

Guest Lecture Series of the Office of the Prosecutor

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**“The War Crimes Chamber of Bosnia and Herzegovina:
a new solution for the impunity gap”**

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**The Sarajevo War Crimes Chamber
and the future relationship of
the international and national criminal jurisdiction.**

1. The response of Bosnia and Herzegovina to the atrocities of the 1991-1995 conflict has been to set up a War Crimes Chamber (WCC), in Sarajevo, to prosecute the crimes committed in this period.
2. Since 2005, a War Crimes Chamber has been functioning within the State Court, and it forms an integral part of this sovereign institution despite its international presence. Its creation formed part of an overhaul of the national justice system by the High Representative.
3. The new Criminal Code and Criminal Procedure Code, drafted from scratch under this overhaul, have given the State Court and, in certain instances, cantonal and district courts, jurisdiction over war crimes and other international crimes.
4. The judicial mechanism established in Bosnia is an unprecedented endeavour, as it is enshrined in the national judicial system. By subsuming the prosecution of war crimes and other crimes with an international dimension under Bosnia's own legal infrastructure, the established solution has taken a bold step ahead of the existing ad hoc tribunals and "hybrid" courts, which function under the auspices of the UN, the principal examples being those in Sierra Leone, Kosovo and East Timor. It enables sovereign institutions, principally the State Court in Sarajevo, to effectively eradicate impunity for international crimes committed on its own territory.
5. In a sense, the system remains a transitional "hybrid" one, although fully integrated into a sovereign domestic judicial system.
6. The WCC contains a significant international presence. Judicial panels are composed of two international and one domestic judge. The support staff of the Chambers is also international and domestic in its composition.
7. The reason for the international presence is to ensure that the rule of law and international human rights standards are abided by in every instance, in the light of the fact that the entire legal system has only recently been reconstructed, along with the sensitivity of the cases being prosecuted and consequently the immense potential that they represent for human rights standards to be breached.
8. OSCE trial monitors also oversee trials. However, it is currently anticipated that the international presence be phased out in its entirety by 2010, assuming that, by this time, Bosnia and Bosnian judges will be fully capable of trying its own war crimes suspects, having benefited from many fruitful years of international assistance.
9. The State Court has also recently accepted six accused, transferred to it from the ICTY under Rule 11 bis of the ICTY's Rules of Evidence and Procedure (RPE).
10. The WCC is an important development for three major reasons.

11. Primarily, it is crucial in the completion strategy of the ICTY, which is due to be completed by 2010.
12. Secondly, it is a fundamental step, as kind of a heist in rebuilding Bosnia's judicial system. Following the conflict, the country's entire legal infrastructure had been destroyed. This included the loss of skilled members of the profession, as well as the destruction of crucial facilities and equipment, which impaired the administration of justice. The justice system could therefore not play any conceivable role in eradicating impunity for the heinous crimes committed during the conflict.
13. Thirdly, the Chamber is vital for the process of reconciliation in Bosnia. Although it is not free of imperfection and complexity, the prosecution of war crimes suspects on home soil has a far more positive effect on reconciliation than the dispensation of "distanced" justice in a forum such as the ICTY. It is important the perception of justice being done in accordance with the traditional maxim "justice must not only be done, but seen to be done."
14. Such a perception becomes far more prevalent if a domestic, rather than an alien, judicial mechanism, dispenses justice.
15. Moreover, it forces Bosnian society to confront the truth of its recent past in a very practical and real sense.
16. The Chamber is an excellent example of how a transient international presence has rendered a state not only capable of conducting its own war crimes trials and thereby gaining full autonomy over its own process of reconciliation, but also and mainly to "transform" judges seen as civil servants into real judges, it means with all three "i" characteristics, so to say, with independence, impartiality and integrity.
17. That solution might be seen as the complement of the complementarity principle.
18. The shift to transferring competence to national jurisdictions began in November 2001, when the ICTY President proposed the referral of certain ICTY cases to domestic courts while presenting his reform programme to the Security Council. A major factor behind this shift was identified as the reconstruction and reinforcement of local resources for prosecuting cases domestically.
19. This was of course particularly relevant in the case of the Balkans as it is in all post-conflict scenarios. The assistance of the international community in the rebuilding of local legal infrastructures and thereby enabling war crimes prosecutions to be held close to the place in which the crimes were committed has proved vital to the process of reconciliation and the eradication of impunity at a domestic level. An obligation was placed upon the international community itself to this end by Security Council Resolution 1503 (2003), which specifically calls upon international actors "to assist national jurisdictions." This emphasises the need to maintain such cooperation in the future.
20. This is the spirit in which the War Crimes Chamber (WCC) at the Bosnian State Court was established. On 30 September 2002, Rule 11 bis of the ICTY RPE was amended to set out the criteria, which must be satisfied for a case to be transferred to a local jurisdiction.

21. The first cases to be transferred have been those of lower- and mid-level accused. Simultaneously, the international presence in BiH, in the form of the Office of the High Representative (OHR), helped to draft an entirely new criminal code and criminal procedure code, which incorporated the offences of genocide, crimes against humanity and war crimes. This also includes a Law on Transfer of cases from the ICTY, an elaborate code on the precise procedural steps to be taken upon a case being transferred, and to clarify jurisdictional issues.
22. The WCC became fully operational in early 2005. This would not have been possible without the full cooperation and mutual assistance of the international and domestic communities.
23. The Security Council Resolution also makes reference to outreach programmes, which are essential in informing local actors of the work of international tribunals, such as the ICTY. The Bosnian experience, by virtue of an outreach programme set up by the ICTY, has shown that there is often a paucity of knowledge among local people, affected by atrocities committed during the conflict, about the real work of the ICTY.
24. Taking into account the different nature of ICTY and ICC, we can see the future practice (or intended practice) of ICC as reflecting the above direction.
25. Rule 4 of the ICTY's RPE states that a Trial Chamber may exercise its functions "at a place other than the seat of the tribunal." Article 3(3) of the ICC's Statute, which states that the Court "may sit elsewhere, whenever it considers it desirable", accompanies this same possibility.
26. The BiH Law on Transfer is also a model of cooperation between a domestic and international jurisdiction.
27. In Article 4 of the Law, for instance, the courts "may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings." This has a very positive impact upon sharing investigations, evidence, human, material and financial resources, case management and the adequate utilisation of time in international and domestic courts. Delayed justice is denied justice.
28. The experience of the WCC in BiH provides a template for the future cooperation between international and domestic jurisdictions. These norms establish that resources are increasingly being shared between the two planes. This is particularly relevant for the future of the nascent ICC, which can and should play an important role in rebuilding local justice systems and do its utmost to help eradicate impunity at the local level.
29. Owing to the fact that the Bosnian example shows the way in which international assistance has helped to rebuild a legal system and social infrastructure previously destroyed by conflict, it can also be a model for future cooperation to be implemented by ICC in the future international and national criminal jurisdiction relationships.
30. In contrast to the ICTY Statute, which establishes the principle of the primacy of the ICTY's jurisdiction, the Rome Statute of the ICC fully espouses the principle of complementarity. It therefore has a duty to cooperate with national institutions, complementing actively the complementarity principle.

31. This provides a sound basis upon which to analyse the future cooperation, it means how to help a national system where and when “the State is unwilling or unable genuinely to carry out the investigation or prosecution”.