

MCJ

**International Criminal Tribunal
for the Former Yugoslavia**

PROSECUTOR OF THE TRIBUNAL

v.

DUSKO TADIC

**MOTION OF THE PROSECUTOR REQUESTING
PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES**

**BRIEF AMICI CURIAE of
Jacob Blaustein Institute for the Advancement of Human
Rights of the American Jewish Committee, Center for
Constitutional Rights, International Women's Human Rights
Law Clinic of the City University of New York, Women
Refugees Project of the Harvard Immigration and Refugee
Program and Cambridge and Somerville Legal Services**

I. CREDENTIALS OF PARTIES

The authors of this brief are Rhonda Copelon, Professor of Law and Director of the International Women's Human Rights Clinic at the City University of New York (USA); Felice Gaer, the Director of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, New York, New York; Jennifer M. Green, Administrative Director of the Human Rights Program at Harvard Law School,* Cambridge, Massachusetts (USA), Attorney for the Center for Constitutional Rights, New York, New York, and a volunteer attorney with the Women Refugees Project of the Cambridge and Somerville Legal Services and the Immigration and Refugee Clinic at Harvard Law School; Sara Hossain, a Barrister and volunteer lawyer at Ain o Shalish Kendro [Law and Mediation Centre], Dhaka, Bangladesh, and an advisory committee member of Interights, London; and Carol Rose, J.D. candidate, Harvard Law School and Editor, Harvard Human Rights Journal** , Cambridge, Massachusetts.

The brief is submitted on behalf of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, Center for Constitutional Rights, International Women's Human Rights Law Clinic of the City University of New York, Women Refugees Project of the Harvard Immigration and Refugee Program and Cambridge and Somerville Legal Services.

* listed for identification purposes only

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Additional organizations may be added later. The work of these groups ranges from direct assistance for individual victims of violence to legal analyses about the most appropriate legal mechanisms and procedures which should be implemented to hold perpetrators accountable for war crimes and human rights violations.

II. SUMMARY OF ARGUMENTS

The purpose of this brief is to present a framework by which the Trial Court can adequately consider the rights of witnesses and victims on a case-by-case basis. Such consideration must take into account possible conflicts between the protection of victims and witnesses and the rights of accused, as well as other public interest goals of the Tribunal, including deterrence of future violations of international humanitarian law and human rights law.

The Motion of the Prosecutor requests the Trial Chamber to order a series of measures to ensure the protection of witnesses and victims. Although there is no record of any consultations with the witnesses and victims inquiring whether they have requested or consented to non-disclosure, we will proceed on the assumption that in the case presently before the court, the measures requested by the Prosecutor to protect confidentiality and anonymity have been requested and agreed to by the witnesses and victims.

The level of physical protection and psychological support

will vary with each individual and will depend on information they present about whether they want to testify publicly, and if so under what conditions; the physical threats they face; the trauma and fear they are dealing with. The Tribunal must establish a clear process within the Victims and Witnesses Unit so that a member of this unit consults with survivors and witnesses, assesses their needs and makes a report to the Trial Chamber before it can make decisions about appropriate protections.

We support generally the Prosecutor's requests to:

- Assure the use of pseudonyms and nondisclosure to the public or media of victims' or witnesses' names or other identifying information;¹
- Use pseudonyms for protected victims and witnesses in documents and during trial;²
- Seal or expunge from public records and trial documents any identifying information about witnesses and victims;³
- Use one-way closed circuit televisions or voice and image

¹Motion on Behalf of the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses of Crimes Alleged in Charges 4, 5, and 11 and for General Protective Measures for Victims of Conflict in Former Yugoslavia, Case No. IT-94-1-I. Filed 18 May 1995. [Hereinafter Prosecutor's Motion]

²Prosecutor's Motion, Requests for Orders 1, 2, 10.

³Prosecutor's Motion, Request for Orders 4, 5, 6.

altering devices during testimony by these witnesses;⁴

- Require the accused, defense counsel and their representatives to notify the Prosecutor of any requested contact with prosecution witnesses or relatives of such witnesses and that the Prosecutor shall make arrangements for such contact.⁵
- That hearings to discuss the testimony and the testimony of these witnesses will be heard in closed session.⁶ We note that closed sessions should be used only as a last resort, when the use of such mechanisms as closed-circuit testimony, voice- and image-altering devices and depositional testimony are not sufficient to ensure the confidentiality and security of the witness/victim.

We support with reservations the following motion of the Prosecutor:

- That the public and media shall not photograph, video record or sketch witnesses who are victims of the conflict in former Yugoslavia when these witnesses are entering or exiting the Tribunal Building.⁷ It is unclear whether such an order would require the Trial

⁴Prosecutor's Motion, Requests for Orders 7 & 8.

⁵Prosecutor's Motion, Request for Order 13.

⁶Prosecutor's Motion, Requests for Orders 9.

⁷Prosecutor's Motion, Request for Order 14.

Chamber to prosecute the media for violations of this order and, if so, whether the Trial Chamber would have the authority to do so. Moreover, we question whether such an order is always in the interest of the witness or victim.

We oppose the following motions of the Prosecutor:

- That the Prosecutor shall disclose the names and unredacted statements of the protected witnesses to the defense no earlier than one month in advance of trial date.⁸ We believe that this arbitrary time period offers no meaningful protections to witnesses and victims. Moreover, the use of unredacted statements contradicts the request for the use of pseudonyms, sealed documents and expunged records.

We propose, instead, an order that would forbid the release of witness or victim names to the accused when the witnesses or victims can show that they have a well-founded fear for physical safety if their names are revealed to the defendant and can show that the potential risk of physical harm outweighs the accused's due process rights to confront the witness (e.g., this is a strong possibility in "command responsibility" cases). Such a determination should be made by the Trial Chambers pursuant to a hearing in closed session.

⁸Prosecutor's Motion, Request for Order 11.

If it is determined that the defendant has a right to know the identity of the victim or witness, the Tribunal must provide meaningful protection for the duration of the threat to the victim or witness.

