure that judges and prosecutors fulfill their duties responsibly, encourage witnesses to come forward, and discourage perjury.¹²⁹ Aside from facilitating public knowledge and understanding, which may have a general deterrent effect, the public should have the opportunity to assess the fairness of the proceedings to ensure that justice is both done and seen to be done.¹³⁰

Fostering public confidence in judicial institutions is particularly important in a post-conflict setting such as Bosnia because of recognized deficiencies in the justice

¹²³ Criminal Procedure Code, art. 234.

¹²⁴ The European Court of Human Rights has held, "This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial." *Werner v. Austria* (App. 21835/93), Judgment of 24 November, 1997; (1998) 26 EHRR 310, para. 45.

¹²⁵ ICCPR, art. 14(1); ECHR, art. 6(1). The right of a defendant to a public trial must be measured against the interests implied by these exceptions, such as the interest in protecting the privacy of victims and/or witnesses, to ensure the appropriate balance is reached in deciding whether to close all or part of a trial to the public. See, for example, *Prosecutor v. Delalic and Delic* (Celbici case), ICTY, Case No. IT-96-21, Decision On The Motions By The Prosecution For Protective Measures For The Prosecution Witnesses Pseudonymed "B" Through To "M" (Trial Chamber), April 28, 1997, para. 35.

¹²⁶ Criminal Procedure Code, art. 235.

¹²⁷ Law on Protection of Witnesses, art. 4.

¹²⁸ The ICTY has stated that consideration will be given to the special concerns of victims of sexual assault in assessing whether to hold public sessions. See *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995. See also Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 68(2).

¹²⁹ See discussion of the impact of the public nature of criminal trials in "Sixth Amendment at Trial," *Georgetown Law Journal Annual Review of Criminal Procedure*, vol. 35, June 2006, pp. 608-609.

¹³⁰ *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23&23/1, Order on Defense Motion Pursuant to Rule 79 (Trial Chamber), March 22, 2000, para. 5.

system during and immediately following the war. Indeed, the War Crimes Chamber was created to address these deficiencies, improve the public's perception of judicial institutions, and contribute to the overall establishment of the rule of law in Bosnia. Of course, a certain degree of variation between panels in the application of protective measures is to be expected. However, holding *an entire trial* in closed session can dramatically alter the conduct—and the public's perception—of the trial. As with other international and hybrid criminal tribunals where widespread public acceptance of the legitimacy of the verdicts is crucial, over-reliance on closed sessions may do long-term damage to the court's broader goals.¹³¹

In both the Samardzic and Stankovic cases before the chamber, the prosecutor made a motion to close the evidentiary portion of the main trial to the general public and the press for the purpose of protecting the interests of the injured parties-witnesses.¹³² The court provided several reasons for closing the respective trials. First, most of the witnesses in both cases were victims of rape, some of whom were underage at the time the crimes were committed and have since tried to re-establish their lives. Even if protective measures such as screens or voice distortion were used, the substance of their testimonies could reveal details about the witnesses that could result in their identification.¹³³ This could damage the reputation and jeopardize the privacy of these witnesses.¹³⁴

Second, the witnesses could give names of other alleged perpetrators linked to the crimes of rape and sexual slavery. Third, the witnesses could inadvertently mention

¹³¹ Laura Moranchek, "Protecting National Security Evidence While Prosecuting War Crimes," *Yale Journal of International Law*, vol. 31 (2006), p. 495 (stating, "Milosevic in particular became adept at manipulating perceptions of unfairness when the Tribunal held in camera sessions. As the Trial Chamber prepared to go into closed session to hear the testimony of a protected witness verifying various intercepts, Milosevic interrupted to attack the Tribunal while his words would still appear on record: Milosevic: Well, I would like to say while we're still in public session that I categorically oppose this kind of practice, hearing some kind of secret witnesses.").

¹³² The Samardzic trial was closed to the public beginning March 6, 2006 and was reopened to the public on March 30, 2006. *Prosecutor v. Samardzic*, Court of Bosnia and Herzegovina, Case No. X-KR-05/49, Verdict (First Instance), April 7, 2006 ("Samardzic verdict"). The Stankovic trial was closed to the public with the exception of five sessions (October 12, 25, 27, November 7 and 14, 2006). In addition, portions of four sessions of the main trial were open to the public (July 4, 13, September 4 and 12, 2006). Several matters were addressed during these open sessions, including the taking of judicial notice of certain facts, the presentation of some material evidence, and the closing speeches. Email communications from OSCE staff, Sarajevo, to Human Rights Watch, November 30, 2006 and January 31, 2007.

¹³³ Samardzic verdict, pp. 8-9.

¹³⁴ *Prosecutor v. Stankovic*, Court of Bosnia and Herzegovina, Case No. X-KR-05/70, Decision to Exclude the Public from the Main Trial (Trial Division), February 23, 2006, p. 2 ("Stankovic decision to exclude public").

the names of other victims who were protected witnesses in the case.¹³⁵ Finally, there was concern that the defendant Stankovic could disclose to the public the identities and addresses of the witnesses, as he had threatened to do while still in ICTY custody.¹³⁶

We strongly support the court's desire to preserve the dignity and privacy of witnesses, particularly those who are the victims of sexual violence. We can also appreciate that protective measures used in proceedings before the chamber may be different and, in some cases, more stringent than those used before the ICTY.¹³⁷ The War Crimes Chamber convicted Samardzic and Stankovic of crimes against humanity,¹³⁸ and there are no indications in the particulars of the cases that the closed sessions undermined the defendants' right to a fair trial.¹³⁹ However, in light of the broader purposes of war crimes trials as outlined above, we are concerned by the court's decision to close the main trial proceedings in both of these cases. We wish to emphasize that the protective measures employed by the court must still be used in the least severe manner possible under Bosnian law, particularly since the panel's decision to close the entire trial cannot be appealed until the verdict is issued.¹⁴⁰

The practice of other panels of the War Crimes Chamber illustrates that less restrictive measures could have been used to address the concern of protecting the privacy of the witnesses. For example, the war crimes trial of Gojko Jankovic (ongoing at this writing) has been held almost entirely in open session, notwithstanding the fact that this case involves similar allegations of sexual violence and includes a

¹³⁵ Samardzic verdict, pp. 8-9.

¹³⁶ Stankovic decision to exclude public, p. 2.

¹³⁷ For example, the very nature of proceedings in The Hague, far removed from the territory where the crimes were committed, may permit the use of less severe measures to protect a witness's identity. Human Rights Watch interview with court staff, Sarajevo, September 29, 2006.

¹³⁸ Stankovic was convicted on November 16, 2006 in the first instance and sentenced to 16 years' imprisonment. Samardzic was convicted on April 7, 2006, in the first instance and sentenced to 12 years and four months' imprisonment.

¹³⁹ The verdict in the Samardzic case was appealed on several grounds, none of which related to the closing of the main trial. *Prosecutor v. Samardzic*, Court of Bosnia and Herzegovina, Case No. X-KR-05/49, Second Instance Decision on Revocation of First Instance Verdict (Appellate Division), September 29, 2006. With respect to the Stankovic case, the ICTY has stated, based on the OSCE's monitoring reports, that the defendant received a fair trial. *Prosecutor v. Stankovic*, ICTY, Case No. IT-96-23/2, Prosecutor's Third Progress Report, June 7, 2006 ("ICTY Prosecutor's Third Progress Report on the Stankovic case"); Letter dated 15 November 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, S/2006/898, November 16, 2006, Annex I, para. 22.

