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COMPLETING THE WORK OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

In December 2010, the United Nations Security Council will meet – as it has done every six months for the past six years – to review progress made on the “completion strategies” of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). More than 16 years after it established these two *ad hoc* Tribunals in response to violations of international human rights and humanitarian law committed on a horrific scale in both situations, the Security Council is now pushing for the Tribunals to finish their work. This pressure will inevitably increase this year as, the Council had originally recommended in Resolution 1503 (2003), that both the ICTY and the ICTR complete their trials and appeals by the end of 2010 - a timeline that has proved unrealistic.

At the time the Security Council adopted Resolution 1503, both Tribunals had a significant amount of casework to complete and a number of persons who had been charged with crimes remained at large. Although much progress has been made since then, at the end of 2010, 18 accused persons are on trial and 16 persons have appeals pending at the ICTY. Twenty-one indictees are on trial at the ICTR, nine convicted persons have appeals pending and two suspects are awaiting trial. Two persons charged by the ICTY and ten persons charged by the ICTR remain at large.

Beyond the completion of these cases, Amnesty International is seriously concerned that, if the Tribunals were to close today, impunity for the thousands of other crimes not addressed by the Tribunals would continue in the vast majority of cases due to the inability and/or unwillingness of the relevant national authorities to address the crimes. Such an outcome would be a significant failure for the legacy of both Tribunal legacy and the overall effort of the international community to address impunity for crimes committed in the former Yugoslavia and Rwanda.

This is the first time the international community has sought to develop a completion strategy for contemporary international criminal courts. Given the large number of continuing functions that must continue after the cases are completed, including witness protection, cooperation with national authorities (including transferring evidence and monitoring of transferred cases), review of judgments and supervision of the enforcement of sentences, it is vital that effective mechanisms be established to continue key aspects of the work of the Tribunals.

Clearly more time, resources and cooperation by states are required to ensure that both Tribunals complete their cases effectively. More capacity building and efforts to demand that national authorities fully investigate and prosecute other crimes must be undertaken. More progress must be made in establishing a mechanism(s) to ensure that the continuing functions of the Tribunals are conducted effectively.

COMPLETING THE TRIBUNALS' CASES

CHALLENGES ARISING FROM THE CURRENT PACE OF CASES

The status of proceedings at both the ICTY and the ICTR at the end of 2010 clearly demonstrates that both Tribunals need significantly more time and resources to complete their caseloads. Amnesty International is concerned that both Tribunals are under severe pressure to complete the outstanding cases. Their recent reports to the Security Council indicate that they are resorting to both ineffective and inappropriate measures to complete the work as soon as possible.

Amnesty International notes that in a number of recent cases, the Tribunals have scaled back on charges against the accused – often citing the right of the accused to a trial within a reasonable time.¹ While this fundamental fair trial guarantee must be fully respected, the Tribunals also have a responsibility to victims and the affected communities to investigate and prosecute charges that reflect the full extent of the criminal conduct. This is an important balancing process that should not be affected by external pressure on the Tribunals to complete their cases quickly.

Furthermore, Amnesty International is particularly concerned that the ICTY appears to be functioning well beyond its capacity with 10 parallel trials and judges having to sit on more than one case at the same time. As the June report to the Security Council indicates, this rate is not only exhausting the judges (and presumably the Tribunal's staff involved with and supporting the cases – who are notably leaving the ICTY at an alarming rate), it also highlights that the extremely high work rate is also counter-productive resulting often in delays in scheduling cases and other judicial work. Similar approaches appear to be being taken by the ICTR which reported in June that some judges are working on three cases in parallel.

Amnesty International notes that both the ICTY and the ICTR Presidents reported to the Security Council in June that they were experiencing significant problems in retaining experienced staff and requested that the Council consider a number of measures to assist them in retaining staff. Although Amnesty International supports the Security Council considering these initiatives, a broader examination of whether issues beyond the length of contracts are causing staff to leave is also required. Amnesty International is concerned the workload and the pressure on all staff remaining at the Tribunals to complete cases in unreasonable timeframes as well as covering the workloads of experienced colleagues who have left the institutions may be additional factors that need to be considered and addressed.