- That the accused, the defense attorneys and their representatives shall not disclose the names of victims or witnesses or other identifying data concerning these witnesses to members of public or to the media, except to limited extent such disclosure to members of public is necessary (emphasis added).⁹ This order would contradict the protections proposed in the above-mentioned motions of the Prosecutor. We believe that public disclosure of the names of victims and witnesses is unnecessary except in the most unusual circumstances and should be allowed only with the express consent of the Trial Chambers, the Prosecutor and the victim or witness pursuant to a hearing. Sanctions should be imposed on those who violate victim and witness confidentiality/anonymity.

The authorities upon which this brief is based are relevant to all survivors of war crimes or crimes against humanity. We have particular concern, however, for the potential of added trauma for the victims of sexual violence.

As has been widely publicized, since the outbreak of the war

⁹Prosecutor's Motion, Request for Order 12.

in Bosnia-Herzegovina, nearly a quarter-million people have been killed. Over two million -- over half the country's pre-war population -- have been forced to flee their homes and in many cases their countries. They have been subjected to countless atrocities -- killings, torture including rape and other sexual and reproductive violence, arbitrary detention, etc.¹⁰

Because of the continuing war, those who might present information to the International Criminal Tribunal face continuing threats to their lives and physical security and to

¹⁰See, Green, Copelon, et al, Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, 5 Hastings Women's Law Journal 171 (Summer 1994) and sources cited in fn 7, e.g., U.N. Economic and Social Council, "Situation of Human Rights in the Territory of the Former Yugoslavia: Fifth period report on the situation of human rights in the territory of the former Yugoslavia submitted by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of Commission resolution 1993/7 of 23 February 1993, E/CN.4/1993/50 (17 November 1993) (hereinafter Mazowiecki Fifth Report); Amnesty International, Bosnia-Herzegovina - Rape and Sexual Abuse by Armed Forces (January 1993); Helsinki Watch, Physicians for Human Rights, "War Crimes in the Balkans," (Winter 1993); U.N. Resolution on "Situation of Human Rights in the Territory of the Former Yugoslavia" (2/10/93); U.N. Document "Letter Dated February 9, 1993 From Secretary-General Addressed to President of Security Council"; Institute for War and Peace Report, "Balkan War Report, Hearing before the Commission on Security and Cooperation in Europe, 103d Cong, 1st Sess., Jan. 25, 1993, at 2-3 (mass rape of women and children "are part of the systemic policy of 'ethnic cleansing,' a policy based on prejudice and designed to commit genocide against a people."); Roy Gutman, Witness to Genocide (1993) (compilation of Gutman's reporting for Newsday on the genocide in the former Yugoslavia); U.S. Department of State, Country Report on Human Rights Practices (Feb. 1993; Feb. 1994; Feb. 1995); Amnesty International, Bosnia-Herzegovina: Gross Abuses of Basic Human Rights (October 1992); International Human Rights Law Group, No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia (1994).

that of family members, friends and other members of their communities. Many women and men who have fled from their homes live in the perilous status of refugees or internally displaced persons, both in terms of the fear for their physical safety and in terms of their legal status. They often live in unprotected "safe areas" or overcrowded cities in which local gangs act with impunity, not subject to police controls.

In addition, the war crimes and crimes against humanity they have endured have inflicted deep and possibly long-lasting trauma on survivors of the attacks, those close to them and those affected by assaults against the deceased.

Many reports state that women were subjected to rape and other sexual and reproductive abuse. Some were detained in concentration camps and raped repeatedly and terrorized by the ubiquitous threat of rape. Others were held against their will and assaulted in their own communities. The injuries and trauma of rape are far reaching, as recently described in an amicus brief before a U.S. Court of Appeals in the case of Doe v. Karadzic:

As a result of the gender-specific crimes perpetrated against them, women suffer both tangible and intangible losses. They often lose their bodily integrity; their physical and mental health; their self-esteem; their sexuality; their sense of personal security; and their right of sexual, ethnic, and religious equality. They have lost or been forced to separate from family members; they have lost or fear the loss of their capacity to form families or bear children in the future. They have been rejected by their communities on account of the crimes against them. They have been forced to leave behind their homes, their work, their possessions, and their sense of belonging to a community. They have been rejected by their communities on account of the crimes against them.¹¹

Notwithstanding physical fear, trauma, marginalization and shame, that some victims and witnesses have cooperated with the Prosecutor and are willing to consider prosecuting their cases attests to the strength, stamina and desire for justice of the survivors and their families. Particularly in cases of human rights abuses and war crimes, many survivors find it assists in their healing to bring to justice those who perpetrated the crimes against them. Further, public prosecution of those who

¹¹Brief Amici Curiae submitted for appellants in Jane Doe et al. (Appellants) v. Radovan Karadzic (Appellee) to the United States Court of Appeals for the Second Circuit, January 17, 1995 by Alliances - An African Women's Network, Asian Women Human Rights Council, Autonomous Women's House, B.a.B.e., C.E.A.D.E.L., Center for Women War Victims, Center for Women's Global Leadership, Centro de la Mujer Peruana Flora Tristan, Coalition Against Trafficking in Women-Asia Pacific, Committee on Feminism and International Law of the International Law Association, Coordination of Women's Advocacy, Deutscher Frauenrat e.V., Infoteka, Isis International, Korean Council for the Women Drafted for Military Sexual Slavery by Japan, Latin American and Caribbean Network Against Domestic and Sexual Violence - Southern Cone Region, Lila Pilipina on Task For Pilipina Victims of Military Sexual Slavery by Japan, MADRE, National Alliance of Women's Organisations, Network of East-West Women, Red Feminista Latinoamericana y del Caribe Contra la Violencia Domestica y Sexual: Region del Caribe, Reproductive Rights Project of the Columbia School of Public Health, Shirkat Gah - Women's Resource Centre, Women and Laws Programme, Women in Black, Women in Nigeria, Women Living Under Muslim Laws, Women for Women's Human Rights, Women Refugees Project, Women's Education, Development, Productivity and Research Organization, Women's Environment and Development Organization, Zagreb Women's Lobby.

