

August 1993
Volume 5, Issue 15

PROCEDURAL AND EVIDENTIARY ISSUES FOR THE YUGOSLAV WAR CRIMES TRIBUNAL:

Resource Allocation, Evidentiary Questions and Protection of Witnesses

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INTRODUCTION

The United Nations has issued nearly thirty declarations on the former Yugoslavia; it has thus far failed to follow through with a single one of them.¹ From promises to create "safe havens" to threats of retaliation against continuing acts of aggression, the U.N. has, for the most part, been all talk. The Security Council's call for an international tribunal to investigate and try war criminals seems headed for the same dead end. Eight months have passed since the U.N. first called for the tribunal;² three months have passed since the U.N. gave a tribunal its final stamp of approval.³ Still, as of this writing, the tribunal has yet to get off the ground.

On July 29, 1993, Helsinki Watch, a division of Human Rights Watch, released a report on eight cases ready for investigation by the tribunal, naming 29 individual defendants, linking each defendant to specific violations of the law governing the tribunal⁴ and summarizing evidence collected by Helsinki Watch to date. That report demonstrates that a prosecutorial office could obtain sufficient evidence for a war crimes tribunal, if the U.N. allocates adequate resources for uncovering, preserving and preparing evidence before it disappears.

Integral to any investigatory effort is a parallel commitment to the safety and integrity of the witnesses who will testify, and to the development and implementation of fair procedural and evidentiary rules. The U.N. attempted to address these issues in the Statute of the International Tribunal ("the Statute"),⁵ the law governing the tribunal. However, many concerns remain, including several of particular interest to groups like Helsinki Watch that have been working closely with witnesses and survivors, and that understand the practical obstacles to mounting successful and fair investigations in the context of the Balkan conflict.⁶

¹ See Human Rights Watch, *The Lost Agenda: Human Rights and U.N. Field Operations*, June 1993, pp. 85-103, detailing failure of U.N. actions in the former Yugoslavia.

² Security Council Resolution 808 of February 22, 1993.

³ Security Council Resolution 827 of May 25, 1993.

⁴ See *Prosecute Now!, Helsinki Watch Releases Eight Cases for War Crimes Tribunal on Former Yugoslavia*, News from Helsinki Watch, Vol. 5, no. 12, August 1, 1993.

⁵ The Statute of The International Tribunal, in Security Council Resolution 827 of May 25, 1993 (incorporating The Report of the Secretary General pursuant to Security Council Resolution 808 of February 22, 1993). Among other substantive provisions, the statute incorporates a list of "grave breaches" of the 1949 Geneva Conventions and their 1977 First Additional Protocol (Article 2); enumerates specific violations of the laws of war (Article 3); specifies that the tribunal shall have the power to prosecute persons committing genocide (Article 4); lists nine crimes that will be considered "crimes against humanity" when committed in armed conflict against civilians (Article 5); and specifies when persons shall be liable for aiding and abetting "grave breaches" under Article 2 and "crimes against humanity" under Article 5 (Article 7).

⁶ Helsinki Watch has released portions of the extensive testimony gathered by its field representatives in *War Crimes in Bosnia-Herzegovina, Volumes I and II* (released in August 1992 and April 1993, and available from Human Rights Watch, 485 Fifth Avenue, New York, New York 10017). On August 29, 1993, Helsinki Watch updated these volumes

In this document, Helsinki Watch discusses some of the major flaws in the Statute that stand in the way of fair and adequate preparation of evidence, particularly poor resource allocation, vague and inadequate procedural and evidentiary rules, and insufficient protection of witnesses. While the document does not attempt to address every possible area of concern,⁷ it highlights those of most immediate and particular interest to Helsinki Watch and, in these areas, offers concrete suggestions for improvement.