Beyond the impact of the current pace of work on judges and staff and resulting inefficiencies, Amnesty International is concerned that in rushing to complete their cases, the Tribunals may fail to achieve the highest standards of international justice in their remaining cases. Close monitoring is vital to ensure that measures being taken to expedite trials, including practice directions limiting the size of submissions and timing of key stages of the trial, do not undermine the right of the accused to present their defence.

Amnesty International is calling on both the Security Council and the Tribunals to review the current plans of both the ICTY and the ICTR to ensure that efforts to expedite the remaining trials and appeals meet the highest standards of international justice, including fully respecting the rights of the accused and victims and the expectations of the affected communities. Such efforts must not be counter-productive resulting in delays and depletion of staff due to unrealistic workloads.

FUNDING

Amnesty International opposes calls by some Security Council members for the future work of the ICTY and the ICTR to be funded by voluntary contributions. Decisions to fund other internationalized courts through voluntary contributions – including the War Crimes Chamber of the State Court of Bosnia and Herzegovina, Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia – have undermined the work of those courts which have had to operate in a continued state of financial crisis due to lack of consistent contributions from states. In some instances, these courts have had to scale back on fulfilling their core functions. This flawed system should not be applied to the ICTY, the ICTR, their residual mechanism(s) or any other future international or internationalized criminal court. Genocide, crimes against humanity and war crimes are crimes against the entire international community. International justice is a shared responsibility of all states and the costs of the ICTY and the ICTR and any residual mechanism(s) should continue to be shared by UN member states through the UN assessment system.

PREPARATIONS FOR NEW ARRESTS

Both the reports of the Tribunals and the 2009 Report of the Secretary-General setting out options for the residual mechanism(s)² fail to set out what would happen if one of the persons currently at large is arrested in the next years while the ICTY and the ICTR are still prosecuting their cases and a residual mechanism(s) may or may not be established. Amnesty International believes this point should be resolved promptly to ensure that there is no gap in the availability of a competent jurisdiction and no delay in bringing such a person to trial. Recognizing that there may be complex constitutional issues around the relationship between the Tribunals and the residual mechanism(s), Amnesty International considers that any solution must ensure that the trial starts without delay and that it is not disrupted in any way by a potential transfer of activities to a residual mechanism(s).

TRANSFERRING ICTR CASES TO NATIONAL JURISDICTIONS

Amnesty International notes that rather than prosecute all remaining cases, the ICTR Prosecutor is endeavouring to transfer up to eight of the cases where persons remain at large to Rwanda. Amnesty International notes that, on numerous occasions, the judges have rejected applications by the Prosecutor under Article 11 *bis* to transfer cases to Rwanda. Problems with the national justice system in Rwanda, in particular, witness protection and the potential unwillingness of defence witnesses to testify given restrictions on freedom of expression, means that barriers to transfer identified by the ICTR may be difficult to address in the short-term. Nevertheless, Amnesty International notes that the Prosecutor made three applications for transfer of cases in November 2010, including of two suspects still at large. If the Chambers decide to transfer any cases of suspects still at large to Rwanda, those persons upon their arrest must retain the right to challenge the decision under 11 *bis* before the ICTR or its residual mechanism(s).

Amnesty International regrets that the Prosecutor states in his June report that he is focused on transferring cases to Rwanda indicating that his office is no longer pursuing opportunities in other national jurisdictions even though there are many states around the world that have provided their courts with universal jurisdiction over genocide, crimes against humanity and war crimes.³ Although the organization notes that a number of attempts to prosecute ICTR cases in other jurisdictions have been obstructed by inadequate legislation in the country willing to accept the case, it would appear prudent in light of the uncertainty whether the ICTR will transfer cases to Rwanda to continue to explore this alternative. The Security Council could play a significant role, as it did in Resolution 978 (1995), in calling on all states whose national justice systems meet the safeguards set out in Article 11 *bis* to accept

cases from the ICTR and, if necessary, to review and amend their national legislation so that national courts can prosecute the crimes on behalf of the international community.⁴

If the ICTR is unable to transfer cases, the trials must proceed before the ICTR or any residual mechanism(s) without delay.

