

amnesty international

Bosnia-Herzegovina

Shelving justice - war crimes prosecutions in paralysis

Summary

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At present, thousands of perpetrators continue to enjoy impunity for war crimes, crimes against humanity and genocide, committed during the war in Bosnia-Herzegovina. An estimated quarter of a million people lost their lives during the conflict, many as a result of extra-judicial executions and deliberate and arbitrary killings. The official number of persons still unaccounted for is around 16,000 (including thousands of unresolved "disappearances"). Rape and sexual abuse of women and girls occurred on a massive scale. However, most of the vast number of case files, recorded and investigated by Bosnian police and prosecutors, are gathering dust in the criminal justice system's offices and archives, instead of generating active and effective prosecutions before the country's courts. At the International Criminal Tribunal for the former Yugoslavia (Tribunal), proceedings have been completed or are ongoing for about 90 persons, most of whom were in leadership positions or responsible for large numbers of these crimes. Thus, many thousands of persons responsible for the worst possible crimes in Bosnia-Herzegovina still have got to be brought to justice in any court.

There is an overwhelming need for a comprehensive, sustainable and truly independent and impartial domestic criminal justice system to start effectively addressing the vast legacy of war-time violations committed in Bosnia-Herzegovina. The victims of these massive and serious violations and their relatives must be served with justice and given access to full reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.

The task ahead is daunting, both in terms of the sheer numbers of violations and alleged perpetrators, and in view of the complexity and sensitivity of these cases. Amnesty International believes that any criminal justice system should, therefore, commensurately acknowledge the specific needs and circumstances prevailing in the country and the wider region, and, crucially, become sustainable in the long-term.

However, Amnesty International considers that the current proposal by the international community -- to create a specialized War Crimes Chamber at the newly established State Court of Bosnia-Herzegovina -- could be a first step in tackling the challenging task, but only if part of a wider strategy which embraces the entire Bosnian criminal justice system dealing with cases of genocide, crimes against humanity and war crimes.

One of the primary reasons for the establishment of the War Crimes Chamber has been the failure of entity courts to ensure fair trials in war crimes cases. Yet the proposal

makes little effort to address the reported shortcomings that have resulted in flawed trials at various levels of the judiciary, and no satisfactory solution is proposed to address this serious problem. Amnesty International continues to recommend that, in order to bring justice home and lay the foundation for a lasting functioning criminal justice system, it would also be necessary to introduce an international component in the Cantonal and District Courts which would be prosecuting war crimes cases. The organization is extremely concerned at the failure of those in charge of establishing the War Crimes Chamber to give sufficient attention and resources to the criminal justice system at the entity level, which points to an inherent lack of perspective and vision on the part of the international community. A court based in the capital will not bring home the fight against impunity to local communities or help rebuild the entire national criminal justice system.

Amnesty International has outlined in this document a number of other concerns which need to be addressed urgently. These include:

- a) the continuing lack of meaningful and unconditional inter-state cooperation between the various countries that once made up Yugoslavia;
- b) the failure of the local authorities to arrest suspects indicted by the Tribunal;
- c) the failure to provide adequate protection of the security of victims and witnesses as a result of testifying at war crimes proceedings: much more needs to be done on the practical and legal level in order to ensure adequate and, if necessary, international, protection of witnesses testifying in war crimes trials before all courts in the country;
- d) the need for thorough and impartial criminal investigations as a vital condition for effective and fair prosecutions; Amnesty International has lobbied the European Union to ensure that the European Union Police Mission, which took over the monitoring of the local police force from UNMIBH in January 2003, plays an active role in scrutinizing and supervising police investigations for human rights violations, in particular those stemming from the war-time period;
- e) few perpetrators have been brought to justice for the horrific crimes of sexual violence against women during the armed conflict, and standard-setting case law of the Tribunal has not yet been used before domestic courts;
- f) the rights of victims, in pursuing a remedy for the violations they suffered, to access to justice and to participation in trial proceedings, have been curtailed by new amendments to the Federation Criminal Code which abolished the right of victims to participate in criminal proceedings as the injured party;
- g) the lack of any reparation mechanisms and the proposed abolition of the Human Rights Chamber, which to date has been the only national institution providing some kind of redress for victims of some war-time violations (notably some cases of "disappearances").

In this document Amnesty International has made a number of detailed recommendations, designed to ensure the development and implementation of an effective and comprehensive action plan to end impunity in Bosnia-Herzegovina at the international, regional, national and entity levels so that, wherever it is possible, all those responsible for genocide, crimes against humanity and war crimes in Bosnia-Herzegovina are brought to justice

This report summarizes a 27-page document (8,768 words), : *Bosnia-Herzegovina: Shelving justice – war crimes prosecutions in paralysis* (AI Index: EUR 63/018/2003) issued by Amnesty International in November 2003. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at <http://www.amnesty.org> and Amnesty International news releases can be received by email:

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Bosnia-Herzegovina

Shelving justice - war crimes prosecutions in paralysis

Introduction

There is an overwhelming need for a comprehensive, sustainable and truly independent and impartial domestic criminal justice system to start effectively addressing the vast legacy of war-time violations committed in Bosnia-Herzegovina. At present, thousands of perpetrators continue to enjoy impunity for war crimes, crimes against humanity and genocide, committed during the war in Bosnia-Herzegovina.¹ An estimated quarter of a million people lost their lives during the conflict, many as a result of extra-judicial executions and deliberate and arbitrary killings. The official number of persons still unaccounted for is around 16,000 (including thousands of unresolved "disappearances"). Rape and sexual abuse of women and girls occurred on a massive scale. However, most of the vast number of case files, recorded and investigated by Bosnian police and prosecutors, are gathering dust in the criminal justice system's offices and archives, instead of generating active and effective prosecutions before the country's courts. At the International Criminal Tribunal for the former Yugoslavia (Tribunal), proceedings have been completed or are ongoing for about 90 persons, most of whom were in leadership positions or responsible for large numbers of these crimes. Thus, many thousands of persons responsible for the worst possible crimes in Bosnia-Herzegovina still have got to be brought to justice in any court.

The victims of these massive and serious violations and their relatives must be served with justice and given access to full reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. The truth about these violations, which presently continues to be bitterly disputed between former opponents, must be established in the wider interests of reconciliation and integration of a divided society. Furthermore, the substantial work carried out by the Tribunal must be complemented and ultimately succeeded by a viable national criminal justice system.

The task ahead is daunting, both in terms of the sheer numbers of violations and alleged perpetrators, and in view of the complexity and sensitivity of these cases.

¹ No exact numbers are available for persons currently under investigation for war crimes in Bosnia-Herzegovina, although Amnesty International was informed during meetings with the RS and Federation entity public prosecutors in May 2002 that estimates for those suspected of these crimes in their jurisdictions were respectively around 3,000 and 6,000.

Amnesty International believes that any criminal justice system should, therefore, commensurately acknowledge the specific needs and circumstances prevailing in the country and the wider region, and, crucially, become sustainable in the long-term.

However, Amnesty International is seriously concerned that initiatives, currently pursued by the international community – notably the Office of the High Representative (OHR) and the Tribunal – if established in the currently proposed form may not result in a criminal justice system that will eventually achieve these goals. A proposal, formulated by officials of the Office of the High Representative (OHR) and the Tribunal, and endorsed by the Peace Implementation Conference² in June 2003 (June 2003 proposal), envisages the creation of a specialized War Crimes Chamber at the newly established State Court of Bosnia-Herzegovina (State Court).³ Prosecutions before the War Crimes Chamber would be carried out by both national and international judges and prosecutors, applying newly adopted criminal and criminal procedures codes and rules of procedure, as well as some of the precedent-setting case law developed at the Tribunal.

As Amnesty International has previously stated, the establishment and effective functioning of this War Crimes Chamber could be a first step in tackling the challenging task, but only if part of a wider strategy which embraces the entire Bosnian criminal justice system dealing with cases of genocide, crimes against humanity and war crimes. However, the current proposal appears to be essentially based on short-term planning aiming to effect the quickest and cheapest possible withdrawal of the international community and the acceleration of the exit strategy of the Tribunal. Essentially, the Tribunal is, therefore, closing down as a result of pressure from the United States of America (USA) and other states which argue that the Tribunal is too costly and that national courts in states that are on the territory of the former Yugoslavia could perform the same tasks more cheaply.