Above all, the work of the war crimes tribunal must begin immediately, in order to individualize what too often is seen as collective guilt and, in this manner, to diffuse ethnic tensions.⁸ And, at all times, the investigations should proceed in line with protections accorded the accused in international conventions and customary law. The tribunal's investigations will be largely exemplary: they can never hope to prosecute all offenders and, as such, must strive instead to reestablish the rule of law by prosecuting a select number of offenders with strictest regard to the due process rights of the accused.

Whether the public will perceive that the present war crimes investigations⁹ and subsequent trials have been conducted fairly and appropriately will largely be determined by the rules of evidence that direct their course. Helsinki Watch offers the following suggestions guided by the understanding that to withstand the test of time, investigations and trials must be conducted fairly and without even the slightest appearance of impropriety. Yet, beyond this, Helsinki Watch recognizes that full due process is important in and of itself, as an essential component to reestablishing the rule of law.

RECOMMENDATIONS FOR THE WAR CRIMES TRIBUNAL

Resources for Effective Prosecution

Thus far international bodies have spent most of their time and resources establishing the mechanism of the tribunal – giving it a statute, establishing its jurisdiction and the substantive law it is to apply, and discussing procedural matters. These are necessary tasks. Indeed, much of this memorandum

with a report entitled *Abuses Continue in the Former Yugoslavia* (detailing accounts of human rights abuses spreading into Serbian-controlled Yugoslavia and including previously unreleased testimony from Montenegro and Bosnia-Herzegovina).

⁷ In particular, Helsinki Watch leaves to a later day commentary on elements of the crimes under the Statute, although this area is extremely important. The Statute leaves to the judges the responsibility of drafting the elements of crimes; once they do so, Helsinki Watch will offer its commentary if necessary.

⁸ As Helsinki Watch has pointed out elsewhere, regardless of whether the accused can be forced to stand trial, investigations will serve a purpose in diffusing ethnic tensions. Indictments and arrest warrants – which can be issued without the presence of the accused – can be a successful deterrent in and of themselves. As long as amnesty for alleged war criminals is never put on the bargaining table, those indicted by the tribunal would be subject to arrest once they leave their country. See "Introduction," in *Prosecute Now!, Helsinki Watch Releases Eight Cases for War Crimes Tribunal on Former Yugoslavia*, News from Helsinki Watch, Vol. 5, no. 12, August 1, 1993.

⁹Since Helsinki Watch believes that investigations alone will serve a purpose, its commentary is not limited to the trials themselves, but instead also addresses protections needed during the investigatory stage.

is devoted to such issues. But the tribunal will have no work to do unless time, energy, and financial resources are devoted to investigating and developing cases that can be brought before the tribunal for prosecution. Courts can indict and try individuals only on the basis of evidence. Despite the efforts of the Commission of Experts convened by the Secretary-General, neither that body nor any other has had the necessary resources to develop the evidence needed to prosecute cases. Helsinki Watch therefore cannot emphasize strongly enough that the greatest single need in order to press forward the work of the tribunal is for the Security Council to make available the resources required for thorough and immediate investigations.

Nongovernmental organizations such as Helsinki Watch have been able to do a certain amount of investigatory work, identifying a number of cases where the evidence against particular individuals appears both clear cut and easily documented.¹⁰ Still, the efforts of human rights groups cannot substitute for the work of an international investigatory team, which can focus on the type of information gathering necessary for proving criminal charges at trial. Such investigations include the collection and preservation of physical evidence, identification of witnesses, the collection of testimony that can be presented at trial and the identification of alleged perpetrators for indictment. While the work of nongovernmental human rights organizations such as Helsinki Watch may prompt investigations and provide collateral information and assistance, the work of collecting evidence for trial should be done by a well-financed prosecution team, with cooperation of many governments, including those with access to physical evidence and witnesses.

As time goes by, physical evidence becomes harder to collect; the sites of atrocities are altered, making forensic investigation more difficult and less conclusive; and contact may be lost with witnesses, especially refugees, who move from one place to another. Accordingly, efforts must be undertaken immediately to find witnesses and to ensure their safety so that they can provide preliminary information for the investigation, and also remain willing and available to testify when the time comes.