See also Organization of American States Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Haiti (1995) ("wounds inflicted on women who were abused sexually are both physical and psychological").

have committed atrocities may deter ongoing or future violations. Thus, witnesses or victims who expressly request to testify at an open trial, without protection of their identities, should be allowed to do so.

However, while confronting a perpetrator may assist the victim or witness in her or his healing process, the very act of confrontation may itself cause psychological damage. Thus the procedures must provide victims with a choice of protective measures against both the risk of physical harm and psychological damage.

The brief provides a summary analysis of the legal protections for victims and witnesses who might present information to the International Criminal Tribunal. We do this with full recognition of the rights of the accused and the obligation of the Tribunal under its Statute to strike a fair and proper balance between the rights of the accused and those of victims and witnesses, a balance which does not compromise the accused's essential and important due process rights.

There are two forms of protection for victims and witnesses which the Tribunal should address, in formulating appropriate procedures:

a) confidentiality: survivors and witnesses are unidentified to the public and the media.

b) anonymity: survivors and witnesses are not identified to the defendant and defense counsel.

These two forms of protection implicate two categories of defendants' rights, as established under international law. Protecting the confidentiality of survivors and witnesses implicates a defendant's right to a public trial¹² and protecting anonymity implicates the right to confront the accused.¹³ The Statute of the International Tribunal also provides that the accused shall be entitled to "examine or have examined" witnesses against him and shall have a "public hearing."¹⁴ The right to a public hearing, however, is expressly subject to Article 22 provisions for the protection of victims and witnesses.¹⁵

We propose the establishment of a framework which integrates the concerns for protection of victims and witnesses in the investigation, trial and post-trial processes. Specifically, we

¹²Universal Declaration of Human Rights, art. 10. GA 217A (III). December 10, 1948. International Covenant on Civil and Political Rights, art. 14(1).GA2200A (XXI). Entered into force March 23, 1976. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1). Signed November 4, 1950. Entered into force September 3, 1953. 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118.

¹³ICCPR, art 14(2)(e) states that the accused has a right to examine, or have examined, the witnesses against him. (emphasis added). See also European Human Rights Convention, art. 6(d), which likewise states that accused shall have right to examine or have examined witnesses against him.

¹⁴Statute of the International Tribunal, art. 21(2).

¹⁵Statute of the International Tribunal, art. 22, states that the 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 proceedings and the protection of the victim's identity."

advocate that the Tribunal establish a process whereby victims and witnesses are consulted about their concerns and the dangers they face, advised about the protections available to them, and give their fully-informed consent before they are considered to have relinquished their confidentiality and/or their anonymity. This process properly belongs in the Victims and Witnesses unit. The unit's independence from the judicial chamber, the prosecutor's office and defense counsel¹⁶ makes it ideally suited to provide information to victims and witnesses so that they can make carefully considered decisions about whether to begin, continue, or end participation in the Tribunal process. Its serious lack of human, financial and technical resources must be addressed if it is to provide meaningful protection and support to victims and witnesses.

In international law and institutions there has been recent recognition of the importance of respectfully integrating victims and witnesses into judicial processes. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res 40/34 (November 29, 1985) states the measures which should be taken to give victims access to justice:

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

.....
(b) Allowing the views and concerns of victims to be presented and considered at appropriate states of the proceedings where their personal interests are

¹⁶The Unit will need to exercise precautions in protecting both prosecution and defense witnesses.

affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation....¹⁷

In this amicus brief, we have drawn on different legal approaches. We advocate protections which appear to have reached the fairest balance between the rights of the victims and witnesses who fear physical retaliation and/or further psychological trauma, on the one hand, and the rights of the accused, on the other.

III. PROVISIONS TO PROTECT THE CONFIDENTIALITY OF VICTIMS THE CONFIDENTIAL WITNESSES SHOULD BE SUPPORTED

The Prosecutor has filed a motion requesting that the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms should not be disclosed to the public.¹⁸ The Trial Chamber should grant the Prosecutor's motions for

¹⁷ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res 40/34 (November 29, 1985). In addition, the establishment of a special rapporteur on compensation, restitution and reparations for victims is an indication about growing concerns for substantive redress for the actual needs and concerns for survivors of human rights violations.

¹⁸ Prosecutor's Motion, Requests for Orders 1 & 2.

confidentiality.

The on-going nature of the conflict in the former Yugoslavia and the related danger of reprisal and physical threats against victims, witnesses and their family members, makes it incumbent upon the Trial Court to ensure that victims and witnesses are not further endangered by the activities of the Tribunal itself.

It is submitted that the identity of victims and witnesses should not be made available to the public or media without close consultation with the witnesses or victims and their express consent to the public release of their names and identifying characteristics. "Confidentiality" thus refers to keeping this information "private and not for publication."¹⁹

The Trial Chamber's authority to protect the identity of witnesses and victims is set forth in the Tribunal's Rules of Procedure and Evidence.²⁰ During an investigation, for example, the Prosecutor may take "special measures to provide for the safety of potential witnesses and informants."²¹ Once an indictment is issued, the judge, in consultation with the prosecutor, may order that there be no public disclosure of the indictment until it is served on the accused.²² Rule 69

¹⁹ Black's Law Dictionary 84 (1979).

²⁰ Rules of Procedure and Evidence (as revised 30 January 1995), IT/32/Rev.3. [hereinafter Rules of Procedure].

²¹ Id., Rule 39(ii): Conduct of Investigations.

²² Id., Rule 53(A): Non-disclosure of Indictment.

specifically states that the Prosecutor may apply to the Trial Chamber "to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal."²³ Finally, Rule 75 provides for measures for victim or witness protections, which may include: (a) expunging names and identifying information from the Chamber's public records; (b) non-disclosure to the public of any records identifying the victim; (c) giving of testimony through image- or voice-altering devices or closed-circuit television and (d) assignment of a pseudonym.

The Tribunal, however, has limited means by which to bring a witness or victim under its "protection." The dearth of adequate financing makes it unlikely that the Tribunal will be able to undertake the complex and expensive security measures necessary to protect victims, witnesses and their families for the indefinite future -- possibly for the duration of their lives.²⁴ The need for confidentiality is enhanced by the fact that the hatreds and destruction of community perpetrated in this war heightens the possibility of revenge with impunity. Thus, the Trial Chamber must take due care to ensure that the

²³Id., Rule 69(A,) Protection of Victims and Witnesses.