Amnesty International opposes the closing down of the Tribunal until effective alternatives are established by the international community to bring all those responsible for crimes under international law to justice in fair and effective proceedings. Justice can be cost-effective, but justice cannot be achieved on the cheap. The rushed timeline envisaged for the War Crimes Chamber to become fully and independently operational reveals a totally unrealistic and insufficiently detailed plan, which carries a substantial risk that the War Crimes Chamber may only have the resources and time available to prosecute a small number of the thousands of suspects,

² The Peace Implementation Conference (PIC) is an intergovernmental body consisting of over 55 countries and agencies monitoring progress in the implementation of the 1995 Dayton Peace Agreement.

³ Despite its name, Amnesty International understands that the War Crimes Chamber would also have jurisdiction over genocide and crimes against humanity.

selected on the basis of vague and contradictory criteria. This would significantly undermine the battle against impunity – including efforts by the Tribunal itself – and have an adverse impact on the process of reconciliation and reintegration of society. It would neither serve the cause of justice, nor the discovery of the truth nor the right of the victims to full reparations.

Furthermore, the establishment of a system, that will be truly functioning and serving the interests of the country, can only be legitimately achieved through a genuinely inclusive and transparent process of input by and consultation with national governmental and judicial officials and experts, as well as representatives of civil society and non-governmental organizations who have been working on these issues for the last 10 years. There is little evidence to suggest that the current proposal has come about as a result of such a process, implying that the initiative means yet another institution to be imposed upon the country by the international community.

Background

A formal proposal for the establishment of a special War Crimes Chamber in the State Court (May 2002 proposal) was first presented in May 2002 by a group of experts commissioned by OHR to examine options for a future mechanism for the domestication of war crimes trials (including OHR staff, and two ex-members of staff of the Tribunal and a former staff member of the Judicial Systems Assessment Process – JSAP – in the United Nations Mission to Bosnia-Herzegovina (UNMIHB)).⁴

The judicial structure proposed was a special division in the State Court, with jurisdiction which would “bear overall responsibility for the conduct of cases involving serious violations of International Humanitarian Law in Bosnia and Herzegovina”.⁵ The division’s trial and appeal chambers and its prosecutor’s office would be staffed by both Bosnian and international judges and prosecutors. The division would not deal exclusively with all cases but transfer cases to “carefully chosen Cantonal Courts in the Federation, District Courts in Republika Srpska and the

⁴ This issue had become more urgent in view of the envisaged termination of the Tribunal in 2008 and the unsatisfactory way in which domestic war crimes prosecutions had been conducted so far (broadly speaking either sustaining impunity and/or resulting in violations of fair trial rights of the accused). The consultants proposed to set up an International Humanitarian Law Division in the State Court, with jurisdiction analogous to that of the Tribunal. (See: *The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina, Consultants’ report to the OHR*, submitted by Peter Bach, Kjell Björnberg, Johan Ralston and Almiro Rodrigues (Consultants’ Report)).

⁵ Consultants’ Report, page 9.

Brčko District Court where appropriate”.⁶ The May 2002 proposal was never formally publicized.

On 29 May 2002, Amnesty International wrote to the newly appointed High Representative, Lord Ashdown, outlining a number of the organization’s concerns on current domestic war crimes prosecutions in Bosnia-Herzegovina, as well as some comments on the proposal, a copy of which it had obtained.⁷ Although more than a year has elapsed, the OHR has not provided any formal and substantial reply to the organization’s concerns. However, the organization is seriously concerned that most of these concerns about the May 2002 proposal were not addressed in the current June 2003 proposal and remain in urgent need of attention. A detailed overview of these concerns is presented below.

In mid-July 2002, the UN Security Council, upon having examined a report prepared by the President of the Tribunal⁸, endorsed the proposed broad strategy for transferring cases of the “lower-level and intermediary accused” to competent national courts in the region of the former Yugoslavia, so that the Tribunal would be able to complete all its trials (at first instance) by 2008. The Security Council indicated its willingness in this context to consider the proposal of the establishment of a special Chamber to try serious violations of international humanitarian law in the State Court of Bosnia-Herzegovina, as suggested by the OHR and recommended by the Tribunal.⁹

On 12 June 2003, the Steering Board of the PIC endorsed the proposal put forward by the OHR/ICTY working group to establish a war crimes chamber within the State Court.¹⁰ The Steering Board proposed:

⁶ Ibid. page 10. In addition, the report recommended that the division should also have a supervisory role in proceedings conducted at the entity-level courts, with the possibility for deferral of a case to the state-level upon a motion by the State Court prosecutor.

⁷ See: *Bosnia-Herzegovina: Memorandum to the High Representative of Bosnia-Herzegovina*, AI Index: EUR 63/009/2002, May 2002.

⁸ *Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospect of Referring Certain Cases to National Courts*, (S/2002/678), June 2002.

⁹ Statement by the President of the Security Council, S/PRST/2002/21, 23 July 2002.

¹⁰ The proposed War Crimes Chamber would have jurisdiction over three types of cases:

- 1) cases deferred to it by the Tribunal under Rule 11 bis of the Rules of Procedure and Evidence of the Tribunal (these are cases for which indictments have already been issued and confirmed by a judge), currently there are some 15 accused whose cases might thus be deferred,
- 2) cases deferred to it by the Tribunal Prosecutor, for which indictments have not yet been issued (currently involving some 45 suspects),
- 3) Cases currently pending before the entity (Cantonal and District) courts – also known as Rules of the Road cases, after the procedure by which they must first be examined by the Tribunal Prosecutor before a local court can proceed – which should be tried at the State Court level given their sensitivity.

“to task the OHR to establish and co-chair with the relevant Bosnian authorities an Inter-Agency Implementation Task Force (ITF), involving other relevant international organizations, to coordinate the implementation of the project.

“To support the principle that the ITF should become a Monitoring Task Force at the end of the OHR’s mandate, chaired by the BiH Minister of Justice.

“To make realization of the project contingent upon the availability of financial resources.”

The OHR was requested to report back to the PIC on measures taken to create the ITF, and on the outcome of the Donors’ Conference (planned for late October 2003) following a joint OHR/ICTY presentation to the UN Security Council in early October.¹¹

Prior to the PIC Steering Board meeting, there was a consultation process involving other international organizations in Bosnia-Herzegovina, which are similarly monitoring the protection of human rights and the rule of law. They underlined the importance of transparency and genuine and complete incorporation of the national authorities in this process.

Amnesty International considers that any changes to the criminal justice system to address crimes under international law in Bosnia-Herzegovina must ensure that all of the thousands of persons responsible for the massive crimes committed during the war must be brought to justice. Every crime should be thoroughly, independently and impartially investigated and, where there is sufficient admissible evidence, prosecuted. The starting point is that the genocide, crimes against humanity and war crimes committed in Bosnia-Herzegovina in the previous decade were not just crimes against nationals of the country, but were crimes against the international community itself. As such, the international community has a shared responsibility with Bosnia-Herzegovina to bring all those responsible to justice whether in national or international courts. Thus, any solution must take into account the specific needs of the country generated by the legacy of unresolved crimes and exacerbated by the current situation in the country in which public trust in the criminal justice system is minimal and general resentment over the failure to address past abuses huge. Above all, the process should not be driven by international budgetary and political factors,

(From: *Joint conclusions of the Working Group of the ICTY and the OHR regarding domestic prosecution of war crimes in Bosnia-Herzegovina*, 21 February 2003).

¹¹ Security Council Briefed on Establishment of War Crimes Chamber Within State Court of Bosnia and Herzegovina, Press Release SC/7888, 8 October 2003. The establishment and running costs of the War Crimes Chamber for the first five years were estimated to be around € 30 million.

and dictated by short-term and unrealistic planning. Below, the organization has summarized these needs as issues of serious concern, which it believes should be taken into account as a matter of priority during any further debate on the subject.