The commitment of the international community to holding a tribunal covering war crimes in the former Yugoslavia will be measured not by the amount of discussion and refinement of the legal machinery of the tribunal, necessary as that is, but rather by the political willingness to commit the resources required to investigate alleged crimes. Every word that follows in this memorandum thus is meaningless, unless the tribunal and its investigatory staff receive financial and technical support.

Rules of Procedure and Evidence

While resource allocation garners top priority at this point, the U.N. cannot afford to neglect thorny procedural and evidentiary questions that remain unaddressed. In this section, Helsinki Watch highlights some of the major shortcomings of the Statute under widely accepted international law, and suggests that the Security Council amend its decision to address these issues.

The Statute

¹⁰ See *Prosecute Now! Helsinki Watch Releases Eight Cases for War Crimes Tribunal on Former Yugoslavia*, News from Helsinki Watch, Vol. 5, no. 12, August 1, 1993.

The judges of the international tribunal have the task of developing rules of evidence and procedure for every stage of the proceedings. Specifically, Article 15 of the Statute provides that the judges of the tribunal

shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

The Statute includes no provision for either the Security Council or any other international body to scrutinize and reject the rules adopted by the judges. Indeed, the Statute does not provide for public input and comment on the rules of evidence.

Nevertheless, other articles of the Statute circumscribe the power of the judges. In particular, the judges are bound to follow provisions which specify the rights of the accused (Article 21).¹¹ Under Article 21, the accused enjoys the following rights:

- **"equal treatment" before the tribunal;**
- **a "fair and public hearing;"¹²**
- **the "presumption of innocence;"**
- **prompt information in detail and in an understandable language of the nature and cause of any charge against him;**
- **adequate time to prepare for trial;**
- **notification of the right to counsel;**
- **counsel of his own choosing;**
- **appointed counsel "where the interests of justice so require," and without charge when the defendant is indigent;**
- **trial without "undue delay;"**
- **to be present at his own trial;**

¹¹ In addition, the power of the justices is circumscribed by the provisions pertaining to jurisdiction (Articles 6, 8, and 9); organization and composition of the tribunal (Articles 11, 12, 13 and 14); general pretrial requirements and investigation, preparation, and review of indictment (Articles 18 and 19); and conduct of trial proceedings (Article 20). In this document, Human Rights Watch concentrates on Article 21 and 22, touching only briefly on related sections.

¹² Article 21 specifically provides that the right to a public hearing is "subject to Article 22 of the statute." (Article 22 provides for the protection of witnesses.)

- **"to examine or have examined the witnesses against him;"**
- **"to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"**
- **free assistance of an interpreter; and**
- **the right not to be compelled to testify against himself.**

This list, for the most part copied verbatim from Article 14 of the International Covenant on Civil and Political Rights ("the ICCPR"), appears exhaustive at first glance. Nevertheless, a direct comparison of the ICCPR and the Statute illustrates that a few major gaps remain unaddressed.

First, the Statute does not indicate when proceedings may be held *in camera*. In contrast, the ICCPR specifically restricts the use of such proceedings:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...¹³

The Statute contains no such limitations; instead, it states only that trials need not be public when "the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence." The Statute itself, however, never offers exactly what those rules should be. At best, the Statute implies only that trials may be closed in order to protect the identity of victims and witnesses. (See Article 22.)

Second, in a related matter, the Statute fails to indicate when, if ever, *ex parte* affidavits may be used. The ICCPR does not directly address this issue; instead it simply reiterates the basic principle that in general trials should be open and that the accused shall have the right to examine witnesses against him. (See ICCPR, Article 14(3)(e).¹⁴) This approach makes sense under the ICCPR, as it is a general statute, drafted to encompass all scenarios. The Statute, however, was created only to address a single and unique war crimes tribunal, a court burdened with the difficulty of investigating war crimes during an ongoing conflict and while the aggressors remain, at least in part, victorious.¹⁵ Given that the issue of admissibility of *ex parte* affidavits is of paramount concern under such circumstances (and especially because some

¹³ This section further states that "any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." ICCPR, Article 14(1). Thus, even cases that hold private hearings are usually required to make public *judgments*.