²⁴It would cost an estimated US\$1 million per witness to provide proper protection. See Materials Prepared by the Jacob Blaustein Institute for the Advancement of Human Rights and the Orville Schell Center for Human Rights, "Expert Consultation on Technical and Financial Requirements for the International Criminal Tribunal for the Former Yugoslavia," Yale Law School, February 11, 1995. Tab 28.

confidentiality of witnesses and victims is closely guarded from the public and media throughout the investigation and all court proceedings, and as they proceed with their lives after trial.

Further, information about the identities of victims and witnesses who have requested confidentiality should be limited within the prosecutor's office and the court. Only those officials who need to know -- for example, the trial judges and a small number of the prosecutorial team -- should have access to information. Knowledge of identity should be guarded under highest security and disclosure punished by the strictest sanctions.

It is respectfully submitted that the following measures should be adopted as part of a range of options available to victims and witnesses by the Trial Chambers to ensure that the confidentiality of witnesses and victims is protected.

A. We support the Prosecutor's Request for an Order that the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms not be disclosed to the media or the public.²⁵

Authority for the protection of confidentiality through the use of pseudonyms can be found in the Statute of the Tribunal²⁶ and in the Procedural Rules of the Tribunal.²⁷ Rule 75, providing for the protection of victims and witnesses, expressly

²⁵ Prosecutor's Motion Orders 1 & 2.

²⁶ Statute of the International Tribunal, art. 22.

²⁷ Rules of Procedure, See Rules 39, 53, 66, 69, 75, 79.

gives the Judge the right, proprio motu or at the request of either party, or of the victim or witness concerned, to order "appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused."²⁸ This Rule specifically gives the Trial Chambers authority to take measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness.

Many countries provide for non-disclosure of the identities of victim-witnesses, particularly in cases involving crimes against sexual integrity. In the common law context, South African law states that if it appears to any court at a criminal proceeding that there is a likelihood that harm might result to a person (other than accused) if she testifies at a proceeding, the court may direct that the identity of the person not be revealed for a period of time specified by the court.²⁹ When trials are closed to the public, South African law further mandates that no person shall publish any information which might reveal the identity of the complainant in the proceedings.³⁰

English law states that after a victim has made an allegation of rape there can be no publication of the victim's

²⁸Id., Rule 75.

²⁹Criminal Procedure Act of South Africa 51/1977, §153(2)(b).

³⁰Id., §154(2)(a).

name, address, still or moving picture (or any likeness reproduced) in any written publication published in England and Wales and available to the public or in any broadcast or cable program in England and Wales for the victim's lifetime "if it is likely to lead members of the public to identify her as an alleged victim of such an offence."³¹

A recent law which carefully considers protections for women victims of sex crimes was enacted in Switzerland in 1993. The Swiss law³² provides that the authorities and private persons are not allowed to publicize the victim's identity if it is necessary to protect the interests of the prosecution or if the victim requests non-disclosure.³³

³¹Sexual Offences (Amendment) Act 1976 (1978 c 82), Halsbury's Statutes of England and Wales, Fourth Edition, Volume 12, 1989 Reissue, Criminal Law, 1989. p. 682.

³²"Bundesgesetz Über die Hilfe an Opfer von Straftaten," Article 5. Passed by Parliament 4 October 1991. Entered into force 1 January 1995. [Hereinafter Swiss Law]

See also Commentary by Myrjam Rehsteiner-Cabernard, Franciska Hildebrand, Organisiert durch die Feministischen Juristinnen Ostschweiz, 24 Feb. 1993.

³³Id., Art. 5(2).

In Israel, when a trial is closed,³⁴ there is a similar prohibition on the publication on anything about the trial, including the names of those involved, except with permission of the court. There also is a specific prohibition on the publication of the name of the victim of a sex crime, except with the victim's consent.

Even the U.S. Supreme Court, which oversees a system in which the right to a public trial is far more strictly interpreted than in other systems, the court has held that imposing damages on newspapers and other media outlets for publishing rape victim's names may be constitutional in exceptional circumstances.³⁵ In cases in which the First Amendment prohibits holding the media liable for publication, the

³⁴In Israel, there is a presumption of an open trial. However, the court has discretion to conduct closed trial in circumstances laid down in law, including the need to protect a minor or to protect a complainant accused in cases of sex crimes. See An International Survey of Criminal Procedure Codes and Witness/Victim Protection in Rape Trial, (unpublished manuscript by Carol Rose, on file with the Harvard Human Rights Program.) [hereinafter International Survey of Criminal Procedure]. Information on Israeli law provided by Dana Alexander, The Association for Civil Rights in Israel.

³⁵The Florida Star v. B.J.F., 491 U.S. 524; 109 S. Ct. 2603 (1989). ("We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense.") But see also Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of this information, absent a need to further a state interest of the highest order." (emphasis added)

Supreme Court has held that it is nevertheless constitutional for the government to refuse to release rape victim names to the public and the press:

[T]he government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity. To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition....To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release.³⁶

B. We Support the Prosecutor's Requests for Orders sealing and expunging records when necessary to protect witness and victim confidentiality³⁷

Expunging the names of and other identifying information about witnesses and victims from all court documents is necessary to ensure the physical and mental safety of witnesses and their families.

The Trial Chamber has clear authority to expunge the names and identifying information from the Chamber's public records under Rule 75.³⁸

Similarly, at Common Law, access to judicial records may be denied when there is neither a history of access nor an important public need justifying such access.³⁹ In the United States, one

³⁶The Florida Star v. B.J.F., at 20-21.

³⁷Prosecutor's Motion Orders 4 & 5.

³⁸Rules of Procedure, Rule 75(B)(i)(a).