Issues of concern

1) Ongoing and future war crimes prosecutions before entity courts

Amnesty International is seriously concerned that the June 2003 proposal, while acknowledging the continuing role played by the entity courts in the RS, the Federation and the Brčko District, makes little effort to address the reported shortcomings that have resulted in flawed trials at those levels of the judiciary. Such an approach may be counter-productive, given that the unsatisfactory way in which the entity courts dispensed justice in war crimes cases has been quoted as one of the primary reasons for the establishment of the War Crimes Chamber, and no satisfactory solution is proposed to address this serious problem.¹²

Awarding immediate and sustained attention and support to the prosecutions ongoing at the entity level is all the more necessary as these courts will have to continue (or start) dealing with the bulk of all cases. Currently, some 13 trials for war crimes are taking place before the entity courts, most of them in Sarajevo, Hercegovacko-Neretvanski and Zenica-Dobojski Cantons.¹³ The War Crimes Chamber would have jurisdiction to try (presumably during its first five years of operation) a total of between 108-118 cases involving genocide, crimes against humanity and war crimes (approximately 21 to 23 cases per year). These would include some 50-60 "sensitive" Rules of the Road cases. Meanwhile, it is reported that the Rules of the

¹² *Joint conclusions of the Working Group of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Office of the High Representative regarding domestic prosecution of war crimes in Bosnia and Herzegovina*, The Hague, 21 February 2003, which states on page 1 that both organizations, while formulating their proposals, took into account "... the fact that prosecution of War Crimes by domestic courts in BiH has proven, thus far, to be ineffective and not in compliance with international standards ...".

¹³ According to the Bosniak liaison officer with the Tribunal, over the past six years, local courts (in the Federation) have convicted one Bosnian Croat for war crimes against Bosniaks, ten Serbs for war crimes against Bosniaks and 40 Bosniaks for crimes against Serbs and Croats. He further claimed that he had sent some 1,200 cases [presumably meaning individuals] back to the Federation Justice Ministry, after they had been reviewed and approved by the Tribunal Prosecutor's office under the Rules of the Road procedure. (See : Esad Hećimović: "Zločin bez kazne – Haški tribunal u BiH", *Dani*, 7 March 2003).

Road Unit has reviewed some 500-600 cases which had been referred to it by local prosecutors.¹⁴

No matter what distinction will be made to classify a case as highly sensitive or difficult,¹⁵ it is clear that the entity courts will have to continue to struggle with highly problematic and complex cases, even when there is the political will to pursue criminal proceedings.¹⁶ It is also clear that in many such cases, once any serious investigative work starts, the solving of one crime will likely produce evidence pointing to several other suspects in either the case at hand or other cases of violations, which will then need to be separately processed. In addition, many of these cases – though the alleged perpetrators may be considered “small fry” – will be intricately linked to or overlapping with other cases now being tried before the Tribunal, or in future before the War Crimes Chamber in Sarajevo.¹⁷

For example, the judicial proceedings in the war-time abduction and murder of the *Matanović family* by the Banja Luka District Court have amply demonstrated many of the difficulties faced by those working in the local criminal justice system in prosecuting war crimes. The police investigation which started in late 2000 – though closely supervised and scrutinized by international police monitors and legal experts of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) until the end of its mandate in December 2002 – was already continuously delayed and undermined by internal obstruction.¹⁸ UNMIBH had in addition concerns that the investigation was not at this point focusing on identifying who had command responsibility for the abduction and killings, as investigators reportedly presumed that responsibility rested solely with the Bosnian Serb war-time head of police in Prijedor, who had been killed

¹⁴ It is unclear how many have been sent back in total, although up till now between 70-80 trials for war crimes were held mainly in the Federation. Files in all, or the vast majority of cases, had gone to the Tribunal Prosecutor for the Rules of the Road review procedure.

¹⁵ At present, all cases which fall within the jurisdiction of the State Court are required to be reported to the State Prosecutor by the entity prosecutors. However, at present there are no publicly known legal criteria nor guidelines upon which the selection of cases to be tried at the state level would be based. Indeed, some judges interviewed by Amnesty International in August 2003 believed that the establishment of the War Crimes Chamber at the state level would in practice mean that virtually *all* cases of war crimes would be transferred to that court.

¹⁶ Esad Hećimović: “Zločin bez kazne”, as above.

¹⁷ It is also important to bear in mind that, firstly, many of such “lower-level” alleged perpetrators continue to wield considerable influence in their local community and in many cases could be considered serial killers in any other context.

¹⁸ See: *Bosnia-Herzegovina - Honouring the ghosts: Confronting impunity for “disappearances”*, AI Index EUR 63/004/2003, March 2003, pages 29-31.

by Implementation Forces (IFOR) during an arrest attempt in 1997.¹⁹ In late January 2003, the Banja Luka District Prosecutor finally charged 11 Bosnian Serb men (all of them former police officers) for war crimes against the civilian population for their involvement in the illegal detention of the Bosnian Croat family. The trial against these defendants opened on 30 June 2003 but was immediately postponed as one of the defence lawyers asked for the case to be transferred to another court. The RS Supreme Court rejected this request in early July; proceedings were still adjourned at the time of writing of this document (late September). Meanwhile, the continuing police investigation into the murder of the victims apparently uncovered further evidence of war-time related violations of international law against the non-Serb population in the Prijedor area. Criminal reports based on this new evidence have been similarly forwarded to the local prosecutor.²⁰

Another example of how artificial and unworkable the sensitivity criterion may likely prove to be in practice is posed by trial proceedings currently taking place before the Zenica Cantonal Court, against Bosnian Croat Dominik Ilijašević. During the war, specifically during the Bosniak-Croat conflict, the accused was the deputy commander of a special unit of the Bosnian Croat armed forces, the HVO (*Hrvatsko vijeće obrane*) known as the *Maturice*, which was alleged to have carried out large scale killings of Bosniak civilians during an attack on Stupni Do village in Central Bosnia in October 1993. His superior commander, Ivica Rajić, is currently also awaiting trial on charges of command responsibility for war crimes against the non-Croat population – notably the Stupni Do massacre – at the Tribunal.²¹ Trial proceedings against Dominik Ilijašević opened in December 2002 and adjourned in mid-August. Given that Dominik Ilijašević and Ivica Rajić are alleged to have been involved partly in the same crimes, prosecution evidence collected and analysed by the Tribunal Prosecutor Office (which had also reviewed Dominik Ilijašević's file under the Rules of the Road procedure) could well be used by the Zenica Cantonal Prosecutor on his case. However, although the Tribunal Prosecutor reportedly sent evidence from its archives to the Zenica prosecutor in early July, the Presiding Judge reportedly declared this material inadmissible under current Federation criminal

¹⁹ IFOR was acting upon an arrest warrant for this suspect, Simo Drljača, issued by the Tribunal; the Tribunal Prosecutor had charged him and two others for genocide against the non-Serbian population of Prijedor.

²⁰ Letter from the Head of the Criminal Police Department in Banja Luka to Amnesty International members in the Netherlands, dated 10 April 2003.

²¹ *Prosecutor v. Ivica Rajić*, (IT 95-12), of 29 August 1995. Ivica Rajić was arrested by Croatian police in April 2003 and extradited to the Tribunal in June.

procedure law and threatened to take disciplinary action against the Deputy Cantonal Prosecutor if she were to again “delay trial proceedings”.²²

It is also reported that prosecution witnesses during the trial were insufficiently protected by the presiding judge and other judicial officials from intimidating and offensive treatment by the accused and his family and supporters.²³ The case is further compromised by the fact that yet another sub-commander of the *Maturice*, who had been tried and acquitted by a court in neighbouring Croatia, provided testimony to the investigative judge and the court which could have been used to challenge Dominik Ilijašević’s alibi (see below).