¹⁴⁰ Stankovic decision to exclude public, p. 3.

number of protected witnesses who testified in the Stankovic and Samardzic cases.¹⁴¹ For the most part, witnesses testified behind screens in the same room as the defendant, with their identities—but not their testimonies—shielded from the public. Judges have been prompt in intervening when inappropriate questions have been posed. One witness informed the prosecutor that she had not told her husband or her children that she had been raped, so the presiding judge reminded those present in the courtroom of their obligation not to disclose any information that could reveal the witness’s identity or undermine her privacy.¹⁴²

In response to the concern that witnesses may identify other protected witnesses, the court could have used a “pseudonym sheet,” and parts of the testimony could have been given in private or closed session.¹⁴³ With respect to the concern that the defendant Stankovic could reveal the identities of witnesses, we note that at the first session of the main trial the defendant was removed from the courtroom due to disruptive behavior immediately before the first protected witness began her testimony. Although duly summoned, he refused to attend all subsequent sessions until the end of the trial.¹⁴⁴ The validity of this ground for continuing to exclude the public from Stankovic’s trial was therefore questionable.¹⁴⁵

In all cases involving the application of protective measures, the prosecution should only seek the least severe protective measures.¹⁴⁶ We urge the prosecution to avoid making overbroad requests for protective measures, such as those made in the Samardzic and Stankovic cases to close the entire trials to the public. Further, we

¹⁴¹ *Prosecutor v. Gojko Jankovic*, Court of Bosnia and Herzegovina, Case No. X-KR-05/161, Amended Indictment, June 27, 2006. There were seven overlapping witnesses between the Jankovic and Stankovic cases, and at least five overlapping witnesses with the Samardzic case. Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006; Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, November 30, 2006.

¹⁴² Human Rights Watch telephone interviews with Special Department for War Crimes staff, Sarajevo, November 29-30, 2006. We also note that the appeal in the Samardzic case was held in open session, meaning the appeals panel played recordings of the testimonies given in the first instance trial. Email communication from OSCE staff, Sarajevo, to Human Rights Watch, November 30, 2006.

¹⁴³ ICTY Prosecutor’s Third Progress Report on the Stankovic case, para. 7, footnote 15.

¹⁴⁴ Email communication from OSCE staff, Sarajevo, to Human Rights Watch, November 30, 2006. Had the defendant continued attending sessions, he could have been placed in a soundproof booth with his microphone controlled by the presiding judge. ICTY Prosecutor’s Third Progress Report on the Stankovic case, para. 7, footnote 15.

¹⁴⁵ Human Rights Watch interview with OKO staff, Sarajevo, September 26, 2006; Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006; Human Rights Watch interview with court staff, Sarajevo, September 29, 2006.

¹⁴⁶ ICTY Prosecutor’s Third Progress Report on the Stankovic case, para. 7.

note that the panel is required to obtain the witness's assent before deciding whether to grant a request for protective measures.¹⁴⁷ While this was done, we are concerned that the witnesses in the Samardzic and Stankovic cases may not have understood the differences between the various protective measures that could have been used.¹⁴⁸ The significant discrepancies in the use of protective measures in the Samardzic, Stankovic, and Jankovic trials underscore the need for panels to ensure that witnesses are fully apprised of the range of appropriate protective measures available in order to obtain their informed consent and implement the least restrictive protective measures possible in accordance with Bosnian law.

2. Witness protection outside of the courtroom

The Witness Protection Unit (WPU) of the State Investigation and Protection Agency is the Bosnian institution responsible for the protection of witnesses outside the courtroom in war crimes and organized crime cases. As outlined in “Looking for Justice,” this unit receives financial and technical support from the Registry. During the period of January–September 2006, 65 witnesses in war crimes cases received protection, all of whom were assessed as requiring a low level of risk protection.¹⁴⁹ Human Rights Watch was informed that so far SIPA's WPU has been able to provide adequate protection in bringing witnesses to and from the court to provide testimony.¹⁵⁰

After returning home, witnesses are provided with the contact information for the WPU. If a risk develops, it is up to the witness to contact the WPU to obtain assistance.¹⁵¹ In the event the risk is imminent, the WPU contacts the police in the area where the witness resides to provide emergency assistance pending the arrival of its protection officers.

¹⁴⁷ Law on Protection of Witnesses, art. 5.

¹⁴⁸ Human Rights Watch interview with court staff, Sarajevo, September 29, 2006.

¹⁴⁹ Second Registry Report, p. 43.

¹⁵⁰ Human Rights Watch separate interviews with two Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006.

¹⁵¹ Human Rights Watch interview with court staff, Sarajevo, October 2, 2006; Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

Officials inside and outside of the chamber have expressed concern to Human Rights Watch regarding SIPA's capacity to provide long-term protection.¹⁵² The WPU is not in a position to systematically follow up with all protected witnesses, in large part because of inadequate resources.¹⁵³ While the onus is on the witness to report any threats he or she receives after testifying, most witnesses lack expertise in assessing risk, and in some cases they may not be immediately aware that their safety is under threat.

Ensuring adequate witness protection is a challenge within the confines of limited resources. The WPU's budgetary constraints highlight the importance of the Registry's ongoing financial and technical support to maintain the current level of protection. We strongly urge the Bosnian authorities to provide additional financial support to the SIPA WPU to bolster its capacity to offer protection to witnesses in the long term.

We also encourage the WPU to engage in more consistent follow up with witnesses after their testimony. This may involve, for example, contacting the police authorities in the vicinity of the witness's home to inform him or her of possible risks to the witness's safety. These authorities could monitor the witness and provide intelligence data to the WPU. On this basis, the unit could make its own determination of any ongoing threats to the witness's safety and take preemptive action, if necessary.¹⁵⁴ Of course, sensitivity should be used when the witness is living in an area where the police may be implicated in crimes that are the subject of proceedings before the chamber.

Further, we note with concern the absence of effective witness protection measures at the cantonal and district court levels.¹⁵⁵ In terms of protection outside of the

¹⁵² Human Rights Watch separate interviews with three Special Department for War Crimes staff, Sarajevo, September 27 and October 2, 2006; Human Rights Watch interview with Bosnian civil society representative, Sarajevo, September 28, 2006.

¹⁵³ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

¹⁵⁴ *Ibid.*

¹⁵⁵ Human Rights Watch, *A Chance for Justice: War Crimes Prosecutions in Bosnia's Serb Republic*, vol. 18, no. 3(D), March 2006, <http://hrw.org/reports/2006/bosnia0306/>, pp. 33-35; Commission of the European Communities, "Bosnia and Herzegovina 2006 Progress Report," SEC (2006) 1384, http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/bih_sec_1384_en.pdf (accessed January 27, 2007), p. 20; International Covenant on Civil and Political Rights Human Rights Committee, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant," CCPR/C/BIH/CO/1, Geneva, November 10, 2006, para. 13; Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006.

courtroom, the SIPA WPU provides assistance wherever possible to the cantonal and district courts on an ad hoc basis although there is no legal obligation to do so.¹⁵⁶ The lack of systematic protection means there are significant risks to witnesses, which could undermine war crimes cases brought before the cantonal and district courts. Moreover, the lack of protection for witnesses before these courts could inadvertently jeopardize those protected witnesses who also testify before the chamber. We therefore strongly urge the Bosnian authorities to allocate additional resources to address deficiencies in witness protection in cases before the cantonal and district courts as well.

B. Witness support

The trauma suffered by many witnesses during the conflict in Bosnia illustrates the importance of ensuring adequate psychological support for witnesses involved in war crimes proceedings. Effective witness support can minimize any additional trauma and fear associated with participating in such proceedings. Providing witness support can also, to an extent, address issues relating to witness reluctance and fatigue that may otherwise prevent a witness from providing statements or testimony. There have been several positive developments in the services available for witnesses in the pre- and post-indictment phases, which are outlined below.

