

# **Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina**

Eszter Kirs\*

## **Table of Contents**

A.	The Changing Relationship of the ICTY and the Bosnian Judicial System .....	398
I.	International Primacy .....	398
II.	Establishment of the State Court: Efforts for Reaching Uniformity.....	401
B.	Positive Impact of the International Assistance .....	404
I.	Transfer of Evidence .....	404
II.	Transfer of Expertise .....	405
III.	Evaluation of the Impact of the ICTY on the Practice of the State Court.....	407
C.	The Limits of the Impact: Entity Level Courts .....	409
I.	The Role of Cantonal and District Courts .....	409
II.	Fragmentation within the Domestic Judiciary.....	410
III.	Challenges Faced by the Entity Level Courts .....	412
D.	Concluding Remarks .....	414

\* Lecturer, Department of International Law, Faculty of Law, Miskolc University (Hungary); legal assistant in the Prlić *et al.* case before the ICTY. Contact: kirs.eszter@gmail.com.

The author gratefully acknowledges the support of the Postdoctoral Eötvös Scholarship of the State of Hungary (Magyar Állami Posztoktori Eötvös Ösztöndíj).

## Abstract

Information is a fundamental resource in post-conflict societies. However, information-sharing may lead to both advantages and disadvantages. The main focus of the present paper is the flow of information and knowledge from the International Criminal Tribunal for the Former Yugoslavia (ICTY) to the domestic judicial system of Bosnia and Herzegovina. Following a brief introduction of the dynamics of the changing relationship of the Tribunal and the Bosnian judiciary, the paper aims to outline the positive achievements and the practical barriers of the international intervention into the management of war crime cases in Bosnia and Herzegovina. The paper introduces the practical problems that came forth with the introduction of the adversarial procedure in the domestic judicial system, by which measure international intervention might have gone too far resulting also in negative consequences with regard to the management of domestic war crime trials.

### A. The Changing Relationship of the ICTY and the Bosnian Judicial System

#### I. International Primacy

In the early years of the existence of the ICTY from 1993 on, the conflict was still ongoing in the affected states. Even in the first decade after Dayton, the domestic judiciary was clearly not able to conduct impartial and effective investigations and prosecutions. Numerous actors in the judiciary were politically biased and aimed for reprisals. While Bosnian courts undertook a limited number of war crimes prosecutions in this period, these were widely and strongly criticized by independent observers.<sup>1</sup> Only 54 domestic war crimes prosecutions were documented to have reached trial stage before January 2005.<sup>2</sup> Therefore, domestic courts of Bosnia and

<sup>1</sup> D. Orentlicher, ‘That Someone Guilty Be Punished – The Impact of the ICTY in Bosnia’ (Open Society Justice Initiative, International Center for Transitional Justice, 2010) available at [http://www.ictj.org/static/Publications/Orentlicher\\_BiH\\_OSJI-ICTJ\\_ThatSomeoneGuilty\\_pb2010.pdf](http://www.ictj.org/static/Publications/Orentlicher_BiH_OSJI-ICTJ_ThatSomeoneGuilty_pb2010.pdf) (last visited 29 April 2011), 109.

<sup>2</sup> W. Burke-White, ‘The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina’, 46 *Columbia Journal of Transnational Law* (2008) 1, 279, 287

Herzegovina were not seen as credible partners for the ICTY in ensuring accountability for the most serious crimes committed during the armed conflict.

The Statute of the ICTY accordingly established a relation of international primacy:

The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.<sup>3</sup>

In 1996, the relationship between the ICTY and the judiciary of Bosnia and Herzegovina was transformed into the state of absolute international primacy,<sup>4</sup> where the main aim became to hinder arbitrary arrests in the region by the supervision of the ICTY within the framework of the newly established Rules of the Road program.<sup>5</sup> The Bosnian, Serbian

For a more detailed report about the early prosecutions and initial problems in Bosnia and Herzegovina see Organization of Security and Cooperation in Europe, ‘War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles’, Report 3 (March 2005) available at [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122311024992eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf) (last visited 29 April 2011).

<sup>3</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, Art 9.