In its May 2002 Memorandum to the High Representative on this issue, Amnesty International recommended that, in order to bring justice home and lay the foundation for a lasting functioning criminal justice system, it would also be necessary to introduce an international component in the Cantonal and District Courts which would be prosecuting war crimes cases. As stated above, no formal response was ever received to this suggestion. However, Amnesty International understands that at present there is no international political will to extend international participation to the war crimes prosecutions ongoing before the entity courts.²⁴ The organization is extremely concerned at the failure of those in charge of establishing the War Crimes Chamber to give sufficient attention and resources to the criminal justice system at the entity level, which points to an inherent lack of perspective and vision on the part of the international community. Ultimately, a Sarajevo-based court which is established and expected to function virtually in isolation from the work done by the rest of the country’s criminal justice system will not be a viable institution equipped to tackle the problems it was created to solve. It will not be able to investigate and, if there is sufficient admissible evidence, prosecute more than a handful of the thousands of persons suspected of committing genocide, crimes against humanity or war crimes in Bosnia-Herzegovina in the first half of the last decade. Many of the problems that plague the Tribunal will be replicated at the national level. A court based in the capital will not bring home the fight against

²² “Kome trebaju haški dokazi?”, *Dani*, 29 August 2003. Among the documentation that was reportedly forwarded by the Tribunal were records of the intelligence services of the HVO and earlier statements made by Dominik Ilijašević, the Office of the Prosecutor had also offered the Zenica court to hear one of its own investigators as a witness. Amnesty International understands that the issue of admissibility of Tribunal documents and evidence in local courts is currently still the subjects of discussion between Tribunal officials, the OHR and members of the national judiciary.

²³ Esad Hećimović, “Sudjenje svjedocima”, “Zločin bez kazne” *Dani*, 3 February and 7 March 2003.

²⁴ US Ambassador for War Crimes, Pierre Richard Prosper, in a meeting with members and staff of Amnesty International USA in April 2003, said that this particular proposal was not really being discussed and that it was not considered feasible from a resource perspective.

impunity to local communities or help rebuild the entire national criminal justice system.

It should be recognized that the scope of these problems is so great, that no overnight solutions (or any solutions that are straitjacketed by stringent timelines and budgetary considerations) are appropriate or will be effective in laying a foundation of post-war restorative justice at all levels in the country. In addition, it should be remembered that there is no statute of limitations for these crimes, precisely in recognition of their gravity – this particular legal feature has proven to be invaluable in other countries struggling with a legacy of human rights abuses for which perpetrators could not be brought to justice for many years due to political circumstances, such as Argentina, Chile and Peru.

2) Regional cooperation

As the experiences at the Tribunal have shown, the effective investigation and the conduct of trials of alleged perpetrators meeting international standards of fairness and impartiality require time and resources. Although this is partly explained by the vast amounts and complex contents of documents, witness statements and other materials introduced and examined as evidence, major factors in the delay of trials have been the continuing lack of meaningful and unconditional cooperation from the local authorities in the region in virtually every case prosecuted.²⁵

If regional cooperation with the Tribunal has been less than ideal, the situation on the level of inter-state cooperation between the various countries that once made up Yugoslavia is catastrophic. By and large, countries either directly or indirectly refuse to cooperate or are engaging in cooperation agreements which appear to have the ultimate aim of stifling prosecutions altogether, guaranteeing lasting impunity for perpetrators from their own side who committed violations.

For example, one alarming recent initiative is the joint proposal by the justice ministers of Croatia and Serbia, which appears to cement both countries' continuing refusal to transfer nationals suspected of war crimes to other jurisdictions, including

²⁵ See, for example: Press Release CC/P.I.S./727e of 14 February 2003, which quotes the Tribunal Prosecutor as saying that "the task of her office was more and more complex", and that "full cooperation is needed to carry out in the given timeframe the full investigation programme ...". She complained about the lack of cooperation by Croatia and Serbia and Montenegro and said that she still needed "full access to evidence and full access to documents". The Tribunal Prosecutor reiterated these concerns in her most recent address to the UN Security Council on 9 October 2003 (See ICTF Office of the Prosecutor Press Release, FH/P.I.S./791-e, of 10 October 2003)

each other's.²⁶ Serbian Justice Minister Vladan Batić said that the agreement in practice envisaged the formation of working groups which would return birth certificates (to persons who left their country during the war) and which would draw up lists of all persons under investigation or indictment so that would be no more "secret report, investigations, indictment and judgments". Both countries would prosecute "their own citizens", who upon conviction would serve their sentences there. He emphasized that Serbia could not extradite its own citizens and that it was only obliged to surrender people to the International Criminal Court under the Rome Statute of that Court.²⁷ These statements are, however, in direct contradiction to internationally agreed principles such as the United Nations (UN) principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly of the UN in Resolution 3074 (XXVIII) of 3 December 1973. This resolution sets out an extensive list of obligations of states to cooperate in the investigation and prosecution of war crimes. This obligation of states to cooperate in the investigations and prosecutions of these crimes was reaffirmed in the Preamble to the Rome Statute, which states " ... that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

In particular, Amnesty International underscores the fundamental principle that states must not shield persons, suspected of crimes under international law, from justice, and that they are under an obligation to either investigate and prosecute such persons, or extradite them to states that are willing to exercise jurisdiction.²⁸

Given the fact that prosecutions for genocide, crimes against humanity and war crimes of Serb citizens so far have been the exception, rather than the rule, in the

²⁶ See Croatian News Agency HINA, "Croatia and Serbia to cooperate in prosecuting war criminals", 2 June 2003, and "Croatia, Serbia to step up cooperation on war crimes investigations", 20 July and 2003.

²⁷ *Dnevnik*, "Intervju: Vladan Batić, Ministar pravde i lider demohrišana", 20 July 2003. In fact, Article 35, Paragraph 2 of the 2003 Constitution of Serbia and Montenegro states that "A citizen of the state union of Serbia and Montenegro may not be deprived of citizenship, expelled from the state union of Serbia and Montenegro, or extradited outside its territory, save in accordance with the international obligations of the member states." This wording would raise the presumption that Serbia and Montenegro have an obligation to bring those suspected of crimes under international law to justice before their own courts in fair and impartial proceedings or extradite them to another states able and willing to do so.

²⁸ See also *Amnesty International: Universal Jurisdiction: The duty of states to enact and enforce legislation; Chapter Five (Crimes against Humanity: The legal basis for universal jurisdiction)*. AI Index: IOR 53/008/2001, September 2001.

current Serbian criminal justice system, it would appear very doubtful that many effective prosecutions will be initiated soon in that country against alleged Serb perpetrators of such crimes against non-Serb victims.²⁹ Meanwhile, in neighbouring Bosnia-Herzegovina and Croatia, prosecutors have been amassing evidence against alleged perpetrators now thought to be in Serbia or Montenegro, but their requests for the extradition of these suspects have so far not been met.³⁰ One example among many others in this respect is the deadlocked prosecution of Bosnian Serb Veselin Čančar, wanted by the Sarajevo Cantonal Court for war crimes committed in Foča. After local RS police failed to apprehend him, despite having received an arrest warrant by the Sarajevo court, the suspect apparently fled to neighbouring Serbia and Montenegro in November 2002 and has yet to be transferred to the custody of the court.³¹

Another case which has been dragging on for years is the extradition request concerning (former) Bosnian Serb Veselin Vlatković, nicknamed Batko. The Federation Justice Minister had already in 1999 requested his extradition request from the then Federal Yugoslav authorities in order for him to be tried before the Sarajevo Cantonal Court for his alleged involvement in the abduction, rape and murder of scores of Sarajevo civilians in Grbavica suburb in 1992. Prior to the request the Tribunal Prosecutor had reviewed the case under the Rules of the Road procedure and, having found sufficient evidence to proceed, returned it to the Sarajevo Cantonal Court for prosecution. However, the Montenegrin authorities categorically refused to hand over the suspect, claiming they could not extradite their nationals to another country.³²

²⁹ Amnesty International notes the recent conclusion of trial proceedings in the Podgorica and Belgrade courts which resulted in convictions of five Serb and Bosnian Serb men for war crimes against the civilian population committed inside Bosnian-Serb held territory (the so-called Štrpci and Sjeverin cases). However, in both cases the organization expressed concern that those holding command responsibility for these crimes continued to evade justice (See: *Serbia and Montenegro: Sjeverin war crimes verdict in Belgrade – Amnesty International calls for all those responsible for the policy of abductions and murders to be brought to justice*, AI Index: EUR 70/023/2003, October 2003).

³⁰ It should be pointed out that many of these alleged perpetrators fled to Serbia or Montenegro with the express purpose to escape judicial proceedings for war-related crimes and gained citizenship of those countries solely on the basis of their ethnicity. The same applies to Bosnian Croat criminal suspects, who have for similar purposes exploited the relative ease by which persons of Croatian origin (regardless of their country of birth or residence) can obtain citizenship of the Republic of Croatia and the reluctance of the local authorities to hand them over to another jurisdiction for criminal proceedings.