1. Pre-indictment

As outlined in “Looking for Justice,” the Witness Support Office is responsible for providing support to both defense and prosecution witnesses in war crimes proceedings before the chamber.¹⁵⁷ As a neutral body, it is precluded from intervening in the pre-indictment phase of a potential case. Thus, there was no support offered to potential witnesses during the investigative phase of a case.

To address this gap in support, the Special Department for War Crimes has recently established the position of a “witness liaison officer.” Rather than providing psychological support, the primary task of this official is to put victims and potential

¹⁵⁶ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, October 2, 2006; Human Rights Watch interview with court staff, Sarajevo, October 2, 2006; Law on Witness Protection Program in Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, 29/04, art. 1.

¹⁵⁷ Human Rights Watch, *Looking for Justice*, p. 32.

witnesses in the pre-indictment stage in touch with outside organizations providing mental and physical rehabilitation services whenever needed. One organization has already indicated its willingness to prioritize individuals referred by the department in providing these necessary services.¹⁵⁸

Upon confirmation of an indictment, the Witness Support Office assumes responsibility for support of those witnesses who will provide testimony in the case, although the liaison officer is expected to play a role in easing the transition and ensuring the smooth transfer of information.¹⁵⁹ In addition to coordinating victims and potential witnesses in accessing mental and physical services, it is anticipated that the witness liaison officer will help promote uniformity within the department in the payment of witness expenses under the law.¹⁶⁰

2. Post-indictment

The Witness Support Office has provided essential support to a number of witnesses in war crimes trials. During the period from January through September 2006, the section provided support to 372 prosecution and defense witnesses. This number refers primarily to prosecution witnesses since not all cases were in the defense phase by September 2006. The section follows up with witnesses 15 days after they have provided testimony, although in 90 percent of cases, witnesses indicate that they do not require additional psychological assistance.¹⁶¹

Many witnesses have identified other medical needs that have not been met since the war including dental work, physical therapy, and access to opticians. To help witnesses address these needs, the section has been working with a local NGO to provide referrals for important physical rehabilitation services. So far, the section has identified 15 witnesses and referred them to this NGO for services.¹⁶²

¹⁵⁸ Human Rights Watch separate telephone interviews with two Special Department for War Crimes staff, Sarajevo, November 29 and December 1, 2006.

¹⁵⁹ An existing member of the department's staff has filled this position and is currently undergoing training. Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 1, 2006.

¹⁶⁰ *Ibid.*

¹⁶¹ Human Rights Watch interview with court staff, Sarajevo, September 29, 2006.

¹⁶² Email communication from court staff, Sarajevo, to Human Rights Watch, November 30, 2006.

V. Administrative Developments at the War Crimes Chamber

A. Increased focus on transition to national authorities

Competent and efficient administration is necessary for any court to run effectively. The need for effective administration is heightened when addressing complex trials involving large-scale crimes, numerous witnesses and victims, and in some cases, multiple defendants. There is an independent body in the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Registry, which addresses the administrative challenges associated with adjudicating such trials. Some of the responsibilities of the Registry at the ICTY include managing the day-to-day work in the courtrooms, filing and distributing documents, courtroom scheduling, and providing administrative support to the chambers and to the Office of the Prosecutor. In this way, the Registry is the “engine room” of the tribunal, providing essential support that allows the other organs to function.¹⁶³

To develop the long-term sustainable capacity within Bosnia’s justice institutions to process war crimes and organized crime cases in accordance with international fair trial standards, in late 2004 the high representative and the Bosnian presidency signed an agreement to establish an independent Registry to function within the State Court.¹⁶⁴ Under that agreement, an international registrar was appointed for a non-renewable term of five years to oversee the administration of the war crimes and organized crime chambers and the development of organs associated with it, including the prosecution, witness protection and support, and outreach.¹⁶⁵ While the document recognized the importance of transition, it did not contain any provisions addressing how this would be realized.

¹⁶³ David Tolbert, “Reflections on the ICTY Registry,” *Journal of International Criminal Justice*, vol. 2, June 2004, pp. 480-485.

¹⁶⁴ Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor’s Office of Bosnia and Herzegovina, December 1, 2004, http://www.registrarbih.gov.ba/files/docs/Old_Registry_Agreement_-_eng.pdf (accessed January 27, 2007) (“First Registry Agreement”).

¹⁶⁵ In addition, the agreement anticipated the creation of an Oversight Committee composed of national and international experts that would, among other duties, advise donor countries on the implementation of the war crimes chamber project, liaise with national and international NGOs in relation to policy issues and make assessments regarding the independence and functioning of the organs of the chamber. However, this oversight mechanism never materialized and the Registry simply assumed these functions. See First Registry Agreement, arts. 1-3. Human Rights Watch telephone interview with court staff, Sarajevo, December 27, 2006.

In September 2006 the high representative and the Bosnian presidency put in place a new agreement for the Registry.¹⁶⁶ Unlike the previous document, the agreement provides the legal basis for the transition of staff to national institutions.¹⁶⁷ The new agreement includes an “Integration Strategy,” which focuses on the transition of Bosnia’s justice institutions from international to qualified national staff and the gradual assumption of financial support of the State Court by the Bosnian authorities. The strategy is aimed at ensuring the presence of competent and sustainable national capacity within the court and the Prosecutor’s Office of Bosnia. The new agreement therefore outlines the details of the incorporation of important functions of the Registry into the appropriate national institutions and the eventual dismantling of the Registry upon completion of its mandate, currently scheduled for the end of 2009.

The agreement establishes a Transition Council, an advisory body mandated to coordinate the transition of the Registry into national institutions. The council has a number of responsibilities in executing its mandate, including, for example, providing assistance in the preparation and implementation of the proposal for the transition of the Registry authority to the appropriate national body in relation to witness protection. Further, the Transition Council coordinates and prepares the legal amendments required for implementing the transition of Registry authorities and the integration of national staff into the institutions in Bosnia.¹⁶⁸ The Management Committee, an internal body of the Registry, facilitates the implementation of the “Integration Strategy” and the transition of the Registry. Its responsibilities include recruiting personnel, setting salaries, coordinating with donors, and fundraising.¹⁶⁹

¹⁶⁶ Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor’s Office of Bosnia and Herzegovina as well as the Creation of the Transition Council, Replacing the Registry Agreement of December 1, 2004 and the Annex thereto, September 26, 2006, http://www.registrarbih.gov.ba/files/docs/New_Registry_Agreement_-_eng.pdf (accessed January 27, 2007) (“New Registry Agreement”).

¹⁶⁷ Human Rights Watch interview with court staff, Sarajevo, October 3, 2006.

¹⁶⁸ The Transition Council is composed of the president of the court, the chief prosecutor, the registrars, the president of the High Judicial and Prosecutorial Council, the ministers of finance and the treasury and of Justice of Bosnia and Herzegovina and the director of the Directorate for European Union Integration. These observers are selected by the Office of the High Representative and the Presidency of Bosnia; financial donors and donors-in-kind submit the names of candidates for consideration. See New Registry Agreement, art. 4.

¹⁶⁹ New Registry Agreement, art. 5.