¹⁴ The European Convention for the Protection of Human Rights and Fundamental Freedoms includes the same provision, see Article 6(3)(d).

¹⁵ No other international war crimes investigation and/or trial has ever taken place under these conditions.

commentators have suggested that *ex parte* affidavits be used when witnesses are too afraid to testify), the Statute should provide more explicit instructions. Helsinki Watch suggests that, in order to comply with the highest international standards of due process, courts never admit *ex parte* affidavits as substitutes for live testimony, because the admission of *ex parte* affidavits violates the rights of the accused to confrontation and cross-examination.

Third, in contrast to the ICCPR, the Statute apparently does not contemplate compensation of a person whose conviction is overturned or who is pardoned "on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice." (See ICCPR, Article 14(6).) The ICCPR has placed great priority in this safeguard; the Statute is wholly silent on the matter.

Commentary

Given the importance of the rules of evidence in guiding the war crimes tribunal on a fair and just course, Helsinki Watch cannot accept the Security Council's near-complete abdication of responsibility in drafting rules of evidence and procedure. Although Helsinki Watch is confident that an independent and fair judiciary can be chosen for the tribunal, it disagrees with the Security Council's decision to grant the judiciary plenary authority to draft rules of evidence and procedure.

Helsinki Watch thus urges the Security Council to amend the Statute to retain oversight authority over the judiciary's adoption of rules of evidence and procedure, or to issue a statement that makes clear that it intends to exercise oversight responsibilities over rulemaking. Ideally, the Security Council would accept an active role in crafting the most important rules; but, at the very least, it should review the judiciary's rules. Grave concerns about fairness and legitimacy may arise if the judges' actions in this crucial area are not monitored.

Omissions in the Statute include the standard of proof to be used at trial and the standard of review to be used in appellate proceedings.¹⁶ In addition, although the Statute indicates that judgments must be "rendered by a reasonable opinion in writing," no guidelines are provided as to what constitutes an adequate record of decision that will allow for meaningful review, such as a verbatim transcript, a full summary of evidence considered and a detailed account of the court's reasoning.

In addition, Helsinki Watch is concerned about the limited and vague nature of the few procedural safeguards specified in the Statute, and accordingly suggests that the Security Council issue supplementary decisions addressing these matters. As noted above, the Statute fails to provide at least the minimum protections recognized by the ICCPR. These shortfalls include, but are not limited to, the failure of the Statute to adopt:

- specifications as to when trial proceedings may be closed and as to what particular safeguards may be employed to protect witnesses;
- a direction that *ex parte* affidavits, offered as substitutes for live testimony that can be

¹⁶Since the trials are criminal proceedings, the standard of evidence should be the strictest possible, i.e. proof "beyond a reasonable doubt."

subject to cross-examination, are not admissible;

- a provision allowing for compensation of those unjustly accused, similar to that found in the ICCPR. (See ICCPR, Article 14(6).)

Protection of Witnesses and Related Procedural and Evidentiary Issues

No war crimes investigations can succeed unless witnesses receive adequate protection in exchange for their testimony. Based on its extensive field work in the former Yugoslavia, Helsinki Watch understands that the safety concerns of witnesses to war crimes committed in the Balkans are particularly acute.

Helsinki Watch has released over 800 pages of testimony and analysis on war crimes in the former Yugoslavia.¹⁷ Although the purpose of Helsinki Watch missions has been to document human rights abuses generally, not to amass evidence for a trial, many of the same witnesses and victims will be asked to testify about the same events at the tribunal. Helsinki Watch thus has intimate familiarity with many of the men, women, and children who ultimately will provide the tribunal with needed evidence. Through this close and ongoing contact, Helsinki Watch has come to an understanding of what types of protections will be needed for victims and witnesses in order to persuade them to testify, to guarantee their safety, and to provide for their return to society. Drawing from its field work, Helsinki Watch details a range of suggestions below.