<sup>4</sup> The author adopted the categorization of Professor William Burke-White. According to his interpretation, the simultaneous existence of international and domestic criminal judicial bodies, four significant types of jurisdictional relations can be identified. The first type is domestic primacy where the relevant international tribunal can proceed only if domestic authorities refer a case to it. The second type is simple international primacy where domestic courts have jurisdiction only above cases which the international tribunal has not dealt with. In case of the third type of relation, the international tribunal is entitled to authorize the domestic court to proceed, and without this approval the domestic courts do not have jurisdiction. This relation was called by Professor Burke-White absolute international primacy. The fourth category is complementarity which came into the focus mainly by the establishment of the International Criminal Court. In case of this relation, one of the conditions of the jurisdiction of the International Criminal Court is that the domestic authorities do not conduct genuine investigations. Concerning the possible incentives for the improvement of the domestic judicial system, the relation of complementarity is clearly the most beneficial solution. Burke-White, *supra* note 2, 297-301.

<sup>5</sup> Office of the High Representative, ‘The Rome Statement. Agreed Measures’, , February 18, 1996. Art 5.

and Croatian parties agreed that local authorities would not arrest anyone on war crimes charges without first obtaining approval from the ICTY prosecutor.<sup>6</sup>

In this way, local prosecutors could obtain a better insight into international standards. The staff of the Office of the Prosecutor (hereinafter OTP) of the ICTY reviewed 1,419 files involving 4,985 suspects. Approval was granted for the prosecution of 848 persons.<sup>7</sup> At the same time, a number of problems appeared in the implementation of the strategy. More than 2,300 cases (40%) sent to the ICTY were never reviewed and no response was sent to the Government of Bosnia and Herzegovina.<sup>8</sup> According to research conducted by Professor Diane F. Orentlicher, ICTY officials failed to keep their Bosnian colleagues informed about the status of the Rules of the Road investigations, even in response to direct inquiries.<sup>9</sup>

According to the evaluation of Professor Burke-White concerning this period, the close supervision of the ICTY together with the lack of involvement of domestic actors created strong disincentives for domestic prosecutions in Bosnia and Herzegovina. Even if national courts chose to initiate proceedings, the ICTY could assert primacy and preempt national action. The Rules of the Road Agreement essentially hardened the ICTY's jurisdictional relationship with national governments into a form of absolute international primacy. This relationship did not encourage domestic actors to improve the quality of domestic institutions or to look into the practice of the ICTY.<sup>10</sup>

For a more detailed introduction of the Rules of the Road program see M. Ellis, 'Bringing Justice to an Embattled Region – Creating and Implementing the „Rules of the Road“ for Bosnia-Herzegovina', 17 *Berkeley Journal of International Law* (1999) 1, 1.

<sup>6</sup> Orentlicher, *supra* note 1, 110.

<sup>7</sup> *Id.*, 111.

<sup>8</sup> Burke-White, *supra* note 2,317.

<sup>9</sup> The interviews conducted by Professor Orentlicher demonstrate that the lack of proper information-sharing with the domestic stakeholders was a serious problem:

„A judge reported that after having submitted twenty-five case and waiting eight months, the ICTY had not responded. Other judges and prosecutors stated that they too had submitted files several years before and had received no communication [...] These professionals viewed the ICTY as unresponsive and detrimental to the ability of Bosnian courts to conduct national war crimes trials.“, Orentlicher, *supra* note 1,112.

<sup>10</sup> Burke-White, *supra* note 2, 312-318.

## II. Establishment of the State Court: Efforts for Reaching Uniformity

With the completion strategies of the ICTY of 2002 and 2003,<sup>11</sup> the relationship with the domestic courts got to the next stage. The main aim was to transfer cases not yet tried by the Tribunal back to domestic courts. The question became which domestic institution would be a proper and reliable forum for conducting such trials in Bosnia and Herzegovina.<sup>12</sup> A precondition was the thorough reform of the Bosnian judicial system.

In 2002, the Office of the High Representative launched a project of judicial streamlining within the constituent entities, focusing on the number of courts, their location, jurisdiction and ethnic balance. Vetting was conducted within the judiciary between 2002-2004 in order to avoid bias and corruption. As a consequence, about 30 percent of first instance courts were closed and 30 percent of the judiciary had to leave their offices. Furthermore, prosecutors and judges were subjected to a process of reappointment by the High Judicial and Prosecutorial Council.<sup>13</sup> Efforts were also undertaken to improve court administration and management.<sup>14</sup> In 2003, a new Criminal Code and Criminal Procedural Code was adopted that created a legal basis for internationally acceptable proceedings. The new

<sup>11</sup> United Nations General Assembly, ‘The ninth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) since 1991’ (4 September 2002) available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2002\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2002_en.pdf) (last visited 29 April 2011), para. 37.

United Nations General Assembly, ‘The tenth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) since 1991’ (20 August 2003) available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2003\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2003_en.pdf) (last visited 29 April 2011), para. 13-14.