ENSURING NATIONAL JUSTICE IN CASES TRANSFERRED BY THE ICTY TO NATIONAL JURISDICTIONS

Amnesty International is concerned that the national authorities in the Balkans states are failing to prosecute effectively crimes transferred to them by the ICTY under Rule 11 *bis* or as “category two” cases, resulting in impunity.

A number of cases transferred under Rule 11 *bis* have failed to meet international standards. For example, the Ademi-Norac trial conducted by Croatian courts has been criticized for its failure to provide adequate witness protection, for failing to apply the principle of command responsibility in accordance with international law and for applying inappropriate mitigating circumstances during sentencing.

A number of cases transferred to national authorities as “category two” – which do not meet the threshold of seriousness to be prosecuted by the ICTY – have yet to result in national investigations and prosecutions.

The process of the ICTY completing its caseload must also ensure that cases transferred to national authorities are investigated and prosecuted in accordance with international standards. The Security Council and the Tribunals should monitor the national prosecution of all 11 *bis* and “category two” cases and take measures, where appropriate, to ensure that national inaction or flawed action does not result in impunity.

LEGACY – ENSURING NATIONAL JUSTICE FOR OTHER CASES

The ICTY and the ICTR have prosecuted more cases than any other contemporary international criminal court. Nevertheless, thousands of crimes in both the former Yugoslavia and Rwanda remain unaddressed and every effort must be made to ensure that, especially with the Tribunals completing their cases, the national authorities now take full responsibility for investigating and prosecuting those accused of other crimes under international law. Regrettably, major political, legislative and institution barriers against justice, truth and reparations continue to exist in almost all the countries.

BOSNIA AND HERZEGOVINA⁵

Considering the horrendous scale of the crimes committed in Bosnia and Herzegovina (BiH) during the 1992-1995 war, only a very limited number of crimes have been prosecuted before national courts to date. The State Strategy for the Work on War Crimes Cases which was adopted in December 2008, although being a good step toward addressing impunity, remains unimplemented. Amnesty International is particularly concerned that the legal framework for prosecuting crimes under international law in BiH is currently inadequate.

Prosecution of crimes under international law currently takes place before the War Crimes Chamber (WCC) of the State Court of BiH as well as the entity courts in the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS). A limited number of prosecutions take place in the Brcko District. There are, however, significant differences in legislation applied by the different jurisdictions. While the WCC applies the Criminal Code of BiH adopted in 2003, the entity courts continue to apply the Criminal Code of the former Socialist Republic of Yugoslavia (SFRY) which is not in line with the current standards related

to prosecution of crimes under international law. The flaws in the SFRY Criminal Code include the lack of explicit recognition of the principle of command responsibility; no definition of crimes against humanity; and the failure to adequately define crimes of sexual violence committed during the war.

Although the 2003 Criminal Code of BiH addresses a number of these flaws, it fails to define crimes of sexual violence in a manner consistent with the relevant international standards. In particular, the requirement of use of force or a threat of use of force as an element of the definition of sexual violence in the context of war is inconsistent with the jurisprudence of the ICTY and the definition of these crimes under international law.

Witness protection and support before the entity courts in the FBiH and RS is extremely poor and sometimes non-existent. Although witness protection is provided by the WCC, it remains inadequate.

Amnesty International notes that in the last two years, some high level politicians have openly attacked the independence of the justice system or denied the occurrence of incidences of war crimes, notwithstanding final judgments of courts confirming the existence of the crime and convicting individuals responsible for it, thereby exercising political pressure and undermining the independence of the justice system in the country. This coincided with the departure at the end of 2009 of most of the international judges and prosecutors from the State Court of BiH who had been providing support and had played a crucial role in protecting the impartiality of the court.⁶

CROATIA⁷

Amnesty International is concerned that, although the war in Croatia ended almost 15 years ago, the Croatian authorities still lack the political will to deal fully with the past. This leads to impunity for members of the Croatian Army and police forces who allegedly committed war crimes against Croatian Serbs. This attitude also prevents the victims of war crimes from accessing justice and receiving full reparation. Most cases that have been prosecuted fail to meet international standards.

Croatian authorities continue to apply the 1993 Basic Criminal Code in prosecuting crimes under international law which does not explicitly recognize the principle of command responsibility; omits crimes against humanity; and fails to adequately define crimes of sexual violence committed during the war.