The agreement also splits the responsibilities of the Registry and creates two registrars: one for the administration of the organized crime and war crimes chambers (the court registrar), and one for the special departments for war crimes and organized crime of the prosecutor's office (the Prosecutor's Office registrar). The separate positions reflect the legal and operational separation between the court and the Prosecutor's Offices.¹⁷⁰ Bosnian nationals must fill these positions, but there is a provision allowing for the appointment of an existing international staff member in either position for a period not exceeding one year. At present, the court registrar is a Bosnian national¹⁷¹ and the Prosecutor's Office registrar is an international.¹⁷²

We welcome the intensified focus on the transition of the court's administrative structure to the national authorities. In light of the importance of ensuring that complex war crimes trials are processed in a manner that is consistent with international fair trial standards, the smooth transition of the administrative functions executed by the Registry to national authorities is essential. Moreover, by establishing a framework for the transition to national authorities, the new agreement provides a measure of transparency regarding how this commitment to transition is realized in practice.

B. Developments in court management

Maximizing judicial resources through effective court management is essential to preserve a defendant's fair trial rights, including the right to be tried without undue delay. Since it began operations in March 2005, the War Crimes Chamber has made steady progress in conducting trials. For example, during 2005 three trials were conducted, one first instance judgment rendered and one appeal decision revoking in part a first instance verdict. By contrast, during the period of January through September 2006, the war crimes chamber commenced a total of ten trials involving 21 defendants, including one case of 11 defendants charged with genocide. There were three first instance judgments, two of which were appealed, and one final

¹⁷⁰ Second Registry report, p. 3.

¹⁷¹ The previously appointed international registrar resigned from the court in March 2006, indicating that the speed of the transition process meant his position no longer required staffing by an international. Balkan Investigative Reporting Network, "All change for Bosnia's registrar," Justice Report, September 13, 2006.

¹⁷² The Registry is currently in the process of finding a suitable national candidate for this position. Human Rights Watch interview with court staff, Sarajevo, October 3, 2006.

verdict was rendered.¹⁷³ Several practices have been implemented to further improve the efficiency of trials and the overall communication between judges of the chamber. These initiatives are discussed in more detail below.

1. Measures to improve efficiency

Maintaining a rigorous hearing schedule is an important aspect of effective court management, provided the defendant's other fair trial rights are respected (for example, the defendant's right to have adequate time and facilities to prepare his or her defense). To promote the efficiency of proceedings, according to the court's own estimates, a panel should ideally spend approximately twelve six-hour days per month (72 hours) in trial or other hearings.¹⁷⁴ This is equal to a panel spending roughly 73-76 percent of its working time in court.¹⁷⁵

However, none of the four panels conducting trials during the period of April–June 2006 met the target of spending 72 hours per month in the courtroom and only one out of five panels exceeded this target in July and September 2006.¹⁷⁶ Factors explaining the discrepancy between the projected figure and the actual time spent in court may include judges' involvement in preliminary matters, deliberations and the drafting of decisions, and adjournments during trial to allow time for parties to prepare or respond to submissions.¹⁷⁷ There were also novel legal issues in the early trials requiring additional out-of-court time for resolution.¹⁷⁸ Another factor that may have influenced the scheduling of hearings is that the Code of Criminal Procedure only requires the presiding judge to hold a hearing once every 30 days.¹⁷⁹

To address these challenges, an ad hoc system has been developed to better coordinate the scheduling of trials and improve efficiency. At present, there is no

¹⁷³ Second Registry Report, pp. 29-30.

¹⁷⁴ Second Registry Report, p. 33.

¹⁷⁵ Section I for War Crimes & Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Departments for War Crimes and for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, "Registry Quarterly Report," June 2006, http://www.registrarbih.gov.ba/files/docs/JUNE_o6_REPORT_FINAL.pdf (accessed January 27, 2007), p. 27 ("First Registry Report").

¹⁷⁶ First Registry Report, p. 27; Second Registry Report, p. 33.

¹⁷⁷ First Registry Report, p. 27.

¹⁷⁸ Human Rights Watch interview with court staff, Sarajevo, October 2, 2006.

¹⁷⁹ Art. 251(3); Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006.

centralized mechanism for scheduling trials.¹⁸⁰ Although the presiding judge has the authority to schedule the trial, as a practical matter, he or she now consults with the assigned court officer, the parties, and other members of the panel to prepare a trial plan. In addition, the Court Management Section maintains an overview of scheduling in all cases, summarizes this information, and provides reports to the president of the court, the judges, and court officers to maintain consistency in scheduling in all cases.¹⁸¹ Other judges can use this information to compare the amount of time their respective panels are spending in the courtroom and make adjustments to the scheduling of trials as considered necessary.

Another strategy to improve efficiency is the increased use of status conferences. A status conference is a pre trial meeting of the parties before the panel to settle preliminary matters before moving ahead to trial. Although not a legal requirement, most panels are now using status conferences to manage issues and to schedule the trial.¹⁸² In one case, for example, a panel held a number of status conferences so that the prosecution and the defense could come to an agreement on the admission of facts established by the ICTY.¹⁸³ Agreeing to such facts in advance of the trial meant that the parties did not have to present evidence in relation to these facts during the trial, a process that could have otherwise expended valuable time in court. The panels are also increasingly using status conferences in conjunction with the parties to obtain updates regarding other procedural issues (such as those related to the disclosure of evidence, translation, etc.), to set deadlines for the disposition of these issues and to establish a long-term schedule for the conduct of the trial.

These developments represent important initiatives aimed at improving the court's efficiency. The complexity of war crimes cases means trials can be very lengthy, which underscores the importance of maintaining efficiency in processing these cases. We look forward to the implementation of additional measures to improve the

¹⁸⁰ Maintaining a centralized trial scheduling system requires a more comprehensive understanding of the case and the issues in the trial in order to schedule hearing dates appropriately. The ultimate goal is to develop a practice of scheduling back-to-back trial dates to the greatest extent possible to minimize scheduling delays. Human Rights Watch telephone interview with court staff, Sarajevo, December 5, 2006.

¹⁸¹ Email communication from court staff, Sarajevo, to Human Rights Watch, December 5, 2006.

¹⁸² Human Rights Watch separate interviews with two court staff, Sarajevo, September 29 and October 2, 2006; email communication from court staff, Sarajevo, to Human Rights Watch, December 5, 2006.

¹⁸³ Balkan Investigative Reporting Network, "Mandic: Fourth status conference scheduled," Justice Report, October 13, 2006.

court's efficiency, including further improvements in the scheduling of proceedings, while at the same time safeguarding the fair trial rights of defendants.

2. Communication between judges

As a new institution, one of the challenges facing the chamber is the absence of a body of legal principles specific to the chamber that could serve as a reference point for judges in tackling complex substantive and procedural legal issues. In order to maximize judicial resources, it is important to foster awareness and communication between the different judicial panels about emerging developments in jurisprudence from the chamber. Awareness of other panels' decisions and activities can help judges develop and refine responses to the often novel legal questions that arise in war crimes trials. Such awareness can also promote consistency, where appropriate, in terms of how these issues are addressed.

To facilitate communication within the State Court, the Court Management Section has recently implemented an electronic database containing the confirmed indictments, substantive decisions, and verdicts issued by the organized crime and war crimes chambers. The database contains documents in both English and Bosnian-Croatian-Serbian and is fully searchable in these languages. Although only recently implemented, results indicate that court staff have already consulted this database extensively.¹⁸⁴ Indeed, this comprehensive database has been identified as an important tool in facilitating communication between judges.¹⁸⁵ As such, the database can assist in developing a strong body of jurisprudence in complex trials.

¹⁸⁴ Email communication from court staff, Sarajevo, to Human Rights Watch, December 7, 2006. The database also has an advanced search facility that allows the user to narrow down the search using, for example, key words, dates, case names, and legal provisions.