³¹ See Bosnia-Herzegovina entry in *Concerns in Europe and Central Asia July-December 2002*, AI Index: EUR 01/002/2003, February 2003. Veselin Čančar had already been found guilty by the same court on other charges of war crimes in 1998; he was subsequently transferred to the RS to serve his sentence and soon afterwards released from prison after having been amnestied by the RS President.

³² The Montenegrin state prosecutor stated in late 2000 that Veselin Vlahović – then imprisoned for robbery – would be tried for war crimes in Podgorica and requested and received some documentation from the Sarajevo Cantonal Court. However, according to Amnesty International's information, no trial

Furthermore, the stated intention of the Serbian and Croatian authorities to try their own nationals for war crimes committed outside their jurisdiction under the principle of universal jurisdiction would similarly necessitate detailed judicial cooperation agreements as well close regional cooperation by the authorities, in particular the police on issues such as the exchange of data and witness protection (see below). The particular circumstances prevailing in the region mean that most local courts with jurisdiction to try war crimes have amassed large amounts of evidence on war crimes where the victims were from their "own side". Meanwhile the alleged perpetrators for these crimes now reside in another country where their prosecution will be the responsibility of a local court which will have minimal information on the crimes committed, and before which many victims and witnesses may be loathe to testify.

In some cases, persons accused of responsibility for the same crimes, who would normally have been tried jointly are now being prosecuted in separate countries for the same crimes with widely disparate results which further undermine the course of justice. In the above-mentioned Zenica war crimes trial, another member of the *Maturice* formation had been acquitted of war crimes charges by the Split County Court in Croatia, in early 2001. This person had allegedly stated to the Split investigative judge that the attack on Stupni Do had been carried out by three HVO commanders, including himself and Dominik Ilijašević, directly contradicting the latter's alibi that he had never participated in the operation. However, none of the evidence gathered by the Split County Court in this case was ever transferred to the Zenica Court, which was seized of the same case, and a request for extradition was reportedly rejected by Croatian Interpol.³³

Meanwhile, a further barrier to effective investigations and prosecutions lies in the fact that many relevant official war-time documentary materials and records remain inaccessible to local investigators, prosecutors and courts, as these are (now)

proceedings for war crimes were ever initiated against the suspect, who escaped prison in June 2001 and has since gone into hiding. In September 2001, the Sarajevo Cantonal Prosecutor, Mustafa Bisić – whose office has so far completed around 15 war crimes prosecutions, the highest number in the country – criticized the lack of cooperation by Croatia and Serbia in extraditing their citizens for crimes under international law. He stated that he had previously attempted through the Bosnian foreign minister to initiate a bilateral agreement on extradition for war crimes and terrorism, but that this proposal had met with deaf ears. (*TV Bosnia-Herzegovina*, "Bosnian prosecutor: Croatia, Serbia reluctant to extradite war crime suspects", 7 September 2001).

³³ Esad Hećimović, "Dokazi čekaju tužioca", *Dani* 4 April 2003.

stored in another country, and hence another jurisdiction.³⁴ One particularly intractable situation has developed with regards to some cases involving alleged Bosnian Croat perpetrators in the Federation, given that the entire HVO archives were transported to the Croatian State Archives in Zagreb and have remained there ever since. These archives contain invaluable information which has been used in several proceedings before the Tribunal. However, according to Amnesty International's knowledge, no attempt was ever made to return the archive to the Federation Ministry of Defence (as the HVO was formally integrated into the Federation Army).³⁵ As the examples above have shown, cooperation between prosecutors in Bosnia-Herzegovina, Serbia and Croatia is occurring in only a minority of cases and even then it is characterized by delays, and obstruction, fuelled by the mutual lack of trust and in the absence of formal judicial cooperation agreements, on which adequate and effective collaboration should be based.

3) Justice for women

As has been abundantly and graphically reported, women were massively affected by violence during the armed conflict in Bosnia-Herzegovina, including by being subjected to horrific crimes of sexual violence. Few perpetrators have been brought to justice for these serious violations of mental and physical integrity – and virtually all concern cases prosecuted at the level of the Tribunal.³⁶ Despite the long-lasting and damaging effects these violations have had on the physical and mental health of the victims as well as on their wider social and economic circumstances, their suffering continues by and large in silence.³⁷ With the notable exceptions of the work of some women's non-governmental organizations, adequate medical and psycho-social support in general is unavailable.

³⁴ The Croatia-Serbia agreement also appears to have conspicuously left out any mention of the transfer of documents that may have to be entered into evidence in any future prosecutions.

³⁵ See also: *Bosnia-Herzegovina, Honouring the ghosts – confronting impunity for "disappearances"*, AI Index EUR 63/004/2003, March 2003, pages 36-37. Amnesty International has been subsequently informed by Federation authorities that neither the Ministry of Defence nor the Guard Corps of the Federation Army (the legal successor of the HVO) have inherited any archives from the war-time period (letter by Federation Defence Minister Miroslav Nikolić to Amnesty International members in the USA, working on the case of "disappeared" Bosnian Serb Dragan Mitrović, dated 9 June 2003).

³⁶ See Tribunal Judgments in Case Nos. IT-96/21 ("Čelebići Camp"), IT 97-25 ("Foča"), IT-95/17/1 ("Lašva Valley/Furundžija").

³⁷ See: Economic and Social Council: *Integration of the human rights of women and the gender perspective: violence against women*. E/CN.4/2003/75, 6 January 2003, paragraphs 15-25.

Amnesty International urges that the needs of women, who were subjected to violence and violations during the armed conflict, should become an immediate priority in any further discourse on the future of war crimes prosecutions, whether these will take place at the level of the State Court, or in the entity courts. It has been acknowledged that, were it not for the courage and determination of women survivors testifying about crimes of sexual violence committed against them, few prosecutions for such before the Tribunal and the International Criminal Tribunal for Rwanda would have succeeded. However, the needs of these women, ranging from protection against risks to their physical security, to psychological, social and economic support both during trial proceedings and afterwards, have often not been adequately addressed.³⁸

Officials engaged in the investigations and judicial process must receive adequate training and support, in order to ensure a gender sensitive approach in dispensing justice for such violations. Amnesty International believes that concerted efforts should be made – in particular at the level of the State Court War Crimes Chamber – to recruit women in the offices of the War Crimes Prosecutor and the investigative agencies which will work in narrow cooperation with the courts on all levels. Such steps would also be in keeping with repeated calls by the international community and the local women's movement to promote the inclusion of women, in particular in post-conflict societies, into decision-making bodies and the decision-making process.³⁹

A similar approach should also be followed in order to provide adequate support for women survivors of crimes of sexual violence who will be testifying at proceedings, both in preparation for and follow-up to their testimonies. An example of recent efforts to gather recognition for the continued vulnerable position of these women is the initiative by the women's organization Medica Zenica to grant them the status of civilian victims of war. This status would give survivors of sexual violence the right to various social benefits, including social protection for themselves and their children.⁴⁰

³⁸ See for example: *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building*, United Nations Development Fund for Women, 2002, Chapter 7.

³⁹ See for example the Beijing Platform for Action, Paragraph 142 (b) calling for governments and international intergovernmental institutions to "aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant international bodies ..." (Report of the Fourth Conference on Women, Beijing 14-15 September 1995, A/CONF.177/20).

⁴⁰ See: *Saopštenje sa okruglog stola ratna silovanja 10 godina poslije*, Zenica 6 May 2003.

Furthermore, it is imperative that the standard-setting jurisprudence which has been issued by the Tribunal in various cases of crimes of sexual violence should be applied by the Bosnian courts in order to achieve justice for women and consistency in the application of international law. In particular the definitions of rape and sexual enslavement, painstakingly and carefully developed in Tribunal case law, should be included in domestic criminal law on all levels, in order to ensure that women who were subjected to crimes of sexual violence during the war receive justice.⁴¹ Currently, the State Criminal Code's definition of rape constituting a crime against humanity provides that the act consists of "[c]oercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity."