³⁹Id., citing Times Mirror Co. v. U.S., 873 F.2d 1210, 1219 (9th Cir. 1989) (no common law right of access to pre-indictment

of the strictest enforcers of the public trial protection, the U.S. Circuit Court of Appeals held in U.S. v. Criden⁴⁰ that portions of ABSCAM tapes that were likely to cause third parties "serious harm" or "unnecessary and intensified pain" rather than "mere embarrassment" may be deleted before public disclosure.⁴¹

C. We support the Prosecutor's Request for an Order allowing witnesses to testify using one-way closed circuit television, voice- or image-altering devices⁴² and argue further that depositions, video-conferences, screens and mirrors should be considered as alternatives.

The emotional trauma of forcing witness-victims to testify in front of their alleged attackers is well-documented.⁴³

warrant materials because documents have traditionally been kept secret for important policy reasons.)

⁴⁰681 F.2d 919, 921-922 (3rd Cir. 1982).

⁴¹Cited in "Project: Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989: III. Trial", published in 78 Geo. L.J. 1163, 1193, n. 2238. [hereinafter Review of U.S. Criminal Procedure]

⁴²Prosecutor's Motion Orders 7 & 8.

⁴³"If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law. Women who have sought justice in the legal system commonly compare this experience to being raped a second time." Judith Lewis Herman, M.D., Trauma and Recovery (1991), at 72.

See also The National Women's Study, a three-year longitudinal survey of a national probability sample of 2,008 adult American women suggests that over two-thirds of women surveyed were "extremely" or "somewhat" concerned about one of the following: their family knowing that they were raped (71%); people thinking that the rape was their fault or that they were responsible for it (69%); or non-family members knowing that they were raped (68%). National Victim Ctr. and Crime Victims Research and Treatment Ctr., Rape in America: A Report to the Nation (Apr. 23, 1992), quoted in Deborah W. Denno, Symposium: The Privacy Rights of Rape Victims in the Media and the Law: Perspectives on Disclosing Rape Victims' Names, published in 61

Various mechanisms are available to the Tribunal, however, to minimize the risk of psychological trauma and witness intimidation. This section shall explore a few of the options available to the Court.

One-Way Closed Circuit Television

The use of one-way closed circuit television would protect the witness from the trauma of confronting the defendant, while still enabling the accused to see and hear the witness. Such devices enable the Trial Chambers to strike an important balance between preserving a key portion of the defendant's right to a public trial, communicating information about the atrocities committed to the public in order to deter abuses, and protecting the privacy rights of survivors and witnesses.

The Tribunal clearly anticipated the need for the use of closed-circuit television when it developed the rules for procedure and evidence. Rule 75 expressly states that the Judge or a Chamber may consider the use of "appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television."⁴⁴

Increased recognition of the rights of witnesses and victims has led many countries to adopt similar provisions allowing for the use of closed-circuit testimony in the courtroom. South

Fordham L. Rev. 1113, 1125.

⁴⁴Rules of Procedure, Rule 75(B)(iii).

Africa, for example, allows the use of closed-circuit television in cases of sexual offenses where a child witness is involved.⁴⁵ In Israel there is a proposed government-endorsed law, which soon will be brought for a "first vote" in the Knesset, which would allow victims of crimes to testify on closed-circuit television or using one-way mirrors, if the court is convinced that the testimony in the presence of the accused may cause the victim severe emotional harm or that the victim will be unable to testify in the presence of the accused.⁴⁶

In the United States, several of the 50 constituent states allow closed circuit television in the courtroom.⁴⁷ The U.S. Supreme Court held in Maryland v. Craig⁴⁸ that closed circuit television can be used without violating the defendant's Sixth Amendment right to confrontation when the court finds it

⁴⁵"De Rebus, Augustus 1994", p. 569.

⁴⁶International Survey of Criminal Procedure, p. 25.

⁴⁷States that allow either one-way or two-way closed circuit television for children only: Alabama, Alaska, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont and Virginia. Nevada and South Carolina statutes refer to "victims" in general language, suggesting closed circuit television might be allowed for adult victims as well. See Ben-Jehuda, at 1.

⁴⁸Maryland v. Craig, 110 S. Ct. 3157 (1990). To date, the U.S. Supreme Court has not addressed whether the use of one-way closed circuit television would be constitutional when applied to an adult victim. See Lisa Hamilton Thielmayer, Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?, 67 Ind. L.J. 797 (1992).

necessary to protect a child-witness from psychological harm.

It is noteworthy that the Courts have exercised their equitable discretion to protect witnesses through the use of closed-circuit testimony because of extraordinary circumstances surrounding the trial, that is, the potential intimidation and psychological trauma to a child-witness. Although many of the potential witnesses before the Tribunal are adults, they similarly are being asked to testify in the extraordinary circumstances of an on-going civil war, with the heightened risk that their willingness to cooperate with the Tribunal will place them at risk of physical harm, retaliation, intimidation and related psychological suffering.

Depositions and Video-Conferences

Another option would be to take a deposition from a victim or witness and read that deposition during the trial. The deposition could exclude any information which would identify the witness.

Rules 71 and 90 permit both the prosecution and defense in "exceptional circumstances and in the interests of justice" to submit evidence from witnesses through deposition. These witnesses may be cross-examined and the deposition taken locally or, if appropriate, by way of video-conference.⁴⁹

Similar protections are found in Australia. In

⁴⁹Lawyers Committee for Human Rights, "The International Criminal Tribunal for the Former Yugoslavia," May 25-28, 1995, at 18.

circumstances in which a so-called "special witness"⁵⁰ is to give evidence, the Court may on its own motion or upon application by a party, require that the defendant be excluded from the room or obscured from the view of the special witness; that all persons other than those specified by the court be excluded from the room; or that a videotape of the evidence of the special witness be viewed and heard in lieu of direct testimony.

U.S. Courts also have held that right to a public trial is not necessarily violated when testimony is not given in open court.⁵¹

Other Techniques: Image- and Voice-Altering Devices, Screens, One-Way Mirrors and Removal of Accused from Courtroom

Other mechanisms available to protect the identity of victims and witnesses include screening off the witness who desires protection or using image- and voice-altering devices, as provided for in Rule 75 and requested in the Prosecution's Request for Order No. 8.

