



Still Waiting

**Bringing Justice for War Crimes, Crimes against
Humanity, and Genocide in Bosnia and Herzegovina's
Cantonal and District Courts**

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Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts

- I. Introduction 1**
 - Methodology5
- II. The Importance of the Trials before Cantonal and District Courts 7**
- III. Evolution of the Current Legal Framework 9**
 - A. The “Rules of the Road” 9
 - B. The creation of the State Court of Bosnia and Herzegovina and case review 10
 - 1. Difficulties in case review and sensitivity determination 12
 - 2. Lack of clarity on sensitivity determinations 15
 - C. Changes to the legal system and judicial and prosecutorial reforms 16
 - D. Uncertain number of existing cases 18
- IV. Staffing and Specialization of Judges and Prosecutors 20**
 - A. Staffing needs for judges 20
 - B. Staffing shortages in prosecutors’ offices 21
- V. Investigations 24**
 - A. Lack of specialized investigators within prosecutors’ offices 24
 - B. Police cooperation across entity boundaries during investigations 24
 - C. Limited police investigative capacity 25
 - D. Cooperation between prosecutors and police on investigations 26
- VI. Evidence 28**
 - A. Difficulties in the use of evidence from the war period 28
 - B. Evidence sharing with the State Court 28
 - C. Use of ICTY evidence 29
 - D. Use of NGO evidence 30
 - E. Additional concerns regarding sources of evidence 32

VII. Witnesses	34
A. Lack of witness protection services	34
B. Lack of witness support programs	39
C. Witness fatigue.....	41
D. Building trust between prosecutors and victims	42
VIII. Obstacles to Getting Defendants into Court	44
A. Summonses and absence of recourse to custody	44
B. Regional cooperation and the lack of an extradition framework	45
IX. Defense.....	48
A. Training and resources for defense attorneys	48
B. Payment of defense attorney costs	50
X. Law Harmonization/Use of International Precedent	52
A. Law harmonization	52
B. Failure to follow international precedent	55
C. Proper classification of crimes in violation of international law.....	58
D. Importance of a consistent legal approach to cases	58
XI. Public Awareness/Outreach	59
XII. Reform Proposals	63
XIII. Recommendations.....	66
To prosecutors in Republika Srpska and the Federation of BiH	66
To the judiciaries of Republika Srpska and the Federation	66
To police in Republika Srpska and the Federation.....	67
To the governments of Republika Srpska and the Federation	67
To the High Judicial and Prosecutorial Council	68
To the Special Department for War Crimes of the Office of the Prosecutor of Bosnia and Herzegovina	68
To the Criminal Defense Support Section	68
To the government of Bosnia and Herzegovina	69
To the governments of Serbia, Montenegro, and Croatia.....	69
To the international community	69
Acknowledgments.....	71

I. Introduction

Since the end of the conflict in Bosnia and Herzegovina¹ more than a dozen years ago, the International Criminal Tribunal for the former Yugoslavia (ICTY) has made progress in trying many of the leading figures responsible for the crimes committed during the 1992-95 war. These crimes included widespread and serious crimes against civilians, prisoners of war, and civilian property. Killing, torture, rape, forcible displacement, and indiscriminate and deliberate attacks on civilian targets were commonplace. Though several key indictees still remain at large, the trials at the ICTY have sent a powerful message that leaders who are responsible for the commission of war crimes, crimes against humanity, and genocide must face justice for their crimes.

The ICTY, however, was not intended to “preclude or prevent” domestic trials for crimes under international law.² Indeed, by the time it completes its mandate, the ICTY will have tried a relatively small number of the perpetrators. At the same time, for reasons detailed in this report, domestic Bosnian efforts at ensuring legal accountability for the remaining perpetrators have made slow progress. As a result, many years after the conflict, several thousand complaints related to crimes committed during the war remain unresolved in Bosnia. These cases may involve extremely grave crimes and many people who are responsible for directly perpetrating atrocities. Victims of these crimes, and their families, have been waiting for more than a decade to see justice done. The international community made a commitment to victims to bring perpetrators of these crimes to justice when it created the ICTY. It is vital that authorities in Bosnia, as well as the international community, take the necessary steps to follow through on this commitment.

Trials for war crimes, crimes against humanity, or genocide have been held in Bosnia’s two entities: Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (the Federation). But these trials before cantonal (in the Federation) and

¹ Hereinafter Bosnia or BiH.

² Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993) (S/25704), Section II, article 8D, para. 64.

district courts (in Republika Srpska) have proceeded slowly in the years since the end of the war. This problem was in no small amount due to a lack of political will to try sensitive cases such as war crimes, crimes against humanity, or genocide, especially where perpetrators were members of the local majority group.³ By November 2005 (exactly a decade since the war ended), only two such trials had been completed in Republika Srpska. Progress on these cases in the Federation was much better but still insufficient to address the large number of outstanding cases in a reasonable timeframe.

For several reasons, this pace, in the justice systems of both entities, has begun to increase in recent years.⁴ To date, in Republika Srpska, prosecutors have brought a total of 18 indictments for crimes committed during the war, and district courts have rendered 7 verdicts, with 3 cases still currently underway.⁵ In the Federation, cantonal courts have decided a total of 144 verdicts, with 25 cases still in process.⁶

The War Crimes Chamber, created as part of the Court of Bosnia and Herzegovina (hereinafter State Court) in 2005, has played a significant role in this.⁷ In addition to successfully trying many cases, prosecutors in the Prosecutor's Office of Bosnia and Herzegovina⁸ who practice before the War Crimes Chamber have played an important role in reviewing cases that can then be tried before cantonal and district courts. It is hoped that these recent developments toward more successful trials will help build the necessary political will in both entities to complete the task of bringing cases to trial for crimes under international law.

It is envisioned that while the War Crimes Chamber will try a significant number of high-profile cases, the cantonal and district courts will conduct the vast majority of

³ See Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, vol. 16, no. 7(D), October 2004, <http://hrw.org/reports/2004/icty1004/>, pp. 5-6.

⁴ Human Rights Watch, *A Chance for Justice: War Crimes Prosecutions in Bosnia's Serb Republic*, vol. 18, no. 3(D), March 2006, <http://hrw.org/reports/2006/bosnia0306/>.

⁵ E-mail correspondence from the Office of the Chief Prosecutor of Republika Srpska to Human Rights Watch, March 25, 2008.

⁶ E-mail correspondence from the Office of the Chief Prosecutor of FBiH to Human Rights Watch, June 4, 2008

⁷ See Human Rights Watch, *Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber*, vol. 19, no. 1(D), February 2007, <http://hrw.org/reports/2007/ijo207/>; *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, vol. 18, no. 1(D), February 2006, <http://hrw.org/reports/2006/ijo206/>.

⁸ Hereinafter state prosecutor's office.

cases for crimes committed during the war in Bosnia. Currently, the justice systems in both entities, including the cantonal and district courts and prosecutors' offices, face serious obstacles in trying these cases. If these obstacles persist, there is a danger that a two-tiered justice system will solidify, with cases being effectively tried internationally and at the state level, but the cases in the entity justice systems being allowed to languish. This would create an unacceptable impunity gap for many perpetrators of grave crimes.

Many of these obstacles in the cantonal and district court systems are practical, such as:

- limited prosecutorial resources, including a lack of specialization among prosecutors working on trials for war crimes, crimes against humanity, or genocide and inadequate numbers of prosecutors and support staff;
- lack of specialization and expertise among defense attorneys; and
- lack of witness protection or witness support.

Other obstacles seemingly hinge more on political factors, such as:

- problems with the ability or willingness of police to investigate crimes and poor cooperation between police and prosecutors;
- application of differing legal codes in courts throughout Bosnia;
- failure to arrest and detain suspects and a lack of a framework for extradition with neighboring countries;
- failure by prosecutors to make use of available sources of evidence;
- failure by prosecutors and courts to cite and apply relevant international precedent, including the verdicts of the ICTY;
- lack of trust between some prosecutors and victims, exacerbated by insufficient outreach; and
- a need for further cooperation and communication between state and entity authorities.

Still others represent practical and political challenges, such as:

- a large number of unresolved case files; and
- a lack of specialized investigators responsible to prosecutors.

Based on research conducted for this report, Human Rights Watch believes that there are several essential steps that must be taken to ensure fair and effective trials for crimes in violation of international law in the Federation and Republika Srpska.

In regard to matters of resources and organization, the numbers of cantonal and district prosecutors must be increased and specialization must be allowed among prosecutors working on cases for war crimes, crimes against humanity, and genocide. Prosecutors' offices must be given sufficient support personnel, such as associates and law clerks. Additional training should be held for judges, prosecutors, defense attorneys, and police on issues of the use of international law and the investigation of crimes under international law. Adequate facilities and staff must be provided to allow effective witness protection and support. Police reform efforts should take account of the need to screen and train police participating in investigations of crimes committed during the war.

In regard to work practices and cooperation, Bosnian and entity government officials must work together to find a way to harmonize the law applied in cases for war crimes, crimes against humanity, and genocide in different areas of the country. Prosecutors should consider seeking the arrest and detention of suspects where necessary. Prosecutors should make use of evidence available from sources such as the State Court, the ICTY, and nongovernmental organizations (NGOs). Prosecutors and courts should increase use of international law and respect the precedent of international tribunals such as the ICTY. Prosecutors, police, and others involved in these trials should make greater efforts to participate in and instigate outreach events in order to raise public awareness of trials and to build trust with victims. State and entity prosecutors should continue efforts to regularize contacts and to increase transparency regarding the status of investigations at the entity level and review of cases at the state level. Specialized investigators should be created within prosecutors' offices working on cases for crimes committed during the war. A legal framework for extradition and case transfer must be completed and agreed with neighboring countries.

Ultimately, state and entity officials should work together to devise a meaningful national strategy to address the large number of complaints pertaining to crimes dating from the war.

These trials are a unique opportunity for Bosnia to provide a model of successful complementary prosecutions for crimes against humanity, war crimes, and genocide at the international, national, and local levels that could be emulated in other countries around the world dealing with the legacy of conflict and human rights crimes. If the challenges impeding the trials before cantonal and district courts are not addressed, however, many victims who have already waited a long time to see justice done for the crimes committed during the war may never do so. Many witnesses to these crimes have left Bosnia and some have died, and action must be taken quickly before the opportunity is lost. Allowing these cases to go unresolved could undermine, in the eyes of many victims, the hard-fought achievements made in the field of international justice for war crimes, crimes against humanity, and genocide. More broadly, it could undermine faith in the judicial system to handle all manner of cases, and undermine political stability in Bosnia.

Methodology

Interviews for this report were conducted by three members of the staff of Human Rights Watch in December 2007 in locations in both entities of Bosnia: Sarajevo, East Sarajevo, Banja Luka, Mostar, Bijeljina, Tuzla, and Pale. These locations were selected based on a number of criteria including the presence of engaged civil society groups locally and the activity or lack thereof in the prosecution of cases for crimes committed during the war. Brčko District was not included within the scope of this report for logistical reasons. Additional follow-up interviews were conducted by telephone and email by one of the researchers from New York between January and May 2008.

Human Rights Watch held interviews with 50 people representing state, cantonal, and district prosecutors; defense attorneys; state, cantonal, and district court officials; police and Ministry of Interior officials; the State Investigation and Protection Agency (SIPA); state, entity, and cantonal-level Ministry of Justice officials; staff of the Bar Association of Republika Srpska; both entities' Judicial and

Prosecutorial Training Centers; the Criminal Defense Support Section (OKO) of the State Court; the High Judicial and Prosecutorial Council; the liaison officers of the International Criminal Tribunal for the former Yugoslavia; and Bosnian civil society groups and victims' groups. Interview subjects were selected based on their official role in the processing cases based on crimes from the war or on the recommendation of other professionals in the field or of civil society groups. Human Rights Watch also held additional informational meetings with staff of the Organization for Security and Co-operation in Europe (OSCE) Mission to Bosnia-Herzegovina and the United Nations Development Programme (UNDP). Interviews were generally with individual subjects, though occasionally in small groups. Interviews were conducted in Bosnian-Croatian-Serbian (BCS) with the aid of an interpreter or directly in English.

As not all interview subjects wished to be identified by name, interviewees are identified only by their institutional affiliation.

II. The Importance of the Trials before Cantonal and District Courts

The fact that the ICTY and the State Court of Bosnia and Herzegovina generally have jurisdiction over cases dealing with more senior perpetrators or more politically sensitive crimes does not mean that the crimes tried before cantonal and district courts are not very serious. In fact, for many victims, trials of people who physically committed the atrocities, rather than their leaders, may be of greater importance. Examples from recent cases before district and cantonal courts underscore just how serious these crimes are and how important it is that those who committed them face justice.

Mario Matić, a Croat, was convicted by the Mostar Cantonal Court of killing one unarmed prisoner and of seriously beating another while serving as a military police officer in the Bosnian Croat Army (HVO). According to the judgment, Matić approached a column of prisoners that included civilians and BiH army personnel. Referring to the prisoners by a derogatory slur for Bosniaks, he threatened to kill them all before beating a civilian, Vejsil Hajduk. He then ordered another civilian, Ismet Kovačević, out of the column and shot him to death.⁹

Milorad Rodić, a Serb, pled guilty to a number of offenses against civilians before the Sarajevo Cantonal Court. These included forcing his way into apartments inhabited by Bosniaks and in one instance raping one of the inhabitants at knifepoint as well as beating another.¹⁰

Fikret Smajlović, a Bosniak, was convicted in the Tuzla Cantonal Court of participating in numerous and severe beatings of detainees in the Batković camp, near Bijeljina. Himself a prisoner, Smajlović befriended the camp guards, who were Serbs, and was placed in a position of authority over other prisoners. In this capacity, he was involved in abusing prisoners on several occasions. He was convicted of

⁹ Case of Mario Matić, Verdict Number K-28/03, Mostar Cantonal Court, July 6, 2004, affirmed, Verdict Number Kz-382/04, Supreme Court of FBiH, December 1, 2005.

¹⁰ Case of Milorad Rodić, Verdict Number K-65/04, Sarajevo Cantonal Court, July 9, 2004.

beating several prisoners to death with wooden shafts, stones, and batons. He beat a captured soldier so severely that he fractured his vertebrae.¹¹

Romeo Blažević, a Croat, was convicted by the Mostar Cantonal Court of beating Bosniak prisoners with a braided whip and in one instance of wounding a prisoner in the head with the butt of his pistol. He was also found guilty of forcing a female prisoner to cross between enemy lines to retrieve the body of his brother; he threatened to decapitate her two children if she refused.¹²

¹¹ Case of Fikret Smajlović (a.k.a. Piklić), Verdict Number K-25/01, Tuzla Cantonal Court, February 13, 2002, affirmed, Verdict Number Kz-208/05, Supreme Court of FBiH, February 16, 2005.

¹² Case of Romeo Blažević, Verdict Number KT-21/2000, Mostar Cantonal Court, November 29, 2002, affirmed, Verdict Number Kz-272/04, Supreme Court of FBiH, December 16, 2004.

III. Evolution of the Current Legal Framework

A. The “Rules of the Road”

A small number of trials for crimes committed during the war were conducted by a variety of courts in Bosnia both during and shortly after the war itself. Many of these early trials, however, raised concerns among observers regarding arbitrary arrest and detention and restrictions on freedom of movement.¹³ In response to these and other concerns, the government of Bosnia established the “Rules of the Road” process in 1996.¹⁴

Under this agreement, Bosnian authorities were required to submit potential war crimes, crimes against humanity, and genocide cases for review to the ICTY, whose prosecutors supervised the review of case files in order to ascertain whether they contained sufficient evidence to warrant further investigation and possible indictment. When this review was completed, these cases were returned to domestic authorities with a letter marking (“A” through “H”) indicating their suitability for further investigation or trial. The most significant of these markings were “A” (sufficient evidence regarding defendant and alleged crime), “B” (insufficient evidence), and “C” (unable to determine sufficiency of evidence). In 2004 the ICTY’s duties under the Rules of the Road scheme were transferred to the newly created Prosecutor’s Office of BiH.¹⁵

¹³ Book of Rules on the Review of War Crimes Cases, KTA-RZ 47/04-1, October 12, 2004, art. 2(3); See also Human Rights Chamber, *Sretko Damjanovic v. the Federation of Bosnia and Herzegovina*, Case Number Ch/96/30, Decision on the Merits, September 5, 1997, <http://www.hrc.ba/database/decisions/CH96-30%20Damjanovic%20Merits%20E.pdf> (accessed April 7, 2008), para. 40 (finding, inter alia, that a Military Court at which a war crimes trial had been held in 1993 lacked sufficient guarantees of independence to qualify as a “court” under the jurisprudence of the European Court of Human Rights concerning the application of the death penalty).