¹⁸⁵ Human Rights Watch telephone interview with court staff, Sarajevo, November 20, 2006.

VI. The War Crimes Chamber's Outreach and Communications Strategy

A. Overview of developments in outreach and communications

Effective outreach and communications are essential to make proceedings before the chamber meaningful and accessible to the communities most affected by the crimes committed during the war and to bring a sense of redress and closure. While the War Crimes Chamber's physical proximity to where the crimes occurred provides it with a distinct advantage in engaging the people in Bosnia with its work, it cannot be assumed that physical proximity alone is sufficient for the chamber to make an impact. Additional efforts are necessary to make the chamber's work understood and relevant and to fully realize the chamber's potential in strengthening the rule of law in Bosnia. Further, because the chamber is located in Sarajevo, it is important to make efforts to reach people throughout the country so it is not perceived as an isolated institution.

Moreover, in Bosnia there is a widespread perception among each of the three main ethnic communities that they suffered the most during the war and a concomitant expectation that the crimes against their community will be prioritized for prosecution. That state of affairs highlights the need for a strong outreach and communications program to manage expectations and to counteract attempts by nationalist politicians and others seeking to manipulate or undermine the court's work for their own ends.¹⁸⁶ The widespread dissemination of accurate information about the War Crimes Chamber in accessible forms to educate the public is therefore crucial.

The Public Information and Outreach Section (PIOS) of the Registry coordinates many of the chamber's outreach and communications activities. As highlighted in "Looking for Justice," the court's primary method of interacting with local communities has been through the Court Support Network (CSN).¹⁸⁷ The original goal

¹⁸⁶ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, September 26, 2006; Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006.

¹⁸⁷ Human Rights Watch, *Looking for Justice*, pp. 35-37.

was to enlist eight NGO centers throughout Bosnia to participate in the first “ring” of the CSN. The coordinators of these NGO centers would then recruit relevant organizations and institutions within their geographic area of responsibility to participate in the CSN’s second “ring.”

At present, there are five NGOs in the first “ring” and approximately 300 organizations in the second “ring” of the network.¹⁸⁸ None of these organizations receives funding from the Registry, so they operate independently of the court. Court officials informed Human Rights Watch that the court’s interaction with the network has been taken over by the Witness Support Office, although there has been more coordination with the PIOS recently.¹⁸⁹ Until recently, the network has focused primarily on providing support to victims and witnesses as opposed to disseminating information about the court’s activities to the public.¹⁹⁰ Based on recent discussions between the five NGOs in the first ring of the CSN and representatives of the court, it is anticipated that the CSN’s activities will shift to providing general outreach on behalf of the court, including the dissemination of information.¹⁹¹

The PIOS has facilitated other outreach initiatives, including visits to the court by outside groups interested in its work.¹⁹² Staff members of the PIOS have also traveled outside of Sarajevo to disseminate information about the court.¹⁹³ There are efforts underway to prepare a “user-friendly” brochure containing general information about the court’s work and mandate.¹⁹⁴ In addition, representatives of the Special Department for War Crimes have also attended outreach events when invited to do so by local NGOs and other associations.

¹⁸⁸ Email communication from court staff, Sarajevo, to Human Rights Watch, November 30, 2006. The centers currently operating are in Sarajevo, Mostar, Prijedor, Bijeljina and Tuzla. Human Rights Watch telephone interview with court staff, Sarajevo, December 18, 2006.

¹⁸⁹ Email communication from court staff, Sarajevo, to Human Rights Watch, December 21, 2006.

¹⁹⁰ Human Rights Watch interview with court staff, Sarajevo, September 29, 2006.

¹⁹¹ Human Rights Watch telephone interview with court staff, Sarajevo, December 18, 2006.

¹⁹² See “Students from the Law Faculty from Sarajevo Visited the Court of BiH,” Court of Bosnia and Herzegovina press release, December 15, 2006, <http://www.sudbih.gov.ba/?opcija=aktivnosti&id=57&jezik=e> (accessed January 27, 2007).

¹⁹³ Human Rights Watch telephone interview with court staff, Sarajevo, December 27, 2006.

¹⁹⁴ As outlined in *Looking for Justice*, p. 39, the PIOS issued a brochure outlining the “frequently asked questions” about the court. However, this document was criticized for using legalistic language and being too technical, so the new brochure will include general information regarding the court in a more accessible format. Human Rights Watch telephone interview with court staff, Sarajevo, December 18, 2006.

With respect to communications with the media, the court has a comprehensive website, which includes information about specific cases, such as case summaries and copies of indictments and judgments, when available.¹⁹⁵ The court's press releases, which document relevant developments in cases and at the court overall, are also on the website. In addition, the PIOS sends out weekly email summaries of developments at the court. There is a spokesperson in the PIOS for the court, but the general policy is that the court's president speaks on behalf of the court.¹⁹⁶ The court does not hold regular meetings or press conferences with members of the media or the public.¹⁹⁷ The Special Department for War Crimes has a separate spokesperson, and puts out its own press releases as necessary.

B. Public awareness about the chamber's activities

1. The court's interaction with the media

Because of its broad audience, television, print, and radio media are valuable tools in the widespread dissemination of information about the court's work, including information aimed at clarifying misperceptions about the court. Despite the initiatives outlined above, Human Rights Watch has been informed of concerns by officials inside and outside of the chamber that the court's current strategy to communicate with the public is insufficient.¹⁹⁸ As a result, the ordinary citizen in Bosnia is not well informed of the court's work.¹⁹⁹ The negative press in the Republic of Srpska leading up to Bosnia's recent elections that the chamber was a "Serb court" since it was only prosecuting Serb defendants illustrates the poor management of people's expectations about the court.²⁰⁰ The PIOS did very little to address the negative perceptions about the court in the Republic of Srpska as reported in the media.²⁰¹ In the Federation, the chamber faced criticism from victims'

¹⁹⁵ See <http://www.sudbih.gov.ba/> (accessed January 25, 2007).

¹⁹⁶ Human Rights Watch separate telephone interviews with two court staff, Sarajevo, December 18 and 27, 2006.

¹⁹⁷ Human Rights Watch telephone interview with court staff, Sarajevo, December 18, 2006.

¹⁹⁸ Human Rights Watch separate interviews with two Special Department for War Crimes staff, Sarajevo, September 27, 2006; Human Rights Watch separate interviews with three representatives of Bosnian civil society, Sarajevo, September 26 and October 2, 2006.

¹⁹⁹ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, September 26, 2006; Human Rights Watch interview with UNDP staff, Sarajevo, September 29, 2006; Balkan Investigative Reporting Network, "Justice far from public eyes," Justice Report, December 25, 2006.

²⁰⁰ Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006.

²⁰¹ Human Rights Watch interview with court staff, Sarajevo, September 29, 2006.

groups that not enough was being done to pursue the perpetrators of the crimes committed against them.

In terms of specific concerns regarding the court's approach to the media, we note, for example, that press releases about important events at the court are not always released on the day of the event, leading to delays in accurately conveying information to the public. Further, the existing published court schedule is unreliable, with incorrect and incomplete changes,²⁰² which can result in gaps in media coverage. The PIOS should distribute press releases in a timely manner. The Court Management Section and the PIOS should also ensure the accuracy of the published court schedule and its prompt distribution to the press and to the public.