The Need to Balance Competing Interests

The full text of the provision of the Statute providing for the protection of witnesses and victims (Article 22) reads as follows:

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings¹⁸ and the protection of the victim's identity.

The only provisions of the Statute bearing further on what trial measures would be appropriate to protect witnesses seem contradictory on their face. Article 20, the main article establishing the appropriate conduct of the trial proceedings, anticipates closed trial proceedings by specifying that "[t]he hearings shall be public *unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.*" (See Article 20(4)(emphasis added).) In contrast, Article 21(2) grants the accused the right to a "public hearing" and Article 21(4)(e) and allows the accused the right "to

¹⁷See *War Crimes in Bosnia-Herzegovina, Volumes I and II* (released in August 1992 and April 1993, and available from Human Rights Watch, 485 Fifth Avenue, New York, New York 10017).

¹⁸ Trial proceeding held in the judge's chambers or in some other area closed to the public.

examine and have examined, the witnesses against him..."¹⁹

In crafting rules of evidence and procedure to fill in the gaps in the Statute, the tribunal must somehow appropriately balance the interests of the accused and those of the witnesses. The accused's interests, in addition to the right to cross-examination, include an interest in being able to confront the accuser (the "right to confrontation"), to prepare a defense (which may necessitate knowing the names of witnesses), to be present at trial (and at all of the stages in which facts are being weighed), and to have the trier of fact accord appropriate weight to the evidence.²⁰

Witnesses' interests, commonly called "privacy" interests,²¹ are three-fold. First, they include interests associated with personal safety. Many of the people of the former Yugoslavia who will be called on to testify at the tribunal fear reprisal against themselves and their families. This fear, which may arise at any trial, warrants particular attention here, where the accused may be closely acquainted with witnesses and thus knowledgeable about where they may be located; where members of government, military officers, and others with access to weapons and other means of punishment are among the accused; and where some of the supporters of the accused have already taken revenge as a matter of course. The possibility of retaliation will only be magnified if the trial should take place before the war has ended. Under these circumstances, public testimony not only endangers the physical safety of witnesses and their family members, but also their job security, pension, housing, and ability to travel.

Second, witnesses and victims are entitled to what could be called "dignity" interests -- the interest in being treated with respect, with not being publicly humiliated. This need may be especially great for witnesses who are survivors of rape and other forms of sexual abuse. Before they can even talk about their abuse, such witnesses must come to terms with many layers of shame. Some fear that if they admit to having been raped or otherwise sexually abused, no one will marry them, or their husbands will divorce them, their families will disown them, and their communities ostracize them. In addition, based on

¹⁹ The later provision, however, may also allow for restrictions on cross-examination which are intended to protect witnesses' safety. As one commentator has explained:

...this provision aims at ensuring for the defense, in this respect, complete equality of treatment with the prosecution.... On the other hand, it does not imply the right to have witnesses called without restriction. The provision does not therefore mean that municipal law cannot lay down conditions for admission and examination of witnesses, provided that such conditions are identical for witnesses on each side. (Paul Sieghart, *The International Law of Human Rights*, 1983.)

²⁰ One of the reasons courts exclude hearsay testimony in jury trials is that juries may be ill-equipped to weigh evidence differentially, granting first-hand testimony the highest weight and hearsay testimony less weight. Here, where the trier of fact is a panel of judges, this concern is not present; the judges could accept hearsay testimony and merely grant it little weight. However other concerns mitigate against this approach. Courts also exclude hearsay evidence in non-jury trials in order to protect the right of the accused to cross-examine witnesses against him or her, a right specifically provided for by the Statute, see Statute, Article 21(4)(a), as well as the right of the accused to confront the accusers.