⁵⁰The Criminal Code: Evidence Act and Other Acts, Amendment Act 1989, No. 17, The Statutes of Queensland Passed During the Year, 1989. Part I -- Acts Nos. 1-76, pp. 166. The Statute defines a "special witness" as one who, in the courts opinion: (i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness; (ii) would be likely to suffer severe emotional trauma; or (iii) would be likely to be so intimidated as to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court."

⁵¹See U.S. v. Turnnell, 667 F.2d 1182, 1187 (5th Cir. 1982) (use of hospitalized witness' videotaped deposition did not deprive defendant of public trial although deposition only attended by defendant and counsel.)

Another option, not expressly requested by the Prosecution, would be to minimize the trauma to a witness by requiring that the defendant leave the courtroom during the testimony, subject to assurances that due process rights to confrontation are preserved by allowing defense counsel to remain in the courtroom and, if required, to conduct cross-examination. Germany and Japan have made moves to minimize the trauma to and reduce the risk of intimidation of victims and witnesses by requiring the accused to retire during the testimony.⁵²

Finally, if a witness is afraid to come to the Hague, provisions could be made to take testimony via satellite closed circuit.

D. As a last resort, the testimony of the witnesses should

⁵²See The Criminal Code: Evidence Act and Other Acts, Amendment Act 1989, No. 17, The Statutes of Queensland Passed During the Year, 1989. Part I -- Acts Nos. 1-76, pp. 166.

See also The German Code of Criminal Procedure, §247, which states that if it "may be assumed that a co-defendant or a witness will not tell the truth when examined in the presence of the defendant, the court may have the defendant removed from the courtroom during this examination." The judge shall, however, after the defendant has again been admitted to the courtroom, advise him of the essential contents of what was testified to or otherwise transacted during his absence.

Similarly, the Japanese Code of Criminal Procedure & The Law for Enforcement of the Code of Criminal Procedure, art. 281-2 states that: "If, in case where the accused attends to the questioning of a witness held out of session, it is found that the witness cannot give sufficient testimony in the presence of the accused because of being oppressed thereby, the Court may, only in case where counsel is present, cause the accused to retire during the testimony, upon hearing the opinion of the procurator and the counsel. In such a case, the accused shall be notified of the tenor of the testimony after the questioning is over and given the chance of questioning the witness." EHS Law Bulletin Series, Vo. III (No. 26-- & 2601)(1988).

be heard in closed session⁵³

Rule 79 provides that the Trial Chamber may order that the Press and public be excluded from all or part of the proceedings for reasons of protecting the safety, security or non-disclosure of the identities of a victim or witnesses.⁵⁴

Similarly, U.S. courts have held that, despite general constitutional guarantees of a public trial⁵⁵, there are many cases in which courts have held that the need to protect a rape witness-victim from trauma or to ensure her safety provide justifiable grounds for closing a trial.⁵⁶ In addition, many

⁵³Prosecutor's Motion Order 9.

⁵⁴Rules of Procedure, Rule 79: Closed Sessions.

⁵⁵U.S. CONST. amend. VI. The sixth amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

⁵⁶ See U.S. v. Sherlock, 962 F.2d 1349, 1077 (9th Cir. 1992) (Protecting minor attempted rape victim/witness from trauma and embarrassment by public scrutiny substantial reason for narrowly tailored closure of trial to defendant's relatives); Neito v. Sullivan, 879 F.2d 743, 752-53 (10th Cir.) (protecting victim-witness safety is a substantial reason for partial closure of trial to public and defendant's relatives), cert. denied, 110 S. Ct. 373 (1989); Douglas v. Wainwright, 739 F. 2d 531, 532-33 (11th Cir. 1984) (per curiam) (protecting testifying rape victim-witness from insult and embarrassment substantial reason for partial closure of trial to public other than defendant's family and press), cert. denied, 469 U.S. 1208 (1985).

See also United States ex rel. Latimore v. Sielaff 561 F.2d 691 (7th Cir. 1977), cert. denied 434 U.S. 1076 (1987) (involving an adult victim); Mosby v. State 703 S.W. 2d 714 (Tex. App. 1985); State v. Workman, 14 Ohio App. 3d 385, 471 N.E. 2d 853 (1984), State v. Santos 122 R.I. 799, 413 A.1d 58 (1980) (22-year-old woman); Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966), cert. denied, 386 U.S. 964 (1967) (where court observed that closing of courtroom during testimony of an adult rape victim is a frequent and accepted practice.)

U.S. state statutes allow for closure of trials.⁵⁷ U.S. judges also have the discretion to close trials if it is determined that witnesses fear for their safety.⁵⁸

The Criminal Code of the Federal Republic of Yugoslavia, as amended in 1993, also states that the general requirement of open trials is modified by Chapter 28, art. 288, which sets forth reasons for which the general public may be entirely or partially barred from the trial. These reasons include: to preserve public order, to protect morals and to protect the other special interests of the social community.⁵⁹ The prevalence of closed political trials, for example in Kosovo, demonstrate the potential for abuse of summary, closed trials and point to a strong reason to close trials only as a last resort.

Other countries that provide for the closure of trials,

⁵⁷Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New York, North Carolina, North Dakota, South Dakota, Utah, Vermont, Virginia and Wisconsin. See Danielle Ben-Jehuda, Decreasing Trauma to Victims: Possible Courtroom Procedures, unpublished manuscript on file with the National Judicial Education Program to Promote Equality for Women and Men in the Courts.

⁵⁸*Id.*, at 3.

⁵⁹Chapter 21, Criminal Procedure code of Yugoslavia, art. 288. Cited in International Survey of Criminal Procedure. A decision to close a trial may be taken by the panel of judges at any point during the trial, either ex officio or on a motion of the parties. The public may be barred when the interest of the private lives of the parties so require (minors) and, in some circumstances, when publicity would prejudice the interests of justice. *Id.*

particularly in cases involving sex crimes, include: Switzerland,⁶⁰ France,⁶¹ South Africa,⁶² and Israel.⁶³

Even if a trial were to be closed, the interest of making the public aware of the crimes may mean that redacted transcript should be made available to the public. Victims and witnesses should be consulted about this step and the redaction of testimony to ensure that their interests are protected.