In addition, there are no regularly scheduled meetings between representatives of the court and the press. The PIOS made one attempt to interact informally with the media by organizing a breakfast meeting and inviting the president of the court, the chief prosecutor, and the registrar as well as members of the press. Although considered successful and intended to become routine, this initiative was never repeated.²⁰³ There are also currently no regular press briefings for the media.²⁰⁴ Instead, the PIOS's primary contact with the media is through the phone calls it receives from various journalists seeking information about the court's work. On average, staff members receive between 20 and 100 calls daily (not including emails), depending on developments at the court.²⁰⁵

The current situation regarding the court's spokesperson is also cause for concern. As noted above, in general, while there is a spokesperson for the court in the PIOS, the court's president speaks on behalf of the court. The policy is not to comment on opinions expressed in the media; rather, the court's decisions and judgments

²⁰² Balkan Investigative Reporting Network, "Association asks for more effective press department," November 28, 2006, <http://www.bim.ba/en/38/40/1787/?&SearchKeywords=effective%2Bpress%2Bdepartment%2Bdecember> (accessed January 27, 2007); Email communication from Bosnian civil society representative, Sarajevo, to Human Rights Watch, November 28, 2006.

²⁰³ Human Rights Watch interview with court staff, Sarajevo, September 29, 2006; Email communication from Bosnian civil society representative, Sarajevo, to Human Rights Watch, November 28, 2006; Human Rights Watch telephone interview with court staff, Sarajevo, December 18, 2006.

²⁰⁴ Email communication from Bosnian civil society representative, Sarajevo, to Human Rights Watch, November 28, 2006.

²⁰⁵ Human Rights Watch telephone interview with court staff, Sarajevo, December 18, 2006.

should speak for themselves.²⁰⁶ We can appreciate the need to avoid engaging in a debate with individual journalists about the court's work. However, in light of the negative perceptions outlined above, the policy of refusing to comment on negative press does not appear to effectively address the public's misperceptions about the court's work.

An active spokesperson can play an important role in shaping public opinion by explaining the actions of the court to the media, and defending the court's decisions from criticism when necessary. Someone outside of the judiciary should assume these duties, since a judge commenting on the activities of the court in this more robust manner is potentially in conflict with the need to maintain the appearance of impartiality.²⁰⁷ Participating in a constructive discussion with the media on a regular basis could prevent the spread of misinformation about the court's work and circumvent the formation of negative opinions and press about the court's work. The ICTY Registry and Chambers spokesperson's role in issuing statements, including with respect to controversial issues, and responding to inquiries from the media in regular press briefings is a good example of how a spokesperson can take more initiatives in addressing the media and the public.²⁰⁸

The PIOS should have a more active spokesperson who engages more effectively with the media, both through issuing statements and by holding regular press briefings to provide explanations and answer questions about specific issues related to the court's work. Such an approach would help pre-empt negative press about the court and encourage better public awareness of its work overall. In addition, we urge the PIOS to consider using other means of engaging the press in the court's work. This could include, for example, providing the press with an index of the week's documents which have been filed before the chamber, including motions, decisions,

²⁰⁶ Human Rights Watch interview with court staff, Sarajevo, September 29, 2006; Human Rights Watch telephone interview with court staff, Sarajevo, December 27, 2006.

²⁰⁷ We note the publication of an open letter signed by two international judges in response to attacks on the court and the prosecution in the lead-up to the general elections in Bosnia. "Regarding recent attacks on the Bosnia and Herzegovina State Court and State Prosecutorial Authority," Sarajevo, September 4, 2006 (on file with Human Rights Watch).

²⁰⁸ See, for example, "Vojislav Seselj Assigned Counsel by Trial Chamber," ICTY press release, August 21, 2006, <http://www.un.org/icty/pressreal/2006/p1102-e.htm> (accessed January 25, 2007); "Tribunal's Grave Concern About Seselj's Actions which are Seriously Damaging his Health," ICTY press release, November 30, 2006, <http://www.un.org/icty/pressreal/2006/p1132-e.htm> (accessed January 25, 2007).

and judgments.²⁰⁹ By facilitating access to information about the court's work in this manner, journalists could more easily clarify questions in advance and, where necessary, pose targeted questions to court staff, including the spokesperson, to ensure accurate reporting.

2. The Special Department for War Crimes' engagement with the media

Until recently, the Special Department for War Crimes' relationship with the media has been insufficient to deal with the negative press surrounding its work. For example, although it has its own spokesperson, there were previously no attempts to hold regular meetings with the media to explain its prosecution policy. Indeed, the lack of consistent engagement with the media may have been one of the factors contributing to the significant negative press faced by the department, as outlined above in section II(B).

Subsequent to our on-the-ground research in Bosnia for this report, Human Rights Watch has learned of plans to enhance the department's media strategy to improve its interaction with the press. There is an initiative to establish a Public Information and Press Advisory Office within the Prosecutor's Office of the State Court. A public information officer will head this office and will work with the chief prosecutor in coordinating the prosecution's media strategy, which would include the strategy of the Special Department for War Crimes. The newly appointed deputy registrar for the Prosecutor's Office will also work with the Public Information and Press Advisory Office, among other tasks. Further, the Special Department for War Crimes anticipates holding regular briefings with the press in the future.²¹⁰ We look forward to the rapid implementation of these plans.

3. Additional initiatives needed to engage the public

While the media is an important tool in disseminating information about the chamber to the public, ultimately it operates independently of the chamber and devises its own messages. An effective awareness campaign about the chamber's

²⁰⁹ Email communication from Bosnian civil society representative, Sarajevo, to Human Rights Watch, November 28, 2006. The ICTY has adopted such a practice. See, for example, <http://www.un.org/icty/briefing/2006/PBo61115.htm> (accessed January 27, 2007).

²¹⁰ Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 19, 2006.

activities therefore requires initiatives beyond those targeted at the media to directly engage the public in its work. In addition to making the court and the prosecution more responsive to the public's concerns and questions, interacting with the public can maximize the chamber's impact by helping to foster legitimacy around its work.

As outlined above, the court has made some efforts to conduct outreach, such as by organizing group visits to the court. Nonetheless, we are concerned that the court's efforts to interact directly with the public are not sufficient.²¹¹ For example, there have been reports of weak communication between the court and NGOs participating in the CSN.²¹² We welcome the court's recent efforts to engage with members in the CSN's first "ring" to clarify its role in disseminating information about the court and its activities. We strongly encourage the PIOS to actively foster collaboration with the CSN on an ongoing basis to ensure that this remains a priority and that accurate information about the court and its activities is distributed regularly to the public.

Further, while the Witness Support Office, which is currently heavily involved in coordinating the court's interaction with the CSN, can provide valuable information about certain aspects of the court's functioning, the responsibility for the CSN—and for outreach generally—should rest primarily with the PIOS. We also wish to highlight that while the independent CSN can be an important vehicle for disseminating information throughout Bosnia, it does not displace the need for the court to engage directly with the people of Bosnia.²¹³

Human Rights Watch has been informed that the PIOS's budget for 2007 will be considerably higher than in 2006.²¹⁴ One proposed initiative is to conduct a survey to determine the public's awareness about the court's and the prosecution's activities. This survey will in turn provide a "baseline" for designing an effective public

²¹¹ Human Rights Watch separate interviews with three representatives of Bosnian civil society, Sarajevo, September 26 and October 2, 2006.

²¹² Balkan Investigative Reporting Network, "Justice far from public eyes," Justice Report, December 25, 2006.

²¹³ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, September 26, 2006.