²¹ The word "privacy" is both too limited and too vague in this case. Witnesses do not need privacy in the sense that they need to be left alone. On the contrary, what they may desire most is government protection and assistance in order to preserve their security and dignity, and to help them reestablish their lives.

knowledge of the conduct of counsel in previous local trials, many women anticipate that they will be subject to probing and even brutal questioning about their own sexual conduct. Unlike other survivors who may not have been able to hide their suffering – their bullet-ridden limbs, their bruises, their broken legs – survivors of rape may have successfully concealed their trauma. To testify necessitates disclosure and possibly the end of a long process of self-denial.²² Accordingly, for all of these reasons, rape survivors may be extremely reluctant to come forward for a war crimes trial unless the tribunal takes steps to safeguard them from public humiliation.

Third, along with the immediate "safety" and "dignity" interests, witnesses have an interest in life itself, which here means assistance in being able to start their lives anew. To do so, many witnesses need a full array of social services, especially trauma counseling and other health care. Some witnesses also need assistance with relocation, a grant of asylum, and even a new identity. Although such assistance serves safety and privacy interests, it also addresses witnesses' struggle to resume their lives, a struggle that could be seen as an important interest in and of itself.

Toward General Principles on Protection

Although the Statute permits the tribunal to fashion protections for witnesses, the Security Council does not *require* that witnesses who legitimately desire it be protected. For this reason, Helsinki Watch urges the Security Council to amend the Statute to provide a general mandate on protection.

Since cases before the tribunal will be exemplary cases, intended to reestablish the rule of law in what has been a lawless society, the strictest regard must be paid to the due process rights of defendants at all times. Thus, in weighing the rights of witnesses and accused, if due process compromises are needed to entice certain witnesses to testify, then it is better to let the case drop and to prosecute other defendants against whom witnesses are willing and able to testify. Accordingly, Helsinki Watch urges that the tribunal be *required* to provide protection for witnesses whenever needed, but *only* in line with the rights of the accused.

The standard should be that all witnesses shall be granted the degree of protection they need at all stages of the trial, including investigatory, indictment, and trial. Although some commentators have advocated "special" safeguards for rape victims, Helsinki Watch cautions against an approach that would treat all rape survivors alike and grant them seemingly "extra" protections. The general standard of protection for all witnesses can be applied to survivors of rape, with the recognition that the degree of protection needed by some rape survivors may be greater than other witnesses. At all times, the court should focus on the particular needs of *all witnesses*, weighed against the rights of the accused.²³

²² And potential witnesses may realize that after they testify, they are unlikely to receive the kind of counseling and other social services they need. See *Meeting the Health Care Needs of Women Survivors of the Balkan Conflict*, The Center for Reproductive Law & Policy, New York, April 1993.

²³ This approach will be useful in those cases in which witnesses testify about several war crimes at once, and for those in which a woman in the investigatory stage may claim to be a witness to rapes, but later reveals that she was a victim. Such a witness is entitled to protection through every stage of the proceedings.

Concrete Suggestions for Applying Protection Rules

The main priority in any investigation and subsequent trial should be ensuring that the proceedings are fair and that the rights of the accused are adequately protected. In line with these goals, courts have designed several safeguards to protect witnesses, many of which may be applicable here. Juridical measures to protect witnesses include the power of the court to order persons under its jurisdiction to stay away from the witness, with an attendant power of contempt, fine and jail, and court orders or requests to governments to protect witnesses or to arrest persons who harass witnesses. These tactics, however, may be inadequate for many witnesses who will be called to testify before the tribunal. To the extent that such standard provisions fail, the tribunal may draw from the following array of more novel protective measures.

- ***In-Camera* Proceedings**

The expense of closed proceedings is the accused's right to an open trial; however, closed proceedings preserve the defendant's rights to cross-examination and confrontation. The testimony of a witness given outside the public view can in part guarantee his safety, but it can scarcely be considered an adequate protection in many cases, especially taken into account the fact that once the accused discovers the witness's identity, so will others who may wish him harm. Thus, *in-camera* proceedings, without more, will frequently be insufficient when a witness's safety is threatened.