There is a continuing ethnic bias against Croatian Serbs in the prosecution of war crimes cases. The majority of investigations and prosecutions have focussed on crimes committed by Serbs against Croats and few prosecutions of crimes committed against Croatian Serbs have taken place.

Witness protection and support, particularly in cases which are heard in local county courts, is inadequate. In many cases Amnesty International has documented pressure and intimidation of witnesses in war crimes proceedings before the county courts in Croatia. By failing to address and investigate cases of intimidation of witnesses and in some cases the journalists reporting on them, the authorities have created an atmosphere of impunity, enabling this intimidation to continue.

Amnesty International is also extremely concerned by the political interference in the prosecution of crimes under international law, as demonstrated by the open political support voiced by many politicians for the three Croatian Army Generals currently on trial at the ICTY.

The authorities have failed to provide the ICTY Prosecutor's Office with all military documents sought in relation to the trial. Eventually some of them were provided but only after a significant pressure by the international community and only after the European Union temporarily suspended enlargement negotiations with the country.

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

In March 2002, Macedonia enacted an amnesty law which, contrary to Macedonia's obligations under international law, precludes the prosecution of war crimes and other serious human rights violations committed during the conflict, except in cases of war crimes taken under the jurisdiction of the ICTY. Impunity therefore exists in almost all cases.

In February 2008, the ICTY returned four cases to the authorities of Macedonia for prosecution however little progress has been made in prosecuting the cases at the national level. Proceedings been started in only one case - the "Mavrovo" road workers⁸ Proceedings opened in September 2008, but have been repeatedly adjourned in the absence of the majority of the accused. Following the extradition of a key suspect by February 2010, proceedings were further delayed as the accused had not been provided with documentation and other evidence in the Albanian language. On 4 April 2010, proceedings finally opened against 11 of the 23 accused; 11 others remain at large, one committed suicide in prison in May 2010.

In a 2010 letter to the Committee against Torture, the Macedonian authorities stated that one of the four other cases was at the investigation stage, and the other two cases were at a preliminary stage of investigation. However, Amnesty International is aware that both the "Neprosteni" and "Lipkovo Water Reserve" cases were submitted to the investigative judge before September 2008, and the "NLA (National Liberation Army) Leadership" case was at that time under review by the public prosecutor.

Such delays may in part be attributed to the inefficiencies within the justice system, including a backlog of cases and procedural delays, but also reflect the continuing politicization of these cases. Both the Democratic Union for Integration – the ethnic Albanian party within the coalition government - and Albanian opposition parties argue that cases returned from the Tribunal should be subject to the 2002 amnesty law. As these cases have not been tried at the Tribunal, they contend that the Amnesty Law should apply.⁹

MONTENEGRO

Advances in the prosecution of crimes under international law committed in the conflict has only materialised since 2009, after protracted investigations by investigative judges and pressure from the European Commission and international treaty bodies. Progress to date has, however, been characterized by the absence of indictments of senior government and police officials believed to have held command responsibility, inadequate witness protection and inappropriate sentencing.

On 15 May 2010, six former members of the Yugoslav Army were convicted of war crimes at Podgorica High Court and sentenced to periods of imprisonment which failed to meet the minimum sentence of five years' set out in Article 430 of the Montenegrin Criminal Code.¹⁰ The men had been found guilty of torture, inhumane treatment and bodily harm of 169 Croatian prisoners of war and civilians in the Morinj camp near Kotor in 1992. In determining the sentence, the judge took into account the fact that the men had not previously been convicted of any offence.

Proceedings opened in November 2009 against nine former government officials and high-ranking police officers (five of them *in absentia*) indicted for the enforced disappearance in 1992 of at least 79 refugees from Bosnia and Herzegovina (BiH) who were subsequently handed over to the then Bosnian Serb authorities. In 2010, S.P., a former police inspector who had refused to participate in the enforced disappearances was initially refused protection by the State Prosecutor. He had since 1992 received threats to his life, assaults, and damage to his property, none of which had been effectively investigated. S.P. was only granted witness protection after repeated interventions by NGOs.