However, such a definition could unnecessarily limit the scope of acts which should be considered as rape, in particular in the many cases where Bosnian women were subjected to repeated rapes and sexual violence while held in detention or in conditions amounting to detention, but where the element of coercion by force or by threat of attack was not or not permanently present. It also neglects pertinent case law developed by the Tribunal, precisely in recognition of the factual situation prevailing in certain areas in Bosnia-Herzegovina during the war. The Tribunal Appeals Chamber in the Foča case – a precedent-setting case in terms of describing acts of rape and sexual enslavement as crimes against humanity – held that, "[a] narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances *without relying on physical force*" (emphasis added).⁴² The Appeal Judgment further states that, in the Foča case, the detention of the women (often in *de facto* detention centres) in itself amounted to "circumstances that were so coercive as to negate any possibility of consent".⁴³

⁴¹ Article 172 (g) of the 2003 State Criminal Code, parts of the provision are repeated under Article 173(e) ("War Crimes against Civilians). The 1998 Federation Criminal Code defines rape as compelling "another person to sexual intercourse by force or threat of force of immediate attack upon life and limb, or life or limb of someone close to that person" (Article 221), the 2000 RS Criminal Code uses virtually the same wording describing the crime of rape (Article 183).

⁴² *Appeal Judgment in Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23 & IT-96-23/1A, 12 June 2002, Paragraphs 125-130. The Appeals Chamber dismissed the appellants' arguments, that the sexual intercourse should have been accompanied by force or threat of force and that the victims should have offered "continuous" or "genuine" resistance. One of them argued if such resistance had not been present throughout the sexual intercourse "... it may be concluded that the alleged victim consented to the sexual intercourse".

⁴³ *Ibid.*

Similarly, the definition of sexual enslavement, as developed by the Trial Chamber in the same *Kunarac et al* case, could be of direct relevance to many other cases of perpetrators who could be tried before the War Crimes Chamber and the entity Courts.⁴⁴ However, the current descriptions of enslavement in the State Criminal Code, as well as the Federation and RS Criminal Codes, do not encapsulate all elements of this crime (as the same criteria apply as the one mentioned above for the crime of rape) which again could result in perpetrators escaping justice.

4) Participation and reparation of victims in the judicial process

The right to reparation of victims of grave human rights violations and abuses is one that has been expressly recognized in international law.⁴⁵ In pursuing a remedy for the violations they suffered, victims have the right to access to justice and to participation in trial proceedings.⁴⁶ In this regard the lack of such possibilities in trials at the Tribunal (or the International Criminal Court) has been criticized.⁴⁷

The scope for victims' participation has been further restricted by the continuing legal reform process in Bosnia-Herzegovina. New amendments to the Federation Criminal Code, which were recently adopted, abolished the right of the victim to participate in criminal proceedings as the injured party. Under the old legislation, the injured party had the right, during the trial, to have access to all material presented as evidence, to propose further evidence and to question and challenge the statements of the accused and witnesses.⁴⁸ Similar provisions, which were in force in the RS criminal procedure, were also abolished. Amnesty International notes that such steps may be inconsistent with the UN Declaration of

⁴⁴ The *Kunarac* judgment of 22 February 2001 lists a number of factors which should be considered in dealing with these cases, namely: "... control over someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuses, control of sexuality and forced labour ... as well as the mere ability to buy, sell, trade or inherit a person or his or her labours or services ..." (Paragraph 543).

⁴⁵ See: *Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* (UN Doc: E/CN.4/2000/62, at Annex), and Article 75(1) of the Rome Statute.

⁴⁶ See Article 68 of the Rome Statute and the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (UN Doc A/40/53, 1985).

⁴⁷ For example in *Integration of the human rights of women and the gender perspective*, as above, Paragraph 22. The Tribunal Prosecutor, Carla del Ponte, has also regretted that the Tribunal's Statute makes no provision for victim participation during the trial (Speech of Tribunal Chief Prosecutor to the UN Security Council, 21 November 2000).

⁴⁸ Article 55, Federation Code of Criminal Procedure.

Basic Principles of Justice for Victims of Crime and Abuse of Power⁴⁹ and current standards as reflected in Article 68 of the Rome Statute.

Amnesty International has previously pointed out the lack of any reparation mechanisms in its 2002 Memorandum to the High Representative (see above) and in its report on “disappearances” in Bosnia-Herzegovina of March 2003. In the latter report, the organization suggested that the possibilities should be explored to establish a trust fund for victims, the beneficiaries of which would include victims of perpetrators tried at all levels (the War Crimes Chamber as well as the Cantonal and District Court). However, no further steps have been taken so far to develop this proposal.

Amnesty International underlines the need to reinitiate substantial discussion on this issue in light of the proposed abolition of the Human Rights Chamber, the only national institution which has provided some kind of redress for victims of some war-time violations (notably some cases of “disappearances”).⁵⁰ Persons, whose rights have been violated should have equal and unimpeded access to justice, which the current court system – given existing shortcomings, and backlogs and delays resulting from the extensive reform process – is by and large still unable to provide. Removing this avenue of reparations at this moment is premature and not in the interests of many Bosnian citizens, or indeed the successful reform of the judiciary itself.

The current lack of attention given⁵¹ to this important element of present and future prosecutions for war crimes is at serious risk of selling victims short and strengthening the feelings of alienation and dissatisfaction with the judicial process – on both the international and local level -- which are already widespread among large parts of the population.

5) Witness protection

The issue of protecting the security of victims and witnesses as a result of testifying at war crimes proceedings has been the subject of protracted discussion in Bosnia-Herzegovina. Reports of harassment and intimidation of trial witnesses have emerged during virtually all war crimes trials that have taken place to date, often resulting in the collapse of prosecution cases or the significant reduction of evidence as witnesses changed or revoked statements given earlier. While the adoption of witness protection legislation (currently only in force on the state level, and to a limited extent in the

⁴⁹ Adopted by General Assembly resolution 40/34 of 29 November 1985.

⁵⁰ See: *Bosnia-Herzegovina: Abolition of Human Rights Chamber leaves citizens unprotected*, News Service No. 139, 11 June 2003.

Federation) goes some way towards resolving the problematic situation, much more needs to be done on the practical and legal level in order to ensure adequate protection of witnesses testifying in war crimes trials before all courts in the country.

Given that some witnesses may never be safe inside the country, there will be a need to build effective cooperation with other states of the former Yugoslavia as well as with other governments internationally. Amnesty International has in this regard urged that both a regional and wider international approach be adopted as a matter of urgency. As a first step a multi-lateral, regional protection scheme should be set up by the relevant Ministries of the Interior in Bosnia-Herzegovina, Croatia and Serbia and Montenegro, which would facilitate the safe and expedient travel of witnesses to and from proceedings, and resettlement of vulnerable witnesses. Such a scheme could partially build upon the Declaration on the Protection of Information and Witnesses in Criminal Proceedings, signed in mid-June by Interior Ministers of the Southeast Europe Cooperation Process (SEECF).⁵¹ It may also require legislation to ensure that practical steps are effective. The national criminal justice systems in the region should draw upon the legal and practical experience of the two international criminal tribunals.

In addition, for witnesses who need resettlement in other countries, the international community must contribute to the development of an international program. The need for international protection for those testifying at national war crimes trials should be recognized by the United Nations High Commissioner for Refugees (UNHCR) as such in its Position on Categories of Persons from Bosnia and Herzegovina in Continued Need of International Protection.⁵²

Finally, the point needs to be made that the protection of vulnerable witnesses must take account of other needs apart from their physical security. These politically-charged trials have a profound social impact – both at the general level of the

⁵¹ *Sarajevo Declaration of the Ministers of Interior or Public Order and State Representatives from South Eastern Europe concerning the fight against organized crimes, regarding in particular Data protection and processing, as well as Witness protection.* This Declaration was the product of the ministerial conference of interior ministers of the South East Europe region under the auspices of the Stability Pact for South Eastern Europe, held on 18 and 19 June 2003 in Sarajevo. The conference dealt with issues of illegal migration, trafficking and other forms of organized crimes, and the role of regional policing in war crimes proceedings was apparently not on the agenda.