<sup>12</sup> Concerning the early problematic issues see, D. Mundis, ‘The Judicial Effects of the „Completion Strategies” on the Ad Hoc International Criminal Tribunals’, 99 *American Journal of International Law* (2005) 1, 142.

<sup>13</sup> A. Mayer-Rieckh, ‘Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor’s Office in Bosnia and Herzegovina’, in A. Mayer-Rieckh & P. De Greiff (eds) *Justice and Prevention: Vetting Public Employees in Transitional Societies* (2007), 197.

<sup>14</sup> Burke-White, *supra* note 2, 288.

Criminal Code introduced crimes against humanity, genocide and war crimes into the domestic criminal law of the Federation of Bosnia and Herzegovina, and the legal concept of command responsibility as well.<sup>15</sup> In addition, the new Criminal Procedural Code introduced the combination of the adversarial and inquisitorial procedural system following the model of the procedural rules applicable at the ICTY.

The ICTY and the Office of the High Representative adopted a joint plan of action for the establishment of a new Court of Bosnia and Herzegovina that could receive cases transferred from the Tribunal for further selection and delegation to local courts.<sup>16</sup> This was a clear message from the Tribunal about the international acknowledgment of the Bosnian judiciary.<sup>17</sup> According to Professor Burke-White, in this way, the new relationship of the ICTY and the Bosnian domestic courts involved incentives similar to those of complementarity.<sup>18</sup> However, the adoption of a new Criminal and Criminal Procedural Code can be qualified as efforts for reaching uniformity rather than complementarity.

Following the approval of the Peace Implementation Council, the State Court of Bosnia was established in 2003. Its First Section became responsible for the war crime cases, which was launched in 2005.<sup>19</sup> At the same time, a Special Department for War Crimes was created within the Prosecutor's Office of Bosnia and Herzegovina.<sup>20</sup> Meanwhile, the Rules of

<sup>15</sup> Criminal Code of Bosnia and Herzegovina, (27 June 2003) available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/Criminal\\_Code\\_of\\_BH\\_-Consolidated\\_text.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/Criminal_Code_of_BH_-Consolidated_text.pdf) (last visited 29 April 2011), Arts 117-184.

Prior to 2003, genocide and war crimes were included in criminal codes only at the entity levels.

<sup>16</sup> Orentlicher, *supra* note 1, 116.

For a detailed introduction of the process of establishment of the State Court see, F. Donlon, 'Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina', in D. Haynes (ed.), *Deconstructing the Reconstruction – Human Rights and the Rule of Law in Postwar Bosnia and Herzegovina* (2008), 257-284.

<sup>17</sup> Burke-White, *supra* note 2, 328.

<sup>18</sup> *Id.*, 320.

<sup>19</sup> For a brief overview about the structure of the State Court of Bosnia see, 'Jurisdiction, Organization, and Structure of the Court of Bosnia and Herzegovina' available at <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e> (last visited 29 April 2011).

<sup>20</sup> Orentlicher, *supra* note 1, 117.

Procedure and Evidence of the ICTY were amended, and the new Rule 11 *bis* regulated the transfer of cases to the State Court, as follows:

“After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the “Referral Bench”), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.”<sup>21</sup>

Following the launch of the War Crime Section of the State Court, the ICTY prosecutors were entitled to designate observers to monitor domestic trials that originated in an ICTY indictment. The Tribunal could recall any transferred case if local proceedings fell short of international standards. The monitoring role was mandated to the OSCE mission.<sup>22</sup> The ICTY referred a total of six Rule 11 *bis* cases to the War Crime Section of the State Court, involving ten defendants. The OSCE Mission has submitted to the Office of the Prosecutor of the ICTY regular reports on these cases, which have been compiled on a quarterly basis.<sup>23</sup> Today the Milorad Trbic case is the only one left where the appeal is still pending.

Beyond the cases transferred by the ICTY under Rule 11 *bis*, the caseload of the State Court of Bosnia and Herzegovina includes cases belonging to three further categories: those cases which were investigated but not prosecuted by the Office of the Prosecutor of the ICTY (“Category II cases”<sup>24</sup>); new investigations commenced by the Bosnian Special

<sup>21</sup> Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 11 *bis*, A.

<sup>22</sup> Orentlicher, *supra* note 1, 119.

<sup>23</sup> For the reports see ‘Monitoring and Reporting on Rule 11 bis Cases’ available at: <http://www.oscebih.org/Default.aspx?id=70&lang=EN> (last visited 30. April 2011).

<sup>24</sup> ICTY prosecutors transferred fourteen Category II cases to the State Court involving approximately 40 suspects. Orentlicher, *supra* note 1, 122.