- **Modified *In-Camera* Proceedings**

In-camera proceedings may be modified as necessary to address the particular needs of a witness. For example, in cases in which the witness's identity is not critical to the defendant's right to cross-examination, such as when there was no personal relationship between the accused and the witness prior to the alleged crime and there are no extraordinary issues about the witness's motive to testify truthfully, a witness may be introduced by a pseudonym during an *in-camera* proceeding.²⁴ While this method adds extra protection for the witness, the witness remains identifiable by sight. For witnesses needing even greater protection, the use of *in-camera* proceedings may be combined with other safeguards, such as the use of screens (see below),²⁵ when doing so is consistent with the defendant's due process rights. Also, when possible the use of *in-camera* proceedings may be modified to enhance the accused's right to a public trial. In particular, the testimony of an *in-camera* proceeding could be made public, possibly with the name and any other identifying characteristics of the witnesses omitted.

²⁴ Pseudonyms may be used in public proceedings as well.

²⁵ Screens also may be used outside in public proceedings.

- **Alteration of Image or Voice of Witness**

Whenever a video or audio tape is used, either in the investigatory stage or at trial, the tribunal may alter the voice or image in order to further protect the witness. This will help conceal the witness's identity once the evidence is used at trial, but will not protect the witness from being identified by anyone present at the taping. Because both the accused and the accused's counsel should have the right to be present at videotaped depositions or videotaped trial testimony, they will be able to identify the witness regardless of whether the tape is eventually altered.

- **Use of Screens**

To resolve some of the difficulties noted above, witnesses whose identity is not critical to a defendant's right of cross-examination may be permitted to give trial or deposition testimony, or other statements to investigators behind a screen which presents only their silhouettes.²⁶ Their voices can also be altered and their identity further concealed through use of a mask, wig, and/or body padding. In this way, the general public and the press can hear the contents of the testimony while not discovering the witnesses' identities. In addition, the judges, by sitting parallel to the screen, can observe the demeanor of each witness.

- **Designation of an Alternative Site to Take Testimony**

The tribunal may designate another site at which to take testimony from a witness, in an effort to minimize public attention. However, because the public's attention may still be drawn to the presence of the judge, counsel and the defendant in the place of questioning, this system is unlikely to provide much safety unless it is combined with other protective measures.

- **Designation of a Special Rapporteur**

The Court may designate a special rapporteur to investigate general conditions and report to the court. Such a rapporteur would decrease the need to expose witnesses to the possibility of reprisal for testimony on peripheral matters. Witnesses thus would need to be called only to testify about the conduct of the defendant himself.

- **Sealing or Expunging Witnesses' Names from Public Records**

In conjunction with the measures outlined above, the tribunal could seal or expunge witness's names from public records when necessary to ensure their safety. Any records identifying

²⁶ Recently in the U.S., Judge Royce Lamberth, from the United States District Court for the District of Columbia, allowed testimony of witnesses in a criminal case involving an investigation nicknamed "Irangate" or "Contragate." It involved two agents of the Central Intelligence Agency (CIA), whose identity had to be protected for national security reasons. Both agents eventually testified behind a screen under assumed names.

witnesses could be kept in a designated safe in a neutral country, to be opened only upon an emergency and after a decision by the Security Council, or after a set time period, such as 100 years.

- **Use of Pseudonyms**

In so far as the identity of a witness is not critical to a defendant's right of cross-examination, pseudonyms for witnesses may be used throughout the investigatory and trial stages, alone or along with any of the other protective devices detailed above.

- **Use of U.N. Guards**

At every stage in which a witness is called upon to give testimony, his or her safety may be secured through use of U.N. guards.

In addition to the above measures, which concern the presentation of testimony, several other procedural and evidentiary issues bear upon preserving the interests of the witnesses and the rights of defendants. Five of those issues -- use of "rape shield laws," admission of expert testimony, use of other third party testimony, *ex-parte* affidavits, and relocation of witnesses -- are addressed below.