¹⁴ Book of Rules on the Review of War Crimes Cases, art.2(1); Rome Agreement, signed February 18, 1996, http://www.ohr.int/ohr-dept/hr-rol/thedep/war-crime-tr/default.asp?content_id=6093 (accessed February 27, 2008), para. 5.

¹⁵ Book of Rules on the Review of War Crimes Cases, art. 2(5); OSCE Mission to Bosnia and Herzegovina – Human Rights Department, “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles,” March 2005, p. 5.

B. The creation of the State Court of Bosnia and Herzegovina and case review

The creation of the State Court and state prosecutor's office provided a major boost to prosecutions of crimes under international law within Bosnia. The successful completion of a number of cases since trials began in 2005 at the State Court has drawn renewed attention to this issue and provided an important impetus to trials in other venues.¹⁶ More concretely, the state prosecutor's office took on an important role in reviewing and in determining the appropriate venue for cases originating, or being tried or investigated, in the entity systems.

The Criminal Code of Bosnia and Herzegovina, in conjunction with other reforms undertaken starting in 2003, gives jurisdiction for new cases for war crimes, crimes against humanity, and genocide to the state authorities.¹⁷ However, the law has provisions allowing the transfer of cases to entity (cantonal and district) authorities in some instances, and entity prosecutors continue to have jurisdiction to investigate and try a large number of existing case files.

Whether state or entity authorities have authority to investigate and try existing cases is based on a determination by state prosecutors as to whether they are "sensitive" or "highly sensitive." "Highly sensitive" cases are tried before the State Court, while "sensitive" cases are tried by the cantonal and district courts.

The criteria for determining the sensitivity of a case are laid out in the "Orientation Criteria for Sensitive Rules of the Road Cases" (hereinafter Orientation Criteria). These criteria are not rigid but generally take account of the type and seriousness of the alleged crime, the rank or political prominence of the defendant, and a number of "other" factors, such as whether the case involves "insider" or "suspect"

¹⁶ Human Rights Watch, *Narrowing the Impunity Gap*.

¹⁷ The State Court also has jurisdiction over a number of types of cases referred from the ICTY, such as those referred under rule 11 *bis* of the Rules of Procedure and Evidence of the ICTY and certain cases requiring further investigation ("category 2 cases").

witnesses, whether there is a prospect of witness intimidation, and whether political conditions locally are such that a fair trial may be impossible.¹⁸

Cases determined to be “sensitive” and thus suitable for investigation and trial before cantonal and district courts are then referred to the prosecutors with territorial jurisdiction over the case or, more often, to the prosecutor’s office from which the case was sent for review.¹⁹

During 2005 and 2006, state prosecutors reviewed 877 “A” cases and referred the majority of these to entity prosecutors.²⁰ There are also perhaps more than 100 “borderline” cases where legal concerns, such as that a case under review relates to a case being investigated or tried by state authorities, require the postponement of the sensitivity determination.²¹ Though state prosecutors are not bound by the letter marking of the ICTY Rules of the Road Unit and theoretically could conduct an assessment of case files with markings other than “A” following further investigation by entity prosecutors, state prosecutors indicated that this has happened only in one or two instances.²² Newer cases under the jurisdiction of the State Court are also generally not being transferred to cantonal and district courts, as some had envisioned might be the case.²³

This review process has been instrumental in getting cantonal and district prosecutors to undertake prosecutions in a more serious and concerted manner.²⁴ Prosecutors in Republika Srpska told Human Rights Watch that after the beginning of this referral process, in 2004 and 2005, there was an improvement in the quality of

¹⁸ Orientation Criteria for Sensitive Rules of the Road Cases (Annex to the Book of Rules on the Review of War Crimes Cases), A-441/04, October 12, 2004.

¹⁹ Book of Rules on the Review of War Crimes Cases, art 7(5)(c); Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 4, 2007.

²⁰ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 4, 2007.

²¹ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 4 and 19, 2007.

²² Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 4, 2007; Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, June 27, 2008.

²³ Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, June 27, 2008.

²⁴ Human Rights Watch, *A Chance for Justice*, p. 1.

indictments and case preparation that led to a more serious effort to try crimes committed during the war.²⁵

1. Difficulties in case review and sensitivity determination

Despite the success of the review processes by the state prosecutor's office in instigating progress on trials domestically for crimes committed during the war, these processes have also drawn criticism. A great deal of procedural confusion accompanied initial attempts at cooperation between cantonal, district, and state authorities over the review of cases. This confusion in some cases has caused impediments in the conduct of investigations and trials.

At the outset of this arrangement there was confusion as to which cases were required to be submitted for review by state prosecutors, due to apparent conflicts between the BiH Criminal Procedure Code and the Book of Rules.²⁶ The OSCE documented several instances in 2004 and 2005 in which this confusion led to cases already in process being adjourned in order to seek State Court review.²⁷ During interviews conducted for this report, cantonal, district, and state prosecutors continued to voice differing opinions as to the proper procedure that should have been followed during this initial period.²⁸

This specific issue is now largely moot since most of these cases in process at that time have now been completed. However, confusion over the role of the state prosecutor's office persists.²⁹

²⁵ Human Rights Watch interview with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007; Human Rights Watch interview with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007.

²⁶ Criminal Procedure Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, 03/03, <http://www.ohr.int/ohr-dept/legal/oth-legist/doc/criminal-procedure-code-of-bih.doc> (accessed March 31, 2008), art. 449; Book of Rules on the Review of War Crimes Cases, art. 6(2), 6(3).

²⁷ OSCE Mission to Bosnia and Herzegovina – Human Rights Department, "War Crimes Trials: Progress and Obstacles," March 2005, pp. 18-19.

²⁸ Human Rights Watch interview with staff of the Office of the Chief Prosecutor of BiH, Sarajevo, December 20, 2007; Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007; Human Rights Watch interview with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007.

²⁹ Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007.

Cantonal and district prosecutors raised several concerns about the review process in interviews with Human Rights Watch. Some prosecutors stated that because cases investigated locally are transferred to other jurisdictions by state prosecutors, it gave the impression that cantonal and district prosecutors were not working to bring cases within their own offices.³⁰ Other entity prosecutors asserted that the review process wasted time and slowed cases down.³¹ Another issue raised is that due to state prosecutors' powers to refer cases, entity prosecutors feel that they are unable to determine the number of cases that will ultimately be under their control and, therefore, to plan their staffing and scheduling to handle them.³² One prosecutor told Human Rights Watch that the inability to maintain continuous control over the preparation and trial of cases made their work more difficult, as investigative work, including relationships with witnesses, had to be put on hold pending the State Court's review.³³

However, given the large number of "A" cases already referred to cantonal and district prosecutors whose investigation is still incomplete, these concerns voiced by entity prosecutors cannot totally explain the slow progress in some jurisdictions that have yet to try a single case, while in others, prosecutors have completed numerous investigations and trials. Additionally, state prosecutors, while acknowledging that a lack of clarity exists within Bosnia over rules governing jurisdiction and case review, asserted that these criticisms do not reflect the present reality in Bosnia given that the vast majority of case review was completed by 2006.³⁴

Prosecutors in Banja Luka noted that they had been referred only cases with Serb defendants and that this hampered their ability to build trust locally.³⁵ State

³⁰ Human Rights Watch interviews with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007; Human Rights Watch interviews with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch interviews with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007.

³¹ Human Rights Watch interviews with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007; Human Rights Watch interviews with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007.

³² Human Rights Watch interview with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007.

³³ Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007.

³⁴ Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, June 27, 2008.

³⁵ Human Rights Watch interview with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007.

prosecutors, however, questioned whether sensitivity determinations played a role in this, stating that this was likely due to the ethnicity of suspects named in existing complaints from that jurisdiction.³⁶

While some of these difficulties are an inevitable part of the review and referral process, work should continue to increase transparency and communication from both sides during review and referral in order to alleviate some difficulties and misunderstanding. One state official lamented the difficulty that state authorities have encountered ascertaining the location and status of many case files in the entity system.³⁷ Entity prosecutors need to provide their colleagues at the state level with accurate and timely information about open investigations.

One state prosecutor told Human Rights Watch that his office is aware that a great deal of confusion exists around the rules and procedures that govern the review process.³⁸ Part of this is due to the fact that the state prosecutor's office does not have a separate unit to review cases. Rather, cases are reviewed by individual prosecutors working on the territorial division from which the case originated.³⁹ The limited staffing at the state prosecutor's office did not always allow for a prompt review of cases, especially given these same prosecutors' responsibilities for ongoing trials and new investigations.⁴⁰ As a result, communication with cantonal and district prosecutors over the status of case review was infrequent during the review of "A" cases.⁴¹ State prosecutors indicated that they have taken steps to regularize contact with their entity colleagues in recent months.⁴²

³⁶ Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, June 27, 2008.

³⁷ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007; Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, April 1, 2008.

³⁸ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007.

³⁹ Ibid.

⁴⁰ Human Rights Watch interview with staff of the Office of the Chief Prosecutor of BiH, Sarajevo, December 20, 2007.

⁴¹ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007.

⁴² Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, June 27, 2008.

2. Lack of clarity on sensitivity determinations

Another difficulty is that the criteria used to judge the sensitivity of cases at the state prosecutor's office are not widely understood by many cantonal and district prosecutors or by the public at large. One official with the state prosecutor's office acknowledged a need to articulate clearly and publicly the criteria used to determine sensitivity of cases. At the same time, he emphasized that these criteria are not a legal standard that should be subjected to undue outside scrutiny or judicial process.⁴³ Indeed, the Orientation Criteria make clear that they are guidelines and are not "set in stone."⁴⁴ The need to delay sensitivity determinations on "borderline" cases, for example, often has to do with factors other than the sensitivity of the charges in that particular case.⁴⁵

Some cantonal and district prosecutors cited public criticism of state prosecutors' decisions to try relatively low-level defendants early on at the State Court, alongside the lack of transparency in the review process, to argue that the State Court was keeping for itself only "easy" cases, while transferring to entity courts those in which convictions will be harder to secure.⁴⁶

Given the sensitive nature of the criminal charges at issue and of the complex legal realities surrounding the review of case files, it is unsurprising that relations between state and entity authorities have at times proven confused or contentious. Reports by state prosecutors of a recent increase in meetings between state and

⁴³ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007.

⁴⁴ Orientation Criteria for Sensitive Rules of the Road Cases.

⁴⁵ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007.

⁴⁶ Human Rights Watch interview with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007. State Court officials acknowledged that public pressure initially had an inappropriate influence on the selection of cases to try, but they expressed the hope that work on a national war crimes strategy would soon remedy this. Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007.

entity prosecutors are, therefore, welcome. Such efforts will be vital to effective collaboration in resolving existing criminal complaints.⁴⁷

C. Changes to the legal system and judicial and prosecutorial reforms

The above changes in jurisdiction were rendered more difficult because they took place against the backdrop of dramatic reforms of the judicial and prosecutorial systems in Bosnia, as well as drastic changes in criminal procedure.

Judicial and prosecutorial reforms began under the auspices of the Independent Judicial Commission (IJC) in 2001.⁴⁸ They were aimed at reducing political influence and ethnic bias in the judiciary. As a result of this process, about 30 percent of first instance courts in the country were closed and the number of judges was reduced by 30 percent.⁴⁹ Additionally, prosecutors and judges were subjected to reappointment during 2003 and 2004 by the High Judicial and Prosecutorial Council (HJPC) in order to ensure, inter alia, ethnic balance in courts and prosecutors' offices.⁵⁰

Around the same time, as part of reform efforts pushed by the High Representative, Bosnia also undertook radical changes in criminal procedure with the introduction of new Criminal Procedure Codes in Republika Srpska and in the Federation of BiH in 2003. These new codes reflect a major change from the previous criminal justice system. The new codes introduce a more adversarial model of criminal justice by eliminating the office of investigative judge and by shifting much of the responsibility for investigation and the preparation and conduct of trials to prosecutors.⁵¹ Much of the effective responsibility of promoting the fair trial rights of defendants was shifted to defense attorneys.

⁴⁷ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007; Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, June 27, 2008.

⁴⁸ The IJC was mandated by the High Representative to oversee and coordinate many aspects of judicial reform in Bosnia. <http://www.hjpc.ba/docs/ijcarch/?cid=160,1,1> (accessed May 30, 2008).

⁴⁹ Alexander Mayer-Rieckh, "Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina," in Alexander Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007), p. 197.

⁵⁰ OSCE Mission to Bosnia and Herzegovina – Human Rights Department, "War Crimes Trials: Progress and Obstacles," p. 9.

⁵¹ Human Rights Watch, *A Chance for Justice*, p. 22.

These codes also introduced new tools, such as plea bargaining, into the criminal justice system and granted prosecutors the right to grant immunity in exchange for witness testimony.⁵² If properly used, plea bargains could improve the efficiency of trials and could help reduce the large number of open case files for crimes dating from the war. Immunity could help prosecutors to build cases where witnesses are reluctant to testify and to facilitate cases against persons in positions of command.

However, plea bargaining and immunity have no precedent in the Bosnian justice system, and many prosecutors and judges have been slow to adopt their use.⁵³ As such, some people have come to regard these procedures as problematic. Like other aspects of procedural reform, plea bargaining represents a radical change from the prior practice of defense attorneys, who are also relatively unfamiliar with these new procedures. Defense attorneys must act quickly during the negotiation of plea offers and have sometimes had difficulty with this aspect of their new role.⁵⁴

It is also worth noting that because these procedures may result in shorter sentences, or even immunity from prosecution, they may be very hard for victims to accept.⁵⁵ One victims' group leader stressed that while judicial efficiency is a very important value, plea bargaining and immunity are more acceptable in the context of minor crimes, such as car accidents. He stated that he would personally be very upset if the person responsible for his suffering during the war received a reduced sentence under a plea agreement or in exchange for testimony.⁵⁶ State prosecutors, however,

⁵² Criminal Procedure Code of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, 35/03, <http://www.ohr.int/ohr-dept/legal/oth-legist/doc/fbih-criminal-procedure-code.doc> (accessed March 26, 2008), arts. 45(2)(c), 98(3), and 246; Criminal Procedure Code of Republika Srpska, *Official Gazette of Republika Srpska*, 50/03, <http://www.legislationline.org/upload/legislations/fo/o8/abe391d8b2619a3d21ff21bf34e7.htm> (accessed March 26, 2008), arts. 43(2)(c), 148(3), and 238.

⁵³ Human Rights Watch interviews with staff of the Centre for Judicial and Prosecutorial Training of Federation BiH, Sarajevo, December 6, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007; Human Rights Watch interviews with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 7, 2007.

⁵⁴ Human Rights Watch interview with staff of the Criminal Defense Section, The Registry for War Crimes, Organized Crime, Economic Crime and Corruption of the Court of BiH, Sarajevo, December 7, 2007; Human Rights Watch interview with staff of the Bar Association of Republika Srpska, Banja Luka, December 14, 2007.

⁵⁵ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007; Human Rights Watch interview with Bosnian civil society representative, Bijeljina, December 12, 2007.

⁵⁶ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 18, 2007.

noted that they have been able to make important progress in the use of pleas at the state level and that victims who became more familiar with the process had become more accepting of the use of pleas.⁵⁷

D. Uncertain number of existing cases

Another serious complicating factor in the prosecution of war crimes, crimes against humanity, and genocide is the lack of available concrete information on the number of existing criminal matters in the country.⁵⁸ Figures, usually attributed to the state prosecutor's office, range from 13,000 to more than 16,000.⁵⁹ However, skepticism about this figure is widespread. Many people interviewed asserted that only a fraction of this number were cases that contained enough evidence to reach trial.⁶⁰ Additionally, there is a general lack of clarity regarding what this disputed figure even represents. It is unclear what percentage of this figure represents cases or suspects, active investigations, or mere complaints.⁶¹

Members of the state prosecutor's office told Human Rights Watch that they are taking steps to remedy this problem by creating a computer database that will

⁵⁷ Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, June 27, 2008.