⁵² In its latest publication, (*UNHCR's Concerns with the Designation of Bosnia and Herzegovina as a Safe Country of Origin* of July 1993), the agency refers to war crimes witnesses as one category of persons requiring special attention when determining their continued need for international protection and reports instances in which witnesses who had testified at the Tribunal were subjected to violent attacks upon their return to Bosnia-Herzegovina.

community at large and at the level of those participating in the proceedings. They do not take place in an academic, judicial vacuum but are very much part of the dynamics of political and social developments, as many proceedings so far have taken place against a backdrop of mass publicity. Practical, psycho-social and medical support should be offered to all vulnerable witnesses, in particular with regards to the high risk of re-traumatisation as a result of giving testimony and being subjected to cross-examination. The need for such support is expressly recognized in international law. Article 68(1) of the Rome Statute requires the Court and the Prosecutor to take such measures.⁵³

The dire economic and social living conditions of many witnesses (in particular former detention camp inmates, rape victims, displaced persons, single parents and the elderly – categories which obviously to a large extent overlap) need specific attention as well. Therefore, it is recommended that witness protection schemes work in close cooperation with the local health and social service system, as well as with organizations with experience in working with vulnerable and traumatized individuals.

6) Police investigations

Thorough and impartial criminal investigations are a vital condition for effective and fair prosecutions, particularly in these complex and sensitive cases. In view of this requirement, Amnesty International has lobbied the European Union to ensure that the European Union Police Mission, which took over the monitoring of the local police force from UNMIBH in January 2003, plays an active role in scrutinizing and supervising police investigations for human rights violations, in particular those stemming from the war-time period.⁵⁴ Amnesty International has since learnt that in May 2003 a small unit was established inside the EUPM Headquarters for the purpose of monitoring local war crimes investigations. In a reply by Mr Solana, received by the organization in March 2003, following the publication of another report on the

⁵³ Article 68 (1) provides that : “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” See also Articles 36(8)(b), 42(9) and 43(6) of the Rome Statute.

⁵⁴ See: *Bosnia-Herzegovina: AI's recommendations on the European Union Police Mission, Memorandum to Javier Solana, Secretary General of the Council of the European Union*, AI Index: EUR 63/018/2002, 22 October 2002.

issue of unresolved “disappearances”, he stated that, though the EUPM’s priorities would remain focused on organized crime and returnee security, several other training programs were being developed to improve local crime investigation, police-judicial cooperation and training in witness protection.⁵⁵

While welcoming these measures, Amnesty International remains concerned that the approach of the EUPM so far suggests that it is soft on the worst possible crimes and that it does not appear to recognize the close links between and interdependence of these various criminal offences. The overwhelming impunity for perpetrators of genocide, crimes against humanity and war crimes has both a direct and indirect impact on the security of returnees and the extent and nature of organized crime. Establishing a functioning rule of law will ultimately depend upon tackling the legacy of the past, not as a side issue, but as a major and continuously contributing factor to other types of crimes.

Despite such measures, enormous problems remain with police investigations of genocide, crimes against humanity and war crimes, specifically where those crimes were allegedly carried out by “their own side”, or where former or current colleagues were amongst those involved in the perpetration or subsequent cover-up of the crime. The large-scale involvement of the Bosnian war-time police apparatus in violations of international law poses a two-fold problem. Firstly, most police officers who served during the war and were allegedly responsible for violations remain to be brought to justice – the so-called “low-level” suspected perpetrators whose cases will not be tried by the Tribunal.⁵⁶ Where these officers remain inside the force (or maintain close ties with it) public confidence in the police will continue to be low, especially amongst the minority returnee community. Secondly, the presence and influence of present or former police officers may seriously undermine and compromise police investigations into war crimes carried out in the police area of responsibility where they are or were serving. Although the UNMIBH de-certification process went some

⁵⁵Letter by Javier Solana to the Director of the Amnesty International European Union Office, 25 March 2003.

⁵⁶By late 2002 UNMIBH had de-certified 60 police officers in connection with allegations of involvement in violations of international humanitarian law during the war, based on information obtained from investigators at the Office of the Prosecutor at the Tribunal. However, while domestic investigations were pending in many of these cases, only a very small number of these officers were standing trial for the violations they had allegedly committed, despite the obligation on the relevant Ministry of Interior to start criminal investigations into allegations UNMIBH had put forward against the removed police officers. For more information on the rationale and scope of the de-certification process, see: “Non-prosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnian Police Officials”, by Gregory L. Naarden, *The American Journal of International Law*, Vol. 97:342, April 2003.

way towards removing police officers, suspected of both complicity in and direct responsibility for war crimes, no follow-up process was reportedly initially envisaged by the EUPM, which chose to rely on internal investigation and disciplinary procedures adopted by the police authorities during the UNMIBH mandate.⁵⁷ Therefore, Amnesty International strongly recommends an independent screening mechanism, which can remove from active service police officers against whom sufficient information on their involvement in war-time violations has been submitted. It should be recognized that, given the continuing nature of investigations, both at the level of the Tribunal and at the local level, new incriminating information on individual officers should be expected to surface in future and adequate measure must remain in place to ensure that such information is acted upon appropriately and immediately.

For example, two RS police officers serving in Višegrad, who had been certified by UNMIBH/IPTF in late 2002, had been under investigation for war crimes by the Goražde Cantonal Court (in the Federation). In June 2002 the Tribunal Prosecutor, upon reviewing the case under the Rules of the Road procedure had concluded that there was sufficient evidence for the suspects to be prosecuted by the domestic court. However, in early April 2003 the RS police reportedly refused to serve an arrest warrant on the two police officers, issued by the Goražde Court; the suspects have subsequently gone into hiding.

Sustained international pressure is furthermore needed in many cases in order to kick start investigations, even in notorious cases of massive violations, where the authorities have been explicitly instructed to do so. This is aptly demonstrated by the totally inadequate response of the RS authorities to the order by the Human Rights Chamber of 7 March 2003, concerning the case of 49 surviving relatives of victims of “disappearances” in Srebrenica. The Human Rights Chamber had, among other things, instructed the RS government to conduct a comprehensive investigation into the human rights violations which had been committed in the former protected area of Srebrenica.⁵⁸ The RS was ordered to report the findings of its investigation to a

⁵⁷ The de-certification process as operated by UNMIBH did, however, in some cases violate due process rights as the officers concerned did not have the right to be heard in the proceedings, and had limited possibilities to appeal the decision.

⁵⁸ Specifically the Chamber decision states that the RS should conduct a “full, meaningful, thorough, and detailed investigation into the events giving rise to the established human rights violations, with a view to making known to the applicants, all other family members, and the public, the Republika Srpska’s role in the facts surrounding the massacre at Srebrenica in July 1995, its subsequent efforts to cover up those facts and the fate and whereabouts of persons missing from Srebrenica since July 1995. Such investigations should also be conducted with a view to bringing the perpetrators of any crimes committed in connection with the missing persons from Srebrenica to justice before the competent

number of international organizations, including the Chamber itself, the ICTY and OHR by 7 September.

In early June, the RS sent the Chamber an interim report (as it had been ordered), which reportedly said that there were no "indictments brought by any of the domestic courts against any one person in connection with the Srebrenica Cases". The report apparently also claimed that relevant documentation on the RS Army unit involved in the attack on Srebrenica had been confiscated by the Tribunal and that SFOR had banned the RS authorities from carrying out any investigations.⁵⁹ It is clear that no thorough investigation, in the spirit as was explicitly envisaged by the Chamber, was being pursued by the authorities and that consequently no local prosecutions may be brought to address these severe and massive violations.

Amnesty International is aware that the RS government sent a second, much more detailed, reply to the Chamber on 8 September 2003, which reportedly proposes *inter alia* the establishment of an independent commission of enquiry into the events in and around Srebrenica of 10 to 19 July 1995. For such a commission to function in a genuinely independent and effective manner, it would need to be adequately funded, have access to all relevant documentation, be empowered to summon and hear witnesses, and operate in a transparent manner. It would also need the resources to make effective use of the large amount of information, documentation, witness testimony and forensic evidence, which has already been recovered and publicly displayed during several trials before the Tribunal. This would be one of the clearest cases in which it is imperative to ensure that the efforts by the Tribunal, during years of painstaking and resource-intensive investigations and prosecutions, will contribute to justice on the ground.

7) Apprehension of suspects

Major problems persist with the failure of the local authorities to arrest suspects indicted by the Tribunal, in particular those remaining in the RS (and neighbouring Serbia and Montenegro) and the Tribunal Chief Prosecutor has over the years

domestic criminal courts or to extraditing persons wanted by the ICTY for prosecution for war crimes, genocide or crimes against humanity in connection with the Srebrenica events " (*Decision on admissibility and merits*, delivered on 7 March 2003 in the "Srebrenica Cases", Paragraph 212).