IV. ANONYMITY

The decision of whether to allow a victim or witness to testify with anonymity goes further than confidentiality in that it involves withholding the identity of the witness from the

⁶⁰Swiss law provides that the Court may exclude the public from a trial when it is in the victim's interest to do so. In cases involving crimes against sexual integrity, the public will be excluded on the request of the victim. See Swiss Law, Art. 5(3).

⁶¹The French Code of Criminal Procedure, revised edition (Gerald L. Kock and Richard S. Frase, trans.) (1988). When a prosecution is based on articles 332 or 333-1 (rape or indecent assault with violence against persons of either sex), the closed session is a right if the civil party victim or one of the civil party victims requests it.

⁶²South African Criminal Procedures Act 51/1977, §153. "If it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof."

⁶³Israeli courts have discretion to conduct closed trials in circumstances laid down by law, including the need to protect a minor or to protect a complainant accused in cases of sex crimes. See International Survey of Criminal Procedure, at 25.

defendant and the defense counsel.

If the victim's or witness's identity is withheld from the defendant and defense counsel⁶⁴, there is a potential of interference with the defendant's due process rights. For example, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that "Everyone charged with a criminal offence has the following minimum rights: to be informed promptly...of the nature and cause of the accusation against him;...(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."⁶⁵

Decisions about how to weigh the rights of victims and against the due process rights of the accused must take into account the exceptional circumstances of the on-going war, which have produced threats to witness and victim physical safety and psychological well-being of victims and witnesses.

We consider the option of anonymity for victims and

⁶⁴In some circumstances, such as when there is counsel appointed by the Tribunal and counsel does not have prior interest in the outcome of defendant's case, the Trial Chamber may be able to trust counsel to keep information from defendant. However, this would seem to inflict a serious ethical conflict on defense counsel if he or she is to fully represent the defendant.

⁶⁵ 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No.1 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118. Signed on November 4 1950; entered into force on September 3, 1953. Protocols Nos. 3, 5, and 8, which amended the convention, entered into force on September 21, 1970, on December 20, 1971 and on January 11, 1990, respectively.

witnesses because of the Tribunal's inability, at least at present, to provide effective protection to victims, witnesses and their families before, during and after the trial. Certain groups are even more at risk, such as the internally displaced within the former Yugoslavia. In addition, the failure of the international community to provide adequate opportunities for asylum for refugees has increased the likelihood of harm to victims and witnesses.

The Trial Chamber's decision will not only have an impact in the narrow context of the case against Dusko Radic. Denying the right to confrontation presents the potential for the serious abuse of defendants' rights and should only be resorted to rarely.

That said, the potential for interference with the right of defendant to confrontation varies according to the specific allegations against the defendant. For example, in cases in which defendants are charged with command responsibility for a pattern of abuses, the identities of individual victims may have limited relevance to the charges against the defendants and thus the anonymity of the victims or other witnesses will involve far fewer challenges to defendants' due process rights. There are other circumstances in which the relevant question is not the identity of the survivor, but rather whether the rape occurred. Such factors include whether the rape was committed while the victim was in detention, the circumstances surrounding the rape,

and the anonymity of the victim at the time of the offense.

It is also important for the Trial Chamber to assess whether there are forms of evidence other than the direct testimony of survivors of the alleged atrocities before it even reaches the question of anonymity. Article 15 of the Tribunal Statute grants the Tribunal judges broad authority to determine the evidentiary standards that will govern the prosecutorial process. The flexibility of the International Military Tribunal at Nuremberg is an important precedent.⁶⁶ Evidence which might prove charges against the defendant other than the direct testimony of survivors of alleged atrocities includes documentary evidence, eyewitness testimony, medical records, and spontaneous utterances. "Hearsay evidence, unsworn statements, or, in some cases, ex parte affidavits should be allowed wherever there are sufficient indicia of reliability such as, but not limited to, other corroborating hearsay statements, lack of motive to lie, or significant supporting circumstantial evidence."⁶⁷ With specific regard to proving command responsibility:

Evidence of a policy or pattern of ordering, authorizing, tolerating, encouraging, or failing to punish rape and other sexual abuse may prove command responsibility for the crimes. This evidence can be found in witnesses' testimonies stating that commanders had knowledge of rapes and did little or nothing to stop them, ordered rapes, or participated in rapes....Much of this testimony may come in

⁶⁶ Green, Copelon, et. al, supra, at 198.

⁶⁷ Id. at 200. See also discussion therein on the contrast of liberal rules of admissibility with the need for strict limits against the introduction of stereotypes and misconceptions.

the form of hearsay and unsworn statements...."⁶⁸

International national, and state legal systems have already accepted different levels of anonymous testimony. The two different aspects to these gradations of anonymity are: (1) duration, and (2) scope.

A form of time-linked protection of anonymity is to allow the victim to remain anonymous until the defendant is brought into custody by the Tribunal. One procedure, perhaps most relevant for the "super-indictment" cases against high-level officials, would proceed as follows: the name of the victim would be filed under seal with the court. It would remain under seal during preliminary motions for dismissal, about the admissibility of evidence, etc. When the case came up for trial, defendants could ask that names of victims be revealed to them, stating that their rights to due process would be denied if they did not know the identities of those bringing the charges against them. At this point an in camera hearing would be appropriate for the Trial Chamber with the victim to determine whether it was necessary for victims or witnesses to release their identities. If the court ruled that the victims' or witnesses' identities must be revealed, victims and witnesses would have the option of removing themselves from the case without revealing their identities to defendants. One model is that used in United

⁶⁸Green, Copelon, et al., supra at 204.

States civil cases.⁶⁹ Another is that used in South African criminal cases.⁷⁰

Providing at least temporary anonymity for a victim or witness is clearly provided for in Rule 69(A), which states that "In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal." (Emphasis added.)

A. We oppose the proposal by the Prosecutor to disclose the names and the unredacted statements of the protected witnesses to the defence no more than one month prior to trial.

⁶⁹E.g., Jane Doe I and Jane Doe II v. Radovan Karadzic (currently before the Second Circuit of Appeals in New York).