⁵⁸ Human Rights Watch interviews with staff of the Ministry of Justice of BiH, Sarajevo, December 4, 2007; Human Rights Watch interviews with Bosnian civil society representative, Bijeljina, December 10, 2007; Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007; Human Rights Watch interviews with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 7, 2007.

⁵⁹ Human Rights Watch interviews with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007; Human Rights Watch interviews with Bosnian civil society representative, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 7, 2007; See also Merima Husejnovic, "Waiting for a Strategy," Balkan Investigative Reporting Network, December 27, 2007, <http://www.birn.ba/en/95/10/7165/?tpl=58> (accessed February 15, 2008). State Court officials provided us with a current estimate that sets this figure at 10,534 individual persons named in 2,779 criminal complaints. Documentation provided by staff of the Special Department for War Crimes of the Prosecutor's Office of BiH.

⁶⁰ Human Rights Watch interviews with Bosnian civil society representative, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 7, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007; Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007; Human Rights Watch interviews with staff of the Court of BiH, Sarajevo, December 21, 2007.

⁶¹ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007; Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 4, 2007.

catalog existing complaints.⁶² This database will also be used in conjunction with the victim-centered crime study, commonly referred to as the “yellow pages,” a catalog of crimes committed during the war assembled by state prosecutors in conjunction with victims’ groups, NGOs, and others. State prosecutors can cross-reference matters selected for investigation from the “yellow pages” with the database of existing files in order to coordinate existing evidence and leads and to avoid the possibility of duplication in investigation.⁶³

If this database is successful, it will be a welcome development. It is essential to gain a clear picture of the number of existing case files in order to ascertain the staffing and funding needs of the courts where trials will eventually be held. Up to now, the confusion over the number of cases for crimes committed during the war has been a serious problem in Bosnia. It has created the impression in the media that processing these cases will take an inordinately long time, which feeds public skepticism about the ability of entity authorities to complete this task.⁶⁴ The lack of clear information on the number of complaints has also had a negative impact on the cooperation between state and entity courts and has, at times, been a source of tensions that can impede progress.⁶⁵

⁶² Human Rights Watch interviews with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 4 and 19, 2007.

⁶³ Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, June 27, 2008.

⁶⁴ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 18, 2007; Human Rights Watch interview with staff of the Prosecutor’s Office of Federation BiH, Sarajevo, December 7, 2007. See also “Bosnian Courts Said to Need around 100 Years to Try All War Crimes Cases” (in Bosnian/Croatian/Serbian), Independent TV Hayat (Sarajevo), August 8, 2007, 1700 GMT, reproduced in English translation by BBC Monitoring European August 12, 2007.

⁶⁵ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 4, 2007; Human Rights Watch interview with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 7, 2007.

IV. Staffing and Specialization of Judges and Prosecutors

Inadequate numbers of prosecutors, judges, and support staff, as well as a lack of specialization among judges and prosecutors, pose a barrier to addressing the large number of existing complaints for crimes under international law in Bosnia.

A. Staffing needs for judges

At present, the shortage of judges, though real, is not as severe as the shortage of prosecutors. In Mostar, court staff said that the number of judges dealing with war crimes, crimes against humanity, or genocide cases in that court was being reduced from three to two due to a decrease in these cases and that this number of judges was adequate.⁶⁶ Others, however, including the High Judicial and Prosecutorial Council (HJPC), the body charged with assessing the needs and proposing the numbers of staff at courts and prosecutors' offices,⁶⁷ have recognized that the entity courts employ an insufficient number of judges to deal with the current caseload of war crimes and other international law cases.⁶⁸ It is also important to bear in mind that any increase in the rate at which these cases are brought to trial, whether due to an increased number of prosecutors or otherwise, will make the effects of the shortage of judges more severe.

The solution to the shortage of judges proposed by the HJPC and the former IJC⁶⁹ is the appointment of "reserve" or temporary judges, rather than a permanent increase in the number of serving judges.⁷⁰ This system will make it easier to reduce the number of judges at a later date if the backlog of cases is reduced significantly. Some court personnel, however, expressed skepticism about this approach.⁷¹ One

⁶⁶ Human Rights Watch interview with staff of the Mostar Cantonal Court, Mostar, December 17, 2007.

⁶⁷ Law on High Judicial and Prosecutorial Council, <http://www.ohr.int/ohr-dept/legal/oth-legist/doc/LAW-ON-HIGH-JUDICIAL-AND-PROSECUTORIAL-COUNCIL-OF-BH.doc> (accessed February 29, 2008), art. 17(12).

⁶⁸ High Judicial and Prosecutorial Council, "Capability Assessment Analysis of the Prosecutors' Offices, Courts and Police Bodies in BiH for Processing War Crimes Cases," June 2006, pp. 18-19.

⁶⁹ See note 48.

⁷⁰ American Bar Association, "Judicial Reform Index for Bosnia and Herzegovina, Volume II," February 2006, p. 52.

⁷¹ Human Rights Watch interview with staff of the Ministry of Justice of Republika Srpska, Banja Luka, December 14, 2007; Human Rights Watch interview with staff of the District Court of East Sarajevo, East Sarajevo, December 6, 2007.

prosecutor, who also serves on the HJPC, noted that the number of judges needed in Bosnia was determined with reference to other European countries but argued that given the unique challenges faced by Bosnia, such as the backlog of cases related to the war, practices in other European countries may be of limited comparative value.⁷² Temporary judicial appointments could potentially also raise concerns regarding judicial independence.⁷³ Additionally, cases for crimes under international law touch on specialized areas of law that may require additional specialized training to which reserve judges may not have had access.

Practical difficulties, such as bureaucratic delays surrounding budgeting and funding in entity and cantonal governments, also impede the provision of adequate numbers of reserve judges. In the district court in East Sarajevo, court staff stated that the court had been waiting two years for a reserve judge who had been approved but not yet funded to serve a six-month term.⁷⁴ As the pace of prosecutions of crimes committed during the war will likely increase in coming years, it is important that the courts be sufficiently staffed with judges to efficiently deal with the increased caseload.

B. Staffing shortages in prosecutors' offices

The HJPC has concluded that the staffing levels of prosecutor's offices, as well as the technical facilities and level of specialization and expertise, are inadequate to handle the current number of cases for crimes under international law.⁷⁵ The shortage of qualified prosecutors is an urgent problem since it is prosecutors who bear responsibility for the investigations of cases, in addition to trials.⁷⁶

⁷² Human Rights Watch interview with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007.

⁷³ The European Court of Human Rights has held that factors to be weighed in assessing the independence of tribunals under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms include "the manner of appointment of its members and their term in office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence." *Findlay v. the United Kingdom*, judgment of February 25, 1997, Reports 1997-I, available at www.echr.coe.int, para. 73. The European Court offers no firm guidelines as to acceptable length of appointment but has in at least one case viewed skeptically a term of four years for judges. *Incal v. Turkey*, judgment of June 9, 1998, Reports of Judgments and Decisions 1998-IV, available at www.echr.coe.int, para. 68.

⁷⁴ Human Rights Watch interview with staff of the District Court of East Sarajevo, East Sarajevo, December 6, 2007.

⁷⁵ High Judicial and Prosecutorial Council, "Capability Assessment," pp. 18-19.

⁷⁶ Human Rights Watch interview with staff of the Mostar Cantonal Court, Mostar, December 17, 2007.

Nearly all prosecutors who spoke with Human Rights Watch told of being short-staffed and of the difficulty of attracting new prosecutors.⁷⁷ Recent changes can account for some of this shortage. One prosecutor stated that qualified staff were lost to the State Court upon its creation.⁷⁸ Prosecutors are no longer reimbursed for travel expenses, a problem for retaining staff where prosecutors must, at times, commute long distances to work in areas where there are no qualified staff available locally.⁷⁹ In any event, it has been difficult in Bosnia since the war to recruit, train, and fund sufficient numbers of prosecutors to handle the country's large backlog of cases. Staff working on training say that more steps need to be taken to train young lawyers to become prosecutors and to entice them to enter the field.⁸⁰

Beyond the overall shortage of prosecutors, there are very few prosecutors specializing in war crimes, crimes against humanity, or genocide and almost none who work exclusively on these cases.⁸¹ Trials for these crimes demand expertise in international law, including the Geneva Conventions, customary international law, human rights treaties, and the jurisprudence of international and hybrid tribunals. In addition, the investigation of these crimes, especially those that occurred years ago,

⁷⁷ Human Rights Watch interviews with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007; Human Rights Watch interviews with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007; Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007; Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007.

⁷⁸ Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007.

⁷⁹ Human Rights Watch interview with staff of the Centre for Judicial and Prosecutorial Training of Federation BiH, December 6, 2007; American Bar Association, "Judicial Reform Index," February 2006, p. 31.

⁸⁰ Human Rights Watch interview with staff of the Centre for Judicial and Prosecutorial Training of Federation BiH, December 6, 2007.

⁸¹ In the Federation, there are between two and five prosecutors within the war crimes division of each of the cantonal prosecutors' offices. The number of specialized prosecutors is higher in busier cantons, such as Tuzla, where there are five war crimes prosecutors, and Sarajevo and Mostar, where there are four and three, respectively. These prosecutors also work on other types of cases, depending on their caseloads. In Republika Srpska, there are three war crimes prosecutors in Trebinje, three in Doboje, two in Bijeljina, one in East Sarajevo, and one in Banja Luka. Of these in Republika Srpska, only the prosecutor in Banja Luka works exclusively on war crimes. Human Rights Watch interviews with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 12, 2007; Human Rights Watch interviews with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007; Human Rights Watch e-mail correspondence from staff of the Office of the Chief Prosecutor of Republika Srpska, March 25, 2008; Human Rights Watch telephone interview with staff of the Prosecutor's Office of Federation BiH, May 9, 2008.

requires specialized skills and knowledge. While it is true that prosecutors' offices also handle a large number of other types of important cases, it would be extremely beneficial for prosecutors working on cases involving crimes under international law to be able to specialize in this type of case, particularly because of the large number of such cases.

Compounding the inadequate number of prosecutors is the near universal lack of support staff within prosecutors' offices. The District Prosecutor's Office in Banja Luka, for example, employs 35 prosecutors to deal with a territory of over half a million people, with no trainees or assistants.⁸² Only one cantonal or district prosecutor of the ten with whom Human Rights Watch spoke has the assistance of an associate, and that associate's time is shared with other prosecutors.⁸³ The result of this shortage is that prosecutors are forced to do nearly every aspect of cases personally, from interviewing witnesses, to drafting submissions, to routine administrative tasks.⁸⁴ Prosecutors' heavy workloads were cited as a reason why prosecutors often urge the transfer of cases theoretically under the jurisdiction of the cantonal and district courts to the State Court.⁸⁵

⁸² Human Rights Watch interview with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007.

⁸³ Human Rights Watch interview with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007.

⁸⁴ Human Rights Watch interview with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007.

⁸⁵ Human Rights Watch interview with staff of the Court of BiH, Sarajevo, December 21, 2007; Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, April 1, 2008.

V. Investigations

A. Lack of specialized investigators within prosecutors' offices

One of the largest tasks that prosecutors deal with in the context of cases for war crimes, crimes against humanity, and genocide is investigation. Prosecutors must organize the gathering of physical evidence and witness testimony to ascertain the veracity of complaints before seeking an indictment and then preparing indicted cases for trial. The law in both entities allows prosecutors to work with “authorized personnel” who can assist with investigations by identifying suspects, gathering information and evidence, and executing court orders.⁸⁶ Proposals have been put forth to create investigators within cantonal and district prosecutors' offices, but so far these proposals have not yielded results.⁸⁷ Such investigators could assist with some of the more time-consuming tasks facing prosecutors, such as attending exhumations and interviewing witnesses. These investigators would also be under the control of prosecutors, rather than police, which would give prosecutors more control over investigations. Such investigators would also be removed from political pressures that can sometimes make it difficult for police to work on certain politically sensitive crimes.

B. Police cooperation across entity boundaries during investigations

Without specialized investigators within prosecutors' offices, investigations are carried out by prosecutors themselves and by local police. This arrangement is problematic in many regards. Even many years after the war in Bosnia, public trust in the police, especially across entity boundaries, remains low, in part due to lingering suspicions that some members of the police, on all sides, were involved in human rights violations during the war. While there have been improvements in cooperation in many spheres, cases dealing with crimes committed during the war are extremely politically sensitive. Because of this, it is often very difficult for police to fulfill their

⁸⁶ Criminal Procedure Code of the Federation of Bosnia and Herzegovina, art. 35(2); Criminal Procedure Code of Republika Srpska, art. 43(2).

⁸⁷ Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007; Human Rights Watch interviews with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007.

role in investigations of these crimes. This is especially true where police cooperation across entity boundaries is required.

Police in the Federation of Bosnia and Herzegovina state that cooperation with their colleagues in Republika Srpska was nonexistent a few years ago but has made great strides recently, especially on less politically sensitive crimes.⁸⁸ Prosecutors in the RS gave mixed reviews of cooperation from Federation police, citing generally improved cooperation with exceptions in certain cantons.⁸⁹

Despite these advances, cooperation between police in different entities on investigations of international law crimes continues to pose significant challenges. Police in the Federation conceded that the Bosnian State Investigation and Protection Agency (SIPA) is much better suited to investigate crimes committed by the local majority groups than are local police.⁹⁰ Although cooperation between SIPA and entity police existed in the first years of SIPA's creation, it has now been halted so that SIPA investigators can focus their limited resources on their primary task of assisting state prosecutors.⁹¹

C. Limited police investigative capacity

Even apart from political considerations, police in both entities have limited ability to carry out the tasks required by cases dealing with crimes under international law. Police bodies in both entities have taken some steps to increase their capacity to investigate these cases. Training workshops on cooperation between police and prosecutors are credited with some improvement in this area, though many challenges remain.⁹² In the Federation, police war crimes specialists have begun to be used, but these officers also work on a variety of other types of violent crimes and work only in Sarajevo. They are unable to supervise the work of police in the

⁸⁸ Human Rights Watch interview with staff of the Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007.

⁸⁹ Human Rights Watch interview with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interview with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007.

⁹⁰ Human Rights Watch interview with staff of the Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007.

⁹¹ Human Rights Watch interview with staff of the State Investigation and Protection Agency, Sarajevo, December 7, 2007; Human Rights Watch interview with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007.

⁹² Human Rights Watch interview with staff of the Centre for Judicial and Prosecutorial Training of the Republika Srpska, Banja Luka, December 13, 2007.

cantons.⁹³ War crimes specialists are employed within the Public Security Centers in Republika Srpska, but in limited numbers (between three and eight officers apiece), and many centers lack proper facilities for conducting interviews with witnesses.⁹⁴

Ministry of the Interior staff have noted difficulties in recruiting women and people from different ethnic backgrounds to work as war crimes investigators.⁹⁵ Many police have little training in dealing with traumatized victims, and due to this, many male police officials struggle in dealing with women who have been victims of sexual violence.⁹⁶

D. Cooperation between prosecutors and police on investigations

These practical and political difficulties have strained cooperation between prosecutors and police on sensitive human rights cases.⁹⁷ Even those prosecutors who assert that cooperation with police is adequate concede that cases dealing with crimes committed during the war pose challenges. These challenges are especially intense when prosecutors must rely on local police to provide information on crimes committed by members of the police.⁹⁸

The issue of police reform in Bosnia continues to be a live political issue, especially due to Bosnia's European Union accession process. One civil society representative stressed the need for more extensive vetting of police than had previously been conducted in Bosnia, pointing out that several police officers had recently been

⁹³ Human Rights Watch interview with staff of the Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007.

⁹⁴ Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Team for the Research and Documentation of War Crimes, Ministry of Interior of Republika Srpska, Pale, December 20, 2007; Human Rights Watch interviews with staff of the Ministry of Interior of Republika Srpska, Banja Luka, December 14, 2007.