SERBIA

Progress in the investigation and prosecution of war crimes continues to suffer from a lack of political backing and adequate funding for the Special War Crimes Chamber at the Belgrade District Court (WCC) and the Office of the War Crimes Prosecutor (OWCP). Only two chambers are dedicated to the adjudication of war crimes and only seven prosecutors are available to conduct investigations. The OWCP is additionally tasked to cooperate with the ICTY and the search for Goran Hadzic and Ratko Mladic.

Despite these impediments, the OWCP has made significant attempts to address the legacy of war crimes, although the number of trials concluded at the WCC remains low. As of October 2010, eight first instance trials were in progress and investigations of a further 103 suspects were underway.¹¹ Since 2003, nine first instance judgments and 11 final judgments have been delivered in cases of war crimes committed in the context of the conflicts in Bosnia and Herzegovina, Croatia and Kosovo. However, more often than not, the Supreme Court has overturned first instance decisions on appeal. Local NGOs and international observers have alleged that the decisions have been made for political rather than evidential reasons.

Trials of non-Serbs have been agreed by observers, including the OSCE which monitors the court, to respect international standards. However, it is notable that only in two cases involving ethnic Albanian defendants, have indictments included charges of rape or other war crimes of sexual violence.

The OWCP continues to face political pressure considered to influence decisions on the prosecution of commanding officers, particularly within the Ministry of Interior police where a climate of impunity persists, and where few junior officers are willing to testify in proceedings against senior officials.

Further, despite increased cooperation with their Croatian and Bosnian counterparts, until recently OWCP investigations of alleged war crimes committed in Kosovo by Serb police and paramilitary forces had been hampered by a lack of access to witnesses during the investigative stage. Since mid-2010, the OWCP has been provided with access to witnesses in Kosovo. The participation during trial proceedings of witnesses from outside Serbia, has been lead by the Serbian non-governmental organization (NGO) - the Humanitarian Law Fund - but following recent legislative changes, standards of witness protection have reportedly improved.

Kosovo

In Kosovo, given the historical circumstances and consequent lack of cooperation between the authorities in Serbia and Kosovo, war crimes cases have been conducted by international judiciary and prosecutors, initially under the UN Interim Administration Mission in Kosovo (UNMIK) and, since December 2008, by the EU-led police and justice mission (EULEX). Relatively little progress has been made by EULEX in the prosecution of war crimes, despite

having access to evidence which had not been available to UNMIK, including archive material from the ICTY (see below).

In part, this is due to the legacy of ineffective investigations conducted by UNMIK.¹² It also is due in part to the continuing lack of political support for war crimes prosecutions by ethnic Albanian political leaders who have fostered, and in some cases, encouraged, the prevailing climate of impunity. With inadequate witness protection, few witnesses are prepared to testify. The extent of witness intimidation in Kosovo has been noted by the ICTY Appeals Chamber which in July 2010 ordered a partial retrial in the case of Ramush Haradinaj et al, involving the former Kosova Liberation Army leader and briefly prime minister of Kosovo. The Appeals Chamber “found that the Trial Chamber failed to take sufficient steps to counter the witness intimidation that permeated the trial”.¹³

This lack of progress is also due to inadequate support and staffing for the EULEX mission for both the investigation and prosecution of war crimes. According to the Head of EULEX War Crimes Police, in May 2010, they only had the capacity to work on 60 of the 900 war crimes cases inherited from UNMIK. An increasing number of cases, including enforced disappearances and abductions, have been closed by EULEX prosecutors on the basis that insufficient evidence was gathered by UNMIK.

Much of EULEX’s caseload has focussed on UNMIK’s unfinished cases, including in 2009 at least eight outstanding appeals, one of which dated back to 2002. At the end of 2009, nine war crimes trial proceedings were in progress, while another 85 cases were at the pre-trial investigation stage.¹⁴

The EULEX Justice component has an inadequate number of prosecutors (two) and judiciary trained in international humanitarian law. While EULEX has sought to increase the capacity of the local judiciary to adjudicate in war crimes cases by including one member of the local judiciary on war crimes trial panels, in at least one case this has proved problematic.¹⁵ In addition, EULEX judges are also called on to adjudicate in sensitive criminal cases which the local judiciary have refused to adjudicate on the grounds of unacceptable levels of intimidation, including physical violence. Since late 2009, EULEX has appeared to de-prioritize the investigation and prosecution of war crimes, in favour of cases of organized crime and corruption.