⁵⁹ Interim report by the RS liaison agent to the Chamber quoted in *Dani* of 21 July 2003 ("Nemoćni pred vlastima RS-a, brišu tužbe Srebreničana"). The Tribunal has reportedly denied all allegations that it was withholding information from the RS authorities. Members of Amnesty International, who have been writing to the RS government asking to be informed about the status of the implementation of the Human Rights Chamber decision, were referred to the RS government liaison officer with the Tribunal.

repeatedly expressed serious concern that outstanding arrest warrants remained to be executed by the local authorities.⁶⁰ The issue of apprehension by the local authorities is, again, one of inter-entity and regional cooperation (see under heading 2), and one that will continue to need much more sustained attention from the international community.

It is ironic that, while investigation dossiers abound in court offices in both entities, these mostly concern violations committed against their own ethnicity during the war.⁶¹ The preliminary RS government report to the Chamber in the Srebrenica case points to the extent to which local courts have ignored the massive evidence on war crimes committed in their immediate jurisdiction whenever the victims did not belong to the now-majority ethnic group. The problem of non-apprehension will become more acute once the War Crimes Chamber at the State Court starts issuing indictments and arrest warrants in Rules of the Road Cases, as the court will have to rely on local police forces to enforce its warrants. Given the protracted inertia of the local police force, the remaining SFOR troops in Bosnia-Herzegovina should also execute arrest warrants issued by the court. Non-execution of arrest warrants issued by the entity courts should be seriously scrutinized by the EUPM and if necessary followed up through its own disciplinary procedures.

8) Rights of defendants

In its May 2002 Memorandum to the High Representative, Amnesty International made some recommendations relating to the Public Defenders Support Unit which would be set up alongside the division in the State Court dealing with war crimes to provide the accused with defence counsel. Amnesty International welcomes the fact that internationally-recognized rights of defendants have been guaranteed in the new State Criminal Procedure Code.

⁶⁰ The RS police has yet to arrest the first indicted suspect in that entity, as all Bosnian Serb suspects so far have been surrendered from Serbia. See also ICTY Press release CC/P.I.S./727e of 14 February 2003, and *AFP* "UN Prosecutor urges Bosnian Serbs to track down war crimes suspects" of 18 July 2003, and *Reuters*: "Bosnian Serbs pledge cooperation, U.N. wants arrests", 18 July 2003.

⁶¹ Notable exceptions are the trials which have been held before the Sarajevo Cantonal Court against members of the Bosnian Government Army in connection with the abductions and murders of Serb civilians during the war (the so-called *Kazani* case), as well as the above-mentioned trial of 11 Bosnian Serb police officers now taking place before the Banja Luka District Court for the illegal detention of the Matanović family.

The organization notes, however that new Codes of Criminal Procedure, which recently entered into force on all levels,⁶² entail many far-reaching changes, introducing more common law elements and international jurisprudence into the Bosnian judicial system. Given these substantially new features to the criminal process, the organization would recommend that the future defence unit at the State Court – which is currently not envisaged to have any international participation – will include international defence lawyers with experience in dealing with criminal proceedings for violations of international law. Their knowledge and expertise should equally be made available to defence lawyers representing persons before the entity courts through a sustained program of training and mentorship, involving entity and local bar associations.

Amnesty International's recommendations to the international community and government authorities in Bosnia-Herzegovina, Serbia and Montenegro and Croatia

The following recommendations are designed to ensure the development and implementation of an effective and comprehensive action plan to end impunity in Bosnia-Herzegovina at the international, regional, national and entity levels so that, wherever it is possible, all those responsible for genocide, crimes against humanity and war crimes in Bosnia-Herzegovina are brought to justice. None of these steps, including the establishment of a special Chamber in the State Court, is sufficient on its own.

1. The Tribunal should not stop investigations or prosecutions until an effective action plan for ending impunity in Bosnia-Herzegovina, Croatia, Serbia and Montenegro has been adopted and put into effect. No such plan has been developed or adopted yet.
2. States participating in the PIC, and the OHR, should as a matter of urgency re-examine and support prosecutions for genocide, crimes against humanity and war crimes ongoing before the entity and Brčko District courts in Bosnia-Herzegovina. This important task should be incorporated as a crucial element in tandem with the establishment of a functioning War Crimes Chamber of the State Court and as a vital component in the battle against impunity for

⁶² The State Code of Criminal Procedure and the new Federation Criminal and Criminal Procedure Codes entered into force respectively in March and August 2003. New criminal legislation was also introduced in the RS on 1 July 2003.

genocide, crimes against humanity and war crimes. In order for this process to be effective, the sustained involvement of the local judiciary must be ensured from the beginning and not as an afterthought.

3. All States, in particular states participating in the PIC, must provide sufficient funding, resources and staff (including international staff pending recruitment and effective legal and human rights training for local staff) to the State Court and the entity courts to permit them to investigate and prosecute all crimes under international law which will not be dealt with by the Tribunal or which it will defer to the Bosnian criminal justice system.
4. Clear legal criteria and guidelines must be formulated defining the relationship between the War Crimes Chamber of the State Court and the entity courts in order to ensure legal certainty and a consistent allocation of cases to the relevant jurisdictions.
5. The Justice and Interior Ministries of the states of the former Yugoslavia must develop a comprehensive program of regional cooperation, including legal cooperation, procedures for the effective and smooth transferral of military records and other intelligence materials, cross-regional programs for witness protection and cross-regional cooperation agreements on the arrest and transfer of suspects. This program could partially be developed by amending the Sarajevo Declaration of the SEECP with a view to adding the fight against the continued impunity for genocide, crimes against humanity and war crimes.
6. A concurrent international and local witness protection program needs to be developed in consultation with civil society, particularly victims' groups, based on legal and practical expertise at the two international tribunals, to benefit those witnesses whose security cannot be guaranteed inside Bosnia-Herzegovina, Croatia or Serbia and Montenegro.
7. The economic, social and psychological needs of those testifying in war crimes proceedings need to be recognized and fully addressed in all protection programs, incorporating the domestic health and social service system as well as local organizations and individuals who have built up experience in supporting vulnerable witnesses and victims.
8. Criminal legislation on the state and entity level should be amended to take into account the jurisprudence of the Tribunal, especially with regards to the definitions developed by the Tribunal Appeals Chamber for the crimes of rape

and sexual enslavement as crimes against humanity. Furthermore and as a matter of urgency, domestic criminal legislation must be amended in order to render admissible evidence transferred by the Tribunal to Bosnian courts.

- 9 A comprehensive discussion needs to be initiated, led by the domestic authorities and with full participation of civil society, the judiciary and international experts to design an effective mechanism for reparation for victims of genocide, crimes against humanity and war crimes, as well as their participation in the judicial process. The Human Rights Chamber should not be prematurely abolished, given its unique mandate and its importance as a domestic and accessible mechanism for redress for victims of past and current human rights violations.
- 10 Police investigations for genocide, crimes against humanity and war crimes must be actively encouraged and supervised by the EUPM and other international organizations, such as SFOR. To this end, a comprehensive program should be developed in order to ensure that ultimately the entity police forces and the state intelligence services are capable and equipped to conduct impartial and thorough investigations as well as to take over investigations initiated by Tribunal investigators.
- 11 The EUPM and the entity and Brčko District Interior Ministries must develop effective procedures in order to immediately remove from active service police officers reasonably suspected of genocide, crimes against humanity and war crimes. These procedures should be synchronized with provisions on disciplinary proceedings in the entity laws on internal affairs so that in future the police force can continue screening officers in this way. All such cases must be immediately forwarded to the relevant public prosecutor so that criminal proceedings can be initiated.
- 12 All local police forces must immediately give effect to arrest warrants against persons suspected of genocide, crimes against humanity and war crimes, regardless of the ethnicity of these suspects or the court issuing the warrant. In case the police force deliberately fails to act on such warrants, disciplinary proceedings against those responsible should be instigated, and supervised by the EUPM. In line with its mandate under the Dayton Agreement SFOR should actively become engaged in supporting the local police force in arrest operations, or if necessary, carry out such arrests itself.