⁹⁵ Human Rights Watch interview with staff of the Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007.

⁹⁶ Human Rights Watch interview with Bosnian civil society representative, Tuzla, December 11, 2007; Human Rights Watch interview with staff of the Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007.

⁹⁷ Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007; Human Rights Watch interview with staff of the Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007.

⁹⁸ Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 12, 2007; Human Rights Watch interviews with staff of the Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007.

named as having been involved in the genocide at Srebrenica.⁹⁹ Police in both entities acknowledge problems with sympathy for suspects among some police and even the presence of suspected war criminals within police forces.¹⁰⁰ It is important that ongoing efforts in police reform take account of the role of the police in investigating crimes committed during the war. Ensuring funding for more specialized officers, with more extensive training in the complex practice of investigating these crimes, would help with this. Placing such officers under the authority of prosecutors' offices would help insulate them from political pressures in their daily work on politically sensitive cases.

⁹⁹ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 4, 2007.

¹⁰⁰ Human Rights Watch interview with staff of the Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007; Human Rights Watch interview with staff of the Ministry of Interior of Republika Srpska, Banja Luka, December 14, 2007.

VI. Evidence

A. Difficulties in the use of evidence from the war period

Human Rights Watch has previously noted that evidence from the war period frequently contains little information on which indictments can be based. Furthermore, evidence of war crimes, crimes against humanity, or genocide was in some cases destroyed by local police.¹⁰¹ Problems with evidence dating to this time exist in both entities.

Evidence of crimes in violation of international law taken during the war was often based on national or ethnic identity and aimed at establishing political responsibility for the conflict by an opposing side.¹⁰² Thus, even had more of this evidence survived, it is questionable whether it would be useful to prosecutors today.¹⁰³ Prosecutors in both entities told Human Rights Watch that evidence from the time of the war is so politicized as to be of little value. Complaints lodged at that time sometimes name an entire military unit as a perpetrator and contain little of the specific information, such as ballistics or autopsy reports or military records, that could provide the basis for an indictment.¹⁰⁴ Additionally, some prosecutors asserted that evidence gathered in accordance with older criminal procedure codes has at times been ruled inadmissible due to inconsistencies with the law as it now stands.¹⁰⁵

B. Evidence sharing with the State Court

These difficulties in obtaining evidence make cooperation with other evidentiary sources especially important. One such source could be the State Court, whose War

¹⁰¹ Human Rights Watch, *A Chance for Justice*, p. 28.

¹⁰² Human Rights Watch interview with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007; Human Rights Watch interview with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007.

¹⁰³ Human Rights Watch interview with Bosnian civil society representative, Bijeljina, December 10, 2007.

¹⁰⁴ Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007; Human Rights Watch interviews with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007.

¹⁰⁵ Human Rights Watch interview with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007.

Crimes Chamber handles many cases related to cases in the entity systems. Currently, evidence sharing exists between the State Court and entity courts, but it is informal and entity courts do not have access to the State Court's evidence database.¹⁰⁶ A state prosecutor told Human Rights Watch that in one instance, state prosecutors became aware only by chance that a case overlapping with one of their own was being investigated by entity authorities.¹⁰⁷

Plans are being considered to amend the applicable law to allow the transfer of new cases from the State Court to entity courts during the investigative phase, as well as to divide jurisdiction in specific cases between state and entity courts, with high-level defendants tried at the State Court and lower-level defendants at entity courts. If adopted, these changes would require increased cooperation and sharing of evidence.¹⁰⁸ More formalized evidence sharing mechanisms would facilitate this. This could be realized by allowing access to state prosecutors' evidence by cantonal and district prosecutors or by creation of a centralized body to store and organize evidence related to crimes committed during the war.¹⁰⁹

C. Use of ICTY evidence

As cantonal and district courts and prosecutors' offices increasingly gain access to networked computers, priority should be given to enabling access to the ICTY's Evidence Disclosure Suite and Judicial Database.¹¹⁰ Cantonal and district prosecutors

¹⁰⁶ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007.

¹⁰⁷ Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, April 1, 2008.

¹⁰⁸ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007; Human Rights Watch interview with staff of the Office of the Prosecutor of BiH, Sarajevo, December 20, 2007. However, state prosecutors later told Human Rights Watch that this specific plan had been stalled due to concerns about progress on existing investigations in the entity systems. Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, April 1, 2008.

¹⁰⁹ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007.

¹¹⁰ The Evidence Disclosure Suite contains all non-confidential material entered into evidence in cases before the ICTY, and the Judicial Database consists of non-confidential ICTY orders and decisions as well as judgments.

still do not have access to these, despite previous expressions of interest by state prosecutors in facilitating this.¹¹¹

Even without this technology, a small number of prosecutors have taken advantage of the ICTY liaison offices in Bosnia to request the use of ICTY evidence.¹¹² Officials in the liaison office have expressed eagerness to collaborate with cantonal and district prosecutors but report almost no requests for cooperation until this point.¹¹³ The liaison offices have been active in outreach, which will hopefully increase awareness of and interest in their services, but prosecutors should also be more proactive in seeking this cooperation. In some instances, hostility toward the ICTY as an institution may prevent some prosecutors from seeking the services of the liaison offices. Some even questioned whether ICTY evidence would be admissible under domestic law.¹¹⁴ Most prosecutors agreed, however, that this evidence would be useful and some cited it as a key way to obtain evidence that may be otherwise hard to obtain from government agencies.¹¹⁵

D. Use of NGO evidence

NGOs could be another valuable source of evidence for the prosecution of war crimes, crimes against humanity, and genocide. Many local NGOs have been actively compiling evidence on the identities of victims and perpetrators, and victims' groups often have contacts with people who could provide witness testimony about crimes committed during the war. It is true that NGOs are generally not trained in criminal investigation, and some may have been influenced by political concerns. Evidence gathered by them may be considered hearsay, for example, and therefore not admissible at trial. However, greater cooperation could generate valuable leads that

¹¹¹ Human Rights Watch, *A Chance for Justice*, p. 32; Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007.

¹¹² Human Rights Watch interview with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007.

¹¹³ Human Rights Watch interview with staff of the ICTY, Sarajevo, December 4, 2007.

¹¹⁴ Human Rights Watch interview with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007

¹¹⁵ Human Rights Watch interviews with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch interviews with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007.

prosecutors could refine prior to trial, and cooperation would also help to build trust between prosecutors and victims.

Some NGOs have undertaken specific initiatives to compile, and make accessible, information on crimes committed during the war. The organization Savez logoraša, for example, recently unveiled a plan to create a centralized, searchable database that would allow prosecutors to cross-reference victim or perpetrator names and nicknames in order to locate further evidence.¹¹⁶ The Research and Documentation Centre (RDC), in Sarajevo, has already completed an extensive database of information on crimes committed during the war, which also features a search feature.

However, while RDC reports good cooperation with state prosecutors, it has been contacted only once by a cantonal or district prosecutor to assist in gathering evidence for a case.¹¹⁷ Similarly, the Center for Civic Initiatives, an NGO involved in issues related to trials for crimes committed during the war, also reported that state prosecutors had sought their assistance in locating potential witnesses, while cantonal and district prosecutors had not.¹¹⁸

There are some exceptions to this. For example, prosecutors in Banja Luka district cooperate with the NGO Izvor to locate and facilitate some medical, psychological, and practical support for witnesses, and prosecutors in Tuzla Canton work closely with the NGO Vive Žene (see Witnesses).¹¹⁹

In other areas however, such as Bijeljina, there is a distinct lack of trust and cooperation between prosecutors and local NGOs. District prosecutors there

¹¹⁶ However, this will not be ready until 2012. Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 18, 2007.

¹¹⁷ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 4, 2007.

¹¹⁸ Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

¹¹⁹ Human Rights Watch interviews with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interviews with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch interview with Bosnian civil society representative, Tuzla, December 11, 2007; Human Rights Watch telephone interview with Bosnian civil society representative, April 3, 2008.

criticized the quality of evidence provided by local NGOs and questioned whether a nongovernmental organization should play a role in gathering evidence at all.¹²⁰

Prosecutors and NGOs need to take steps to further their cooperation. This will require greater efforts by prosecutors, but also an acknowledgement by NGOs of their limited role and that not all evidence of war crimes, crimes against humanity, and genocide can be used to form an indictment without further work. Nonetheless, cooperation in some districts and cantons, as well as at the State Court, show that information from NGOs can form a useful basis from which prosecutors can further investigate.

E. Additional concerns regarding sources of evidence

Several prosecutors, especially in Republika Srpska, noted difficulties obtaining documents from government archives, such as military records, that would enable them to prove command chains and to establish which military units were stationed near crime scenes at the times that crimes were committed.¹²¹ While not all interview subjects felt that this information was necessary, state prosecutors also noted that requests for records from government archives are difficult to obtain and urged greater ease of access by prosecutors.¹²²

Prosecutors also have limited access to use of DNA evidence. A DNA analysis laboratory was recently opened in Banja Luka, and some training has been provided in the use of this evidence.¹²³ The courts in the Federation do not have a dedicated DNA analysis laboratory, and instead rely on the facilities of the International Commission on Missing Persons, whose continuing work on other important aspects of its mandate means that it cannot always respond quickly to prosecutors'

¹²⁰ Human Rights Watch interview with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007; Human Rights Watch interview with Bosnian civil society representative, Bijeljina, December 12, 2007.

¹²¹ Human Rights Watch interview with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interview with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007.

¹²² Human Rights Watch interview with Bosnian civil society representative, Banja Luka, December 13, 2007; Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007.

¹²³ Human Rights Watch with staff of the Centre for Judicial and Prosecutorial Training of the Republika Srpska, December 13, 2007.

requests.¹²⁴ Some interview subjects questioned the necessity of DNA evidence to solve cases, but one state prosecutor noted that while DNA evidence is not necessary in every case to establish guilt, it is extremely useful in establishing the fate of victims.¹²⁵

¹²⁴ Human Rights Watch interview with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007; Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007.

¹²⁵ Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007; Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, April 1, 2008.

VII. Witnesses

Because of these numerous difficulties in obtaining physical evidence for cases for crimes committed during the war, witness testimony is often the only evidence available to prosecutors in these cases.¹²⁶ Witness intimidation and fatigue, as well as a lack of information on the role of witnesses in the judicial process, impair the ability and willingness of victims to testify at trial. Authorities need to fulfill their obligation to provide adequate witness protection and support services in order to facilitate greater witness participation in trials. While it is true that fulfilling these obligations will require commitment of additional resources, the failure to fulfill them could impede fair trials and the rights of victims.

A. Lack of witness protection services

In a post-conflict society such as Bosnia, political tensions remain high and many victims are still suffering from the trauma that they experienced during the war. In order to foster victim participation in trials, it is necessary that victims have faith in the judicial system, be willing to testify, and feel safe from retribution for their testimony. To ensure this, witnesses and their families must be protected before, during, and after trials. In rare cases, this may require long-term protection or even resettlement to other countries.

As previous Human Rights Watch reports have noted, it is difficult to obtain confirmed information on incidents of witness intimidation during trials in Bosnia's entity court systems, but experience with trials for war crimes, crimes against humanity, and genocide elsewhere in the former Yugoslavia shows that intimidation is frequent in this context.¹²⁷ The sensitive nature of these trials may leave witnesses vulnerable to intimidation or retribution from hostile members of the public. While some officials acknowledged that they had received no reports of witness

¹²⁶ Human Rights Watch interviews with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch interviews with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007.

¹²⁷ Human Rights Watch, *A Chance for Justice*, p. 33; *Justice at Risk*, pp. 19-23.

intimidation that could be prosecuted, at least one prosecutor asserted that this was due to the difficulty of proving this crime, not the absence of intimidation.¹²⁸

Indeed, perception of dangers to witnesses, whether substantiated or not, came up frequently during interviews with victims, prosecutors, and others conducted by Human Rights Watch. Witnesses who have returned to their pre-war homes in areas where they are members of a minority group may be additionally fearful and unwilling to testify.¹²⁹ Many of our interviewees said that victims often did not trust local police, in either entity, to provide adequate protection for them if they were to testify as witnesses, suspecting them of at least sympathizing with war criminals and at times actually employing them.¹³⁰

The entity authorities' obligation to provide the tools necessary for witness protection is based in Bosnian law and does not hinge on the absence or availability of evidence of intimidation.¹³¹ Both Republika Srpska and the Federation of Bosnia and Herzegovina have legal provisions for witness protection and support, but in most instances these laws exist only on paper. State Court officials told Human Rights Watch that in at least two cases, the State Court took over jurisdiction from, or refused to transfer jurisdiction to, entity courts specifically because of the lack of adequate witness protection or support.¹³²

¹²⁸ Human Rights Watch interview with staff of the Tuzla Cantonal Court, Tuzla, December 11, 2007; Human Rights Watch interview with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007.

¹²⁹ Human Rights Watch interview with Bosnian civil society representative, Bijeljina, December 12, 2007; Human Rights Watch interview with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007.

¹³⁰ Human Rights Watch interviews with Bosnian civil society representative, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007; Bosnian civil society representative, Bijeljina, December 12, 2007; Human Rights Watch interviews with Bosnian civil society representative, Mostar, December 17, 2007; Human Rights Watch interviews with staff of the Ministry of Interior of Federation FBiH, Sarajevo, December 20, 2007.

¹³¹ Law on the Protection of Witnesses in Criminal Proceedings, *Official Gazette of Republika Srpska*, 48/03, www.mup.vladars.net/zakoni_lt/pdf/Zakon%20o%20zastiti%20svjedoka%20u%20krivicnom%20postupku_lat.pdf (accessed March 27, 2008); Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, *Official Gazette of the Federation of Bosnia and Herzegovina*, 37/03, <http://www.fbihvlada.gov.ba/bosanski/zakoni/index.php> (accessed March 27, 2008).

¹³² The two cases are Neđo Samardžić (X-KRZ-05/49) and Sreten Lazarević and Others (X-KR-06/243). Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, April 1, 2008; Human Rights Watch telephone interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, June 27, 2008.

Courts lack almost all modern equipment that would be required to protect the identities of witnesses, such as video links or software to disguise witnesses' voices.¹³³ The poor physical state of many of the courts is a symptom of damage from the war and of neglect that predates the war.¹³⁴ One official likened the facilities of the State Court to a "spaceship" compared to those of the entity courts.¹³⁵ The only exception to this is the new courthouse for the East Sarajevo District Court, funded in large part by the Norwegian government, which will, according to its staff, feature facilities for witness protection.¹³⁶

But this lack of technological capacity can only partially excuse the lack of witness protection at cantonal and district courts. Witness protection may require this technology in only a small percentage of cases. In many others, the needs of witnesses could potentially be met by the use of much simpler means, such as erecting a privacy screen around a witness while he or she testifies, assigning pseudonyms, or by closing the courtroom during short periods of a trial where sensitive information is disclosed. State authorities have taken several steps toward providing witness protection that could serve as a model for district and cantonal authorities.¹³⁷

¹³³ None of the courts visited by Human Rights Watch (Sarajevo Cantonal, East Sarajevo District, Tuzla Cantonal, Bijeljina District, Banja Luka District and Mostar Cantonal Courts) had any facilities for witness protection. Human Rights Watch interviews with staff of the Cantonal Court Sarajevo, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the District Court of East Sarajevo, East Sarajevo, December 6, 2007; Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007; Human Rights Watch interviews with staff of the Tuzla Cantonal Court, Tuzla, December 11, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007.

¹³⁴ Human Rights Watch interview with staff of the Ministry of Justice of Republika Srpska, Banja Luka, December 14, 2007.

¹³⁵ Human Rights Watch interview with staff of the Cantonal Court Sarajevo, Sarajevo, December 4, 2007.

¹³⁶ Human Rights Watch interview with staff of the District Court of East Sarajevo, East Sarajevo, December 6, 2007.

Additionally, plans were reportedly underway to outfit one courtroom in the cantonal court in Sarajevo with a witness box and other protective features. Human Rights Watch interview with staff of the Cantonal Court Sarajevo, Sarajevo, December 4, 2007. The Basic Court in Brčko District is also reported to have state-of-the-art witness protection facilities. Brčko District is an administrative unit separate from Bosnia's other two entities. War crimes trials are also reportedly being processed in Brčko, but for practical reasons, Brčko District was not included in the scope of this report. Human Rights Watch interview with staff of the Prosecutor's Office of Federation BiH, December 7, 2007.