RWANDA

Rwandan authorities have prosecuted over one million cases from the 1994 genocide. The vast majority of genocide cases have been prosecuted before gacaca - community tribunals - which were established to expedite trials and to reduce the prison population, but failed to meet international fair trial standards. Some of the most serious cases were initially handled by conventional courts, but others were later transferred to gacaca in 2008. Defendants do not have the right to legal counsel before gacaca, even though they can receive life sentences.

Amnesty International recognizes measures taken to rebuild Rwanda’s conventional justice system after the genocide through significant investment in infrastructure, technical improvements to some laws, and capacity building of judicial staff. Although measures have also been taken to improve the witness protection system - including establishing a witness protection unit - these developments may be insufficient to ensure witnesses are willing to testify and to assure defence rights. Rwanda’s laws on “genocide ideology” and “sectarianism”, designed to prohibit hate speech, have criminalized speech protected by international conventions. Without revising these laws, their application and the wider

context for restrictions on freedom of expression, witnesses may still be reluctant to testify. Witnesses' fear of prosecution is not based solely on immunity for statements in court, but also on their perception of how far they feel able to exercise rights to freedom of expression in everyday life.

The Rwandan government remains unwilling to investigate and prosecute war crimes committed by the Rwandan Patriotic Army (RPA) before, during and after the 1994 genocide. Prosecutions in the years immediately following the genocide for RPA abuses in 1994 were often termed "human rights violations" or "crimes of revenge" (sometimes in response to family members killed during the genocide) not war crimes or crimes against humanity. The number of prosecutions was small and those prosecuted were of low rank. The ICTR has not issued arrest warrants for RPA war crimes, even though cases under its temporal jurisdiction form part of its mandate. In an isolated case, the Rwandan government prosecuted a case file transferred from the ICTR, but the trial in 2008 was said to fall short of fair trial standards and failed to prosecute those alleged to have directed the killings. The UN High Commissioner for Refugees estimated that between 25,000 to 40,000 people were killed by the RPA from April to August 1994.¹⁶ These crimes were committed with impunity and victims have been denied justice and redress.

The ICTY and the ICTR cannot be expected to resolve all of the country specific problems identified above, which require much broader efforts by the United Nations and the international community to demand justice, truth and reparations for victims and help address capacity issues. The development of a completion strategy for the two Tribunals is, therefore, an important opportunity for the Security Council and other UN bodies and mechanisms to lead these efforts. Amnesty International urges them to work with each of the national authorities to develop comprehensive national strategies to address impunity and to monitor their implementation. The ICTY and the ICTR can contribute to these efforts in a number of ways.

CAPACITY BUILDING

Both the ICTY and the ICTR can assist with capacity building, in particular, by creating greater understanding of their work and precedents that can be adopted by national authorities. In this regard, we welcome efforts such as the War Crimes Justice Project initiative by the ICTY and the OSCE Office for Democratic Institutions and Human Rights to translate some ICTY materials and transcripts into local languages, provide training to national authorities and build national staffing capacity. Where possible, these initiatives should be expanded.

The ICTR's efforts in Rwanda have been less ambitious focussing primarily on outreach as a tool for legacy. The Registry has, however, also conducted trainings on witness protection with Rwandan justice officials, including with 40 Rwandans in October 2010. Many improvements in the Rwandan justice system, however, have been mostly driven by efforts to transfer ICTR cases rather than an effort to build the capacity of the justice system to investigate and prosecute other crimes committed during and after the 1994 genocide. For example, an Organic Law adopted on 16 March 2007 and amended in May 2009 which sets out fair trial guarantees, including those rights contained in Article 14 of the International Covenant on Civil and Political Rights, only applied to those transferred by the ICTR to Rwanda and not other suspects before national courts.