- **"Rape Shield" Laws**

In order to protect rape victims from public humiliation, the tribunal may supplement its rule on relevance of evidence with a so-called "rape shield law." These laws, used in a number of U.S. states, generally prohibit defense counsel from presenting evidence on the past sexual history of the witness in order to prove consent or otherwise discredit the witness. Although in cases before the tribunal evidence of witnesses' past sexual conduct is likely to be excludable as irrelevant, the adoption of a general prohibition of such evidence would add a safeguard for witnesses.

- **Admission of Expert Testimony**

The tribunal should admit expert testimony to explain the manner in which some trauma victims testify. For example, one effect of trauma is that victims may blank out a part of their testimony, temporarily or forever. Trauma experts could help the tribunal assess lapses in rape victims' and other trauma victims' testimony, and illuminate whether and how such lapses can be justified.²⁷

- **Use of Third Party Testimony**

The tribunal may accept testimony of human rights advocates, social service workers and other

²⁷ See Glen Randall and Ellen Lutz, *Serving Survivors of Torture*, 1991.

third parties for background and supplementary information about general conditions that are material to the case.

- ***Ex-Parte* Affidavits**

***Ex-parte* affidavits, offered as substitutes for live witnesses, should never be permissible because they directly violate the rights of the accused.**

- **Relocation of Witnesses**

In general, secrecy may be enhanced if testimony is taken close to a witness's residence (so that he or she need not stay overnight to give the testimony) in a hospital, school, or other public building to which the witness is likely to travel. This procedure, however, will be inadequate in many cases. Witnesses with the greatest security needs should be removed from their country with their family members at the earliest stage of investigation. Family members should not be left behind as they may be identified and subject to harassment and abuse. The tribunal should bear full responsibility for housing, health care, and other social services for such witnesses and their families immediately upon their temporary relocation prior to trial and through their permanent relocation.

A Commitment to Witnesses Beyond Trial

The above safeguards, standing alone, are inadequate to preserve fully the rights of witnesses and victims. In addition to their interests in safety and dignity, witnesses and victims have an interest in being able to resume normal lives. In order to do so, many of them, and many of their family members, need social services, housing, legal assistance, long-term trauma counseling and other health care.

Given the heavy psychiatric burden of testifying about war time abuses, the tribunal should bear the responsibility of providing free psychiatric care. Trained trauma counselors can help prevent witnesses from being re-traumatized by their experience before the tribunal. Such counseling must be culturally and ethnically appropriate, gender-sensitive, and in an understandable language; witnesses and their family members should have a choice of counselors and should be able to switch counselors; and the counseling should begin as soon as witnesses are contacted in the investigatory stage and continue as long as necessary past the trial stage. The United Nations must commit the financial resources necessary to provide such needed care. The tribunal could also be given the power to order defendants convicted of crimes to reimburse the U.N. for the costs of such care.

In addition, witnesses and their families may need to be relocated after testifying. Of paramount concern is that there be a place for the witnesses to go. To this end, the Security Council should ensure that witnesses quietly be granted asylum in various pre-arranged countries. As part of a complete "witness protection program," the Security Council should also arrange for new identities for witnesses and their family members when necessary, and assist with their integration into a new society. In order to prevent the public from perceiving such arrangements as attempts to "buy witnesses," the tribunal should offer witnesses such protections as the need arises on an equal basis, no matter how they testify.

CONCLUSION

Helsinki Watch offers the above suggestions for the war crimes tribunal with the hope that the United Nations will make good on its promise to get the war crimes investigations off the ground. In order to do so, the U.N. must first commit the financial and technical resources necessary for thorough investigations. Then, in order to ensure that witnesses are adequately protected and that investigations and trials are fair to the accused, the U.N. should address the concerns enumerated above. Compared with other dilemmas that the U.N. has faced in the Balkans, the war crimes tribunal can easily become a reality. All that is needed is the political will.

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