¹³⁷ Human Rights Watch, *Narrowing the Impunity Gap*, pp. 29-37.

In most cases, district and cantonal authorities are not taking such steps to protect witnesses in sensitive trials.¹³⁸ The only protective measure for shielding witness identity suggested by entity authorities during Human Rights Watch's investigation was to allow witness testimony to be read into evidence, rather than requiring live testimony.¹³⁹ However, whatever measures are adopted to protect witnesses should always respect the overall right to a fair trial, and the option least restrictive of that right should be followed.¹⁴⁰ This includes the right of the defendant to a public hearing and to examine, or have examined, the witnesses against him or her.¹⁴¹ Testimony being read into evidence rather than being delivered live and subject to cross-examination is, therefore, problematic. Similarly, any use of closed sessions of a trial should be limited, as holding trials in secret can undermine the right to a fair trial for defendants and impede public awareness of trials.

In Mostar, some NGOs and victims' groups reported that victims testifying at trials for crimes committed during the war were sometimes seated in the same waiting rooms as the defendants' families. For witnesses preparing to testify about traumatic incidents, this is a very problematic arrangement.¹⁴² Civil society representatives in Prijedor noted that witnesses often had to travel by bus to testify at court, often alongside friends and family of the accused.¹⁴³ Authorities in Sarajevo canton lamented the lack of a separate entrance for victims, which could allow them to avoid unwanted exposure when entering the courthouse via the main entrance.¹⁴⁴

¹³⁸ Human Rights Watch interviews with Bosnian civil society representative, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007; Human Rights Watch interviews with Bosnian civil society representative, Mostar, December 17, 2007; Human Rights Watch interviews with staff of the Mostar Cantonal Court, Mostar, December 17, 2007.

¹³⁹ Human Rights Watch interview with staff of the Mostar Cantonal Court, Mostar, December 17, 2007.

¹⁴⁰ *Van Mechelen and Others v. the Netherlands*, Judgment of April 23, 1997, Reports of Judgments and Decisions 1997-III, available at www.echr.coe.int, para. 58.

¹⁴¹ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, succeeded to by Bosnia and Herzegovina on September 1, 1993, art. 14; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, ratified by Bosnia and Herzegovina on December 7, 2002, art. 6.

¹⁴² Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

¹⁴³ Human Rights Watch telephone interview with Bosnian civil society representative, April 3, 2008.

¹⁴⁴ Human Rights Watch interview with staff of the Cantonal Court Sarajevo, Sarajevo, December 4, 2007.

In cases where more modern witness protection facilities are needed to meet the needs of witnesses, district and cantonal authorities should make use of the facilities that exist at the State Court. State Court personnel who spoke with Human Rights Watch indicated that State Court facilities could be shared with cantonal and district courts and prosecutors.¹⁴⁵ Cooperation between state and local authorities in this area would help cantonal and district authorities live up to their legal obligations to witnesses.

Additionally, entity and national authorities should work to secure the needed funding to bring the physical premises of cantonal and district courts up to the standard needed to protect witnesses. The HJPC has already conducted an extensive needs assessment of the cantonal and district courts which could be implemented relatively quickly given political will and funding.¹⁴⁶

Even with greater commitment to witness protection before and during trial, witnesses and their families may still require protection after trial. In a small number of cases, this may entail relocation. Several people who spoke to Human Rights Watch expressed skepticism at the ability of witnesses to relocate safely within Bosnia. They noted that Bosnia is a small country and that within communities it is very difficult for people to remain anonymous. Where relocation outside of Bosnia is required to protect witnesses and their families, other countries will need to assist.¹⁴⁷ Experience with this issue at the State Court, however, indicates that other countries may often be unwilling to assist with the relocation of witnesses and their families.¹⁴⁸

¹⁴⁵ Human Rights Watch interview with staff of the Court of BiH, Sarajevo, December 21, 2007. At least in FBiH, prosecutors are not making use of State Court facilities. Human Rights Watch interview with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007.

¹⁴⁶ Human Rights Watch interview with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 20, 2007.

¹⁴⁷ Human Rights Watch interviews with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007; Human Rights Watch interviews with staff of the District Court of East Sarajevo, East Sarajevo, December 6, 2007; Human Rights Watch interviews with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007.

¹⁴⁸ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007.

B. Lack of witness support programs

Many witnesses in cases of war crimes, crimes against humanity, or genocide will require services other than protection to participate in trials. Many witnesses cited as barriers to participation aspects that are inherent to the process. Some of these barriers are practical: witnesses in some cases have been asked to pay their own transportation to court in order to testify.¹⁴⁹ Others are more personal and require expert attention. Some victims' groups cited the stigma that can attach to victims of sexual violence in traditional communities. Additionally, the experience of cross-examination, where witnesses may face harsh questioning and have the veracity of their testimony challenged, was cited by at least one victim as a reason not to testify.¹⁵⁰ Many victims are reticent to speak of wartime experiences at all, preferring simply to move on with their lives.¹⁵¹ All of these barriers are issues that witness support professionals could help address. Authorities need to take steps to fulfill their legal obligations to provide access to psychological and other support services so that witnesses have an easier time participating in trials.

In the absence of such services, prosecutors are left to work with witnesses for whom recounting past events may be extremely difficult or even traumatic. This can not only be devastating for witnesses, but can hamper investigations as well. One prosecutor recounted the example of a case that involved witnesses who, as young children, witnessed the murder of their families. Even with extensive support services,¹⁵² it is extremely difficult to speak about these events now that these individuals are adults. For a prosecutor untrained in dealing with the needs of such witnesses, it may be nearly impossible to build enough trust to obtain evidence necessary to the case. Witness support services are crucial in such situations. Some

¹⁴⁹ Human Rights Watch interview with Bosnian civil society representative, December 17, 2007; Human Rights Watch interview with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch telephone interview with Bosnian civil society representative, April 3, 2008.

¹⁵⁰ Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

¹⁵¹ Human Rights Watch interview with Bosnian civil society representative, Tuzla, December 11, 2007.

¹⁵² Human Rights Watch interview with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007.

prosecutors noted that the prosecutors who work on these cases themselves had sometimes also become traumatized by repeating such interactions.¹⁵³

Witness support services have been provided by the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone, and the Bosnian State Court, and experience has shown that these services are essential to enabling witness participation.¹⁵⁴ These witness support offices can help coordinate the practical needs of witnesses, including arranging for transportation, shelter, and food, and can also arrange counseling services that many victims need or desire in order to testify.

However, almost no witness support services are available to witnesses testifying before the cantonal and district courts. In theory, the entity governments should provide counseling and other support services to victims, including those who testify at trials, but, in most cases, the relevant ministries do not fulfill this obligation.¹⁵⁵ Medical fees can sometimes pose a barrier to obtaining needed services elsewhere, especially for uninsured victims.¹⁵⁶

District prosecutors in Banja Luka have begun to address this shortcoming in conjunction with the NGO Izvor. Izvor helps to facilitate the participation of witnesses at trial by providing funding for and assistance with transportation to court and some counseling services by private doctors. This assistance is made possible only by

¹⁵³ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007; Human Rights Watch interview with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007.

¹⁵⁴ Fourteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN General Assembly, 62nd Sess., U.N. Doc. A/62/172, <http://www.un.org/icty/rappannu-e/2007/AR07.pdf> (accessed March 30, 2008), para. 107; Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, UN General Assembly, 62nd Sess., U.N. Doc A/62/284, <http://69.94.11.53/ENGLISH/annualreports/a62/s-2007-502-e.pdf> (accessed March 30, 2008), para. 71; Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, vol. 17, no. 14(A), October 2005, <http://hrw.org/reports/2005/sierraleone1105/>, pp. 21-25; Human Rights Watch, *Narrowing the Impunity Gap*, pp. 37-38.

¹⁵⁵ One exception is the Ministry of Social Welfare in Mostar, which recently began providing the services of one city-funded psychologist. Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

¹⁵⁶ *Ibid.*

international funding rather than by responsible government organs.¹⁵⁷ The international community and the national and entity governments should prioritize the funding of these crucial services.

Another exception exists in Tuzla, where the non-profit organization Vive Žene has stepped in to fill the gap in victim support services. Vive Žene signed an agreement with the Office of the Prosecutor in Tuzla canton to provide services to victims whose testimony is sought in connection with trials.¹⁵⁸ While this arrangement is beneficial to victims and prosecutors, both Vive Žene and the Office of the Prosecutor expressed frustration that Vive Žene was receiving no compensation for taking on responsibilities that ought to be fulfilled by the state.¹⁵⁹ Additionally, Vive Žene expressed fears that their cooperation with the Office of the Prosecutor posed a risk of interfering with their primary mission of assisting victims of war and that this new role could compromise their public image of neutrality.¹⁶⁰

Indeed, other NGOs expressed similar concerns that witnesses who have received services from private, nongovernmental organizations ran a risk of being accused of having had their testimony coached by these organizations when testifying at trial.¹⁶¹ This adds further weight to the argument that the state should fulfill its role to provide support services to victims.

C. Witness fatigue

Many witnesses have testified at numerous different courts, including the ICTY and the State Court, and suffer from “witness fatigue.” This fatigue can be compounded if courts receiving cases investigated in other entity jurisdictions must reinterview witnesses.¹⁶²

¹⁵⁷ Human Rights Watch telephone interview with Bosnian civil society representative, April 3, 2008.

¹⁵⁸ Human Rights Watch interview with staff of the Tuzla Canton Prosecutor’s Office, Tuzla, December 11, 2007; Human Rights Watch interview with Bosnian civil society representative, Tuzla, December 11, 2007.

¹⁵⁹ Ibid.

¹⁶⁰ Human Rights Watch interview with Bosnian civil society representative, Tuzla, December 11, 2007.

¹⁶¹ Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

¹⁶² Human Rights Watch interview with staff of the Tuzla Canton Prosecutor’s Office, Tuzla, December 11, 2007; Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007; Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 19, 2007.

A dozen years after the end of the conflict, many witnesses have died or emigrated, and the recollections of witnesses who remain are less sharp and therefore less useful to prosecutors.¹⁶³ The problems with witness testimony engendered by the passage of so many years may in part explain the frequent reports by prosecutors that witnesses change their testimony from that which they originally gave.¹⁶⁴

D. Building trust between prosecutors and victims

In part because of the issues noted above, an atmosphere of mutual suspicion and mistrust exists between many prosecutors and victims which hampers cooperation on politically sensitive prosecutions, especially war crimes, crimes against humanity, and genocide. One NGO representative told Human Rights Watch that because many victims blame the courts and prosecutors for inaction on these cases and because there are no support services available to facilitate participation, victims often refuse to participate as witnesses.¹⁶⁵ Additionally, one NGO asserted that many victims lacked information and knowledge of the workings of the court system and believed that prosecutors were capable of bringing indictments without witness participation.¹⁶⁶

Witnesses' lack of participation fuels resentment among some prosecutors, with one prosecutor going so far as to assert that witnesses change their testimony due to bribes from defense attorneys.¹⁶⁷ It is imperative that steps be taken to combat this lack of trust so that prosecutors and victims can achieve the common goal of successfully prosecuting crimes committed during the war.

¹⁶³ Human Rights Watch interviews with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007; Human Rights Watch interviews with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007.

¹⁶⁴ Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10 and 12, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007.

¹⁶⁵ Human Rights Watch interview with Bosnian civil society representative, Tuzla, December 11, 2007.

¹⁶⁶ Human Rights Watch interview with Bosnian civil society representative, Bijeljina, December 10, 2007.

¹⁶⁷ Human Rights Watch interviews with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interviews with Bosnian civil society representative, Tuzla, December 11, 2007; Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007.

Providing adequate witness support and protection services would go some of the way to overcoming this, but other steps are also needed. Outreach is also essential to this.¹⁶⁸ Prosecutors who have been able to effectively use witness testimony in prosecutions of war crimes, crimes against humanity, or genocide cite repeated, sustained contact with witnesses as a key tool to building trust and to overcoming suspicion, especially across ethnic lines.¹⁶⁹ Training for prosecutors, judges, defense attorneys, and police is also essential to making participation easier for witnesses. Trainings on working with traumatized witnesses by the Judicial and Prosecutorial Training Centres in both entities have been cited by attendees as helpful in overcoming some of these challenges.¹⁷⁰ A concerted effort by the government and donors must be undertaken to enable these steps to be taken. Building trust between prosecutors, victims, and potential witnesses is essential to the success of future cases for crimes under international law.

¹⁶⁸ See Public Awareness/Outreach section below.

¹⁶⁹ Human Rights Watch interview with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interview with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007.

¹⁷⁰ Human Rights Watch interview with staff of the Mostar Cantonal Court, Mostar, December 17, 2007.

VIII. Obstacles to Getting Defendants into Court

A. Summonses and absence of recourse to custody

Securing suspect attendance at trial continues to pose a serious obstacle to successful prosecutions. One reason for this is the continued use of summonses. Under the criminal procedure codes of both entities, the use of summonses, where suspects are contacted in writing and informed of charges against them, is the default method for securing the attendance of an accused in court. However, the law also allows the use of several other means of securing suspect attendance where the use of a summons is impractical. The most notable is the power of the police to arrest suspects, provided they hold a hearing within 24 hours on the need for continued detention.¹⁷¹

More than one prosecutor with whom we met asserted that they were required by law to notify defendants in writing of the fact that an indictment had been issued in their case before they could order the suspect's arrest.¹⁷² Others, however, scoffed at this, pointing out that the use of police arrests is also allowed and that the use of summonses is obviously impractical in many criminal contexts.¹⁷³ The failure to consider measures other than summonses to secure attendance of defendants in cases dealing with war crimes, crimes against humanity, or genocide seems ill-advised. Given that this practice has received attention and criticism in the media, it is surprising that prosecutors still adhere to it.¹⁷⁴

The use of arrest warrants is not without problems, however. As noted above, despite numerous obstacles, some progress has been made in police cooperation

¹⁷¹ Criminal Procedure Code of the Federation of Bosnia and Herzegovina, art. 153; Criminal Procedure Code of Republika Srpska, art. 196.

¹⁷² Human Rights Watch interview with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007; Human Rights Watch interview with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 12, 2007.

¹⁷³ Human Rights Watch interview with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007.

¹⁷⁴ OSCE Mission to Bosnia and Herzegovina – Human Rights Department, "War Crimes Trials: Progress and Obstacles," p. 13; "Mostar: Court Trusts the Indictees," Balkan Investigative Reporting Network, November 29, 2007, <http://www.bim.ba/en/91/10/6674/> (accessed March 31, 2008).

across entity boundaries. However, even within entities difficulties remain. Police in the Federation told Human Rights Watch that they have made no progress to date in efforts to circulate arrest warrants between police in different cantons.¹⁷⁵ This lack of coordination between cantons was criticized several years ago by the OSCE, which makes the failure to address it even more disturbing.¹⁷⁶

Following arrest, many suspects in cases dealing with war crimes, crimes against humanity, or genocide are not kept in custody. Defendants have a right to remain at liberty in many cases, but it is important that this be determined on a case-by-case basis so that defendants who pose a flight risk or who may attempt to influence or intimidate witnesses can be kept in custody during trial. In Mostar, one judge told Human Rights Watch that prosecutors no longer bothered to ask the Court to order custody of defendants and that as a result, at least one defendant had been able to flee when his verdict was pronounced.¹⁷⁷ Under both entities' criminal procedure codes, custody may be ordered for several reasons, including risk of flight, danger to the public, threat of destruction or concealment of evidence, or danger of threatening or influencing witnesses.¹⁷⁸

B. Regional cooperation and the lack of an extradition framework

In Bosnia, as well as in Serbia or Croatia, it is common for evidence, witnesses, victims, and suspects in cases dating from the war period to be located in the territory of neighboring states. Because of this, regional cooperation is especially important to this type of process. This includes evidence sharing and prosecutorial cooperation as well as extradition.