⁷⁰South African law provides:

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than the accused, if he testifies at such proceeding, the court may direct --

(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;

(b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court...."

For children under 18 years, South African law provides that the court may direct that only the minor and his or her parent or guardian shall be present, with the exception of persons whose "presence is necessary in connection with such proceedings or is authorized by the court."

Another variation of anonymity linked to a period of time is that proposed in the Prosecutor's Motion to release the names of the witnesses, but no more than one month before trial. The base of the analysis seems to be that if there is a limitation on the time the defendant knows the identity of the victim or witness, the defendant will be less able to pose a threat. This leaves unaddressed the difficult question about whether it is possible to withhold the identities of the victims and witnesses without violations from the defendants without violating their due process rights. It is also unclear, what, if any assessment has been made of the expectations about the safety of the victim/witness after trial. If the defendant poses a threat to victims and witnesses, it does not seem that an arbitrary time period can substitute for protective measures such as a witness protection program or the restriction of the movements of the defendant by the Tribunal. If the Tribunal means to protect witnesses, U.N. member states responsible for its financing must devote sufficient resources to provide protection.

B. We support the Motion of the Prosecutor that the testimony of these witnesses should be given using voice and image altering devices or by not transmitting the image to the accused and the defense.

This second proposal by the Prosecutor concerns the scope of anonymity. For example, defendant may not need to know the identity of the victim or witness, but instead may need to respond to the substance of the charges. Thus, the defendants'

due process rights would be satisfied through procedures such as the use of screens in the courtroom or sound or camera techniques such as voice- or face-alterations. Defendants would be able to hear the substance of the testimony and nuances of spoken testimony. As mentioned above, if victims and witnesses are afraid that traveling to The Hague will endanger their physical safety, there is the possibility of taking the testimony simultaneously via satellite. The final option would be to accept written depositions.

Rehsteiner-Caernard and Hildebrand, supra, in their analysis of Switzerland's new law, argue that courtroom procedures can be designed to protect defendants' right of confrontation. Alternatives they include in their discussion are (1) the defendant and victim can be in two separate rooms; (2) only the defense attorney is allowed to question the victim (rather than both the defendant and the defense attorney). A series of international and American nongovernmental organizations has made similar recommendations.

A category of cases which have found that witnesses may retain their anonymity is that involving the use of informants, persons who are employed by the police or other government agency or who are exchanging their testimony for the promise of lesser criminal charges. Perhaps the U.S. authors have the most trouble with these alternatives because of the history of well-founded suspicion of unreliability and the tradition of safeguards to

ensure reliability. In other countries, there may not be this tradition of concern and as a result, there are more lenient standards for the admission of informant testimony. However, because of the differing motivations of victim testimony, as opposed to informant testimony, a higher degree of trust may be appropriate in the cases now before the court.

As mentioned above, decisions made which weigh the rights of victims and witnesses will need to be made on a fact-based case-by-case basis in an in camera hearing.

V. ESTABLISHING A PROCEDURE TO ASSESS THE NEEDS FOR PHYSICAL AND PSYCHOLOGICAL PROTECTION FOR VICTIMS AND WITNESSES

The options are many for the protection of victims and witnesses. Perhaps the most important element linking this framework together is the need for a process through which victims and witnesses can be informed of their rights, of the dangers they may face if they testify, of the psychological harm they might endure should they go forward with their testimony, and of the physical protection and psychological support available to them (both short-term and long-term).

We remain concerned about the skeletal Victims and Witnesses Unit. To date, there is only one staff member and no procedures independent of the prosecutor's office have been established to consult with victims and witnesses about their needs. To our knowledge, funds allocated to providing security programs for

witnesses and victims are woefully inadequate. The international community must devote the resources to provide meaningful physical protection, psychological support and other services to enable victims and witnesses to come forward when they so choose. A security system must be developed for those giving testimony and preparing documentation.⁷¹ This should include the use of U.N. guards, or the issuance and enforcement of restraining orders.⁷² If necessary, victims, witnesses, and their families should be physically relocated⁷³ or assisted with their claims for refugee status.

As mentioned above, the independence of the Victims and Witnesses Unit is critical to ensure the representation of the interests of victims and witnesses. While we have no doubt of the commitment and integrity of prosecutorial staff, the process must take into account that the interests of the prosecution and the interests of the victim or witness may diverge.

With regard to requests for victim and witness

⁷¹See Green, Copelon, supra and sources cited therein: American Bar Association, Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia 29-31 (1993) [hereinafter ABA Report]; Amnesty International, Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal on the Former Yugoslavia 6, 27-28 (April 1993); International Human Rights Law Group, No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia 45-46 (1993).

⁷²Helsinki Watch, Procedural and Evidentiary Issues for the Yugoslav War Crimes Tribunal 10 (1993).

⁷³Id., at 13; ABA Report, supra, note 73, at 45.

confidentiality and/or anonymity, in each case, the unit should present a sealed statement to the Trial Chamber about the consultations with victims and witnesses, as well as their independent assessment of willingness of the victims and witnesses to proceed with the case and their needs for physical and psychological protection. Such statements should include information to indicate the level of discussion: was the potential witnesses fully informed about the harms and traumas she or he might face? In the short-term absence of staff in the Victims and Witnesses Unit available to perform these evaluations, we suggest that the Court appoint an independent advisor, perhaps from among the many nongovernmental organizations working with survivors and witnesses.

CONCLUSION

The Tribunal must provide victims and witnesses with access to meaningful redress for the violations of their rights. Because of the continuing war in the former Yugoslavia and the nature of the crimes, there is grave danger that this judicial process could inflict further harm upon victims and witnesses -- threatening their lives, their physical safety and their psychological health. We urge the Trial Chamber to take the steps discussed above to ensure that the Tribunal is a process which brings justice and healing and prevents further harm.

Respectfully submitted,

Rhonda Copelon /s/

Rhonda Copelon

Jennifer M. Green

Jennifer M. Green

DATE: June 15, 1995

Felice Gaer /s/

Felice Gaer

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Sara Hossain