²¹⁴ The Registry recently received a significant donation from the Swiss government. Of the funds donated, €70,000 will be devoted to the outreach activities of both the court and the prosecution. Email communication from court staff, Sarajevo, to Human Rights Watch, December 21, 2006.

awareness program in the future.²¹⁵ Further, it is anticipated that some of the PIOS's budget will be used to conduct additional outreach activities outside of Sarajevo.²¹⁶

In devising a more effective outreach and communications strategy, we recommend drawing from the experiences of the Special Court for Sierra Leone. Like the chamber, the Special Court is located in the country where the crimes occurred. The Special Court has adopted a robust outreach and communications strategy to make its work understood and relevant to the people of Sierra Leone. For example, the Outreach Unit of the Special Court based outreach staff in Sierra Leone's provinces, where they tapped into local social networks to disseminate information about the court through workshops, trainings, and screenings of specially prepared video materials. These materials covered such issues as the role of the judge, the prosecutor, and the defense lawyer in a fair trial, and simple explanations of complex legal issues such as jurisdiction and challenges to the court's legal foundation. The Special Court's Outreach Unit also undertook workshops to educate the Sierra Leonean legal profession about the court and its rules, helping overcome misperceptions and confusion about the court in this important local constituency.²¹⁷

We are concerned, however, that the PIOS's capacity to devise and execute a more ambitious outreach strategy in Bosnia is limited because of current staffing. There are only three staff members in the PIOS to coordinate all of the court's press and outreach work, and there are no plans to recruit additional staff members in the near future.²¹⁸ We therefore strongly urge the Registry to set aside funds for the recruitment of additional staff in the PIOS as soon as possible to ensure that it is fully capable of executing its mandate effectively.

In terms of the prosecution's outreach strategy, in the past there have been limited efforts by representatives of the Special Department for War Crimes to devise activities to engage directly with the public. While representatives of the department

²¹⁵ Human Rights telephone interview with Special Department for War Crimes staff, Sarajevo, December 19, 2006.

²¹⁶ Email communication from court staff, Sarajevo, to Human Rights Watch, December 27, 2006.

²¹⁷ Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, vol. 17, no. 14(A), October 2005, <http://hrw.org/reports/2005/sierraleone1105/>, p. 29.

²¹⁸ Email communication from court staff, Sarajevo, to Human Rights Watch, December 1, 2006; Human Rights Watch telephone interview with court staff, Sarajevo, December 18, 2006.

have attended outreach events in the past, such attendance has been at the request of other organizations.²¹⁹ These representatives are therefore subject to the agendas—and the audiences—of these outside organizations in conveying important and often sensitive information about the department’s mandate and activities. The department’s strategy vis-à-vis participating in outreach events has been largely reactive.²²⁰

However, Human Rights Watch has since learned of plans to intensify the department’s outreach strategy. It is anticipated that the department will organize its own outreach events, and will therefore have more control over the message provided to the public about its activities.²²¹ For example, if the department is handling a case concerning crimes committed in Foca, representatives of the department will go to Foca to explain the crimes in the underlying indictment and answer questions. In this way, the department plans to take its work to the people of Bosnia.²²²

We appreciate the department’s increased commitment to improving its interaction with the public, and look forward to the realization of this commitment in practice. In addition, we wish to emphasize again the importance of the department’s development and adoption of a strategy document for case selection and management and its widespread public dissemination through targeted and regular outreach events, to maximize its impact.

²¹⁹ Human Rights Watch separate telephone interviews with two Special Department for War Crimes staff, Sarajevo, December 19 and 20, 2006.

²²⁰ Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 19.

²²¹ Human Rights Watch separate telephone interviews with two Special Department for War Crimes staff, Sarajevo, December 19 and 20, 2006.

²²² Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, December 20, 2006. The deputy registrar will likely play a prominent role in these outreach activities as it would be inappropriate for prosecutors working on specific cases before the chamber to discuss the details of these cases with the general public.

VII. Collaboration with Cantonal and District Courts

The War Crimes Chamber's limited mandate and resources mean that it will only try a limited number of war crimes cases. The majority of war crimes trials will therefore take place before the cantonal and district courts in Bosnia's constituent entities. Although a detailed analysis of the functioning of these courts is beyond the scope of this report, there are reasons to believe that their lack of resources, among other factors, may undermine their ability to conduct fair and effective war crimes trials.²²³ These courts and prosecutor's offices require sufficient resources and capacity to try these cases. The international community should therefore coordinate donor support between these courts and the chamber to ensure that all war crimes cases are handled fairly and effectively.

The chamber also has the potential to enhance the capacity of the professionals in the cantonal and district courts to handle these cases. In terms of capacity building, we recognize that the chamber's primary focus is on bolstering the skills of the national staff within the State Court. Moreover, as a relatively young institution, the means of cooperating with national legal professionals outside of the State Court may not have been formalized at this stage. Nonetheless, there are indications of some efforts to nurture collaboration with professionals in the entity courts, which are outlined below.

In terms of judicial collaboration, there are no formal meetings between judges of the state and entity courts. There is, however, some interaction between judges of the State Court and those of the entity courts. For example, a number of national judges in the State Court came from the district and cantonal courts and have maintained informal relationships with judges in those courts. Representatives of the State Court (including judges) have also conducted a number of regional presentations outlining the court's work, which encouraged a level of interaction with entity court judges in the respective regions.²²⁴

²²³ See Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, vol. 16, no. 7(D), October 2004, <http://hrw.org/reports/2004/icty1004/>; Human Rights Watch, *A Chance for Justice*; Human Rights Watch interview with Bosnian civil society representative, Sarajevo, October 2, 2006.

²²⁴ Human Rights Watch telephone interview with court staff, Sarajevo, December 15, 2006.

There have been events organized by outside organizations, such as the UNDP, aimed at increasing collaboration. More recently, a number of judges participated in a “judicial college” event, which was aimed at building relationships between judges of the state and entity courts and fostering collaboration. Almost all national judges and several international judges attended the event from the State Court, and there were between 12 and 15 participants from the 17 entity courts.²²⁵

There is also a degree of informal collaboration in war crimes cases between prosecutors at the state and entity levels when necessary and relevant to a particular case. Further, the Special Department for War Crimes recently held a meeting with the entity prosecutors to discuss issues relating to access to ICTY material. There are plans to hold additional meetings beginning in early 2007 to discuss other general issues of mutual concern regarding war crimes cases.²²⁶

The War Crimes Chamber’s contribution to the development of the judicial system and its overall impact on the rule of law in Bosnia should be maximized to the fullest extent possible. The challenges faced by the cantonal and district courts in conducting fair and effective trials underline the importance of collaboration with the chamber in war crimes cases. We therefore welcome efforts made to date to foster communication and cooperation between the state and entity court judges and prosecutors in relation to war crimes issues and encourage increased collaboration, both formal and informal, between these professionals on an ongoing and regular basis. Indeed, the strategy to phase international staff out of the War Crimes Chamber and its organs by the end of 2009 underscores the importance of creating and seizing opportunities to enhance collaboration as soon as possible.

²²⁵ Email communication from court staff, Sarajevo, to Human Rights Watch, December 18, 2006.

²²⁶ *Ibid.*

VIII. Recommendations

To the War Crimes Chamber

To the Judiciary

- Use the least restrictive protective measures possible for witnesses testifying before the chamber.
 - Ensure that witnesses are fully apprised of the range of appropriate protective measures available in order to obtain their informed consent.
- Consistently provide new pseudonyms to all witness who previously testified before the ICTY and who want to maintain a pseudonym in proceedings before the chamber.
- Develop a strategy in conjunction with the High Judicial and Prosecutorial Council to foster regular collaboration with cantonal and district court judges.

To the Court Management Section

- Continue with plans to implement additional means to enhance the court's efficiency, including measures aimed at increasing efficiency in the scheduling of trials, while at the same time safeguarding the fair trial rights of the defense.
- Ensure that the published schedule of proceedings is accurate and provided to the public and the media.
- Assist the judiciary in developing a strategy to formally foster collaboration with cantonal and district court judges.