Of these, the ban on extradition between states in the region is the more serious obstacle. Extradition is banned under the laws of Bosnia, Croatia, and Serbia.¹⁷⁹

¹⁷⁵ Human Rights Watch interview with staff of the director of police, Ministry of Interior of Federation BiH, Sarajevo, December 20, 2007.

¹⁷⁶ OSCE Mission to Bosnia and Herzegovina – Human Rights Department, “War Crimes Trials: Progress and Obstacles,” p. 14.

¹⁷⁷ Human Rights Watch interview with staff of the Mostar Cantonal Court, Mostar, December 17, 2007.

¹⁷⁸ Criminal Procedure Code of the Federation of Bosnia and Herzegovina, art. 146; Criminal Procedure Code of Republika Srpska, art. 189.

¹⁷⁹ Criminal Procedure Code of Bosnia and Herzegovina, art. 415(1)(a); Constitution of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, 41/01 (corrections published in 55/01), <http://www.usud.hr/>

Many people with whom Human Rights Watch spoke in both entities of Bosnia cited the inability to extradite suspects as a major impediment to trials for crimes committed during the war.¹⁸⁰ Because suspects often have dual or foreign citizenship, it is often impossible to compel their appearance at trial if they reside outside of Bosnia.¹⁸¹

Transfer of cases involving war crimes, crimes against humanity, or genocide to other jurisdictions where the suspects reside is also generally not a solution as Bosnian law prohibits the transfer of cases to other countries where the underlying crime is punishable by more than 10 years' imprisonment. Even if legally permissible, such transfer would also prove difficult practically if witnesses and victims lack faith in the fairness of these proceedings or are unwilling to travel to other countries to testify. Human Rights Watch has previously noted that this creates an "impunity gap" that is an obstacle to justice for many victims.¹⁸²

Cooperation in the form of evidence sharing and investigative assistance does exist between prosecutors in Croatia, Serbia, and Bosnia, especially the latter two.¹⁸³ However, this cooperation is carried out ad hoc under memoranda of understanding

default.aspx?Show=ustav_republike_hrvatske&Lang=en (accessed March 31, 2008), art. 9. Serbia attached a declaration to the European Convention on Extradition prohibiting the extradition of citizens of Serbia; Declaration contained in the instrument of accession deposited on 30 September 2002, European Convention on Extradition, April 18, 1960, CETS no. 024, <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=SAM&NT=&MA=15&CV=1&NA=&CN=999&VL=1&CM=5&CL=ENG> (accessed April 1, 2008). However, it is worth noting that Serbia's Constitution no longer bars extradition of Serbian citizens, as it did when this reservation was made; Constitution of the Republic of Serbia, *Official Gazette of Republic of Serbia*, adopted November 10, 2006, http://www.srbija.sr.gov.yu/cinjenice_o_srbiji/ustav.php?change_lang=en (accessed June 2, 2008).

¹⁸⁰ Human Rights Watch interviews with staff of the Office of the Prosecutor of BiH, Sarajevo, December 20, 2007; Human Rights Watch interviews with staff of the Mostar Cantonal Court, Mostar, December 17, 2007; Human Rights Watch interviews with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007; Human Rights Watch interviews with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007.

¹⁸¹ Human Rights Watch interviews with staff of the Prosecutor's Office of Federation BiH, Sarajevo, December 7, 2007; Human Rights Watch interviews with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interviews with staff of the Mostar Cantonal Court, Mostar, December 17, 2007.

¹⁸² Human Rights Watch, *Narrowing the Impunity Gap*, pp. 18-19; Human Rights Watch interview with staff of the Ministry of Justice of BiH, December 4, 2007.

¹⁸³ Human Rights Watch interview with staff of the Ministry of Justice of BiH, Sarajevo, December 4, 2007.

and should be formalized in legislation to allow for more institutionalized cooperation that includes cantonal and district prosecutors.¹⁸⁴

The importance of regional cooperation has been highlighted recently by the arrest of Ilija Jurišić, a citizen of Bosnia, in Serbia in May 2007. Jurišić is suspected of involvement in an attack on troops of the Yugoslav People's Army as they were retreating from Tuzla in 1992. Jurišić was detained for many months prior to the commencement of his trial in Belgrade.¹⁸⁵ His prolonged detention in Serbia led to efforts during this time by Bosnian state authorities to extradite him or to transfer the case which were repeatedly refused or ignored by the Serbian government.¹⁸⁶ Better regional cooperation, with a clear understanding of in which country it would be best to hold this trial, might have avoided some of the tensions that arose between these two countries over this trial and might have facilitated a quicker resolution of the case.

¹⁸⁴ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007. See also Human Rights Watch, *Unfinished Business: Serbia's War Crimes Chamber*, No. 3, June 2007, <http://hrw.org/backgrounder/eca/serbia0607/serbia0607web.pdf>, pp. 15-18.

¹⁸⁵ Jurišić was indicted in November 2007, and his trial is ongoing at this writing. http://www.tuzilastvorz.org.rs/html_trz/index_eng.htm (accessed May 19, 2008).

¹⁸⁶ Human Rights Watch telephone interviews with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, March 7 and April 1, 2008.

IX. Defense

The right to a fair trial is enshrined in both Bosnian and international law.¹⁸⁷ This includes the right of defendants to a lawyer of their choice.¹⁸⁸

The elimination of the position of investigative judge had a major impact on defense attorneys. Prior to the 2003 changes in criminal procedure, it was the investigative judge who was most responsible for protecting the interests of defendants. Following the changes, defense attorneys took on a much more prominent role at trial than they had previously.¹⁸⁹ Under this new system, which more closely resembles an adversarial system than its predecessor, defense attorneys now have a very significant role in promoting the fair trial rights of the defendants. Learning this new role has created many difficulties for defense attorneys, as have problems with payment of fees and access to legal and investigative resources. Where there is competition for limited resources, as in the justice systems of Bosnia, there may be a tendency not to prioritize the needs of the defense. This is unacceptable from the standpoint of the rights of defendants. Conditions that facilitate a vigorous defense must be created in order to ensure that trials are, and are viewed to be, fair.

A. Training and resources for defense attorneys

Defense attorneys who spoke to Human Rights Watch expressed dissatisfaction with their ability to handle certain aspects of their new roles. This underscores the need for further training to ensure that defense attorneys can work within the structure of the new procedural codes to provide a vigorous defense. Several defense attorneys, for example, stated that they felt themselves at a disadvantage compared to prosecutors, since prosecutors may conduct lengthy investigations prior to

¹⁸⁷ The General Framework Agreement for Peace in Bosnia and Herzegovina, signed December 14, 1995, annex 4, Constitution of Bosnia and Herzegovina, http://www.ohr.int/dpa/default.asp?content_id=372 (accessed March 4, 2008), art. II(3)(e); ECHR, art. 6; ICCPR, art. 14(1).

¹⁸⁸ ICCPR, art. 14(3); ECHR, art. 6(3); Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, August 27 to September 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), 1.

¹⁸⁹ Human Rights Watch interview with staff of the Criminal Defense Section, The Registry for War Crimes, Organized Crime, Economic Crime and Corruption of the Court of BiH, Sarajevo, December 7, 2007.

indictment, but defense attorneys must investigate quickly once an indictment has been issued.¹⁹⁰ Others noted that defense attorneys had no assistance with investigations comparable to what prosecutors received from police. Some attorneys have been able to compensate for this by cooperating with other attorneys within their offices or by using fees for co-counsel to pay other attorneys to act as investigators.¹⁹¹ It is important that defense attorneys receive adequate training and support so that these aspects of the new criminal procedure codes are not viewed as obstacles to the protection of defendants' rights.

At the State Court, the Criminal Defense Support Section provides training and support to defense attorneys. Unfortunately, no similar body exists to support attorneys who represent defendants at cantonal and district courts.¹⁹² Cases involving crimes under international law generally involve vastly different law and evidence than do other types of cases, even other criminal cases. Especially since most attorneys do not specialize in one type of legal practice in Bosnia, they may need special training and support to be able to effectively defend these cases. OKO trainings are theoretically open to any interested attorney, but in practice, would most likely only be known to attorneys who practice before the State Court.¹⁹³ OKO also provides access for defense attorneys to the Judicial Database and Evidence Disclosure Suite of the ICTY, but these services too are only available to attorneys practicing before the State Court.¹⁹⁴

OKO also provides legal research assistance to attorneys practicing before the State Court on key international law issues of concern in cases dealing with war crimes, crimes against humanity, and genocide.¹⁹⁵ In contrast to this, one defense attorney who works at the cantonal, but not the state, level told Human Rights Watch that his

¹⁹⁰ Human Rights Watch interview with defense attorney, Sarajevo, December 7, 2007; Human Rights Watch interview with defense attorney, Mostar, December 17, 2007.

¹⁹¹ Human Rights Watch interview with defense attorney, Mostar, December 17, 2007; Human Rights Watch interview with staff of the Criminal Defense Section, The Registry for War Crimes, Organized Crime, Economic Crime and Corruption of the Court of BiH, Sarajevo, December 7, 2007.

¹⁹² Human Rights Watch interview with staff of the Criminal Defense Section, The Registry for War Crimes, Organized Crime, Economic Crime and Corruption of the Court of BiH, Sarajevo, December 7, 2007.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Human Rights Watch interview with defense attorney, Banja Luka, December 14, 2007.

only education in international law came from his work on cases at the cantonal court. Additionally, his only access to ICTY materials came from reading verdicts posted on the ICTY website.¹⁹⁶ Making OKO's legal research memoranda generally available could provide some help to defense attorneys working before cantonal and district courts.

B. Payment of defense attorney costs

Both the Federation and Republika Srpska mandate legal defense in certain cases and have provisions to provide legal defense to indigent defendants.¹⁹⁷ Attorneys for both indigent and non-indigent clients are paid for their services according to tariffs, which are set by the bar associations and approved by the Ministries of Justice in both entities.¹⁹⁸

Some defense attorneys with whom Human Rights Watch spoke argued that the rates of tariffs are too low to cover the costs of trials.¹⁹⁹ One attorney reported that problems with compensation made it impossible to specialize in cases dealing with international law crimes and that attorneys' practices in other areas of law had to underwrite work on these cases.²⁰⁰ One defense attorney, however, pointed out that while direct financial compensation for representing defendants accused of war crimes, crimes against humanity, or genocide may be low, the press coverage that attorneys received because of this work often boosted their practice in other areas.²⁰¹

¹⁹⁶ Human Rights Watch interview with defense attorney, Mostar, December 17, 2007.

¹⁹⁷ Criminal Procedure Code of the Federation of Bosnia and Herzegovina, arts. 59, 60; Criminal Procedure Code of Republika Srpska, arts. 53, 54.

¹⁹⁸ Law of the Attorneys' Profession of the RS, *Official Gazette of Republika Srpska*, 37/02, <http://www.ohr.int/ohr-dept/legal/oth-legist/doc/LAW-ON-THE-ATTORNEYS-PROFESSION-OF-THE-RS.doc> (accessed March 4, 2008), art. 48; Law on Attorneys' Profession of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, 25/02, <http://www.ohr.int/ohr-dept/legal/oth-legist/doc/law-on-the-attorneys'-profession-of-fbih.doc> (accessed March 4, 2008), art. 31.

¹⁹⁹ Human Rights Watch interview with staff of the Bar Association of Republika Srpska, Banja Luka, December 14, 2007; Human Rights Watch interview with staff of the Criminal Defense Section, The Registry for War Crimes, Organized Crime, Economic Crime and Corruption of the Court of BiH, Sarajevo, December 7, 2007; Human Rights Watch interview with defense attorney, Banja Luka, December 14, 2007.

²⁰⁰ Human Rights Watch interview with defense attorney, Banja Luka, December 14, 2007.

²⁰¹ Human Rights Watch interview with defense attorney, Mostar, December 17, 2007.

A more serious problem may be that delays in fulfilling budgetary requests from courts affected the availability of funds for attorneys who represent indigent clients and that this caused delays in payment for services.²⁰² The President of the Cantonal Court in Sarajevo reported that such attorneys had essentially been working on credit due to unavailability of funds in the previous year.²⁰³

²⁰² Human Rights Watch interview with defense attorney, Banja Luka, December 14, 2007; Human Rights Watch interview with staff of the Cantonal Court Sarajevo, Sarajevo, December 4, 2007.

²⁰³ Human Rights Watch interview with staff of the Cantonal Court Sarajevo, Sarajevo, December 4, 2007.

X. Law Harmonization/Use of International Precedent

A. Law harmonization

The Criminal Code of Bosnia and Herzegovina, created in 2003, contains numerous provisions for the prosecution of war crimes, crimes against humanity, and genocide. It also contains provisions for prosecuting under theories of command responsibility that are broader and more explicit than previous criminal codes.²⁰⁴ Trials at cantonal and district courts for crimes committed during the war, however, are generally conducted under the criminal code of the former Socialist Federal Republic of Yugoslavia (SFRY). This fact raises several legal questions that can undercut the ability of cantonal and district courts to try these types of cases fairly.

The determination of which criminal code should be applied by entity courts has been the source of some confusion and disagreement. While some people involved in the creation of the 2003 Bosnian Criminal Code believed that it would be applied in cases at entity courts involving war crimes, crimes against humanity, or genocide, others believed that it would not due to questions of retroactive application of the law to crimes committed before its enactment.²⁰⁵ The new state-level criminal code seemingly anticipated these objections under article 3(2), which holds, “No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.”²⁰⁶

Thus, application of the new criminal code does not violate the ban on retroactivity since most war crimes, crimes against humanity, and genocide were considered violations of customary international law before the start of the conflict in the former Yugoslavia. This exception in the new code mirrors that in the European Convention

²⁰⁴ Erik Nils Larson, “Analysis of the Substantive War Crimes Provisions,” in *Practical Guide to War Crimes Prosecutions in Bosnia and Herzegovina* (Sarajevo: ABA/CEELI, 2005), p. 15.

²⁰⁵ Human Rights Watch interview with staff of the Court of BiH, Sarajevo, December 21, 2007.

²⁰⁶ Criminal Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, 3/03, http://www.sudbih.gov.ba/files/docs/zakoni/en/krivicni_zakon_3_03_-_eng.pdf (accessed March 31, 2008), art 3(2).

on Human Rights.²⁰⁷ Additionally, many of these crimes were recognized as such by the domestic law at the time.²⁰⁸ Despite this, most cantonal and district courts apply the SFRY criminal code in these cases.

One of the most striking and controversial results of this is that defendants face significantly different sentencing ranges for similar crimes depending on whether they face trial before the Court of Bosnia and Herzegovina or before the cantonal or district courts. The SFRY criminal code, as written, permits the death penalty, but as this has been abolished in Bosnia, the courts in the Federation and in Republika Srpska allow punishments as high as 20 years' imprisonment, which was the second most severe punishment allowed under the SFRY code.²⁰⁹ At the State Court, by contrast, defendants charged with similar crimes may face up to 45 years' imprisonment.²¹⁰ This is especially troubling since the decision as to whether a defendant faces trial before the State Court or an entity court is not a judicial determination subject to appeal, but rather a decision made by an individual state prosecutor based on the "sensitivity" of the case.

This disparity in punishment is cited by those who support the application of the SFRY criminal code for trials dealing with crimes committed during the war. According to this view, the Bosnian Criminal Code, as well as the European Convention on Human Rights, prohibits the retroactive application of a punishment more severe than that in force at the time that a crime was committed.²¹¹ Defendants before the State Court have protested this disparity in sentencing through hunger strikes.²¹²

²⁰⁷ ECHR, art. 7(2).

²⁰⁸ Criminal Code of the Socialist Federal Republic of Yugoslavia, *Official Gazette SFRJ*, No. 44, October 8, 1976 (amended 1990), arts. 141-156, in *Practical Guide to War Crimes Prosecutions in Bosnia and Herzegovina*.

²⁰⁹ Human Rights Watch interview with defense attorney, Banja Luka, December 14, 2007. Case of Milanko Vujanović, Verdict Number K-99/00, Banja Luka Cantonal Court, March 9, 2006, p. 3; Case of Pušara Vlastimir, Verdict Number K-127/02, Sarajevo Cantonal Court, June 29, 2004; Case of Pušara Vlastimir, Verdict Number K-423/04, Supreme Court, December 8, 2004, p. 8.