SHARING EVIDENCE WITH NATIONAL AUTHORITIES

The Tribunals should play a significant role in sharing evidence gathered during their investigations and prosecutions with national authorities, subject where necessary to

safeguards to ensure the protection of victims and witnesses. Amnesty International is informed that, while both the ICTY and the ICTR are cooperating with national authorities in response to such requests, the process can take a significant amount of time. In Kosovo, for example, documentation held by the ICTY relating to the exhumations and reburials of mortal remains conducted in 1999-2000 by investigators working for the Tribunal, as well as information on potential grave sites identified by investigators, requested by the UNMIK Office for Missing Persons and Forensics (OMPF) in 2007 was not transferred by the ICTY until 2008.¹⁷ This contributed to delays in both the identification of mortal remains and the initiation of investigations, as well as causing additional distress to family members.¹⁸ A review should be conducted in both Tribunals to determine whether such cooperation can be expedited whilst still ensuring effective protection safeguards. Furthermore, long-term residual mechanism(s) need to be established to continue engaging with national authorities and responding to their requests.

Amnesty International is concerned that large amounts of information provided to the Tribunals by states, IGOs and other sources has been provided on a confidential basis. Under such confidentiality agreements the Tribunals are precluded from providing potentially vital information that could assist national investigations and prosecutions. Amnesty International urges the Security Council and the Tribunals to establish a thorough process to review all information in the Tribunals files (including information provided on a confidential basis) in responding to requests from national authorities and defence lawyers. If the Tribunals identify information provided on a confidential basis that is relevant to the request, the Tribunals should request the information provider to waive confidentiality so that the information can be shared with the national authorities or the defence.

RESIDUAL MECHANISM(S)

The completion of the cases of the ICTY and the ICTR requires the development of effective mechanisms to conduct continuing functions of the Tribunals for decades. Amnesty International therefore welcomes a 2009 Report of the UN Secretary-General examining the options and making recommendation to the Security Council on how to proceed. It is essential that the Security Council now make progress on defining the mechanisms to ensure an effective transition to any new mechanism as the ICTY and ICTR complete their cases.

Amnesty International supports the recommendations in the Secretary-General's Report to develop a residual mechanism(s) applying the same structure of the Tribunals (Chambers, Office of the Prosecutor and Registry). With the likelihood of future trial activities as suspects at large are arrested, it will be important to ensure the independence of the major organs. However, the organization notes that the role of the defence and needs of defence teams is not adequately addressed in the Report and must be fully implemented into the mechanism.

The mechanism should also expressly be required to apply the Statute and Rules of Procedure and Evidence of the relevant Tribunals and to follow the precedents set by the ICTY and ICTR and pre-trial decisions on specific cases they may prosecute (subject to appeals).

The functions of the mechanism should fully implement the continuing tasks of the Tribunals. Amnesty International therefore supports the establishment of mechanisms undertaking the "maximum level of functions" recommended in the Secretary-General's Report, including: (a) trial of fugitives; (b) trial of contempt cases; (c) protection of witnesses; (d) review of judgments; (e) referral of cases to national jurisdictions; (f) supervision of enforcement of sentences; (g) assistance to national jurisdictions and (h) maintenance of the

archives. In addition, to these tasks, the mechanism should carry on the Tribunal's outreach work for a significant time to both inform the public about the work achieved by both Tribunals and the residual mechanism.

Amnesty International shares security concerns cited in the Secretary-General's Report, if the archives of the ICTR and the ICTY should be located in the situation countries. Amnesty International sees merit in the recommendation to instead consider locating the residual mechanism(s) and archives in Europe and Africa, not too distant from the affected countries. The Report, however, does not expressly recommend the need for a field presence in the situation countries which could be essential to conducting some tasks of the residual mechanism including, ensuring effective witness protection and conducting outreach. It does, however, raise the idea of establishing information centres in the affected countries to provide public access to the reproductions of some of the archives. Amnesty International supports the idea of such information centres, which should also maintain on-line access to relevant archived documents and respond to specific requests for archived materials. The information centres should also be used to conduct outreach and could be a location for staff providing witness protection or act as a point of contact for witnesses at risk.

¹ See for example: Amnesty International Bosnia and Herzegovina: No Justice for Rape Victims: <http://www.amnesty.org/en/for-media/press-releases/bosnia-and-herzegovina-no-justice-rape-victims-20090721>; and Whose justice? : The women of Bosnia and Herzegovina are still waiting, p. 13-14: <http://www.amnesty.org/en/library/asset/EUR63/006/2009/en/8af5ed43-5094-48c9-bfab-1277b5132faf/eur630062009eng.pdf>.

² Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals, S/2009/258, 21 May 2009.

³ See: Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018/2001, September 2001 (reviewing state practice in approximately 125 states around the world).

⁴ The Security Council urged:

“States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda[.]”

S.C. Res. 978 (1995), 27 February 1995.

⁵ For a more comprehensive analysis of the obstacles to effective prosecutions of crimes under international law in BiH, see: Amnesty International, *Whose Justice? The Women of Bosnia and Herzegovina Are Still Waiting*, AI Index: EUR 63/006/2009, September 2009.

⁶ Amnesty International, *Bosnia and Herzegovina: International support for the country's judiciary still needed*, AI Index: EUR 63/015/2009, 18 November 2009.

⁷ For a more comprehensive analysis of the obstacles to effective prosecutions of crimes under international law in Croatia, see: Amnesty International, *Briefing to the European Commission and member states of the European Union (EU) on the progress made by the Republic of Croatia in prosecution of war crimes*, AI Index: EUR 64/002/2010, April 2010.

⁸ This case involved five individuals, employed as road workers by the Mavrovo Road Company, who were allegedly abducted in August 2001 and physically ill-treated, sexually violated and threatened with death before being released some hours later.

⁹ For further information, see: Amnesty International, *Former Yugoslav Republic of Macedonia: Amnesty International's Response to the Concluding Observations of the Committee against Torture*, AI Index: EUR 65/002/2010, April 2010.

¹⁰ Article 430 (1) provides:

“Anyone who in breach of the rules of international law orders against prisoners of war the infliction of bodily injuries, torture, inhuman treatment, biological, medical or other research experiments, taking of tissues or body organs for transplantation, or commission of other acts so as to harm health and cause serious suffering or orders coercion to serve in armed forces of the enemy, deprivation of the right to a just and impartial trial or who commits some of the crimes stated above, shall be punished by imprisonment for a minimum term of five years.”

¹¹ See: http://www.tuzilastvorz.org.rs/html_trz/index_eng.htm (retrieved 26 October 2010).

¹² See for example: Amnesty International, *Serbia (Kosovo): The challenge to fix a failed UN justice mission*, AI Index: EUR 70/001/2008, 29 January 2008; and Amnesty International, *Kosovo (Serbia and Montenegro): United Nations Interim Administration Mission in Kosovo (UNMIK) -- Conclusions of the Human Rights Committee, 86th Session, July 2006*, AI Index: EUR 70/011/2006, 1 August 2006,

¹³ Judgement Summary for Haradinaj et al., 21 July 2010, http://www.icty.org/x/cases/haradinaj/acjug/en/100721_summary.pdf

¹⁴ *EULEX Annual Report*, p.50 and Figure 7. The report does not specify whether these are new cases or continuations of cases initiated by UNMIK.

¹⁵ On 12 October 2009, the Kosovo Judicial Council's disciplinary committee suspended Judge Rrahman Retkoceri after he had publicly disagreed with the verdict in the Llapi Group trial, claiming that the decision was unjust and unlawful. He later claimed that he had issued those statements under threat.

¹⁶ United Nations High Commissioner for Refugees (UNHCR), “Note, la situation au Rwanda”, 23 September 1994.

¹⁷ In 2007, the SRSJ for Kosovo reported to the UN Security Council that:

“In this process, 4,019 bodies were exhumed, out of which 2,001 were identified. Unidentified 2,018 bodies (sic) were later buried in unknown locations. The Hague Tribunal did not transfer to UNMIK, which has jurisdiction over these issues in the province, the documentation about exhumations, identifications and the locations of burial of unidentified persons. The Working Group for Missing Persons has twice asked The Hague Tribunal to deliver this documentation, without any success.”

Comments on Technical Assessment of Progress in Implementation of Standards for Kosovo, prepared by the UN SG Special Representative for Kosovo, 30 November 2007, accessed 3 April 2009 at www.mfa.gov.yu/Policy/Priorities/KIM/anex_e.pdf

¹⁸ Amnesty International, *Serbia: Burying the Past, Impunity for enforced disappearances and abductions in Kosovo*, (EUR 70/007/2009), p.16-18 and 34.