To the Registrar of the Prosecutor's Office of the State Court of Bosnia

- Request the extension of contracts of existing international prosecutors in the Special Department for War Crimes as necessary within the overall timeframe established by the existing transition strategy.
- Continue with plans to establish a Public Information and Press Advisory Office within the Prosecutor's Office of the State Court to coordinate the prosecution's media strategy and maintain regular contact with the media in

relation to cases before the State Court, including those being handled by the Special Department for War Crimes.

To the Special Department for War Crimes

- Develop and publish a strategy document aimed at clarifying important elements of the department's case selection and prioritization policy, including the use of plea agreements and immunity as a matter of priority. Once completed, this document should be distributed widely to the public and the media at the earliest opportunity.
- Continue with plans to:
 - Routinely provide relevant background material to investigators in SIPA's War Crimes Unit when requesting assistance in carrying out investigations.
 - Hold regular briefings with the press.
 - Organize regular and targeted outreach events with groups throughout Bosnia to discuss, for example, issues relating to case selection and prioritization, as well as specific cases where appropriate.
 - Hold additional meetings with cantonal and district court prosecutors to discuss general issues of mutual concern regarding the processing of war crimes cases, including legal questions such as those relating to the application of international humanitarian law.
 - Facilitate additional access for cantonal and district court prosecutors to ICTY material.
- Ensure the effective management of the department's limited resources to support efforts to promote consistency in the way cases are selected.
- Participate to the greatest extent possible in the trainings provided to SIPA investigators so that training adequately addresses identified weaknesses in taking statements.
- Avoid making overbroad requests for protective measures, such as those made in the Samardzic and Stankovic cases to close the entire trials to the public.

To the Criminal Defense Support Section

- More actively publicize the range of services offered by OKO.

- Continue with plans to improve the cross-examination skills of defense counsel appearing before the chamber by:
 - Ensuring that there are enough training sessions offered on cross-examination on an ongoing basis to provide defense counsel with as many opportunities as possible to refine their skills outside of the courtroom.
 - Devising a strong curriculum covering cross-examination to adequately prepare defense counsel for some of the challenges that may arise during court proceedings.

To the State Investigation Protection Agency War Crimes Unit

- Put in place a training program aimed at improving the level of sensitivity used in approaching female and male victims of sexual violence.

To the State Investigation Protection Agency Witness Protection Unit

- Engage in more consistent follow-up with protected witnesses after testimony has been provided. This may involve, for example, using information provided by the police authorities in the vicinity of a witness's home about possible risks to his or her safety, and taking preemptive action where necessary. Sensitivity should be used where the witness is living in an area where the police may be implicated in crimes that are the subject of proceedings before the chamber.

To the Public Information and Outreach Section

- Ensure the timely release of accurate press releases.
- Delegate more responsibility to the court's designated spokesperson to include, for example, explaining the actions of the court to the media, and defending the court's decisions from criticism when necessary.
- Provide statements to the media and hold regular press briefings to provide explanations and answer questions about specific issues related to the court's work.

- Consider using other means of engaging the press in the court's work, such as providing the press with an index of the week's documents that have been filed before the chamber, including motions, decisions and judgments.
- Assume full responsibility over the operation of the Court Support Network.
 - Regularly collaborate with the Court Support Network to ensure that accurate information about the court and its activities is distributed regularly to the public.
- Devise and execute a more ambitious outreach strategy in Bosnia to facilitate greater awareness of the court's work among the people of Bosnia.

To the Registry

- Ensure ongoing financial and technical support to the Witness Protection Unit of the State Investigation and Protection Agency to maintain the current level of protection for protected witnesses appearing before the chamber.
- Allocate, as a matter of priority, funds to the Public Information and Outreach Section for the recruitment of additional staff so that it can execute its mandate effectively.

To the government of Bosnia and Herzegovina

- Reach an agreement with the authorities in Serbia and in Croatia regarding the transfer of proceedings (provided the death penalty will not be imposed), so that defendants who have committed war crimes do not enjoy impunity simply by virtue of their citizenship.
- Allocate additional resources to address deficiencies in witness protection in cases before the cantonal and district courts.

To the governments of Serbia and of Croatia

- Reach an agreement with the authorities in Bosnia regarding the transfer of proceedings, provided the death penalty will not be imposed, to ensure that defendants who have committed war crimes do not enjoy impunity simply by virtue of their citizenship.
- Undertake the necessary measures to abolish the existing ban in the countries' respective constitutions on the extradition of nationals to other

states to stand trial for the most serious crimes, including war crimes (provided the death penalty will not be imposed).

To the International Criminal Tribunal for the former Yugoslavia

- Continue with plans to draft, propose and implement an amendment to the Rules of Procedure and Evidence as soon as possible that would provide standing to judicial authorities to make applications to the tribunal to seek an alteration of protective measures for witnesses.
- Ensure efficient, consistent and meaningful cooperation with OKO in providing material requested by defense counsel in Bosnia.

To the international community

- Urge the authorities in Bosnia, Croatia and Serbia to address obstacles relating to the transfer of proceedings and, in the longer term, remove legal obstacles to the extradition of nationals in war crimes cases.
- Ensure that the organs necessary for the effective functioning of the War Crimes Chamber, including the Special Department for War Crimes of the Office of the Prosecutor, the Criminal Defense Support Section (OKO), the Witness and Victims Support Office and the Public Information and Outreach Section, are adequately funded.
 - Fund extensions of contracts of existing international prosecutors in the Special Department for War Crimes as requested within the overall timeframe established by the existing transition strategy.
 - Respond positively to other requests for support for these respective organs, including requests from OKO for financial support for training sessions on cross-examination.
- Provide adequate support and ensure the effective coordination of that support to the War Crimes Chamber and the cantonal and district courts to ensure that all war crimes cases in Bosnia are handled fairly and effectively.

IX. Acknowledgements

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Narrowing the Impunity Gap

Trials before Bosnia's War Crimes Chamber

The grave human rights violations committed during the 1992-1995 war in Bosnia and Herzegovina seized the international community's attention due to their brutality and scale. The International Criminal Tribunal for the former Yugoslavia will have only tried a limited number of top-level perpetrators for war crimes committed in Bosnia by the end of its mandate. Much more is needed at the national level to hold the numerous remaining perpetrators accountable for the serious crimes committed during the Bosnian war.

Bosnia's War Crimes Chamber was established in early 2005 to facilitate fair and effective war crimes trials within Bosnia. Despite international assistance in the short term, the chamber is ultimately a national institution. It therefore has the potential to make an important impact on narrowing the "impunity gap" for war crimes and contributing to the establishment of the rule of law long after international participation in its operation has ceased.

This report outlines the War Crimes Chamber's notable progress in fulfilling its mandate to bring justice for some of the worst crimes committed during the war. There are concerns, however, about aspects of the chamber's operations that could affect the extent of its impact in Bosnia. For example, the prosecution's policy for the selection of cases to date has created confusion about the chamber's priorities. The court's use of closed sessions, and inadequate outreach and communications efforts to explain the court's work to the communities most affected may further undercut the public's confidence in the chamber. *Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber* outlines these and other concerns, and makes recommendations to maximize the chamber's effectiveness.

A Bosnian policeman stands guard while others listen during Bosnia's first home-grown war crimes court inauguration on March 9, 2005, in what has been described as a milestone for justice following the 1992-95 conflict in the former Yugoslav republic. The International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague has already transferred five of its cases, involving nine accused, to the chamber for trial.

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