²¹⁰ Criminal Code of Bosnia and Herzegovina, art 42(2).

²¹¹ Human Rights Watch interview with staff of the Mostar Canton Prosecutor's Office, Mostar, December 17, 2007; Human Rights Watch interview with defense attorney, Banja Luka, December 14, 2007.

²¹² Human Rights Watch interview with staff of the Court of BiH, Sarajevo, December 21, 2007; "Bosnian War Crimes Suspects Revive Hunger Strike," Reuters, October 9, 2007, <http://www.alertnet.org/thenews/newsdesk/L10797932.htm> (accessed March 31, 2008).

This issue was recently addressed by the Constitutional Court of Bosnia and Herzegovina, which upheld the legality of applying the Bosnian Criminal Code in cases dealing with crimes committed during the war. In the *Maktouf* decision, the Constitutional Court noted that the ICTY has also imposed long-term prison sentences that would not be allowed under the SFRY criminal code.²¹³ Additionally, the Constitutional Court disputed the claim that the SFRY code was more lenient, since at the time the crimes were committed, it permitted the death penalty.²¹⁴ The thrust of the Constitutional Court's judgment was that the application of the new Bosnian Criminal Code to crimes from the war fell under the exception to the ban on retroactivity in article 7 of the European Convention on Human Rights for crimes that were proscribed under customary international law when committed.²¹⁵

In the same case, the Constitutional Court also states that the application of different criminal sanctions to similar crimes by the state and entity courts may constitute illegal discrimination. The Constitutional Court, therefore, urged the cantonal and district courts to apply the Bosnian Criminal Code.²¹⁶ Several State Court officials echoed this in interviews with Human Rights Watch, citing the *Maktouf* case to support the application of the Bosnian Criminal Code by all courts in Bosnia dealing with crimes under international law.²¹⁷ This argument mirrors those of supporters of the use of the SFRY code but draws the opposite conclusion.

Even people who do not necessarily support the use of the state criminal code acknowledge that the lack of law harmonization is a problem.²¹⁸ One cantonal official noted that at a public forum on the topic of prosecuting crimes committed during the war, people in attendance noted law harmonization as a principal concern.²¹⁹

²¹³ Case of Abduladhim Maktouf, Decision on Admissibility and Merits, AP-1785/06, Constitutional Court of Bosnia and Herzegovina, http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=73135 (accessed March 31, 2008), para. 68.

²¹⁴ *Ibid.*, para. 69.

²¹⁵ *Ibid.*, paras. 70-79.

²¹⁶ *Ibid.*, paras. 80-92.

²¹⁷ Human Rights Watch interview with staff of the Court of BiH, Sarajevo, December 21, 2007; Human Rights Watch interview with staff of the Office of the Prosecutor of BiH, Sarajevo, December 20, 2007.

²¹⁸ Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 12, 2007; Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007.

²¹⁹ Human Rights Watch interview with staff of the Ministry of Justice of Tuzla Canton, Tuzla, December 11, 2007.

Even apart from the disparities in sentencing noted above, the lack of law harmonization also presents practical difficulties in the prosecution of international law crimes. One SIPA official explained that the different legal requirements in various jurisdictions made it more difficult to conduct investigations, since the code ultimately used in a case can affect the definition of the crime charged and, therefore, what proof is required.²²⁰ One State Court official noted that the lack of law harmonization complicated the process of case review at the state prosecutor's office, since prosecutors had to consider whether the crimes would be covered under the law of the jurisdiction receiving the referral.²²¹

B. Failure to follow international precedent

In addition to the lack of law harmonization between the entity court systems and between those judicial systems and the State Court, the failure of many cantonal and district courts to follow international precedent threatens to further fragment the Bosnian legal system. In many cases, cantonal and district court decisions do not even mention relevant ICTY verdicts. This has resulted in several decisions that are significantly out of line with international precedent. Prosecutors, defense attorneys, and judges need to take steps to bring their work in line with existing international jurisprudence.

One key area of concern is cases that deal with command responsibility.²²² State Court officials questioned whether the entity courts even acknowledge the validity of this important legal concept.²²³ As a result, cases that may involve this legal theory tend to be treated as highly sensitive and tried at the State Court.²²⁴

²²⁰ Human Rights Watch interview with staff of the State Investigation and Protection Agency, Sarajevo, December 7, 2007.

²²¹ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007.

²²² The doctrine of command responsibility holds that people may be convicted of crimes committed by a subordinate in some cases. The ICTY, for example, allows an accused to be held criminally liable for acts committed by a subordinate "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof;" Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), S.C. Res. 827, U.N. Doc. S/RES/827 (1993), as amended, <http://www.un.org/icty/legaldoc-e/basic/statut/statute-febo8-e.pdf> (accessed May 19, 2008), art 7(3).

²²³ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 4, 2007; Human Rights Watch interview with staff of the Court of BiH, Sarajevo, December 21, 2007.

²²⁴ Human Rights Watch telephone interview with staff of the Prosecutor's Office of Federation BiH, May 9, 2008.

A notable example of this problem is the *Čupina* case. In 2001, Mirsad Čupina was found guilty by the Mostar Cantonal Court of war crimes against prisoners of war, a violation of article 144 of the SFRY criminal code. As director of a prison, he was aware that prisoners were beaten and forced to undertake hazardous work, such as digging trenches, but did nothing to stop it. The Mostar court found that although the SFRY code technically covers only those who order or commit the offenses, it should also be read to cover the failure to prevent those same offenses, consistent with an understanding of the international law concept of command responsibility.²²⁵ However, at a second trial, ordered by the Federation Supreme Court, the Mostar Cantonal Court ruled to the contrary and found that no punishment could be given for a failure to act under the SFRY code. While the second ruling left open the possibility that a case could be brought under some other law that acknowledges command responsibility, this judgment's narrow interpretation of the war crimes provisions of the SFRY code effectively forecloses the prospect of finding such liability under this law.²²⁶

The failure to follow international precedent has also resulted in other problematic legal findings. In several cases in Mostar Cantonal Court, it has been held that the existence of stressful wartime conditions when crimes were committed can be a mitigating circumstance to the commission of war crimes and justify a lower sentence.²²⁷ The court, in justifying a reduced sentence in one such case regarding a person convicted of abusing prisoners, reasoned that the existence of “circumstances at the time which were very difficult and which impacted on the behavior of people as a whole in the most basic interactions ... must have also impacted the accused, in that they decreased the level of acceptable behavior in the accused, and therefore acceptable behavior towards the prisoners of war and imprisoned civilians.”²²⁸

²²⁵ Case of Mirsad Čupina, Verdict Number K-24/99, Mostar Cantonal Court, July 6, 2001, p. 23.

²²⁶ Case of Mirsad Čupina, Verdict Number K-24/99, Mostar Cantonal Court, January 24, 2007, pp. 43-45; Case of Mirsad Čupina, Verdict Number K-455/01, Supreme Court of Federation BiH, September 11, 2003.

²²⁷ Case of Zvonko Trlin, Verdict Number K-41/02, Mostar Cantonal Court, June 28, 2004, p. 15; Case of Romeo Blažević, Verdict Number K-43/02, Mostar Cantonal Court, April 26, 2004, p. 18; Case of Mario Matić, Verdict Number K-28/03, Mostar Cantonal Court, July 6, 2004, p. 14.

²²⁸ Case of Romeo Blažević, Verdict Number K-43/02, Mostar Cantonal Court, April 26, 2004, p. 18.

As the ICTY has pointed out, this line of reasoning risks undermining the very concept of the proscription of war crimes, since it is precisely during such war circumstances that the laws of war are meant to protect prisoners from abuse.²²⁹ Despite this, the Supreme Court of the Federation of Bosnia and Herzegovina neither challenged this mitigating factor nor made any reference to ICTY precedent to the contrary.²³⁰

Also in these verdicts, the Mostar Cantonal Court accepted the length of time between the commission of war crimes and their trial as a mitigating factor.²³¹ In at least two cases, courts noted that the “normalization” of life in Bosnia in the years since the war justified a reduced sentence.²³² This is also contrary to the precedent of the ICTY, which noted that the passage of time cannot be a mitigating factor for offenses such as war crimes, which for that reason have no statute of limitations.²³³ However, the Federation Supreme Court made no reference to ICTY precedent in ruling on these cases on appeal.²³⁴

²²⁹ *Prosecutor v. Blaskić*, ICTY, Case No. IT-95-14-A, Sentencing Judgment (Appeals Chamber), July 29, 2004, para. 711 (“[A] finding that a ‘chaotic’ context might be considered as a mitigating factor in circumstances of combat operations risks mitigating the criminal conduct of all personnel in a war zone. Conflict is by its nature chaotic, and it is incumbent on the participants to reduce that chaos and to respect international humanitarian law. While the circumstances in Central Bosnia in 1993 were chaotic, the Appeals chamber sees neither merit nor logic in recognizing the mere context of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants”). See also *Prosecutor v. Česić*, ICTY, Case No. IT-95-10/1-S, Sentencing Judgment (Trial Chamber), March 11, 2004, para. 93 (“It would be inconsistent with the concept of the crimes under Articles 3 and 5 of the Statute to accept anguish experienced in any armed conflict as a mitigating factor.”).

²³⁰ Case of Zvonko Trlin, Verdict Number K-379/04, Supreme Court of Federation BiH, June 15, 2005; Case of Romeo Blažević, Verdict Number K-272/04, Supreme Court of Federation BiH, December 16, 2004; Case of Mario Matić, Verdict Number K-382/04, Supreme Court of FBiH, December 1, 2005, p. 5.

²³¹ Case of Zvonko Trlin, Verdict Number K-41/02, Mostar Cantonal Court, June 28, 2004, p. 15; Case of Dragan Bunoza, Verdict Number K-17/04, July 12, 2004, p. 15; Case of Romeo Blažević, Verdict Number K-43/02, Mostar Cantonal Court, April 26, 2004, p. 18; Mario Matić, K.28/03, Mostar Cantonal Court, July 6, 2004, p. 13.

²³² Case of Mario Matić, K.28/03, Mostar Cantonal Court, July 6, 2004, p. 13; and Case of Romeo Blažević, Verdict Number K-43/02, Mostar Cantonal Court, April 26, 2004, p. 18.

²³³ *Prosecutor v. Dragan Nikolić*, ICTY, Case No. IT-94-2-S, Sentencing Judgment, December 18, 2003, paras. 272-73 (“[T]he Trial Chamber concludes that neither the length of time between the criminal conduct and the judgment nor the time between arrest and judgment can be considered as mitigating factor.”). See also *Prosecutor v. Darko Mrdja*, Case No. IT-02-59-S, Sentencing Judgment, March 31, 2004, paras. 103-104 (“On this point it is important to recall Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity ... which stipulates that such crimes are not subject to statutory limitation... . For crimes of a seriousness justifying their exclusion from statutory limitation, the Trial Chamber considers that a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation.”).

²³⁴ Case of Zvonko Trlin, Verdict Number K-379/04, Supreme Court, June 15, 2005; Case of Romeo Blažević, Verdict Number K-272/04, Supreme Court, December 16, 2004, Case of Dragan Bunoza, Verdict Number K-435/04, Supreme Court, October 5,

C. Proper classification of crimes in violation of international law

In several cases, older indictments classified crimes committed during the war as crimes under ordinary criminal law, such as murder or rape, rather than as war crimes, crimes against humanity, or genocide. In at least two cases originating in Banja Luka district, charges were amended to reflect the international nature of these crimes in recent years.²³⁵ In interviews, prosecutors in Republika Srpska assured Human Rights Watch that future indictments would reflect the international law character of crimes committed during the war.²³⁶ Prosecutors in the Federation also had problems with early indictments being brought under domestic law but have likewise taken steps to correct this.²³⁷

D. Importance of a consistent legal approach to cases

Even many years after the end of the war in Bosnia, Bosnia remains a divided society in many ways. Crimes committed during the war continue to be viewed differently in different communities, and it is often exceptionally difficult for people to accept or acknowledge that crimes were committed by their own ethnic group. The lack of law harmonization and the failure of the courts to apply the law as understood internationally have a detrimental impact on this. Verdicts that call for exceptionally lenient, or exceptionally harsh, sentences on legally dubious grounds feed suspicions of political bias in the judiciary. This lack of faith in the fairness of the justice system can undermine Bosnia's path to recovery and political normalization.

2005; Case of Mario Matić, Verdict Number K-382/04, Supreme Court, December 1, 2005, p. 5. Interestingly, the Supreme Court also made no mention of its own contrary precedent in Case of Goran Vasić, Verdict Number Kz-414/05, Supreme Court of FBiH, November 10, 2005.

²³⁵ Case of Drago Radaković, et al, Verdict Number K-50/01, November 17, 2005, p. 1; Case of Milanko Vujanović, Verdict Number K-99/00, March 9, 2006, p.1.

²³⁶ Human Rights Watch telephone interview with staff of the Prosecutor's Office of Republika Srpska, March 21, 2008; Human Rights Watch telephone interview with Bosnian civil society representative, April 4, 2008.

²³⁷ Human Rights Watch telephone interview with staff of the Prosecutor's Office of Federation BiH, May 9, 2008.

XI. Public Awareness/Outreach

The experiences of other tribunals that have tried war crimes, crimes against humanity, and genocide has shown that public outreach is a critical means of ensuring that trials have meaningful impact in the communities where crimes were committed. Outreach is essential to understanding the process of trials and to enabling members of different communities to accept a common understanding of the events of the war. An absence of accurate, publicly accessible, information on trials for crimes committed during the war promotes speculation and misunderstanding, often fed by preexisting prejudices. Outreach can combat this and, therefore, enhance these trials' ability to contribute to Bosnia's societal healing.

At present, several efforts are being undertaken to increase outreach and public awareness of cases at cantonal and district courts. The ICTY liaison offices, in conjunction with the OSCE, have produced a video highlighting the importance of outreach at the cantonal and district level which it has screened for judges and prosecutors in different cities within Bosnia.²³⁸ Other efforts to bring together NGOs, prosecutors, judges, police, and members of the public around issues raised by these trials have also been supported by the OSCE and civil society groups.²³⁹ Many of the NGOs involved in this are also active in the Court Support Network (CSN), a network of NGOs that conduct outreach and education dealing with the State Court, but generally not the cantonal or district courts.²⁴⁰

These events allow a forum for prosecutors, police, and others to explain their roles and outline some of the challenges and successes that they have had. Victims' groups and other attendees can pose questions and present their concerns and, thus, gain a clearer understanding of events leading to the prosecution of these cases.

²³⁸ Human Rights Watch interview with staff of the ICTY, Sarajevo, December 4, 2007.

²³⁹ Human Rights Watch interview with Bosnian civil society representative, Tuzla, December 11, 2007; Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

²⁴⁰ Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

These efforts are a significant positive step, but more is needed, and by a broader range of actors. Many NGOs and victims' groups with whom Human Rights Watch spoke stressed the lack of public knowledge regarding trials at cantonal and district courts for crimes under international law and called for greater outreach. Many stated that it was difficult to get information regarding cases or even about the process generally and that this lack of information fed rumors and speculation.²⁴¹

On the other hand, many people who had participated in outreach events spoke very highly of the impact. One NGO stated that an outreach event that they organized began with mutual recrimination where victims' groups attacked prosecutors for lack of action and prosecutors blamed victims for refusing to participate and for changing their testimony. This airing of grievances was ultimately helpful as it began a dialogue between victims' groups and prosecutors that had not previously been possible.²⁴² Another person said that outreach events helped break down prejudices and fostered communication.²⁴³ Another participant stressed the importance of including religious leaders in outreach events: their views can carry tremendous weight in some communities, and it is important that they be part of the broader discussion of accountability for war crimes, crimes against humanity, and genocide.²⁴⁴ One observer credited outreach by the prosecutor's office in Banja Luka as one of the key ways in which that office had been able to build trust and to overcome skepticism among witnesses, including some from among minority ethnic groups.²⁴⁵

The positive effects of greater outreach will make the work of prosecutors and courts easier. Currently, however, many prosecutors and court officials do not consider outreach as part of their duties. Several prosecutors stated that participation in outreach events organized by NGOs was unpleasant for them and that they disliked

²⁴¹ For example, Human Rights Watch interviews with Bosnian civil society representative, Bijeljina, December 10, 2007; Human Rights Watch interview with Bosnian civil society representative, Bijeljina, December 12, 2007; Human Rights Watch interview with Bosnian civil society representative, Banja Luka, December 13, 2007; Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

²⁴² Human Rights Watch interview with Bosnian civil society representative, Tuzla, December 11, 2007.

²⁴³ Ibid.

²⁴⁴ Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

²⁴⁵ Human Rights Watch interview with staff of the ICTY, Sarajevo, December 4, 2007.

facing the accusations of disgruntled victims' groups.²⁴⁶ Some court officials consider that the appointment of a spokesperson is sufficient in terms of outreach and access to public information.²⁴⁷

As a result of this, information can sometimes be very hard to obtain for parties interested in following proceedings. One NGO recounted work that they had done on an informal survey in early 2007 wherein they phoned courts and prosecutors' offices asking for information on cases. They found that only one court, in Trebinje, had a person appointed to handle such requests.²⁴⁸

The role of a spokesperson is an important one. The spokesperson can coordinate communications strategy and ensure accurate and timely dissemination of information to the news media and the public. The spokesperson, however, cannot be a substitute for an outreach program, though the two can ideally complement one another. In this way, the courts and prosecutors can provide information about ongoing cases as well as about broader issues concerning the process of trying and investigating cases dealing with crimes under international law and progress and obstacles facing these cases. Ideally, a formal outreach office should be established to coordinate the outreach activities of various actors involved in trials for war crimes, crimes against humanity, or genocide at the district and cantonal level. Such an office could also coordinate cooperation with NGOs and other agencies with experience in outreach, such as the ICTY Liaison Offices and the OSCE. This is clearly an important area for funding. Though the benefits of outreach may seem somewhat intangible, outreach can facilitate cooperation and support between different groups and greatly enhance the impact of these trials.

²⁴⁶ Human Rights Watch interviews with staff of the Bijeljina District Prosecutor's Office, Bijeljina, December 10, 2007; Human Rights Watch interviews with staff of the Prosecutor's Office of Republika Srpska, Banja Luka, December 14, 2007; Human Rights Watch interviews with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007.

²⁴⁷ Human Rights Watch interviews with staff of the Cantonal Court Sarajevo, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the District Court of East Sarajevo, East Sarajevo, December 6, 2007; Human Rights Watch interviews with staff of the ICTY, Sarajevo, December 4, 2007.

²⁴⁸ Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007. Our own experience gathering information for this report was also difficult. Court officials in some instances required written proof of identity and formal freedom of information applications in order to provide copies of verdicts.

Cantonal and district prosecutors and courts should learn from the examples of other prosecutions of crimes under international law and take a greater role in outreach. The outreach program of the Special Court for Sierra Leone, in particular, could provide ideas of innovative ways to help the message of these trials spread to all parts of the country. These could include producing and disseminating video or audio summaries of cases and arranging outreach events with court personnel and prosecutors in different parts of the country.²⁴⁹

The cantonal and district courts possess an advantage over international tribunals trying similar cases in that they are much closer to affected communities. Physical proximity, however, is not enough. Effective outreach is needed to ensure that society at large can derive the most possible benefit from these proceedings. Ideally, outreach activities should be centralized in an outreach office. In the meantime, court personnel, attorneys, NGOs, victims' groups, and prosecutors at the cantonal and district level should take a more active leadership role in these processes and attempt to create a coordinated outreach program.

²⁴⁹ Human Rights Watch, *Justice in Motion*, p. 29. One Bosnian NGO told Human Rights Watch that they recently produced a series of eight television programs on the issue of outstanding war crimes cases that have begun to be aired on 9 local and regional stations throughout the country; Human Rights Watch interview with Bosnian civil society representative, Mostar, December 17, 2007.

XII. Reform Proposals

The slow pace of trials before cantonal and district courts, as well as the many difficulties with these trials noted above, have prompted many within Bosnia to call for reform of the judicial structure as part of a national strategy for trying cases dealing with crimes under international law. As one civil society representative commented, “We have to finish this.”²⁵⁰ The fear that if trials continue at this slow pace, these cases will remain unresolved indefinitely has lent a sense of urgency to these reform proposals in the last few years.

A number of working groups have been formed to address proposals for reform. These include the working group on a national strategy for war crimes recovery, a working group focusing on “satellite courts,” and a working group on the creation of an appellate court.²⁵¹ In addition, the High Judicial and Prosecutorial Council has also put forward its own proposal for reform.²⁵² The Justice Sector Reform Strategy, put forth by the Ministry of Justice of Bosnia also proposes changes along the lines of those proposed by several of the other proposals.²⁵³ What form, if any, reform takes in Bosnia around this issue is impossible to predict at this writing. Human Rights Watch does not express a preference for any specific reform proposal. Rather, we urge those officials involved in these discussions to take account of the challenges that we have noted regarding trials before cantonal and district courts and to ensure that any reforms adopted address these challenges and ensure the possibility of fair and effective justice for crimes committed during the war.

A question presented by several of these proposals is whether to continue to try these cases at cantonal and district courts or to expand the jurisdiction and capacity of the State Court over all cases involving war crimes, crimes against humanity, or genocide. Neither solution is inherently superior. It is true that many cantonal and district prosecutors expressed a preference for the State Court conducting all war

²⁵⁰ Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 4, 2007.

²⁵¹ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 19, 2007, Human Rights Watch interview with staff of the Court of BiH, Sarajevo, December 21, 2007.

²⁵² Human Rights Watch interview with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 7, 2007.

²⁵³ Human Rights Watch interview with staff of the Ministry of Justice of BiH, Sarajevo, December 4, 2007.

crimes, crimes against humanity, and genocide trials, but this preference often had to do more with resource limitations than the will to conduct trials.²⁵⁴ Additionally, proposals for increased centralization seemed to meet with more support among prosecutors in the Federation than in Republika Srpska.²⁵⁵

Proponents of expanded State Court jurisdiction over crimes under international law named several advantages to this approach. First, such an approach would allow for the uniform application of the law without requiring constitutional reform.²⁵⁶ Additionally, this approach would allow for an easier coordination of evidence and investigations, which are currently not centralized.²⁵⁷

Proponents of maintaining jurisdiction at the cantonal and district level also presented strong arguments in favor of their view. They stressed the need to build up local courts and prosecutors' offices so that they can more effectively try cases and to avoid draining their capacity to staff an enlarged State Court.²⁵⁸ Additionally, they urged the importance of justice being accessible and of trials being held in communities where crimes were committed.²⁵⁹ Some prosecutors also argued that undertaking drastic reform at this late stage would only add further delay to the processing of outstanding cases for crimes committed during the war.²⁶⁰

In fact, proponents of both approaches conceded that in many respects, these two approaches need not be contradictory. There is considerable overlap between the

²⁵⁴ Human Rights Watch interview with staff of the Sarajevo Canton Prosecutor's Office, Sarajevo, December 21, 2007; Human Rights Watch interview with staff of the Tuzla Canton Prosecutor's Office, Tuzla, December 11, 2007.

²⁵⁵ Human Rights Watch interview with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007; Human Rights Watch interview with staff of the East Sarajevo District Prosecutor's Office, East Sarajevo, December 21, 2007.

²⁵⁶ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007; Human Rights Watch interview with staff of the Court of BiH, Sarajevo, December 21, 2007.

²⁵⁷ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor's Office of BiH, Sarajevo, December 19, 2007.

²⁵⁸ Human Rights Watch interviews with Bosnian civil society representative, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 7, 2007; Human Rights Watch interviews with staff of the Mostar Cantonal Court, Mostar, December 17, 2007; Human Rights Watch interviews with Bosnian civil society representative, Bijeljina, December 12, 2007.

²⁵⁹ Human Rights Watch interviews with Bosnian civil society representative, Sarajevo, December 4, 2007; Human Rights Watch interviews with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 7, 2007; Human Rights Watch interviews with Bosnian civil society representative, Bijeljina, December 10, 2007.

²⁶⁰ Human Rights Watch interview with staff of the Banja Luka District Prosecutor's Office, Banja Luka, December 13, 2007.

various reform proposals, and they agree on several key issues.²⁶¹ All of the proposals agree on the need for law harmonization. Likewise, the creation of a central institution for the coordination of evidence need not have implications either way for the jurisdiction of the state or entity judicial authorities. Whichever approach is adopted, these problems must be addressed comprehensively, in a way that addresses the challenges facing trials at cantonal and district courts currently.

One other reform proposal that must be addressed is the creation of non-punitive “solutions” to the backlog of cases dealing with war crimes, crimes against humanity, and genocide.²⁶² Non-punitive transitional justice techniques, such as truth-telling and reparations for victims, have been used successfully in a variety of contexts and can be invaluable tools for promoting societal healing.²⁶³ However, it is imperative that these approaches not be used as a way to avoid the obligation to punish war crimes, crimes against humanity, or genocide. Victims in Bosnia have been promised justice for the crimes committed during the war, and many have waited more than a dozen years to see justice done. Any use of non-punitive transitional justice approaches must be done in way that truly complements ongoing trials and not as a way to deny justice to victims.

²⁶¹ Human Rights Watch interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 19, 2007; Human Rights Watch interview with staff of the High Judicial and Prosecutorial Council, Sarajevo, December 20, 2007.

²⁶² Human Rights Watch interview with Bosnian civil society representative, Sarajevo, December 4, 2007; Human Rights Watch Interview with staff of the Special Department for War Crimes of the Prosecutor’s Office of BiH, Sarajevo, December 4, 2007.

²⁶³ See, for example, Human Rights Watch, *Morocco’s Truth Commission: Honoring Past Victims During an Uncertain Present*, vol. 17, no. 11(E), November 2005, <http://hrw.org/reports/2005/morocco1105/>; Human Rights Watch, “An Approach to Reparations,” July 19, 2001, <http://hrw.org/english/docs/2001/07/19/global285.htm>; Pablo De Greiff, ed., *The Handbook of Reparations* (Oxford, New York: Oxford University Press, 2006).

XIII. Recommendations

To prosecutors in Republika Srpska and the Federation of BiH

- Be sure that where evidence of crimes from the war period reflects violations of international humanitarian law, charges also reflect this.
- Increase efforts to cite relevant international precedent, especially verdicts of the ICTY.
- Make use of all available sources of evidence, including that provided by NGOs and victims' groups and that which could be obtained from state prosecutors and the ICTY. Take advantage of the services of the ICTY liaison offices to obtain evidence from the ICTY.
- Where needed to secure suspects' attendance, request that suspects be arrested and detained in accordance with the law in order to prevent flight.
- Where needed, make requests for measures to protect the identities of vulnerable witnesses. Where needed, make use of the facilities of the State Court to do this.
- Undertake greater and more systematic cooperation with state authorities in order to facilitate a clear national understanding of the number and status of open cases dealing with crimes committed during the war.
- Increase participation in outreach events and improve communication and cooperation with NGOs, victims' groups, and the general public.
- Encourage spokespersons to expand their role in outreach events and to be proactive in providing information on cases to the public.

To the judiciaries of Republika Srpska and the Federation

- Courts should create a dedicated staff position to field requests for information on cases and to publicize the work of the courts. Take steps to make public information, such as verdicts, more freely available to the public.
- Courts must take steps to use existing court facilities in ways that protect the identities of witnesses where needed.
- Judges should follow international precedent, such as cases decided by the ICTY

To police in Republika Srpska and the Federation

- Instruct officers in the importance of cooperation with cantonal and district prosecutors investigating war crimes, crimes against humanity, or genocide cases against persons of all ethnicities.
- Increase training on the investigation of cases dealing with crimes under international law.
- Cooperate fully with police across entity lines investigating cases dealing with crimes committed during the war.

To the governments of Republika Srpska and the Federation

- Work with the High Judicial and Prosecutorial Council to increase the numbers of prosecutors and judges, to provide adequate support staff, and to allow prosecutors in war crimes departments to work exclusively on war crimes, crimes against humanity, and genocide.
- Work with the state government to find a way to harmonize the law applied in cases dealing with crimes committed during the war in different areas of the country.
- Make the necessary legal amendments to create specialized war crimes investigator positions within prosecutors' offices.
- Require entity Judicial and Prosecutorial Training Centres to provide additional training for judges and prosecutors on international law and the investigation of cases involving crimes under international law.
- Create, fund, and staff a centralized authority with the responsibility for coordinating and promoting outreach by prosecutors, police, and court personnel.
- Allocate more resources and positions within police forces to the investigation of cases involving crimes committed during the war and provide these specialists with extensive training in investigations of these crimes and in working with witnesses.
- Provide adequate resources and staffing to social welfare centers to provide support to witnesses.
- Take steps to create the facilities within cantonal and district courts necessary to protect the identities of witnesses.

- Take steps to facilitate prompt allocation of resources necessary for the payment of reserve judges and attorneys representing indigent clients.
- Provide easier access to government archives and records by prosecutors.

To the High Judicial and Prosecutorial Council

- Increase the numbers of cantonal and district prosecutors working on crimes committed during the war and allow prosecutors working on these cases to work in units that specialize exclusively in this practice area.
- Increase staffing of support personnel, including trainees and associates, within cantonal and district prosecutors' offices.

To the Special Department for War Crimes of the Office of the Prosecutor of Bosnia and Herzegovina

- Continue efforts to regularize communication with cantonal and district prosecutors, especially regarding the status of existing case files and investigations.
- Facilitate increased sharing of evidence with cantonal and district prosecutors.
- Complete work on a database to centralize existing case files on crimes committed during the war in Bosnia and clarify the total number of existing files.
- Instruct SIPA to cooperate with investigations by entity authorities into war crimes, crimes against humanity, and genocide to the extent possible without compromising state investigations.
- Facilitate the use of state witness protection facilities by cantonal and district courts and prosecutors.
- Facilitate the use of the ICTY Judicial Database and Evidence Disclosure Suite by cantonal and district prosecutors.

To the Criminal Defense Support Section

- Expand trainings to include defense attorneys working on trials for war crimes, crimes against humanity, or genocide before cantonal and district courts and take further steps to publicize the availability of such trainings.

- Make memos on general points of international law available to attorneys practicing at the cantonal and district level.
- Take steps to facilitate access by defense attorneys before cantonal and district courts to the Judicial Database and Evidence Disclosure Suite of the ICTY.

To the government of Bosnia and Herzegovina

- Eliminate restrictions on extradition of nationals and transfer of cases (where the death penalty is not permitted for the crime at issue).
- Commit additional resources to cantonal and district courts specifically for the creation of adequate witness protection programs and facilities.
- Work to harmonize the conflicting legal codes applied in the State Court, cantonal and district courts, and the Brčko District.
- Create a body with the authority to centralize evidence of crimes committed during the war and coordinate its use.
- Expand staffing and resources to the State Investigation and Protection Agency to allow further cooperation with investigation for trials of war crimes, crimes against humanity, and genocide before cantonal and district courts where police are otherwise unwilling or unable to assist.
- Provide staffing and resources to Criminal Defense Support Section to allow greater use of their services by defense attorneys practicing before cantonal and district courts.

To the governments of Serbia, Montenegro, and Croatia

- Reach an agreement with the government of Bosnia to remove legal impediments to extradition and case transfer.

To the international community

- Urge the governments of Bosnia, Serbia, Croatia, and Montenegro to remove legal obstacles to the transfer of cases and to the extradition of suspects in cases of war crimes, crimes against humanity, or genocide.
- Agree to host witnesses and their families who require international relocation for their protection.

- Coordinate donor initiatives aimed at aiding the Bosnian judiciary with the Ministry of Justice of Bosnia and Herzegovina to allow greater focus of donor resources on priority areas.
- Ensure that initiatives aimed at reform of the Bosnian judiciary, especially requirements for European Union membership, prioritize the needs of cantonal and district justice systems addressing crimes from the war.
- Ensure that police reform in Bosnia takes account of the needs of cantonal and district prosecutors and creates conditions for effective and politically neutral investigation of war crimes, crimes against humanity, and genocide.

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