Department for War Crimes; and those Rules of the Road cases which were not processed by local authorities to the point of indictment.<sup>25</sup>

## B. Positive Impact of the International Assistance

In addition to the establishment of the State Court, the impact of the ICTY on the system of domestic criminal justice has appeared in the field of the usage of adjudicated facts, evidences and procedural decisions adopted by the Tribunal, monitoring of trials and the transfer of expertise.<sup>26</sup>

### I. Transfer of Evidence

The prompt management of war crime cases was facilitated by the transfer of evidence from the ICTY. Rule 11 *bis* cases were transferred to the prosecutors of the State Court together with the evidence gathered by the OTP of the Tribunal which made it needless for the domestic office of the prosecutor to undertake extensive investigations before going to trial. Furthermore, in October 2004, the Prosecutor of the ICTY transferred all the Rules of the Road files to the Bosnian authorities. The contribution of these files to the work of the State Court, however, should not be overestimated. In many cases these were not complete materials, far from trial-ready case files.<sup>27</sup>

The Evidence Disclosure Suite and Judicial Database is a major benefit for the domestic courts as well as for the Tribunal. Access to the database is provided at the State Court and any courts equipped with networked computers can reach the Court Records which are available at the website of the Tribunal. Today the most significant problem in this regard is the lack of official B/C/S translation of the transcripts of the ICTY. This means in numbers that the Tribunal has to face the challenge of translating 400,000 pages of documents in order to make them available for the institutions and the people of the region. This shortcoming could have been

<sup>25</sup> T. Abdulhak, ‘Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina’, 9 *International Criminal Law Review* (2009) 2, 333, 341.

<sup>26</sup> See B. Ivanišević, ‘The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court’ (2008) available at <http://www.ictj.org/images/content/1/0/1088.pdf> (last visited 29 April 2011), 25-26.

<sup>27</sup> Orentlicher, *supra* note 1, 120-123.

prevented by better and earlier planning of a strategy on the transfer of transcripts.

## II. Transfer of Expertise

There are five judicial panels allocated to the first Section of the State Court. Initially, panels were comprised of two international judges and one local judge, who was the presiding judge of the panel. In 2008, the balance of composition was reversed. National judges were in a majority, the panels included two nationals and one international.<sup>28</sup> It was anticipated that by the end of 2009 there would no longer be any international judges within the Court.<sup>29</sup> Nevertheless, the mandate of international staff was prolonged and for the time being, the remaining international judges are supposed to keep their position in the panels until 2012.<sup>30</sup> The Office of the Prosecutor of the War Crimes Section, which consists of five mixed national and international trial teams assigned to different geographical areas, has a designated liaison, responsible for the cooperation with the ICTY and with other States in the region. The independent institution of the Criminal Defense Section (Odsjek krivične odbrane, hereinafter OKO) was initially headed by an international director. The defense support of the OKO is organized into five regional groups, each consisting of one Bosnian lawyer, one Bosnian intern and one international intern.<sup>31</sup> It has trained Bosnian lawyers on criminal defense and international law, facilitating the transition to an adversarial judicial model, and developing an accreditation program for Bosnian lawyers. ICTY officials have provided far reaching assistance with training and support for this program.<sup>32</sup>

In order to contribute to capacity building by the transfer of knowledge, the ICTY has organized a number of training sessions for judges, prosecutors, and judicial officials not only in Bosnia, but in Croatia

<sup>28</sup> Ivanišević, *supra* note 26, 7.

<sup>29</sup> Human Rights Watch, ‘Looking for Justice – The War Crimes Chamber in Bosnia and Herzegovina’ (2006) available at <http://www.hrw.org/en/reports/2006/02/07/looking-justice-0> (last visited 29 April 2011), 7-8.

<sup>30</sup> On December 14, 2009, the High Representative for Bosnia and Herzegovina extended the mandate of international judges and prosecutors working on war crimes cases for a further three years. Orentlicher, *supra* note 1, 132.

<sup>31</sup> Human Rights Watch, *supra* note 29, 22-23.

<sup>32</sup> Burke-White, *supra* note 2, 340.

and Serbia as well.<sup>33</sup> The Office of the Prosecutor of the ICTY established a Transition Team within the office in order to facilitate cooperation with local prosecutors concerning 11 bis and Category II transfers. Local judges and prosecutors of Bosnia and Herzegovina traveled to The Hague in order to participate in trainings and professional dialogue with their colleagues working at the ICTY. Workshops have been held by the Office on prosecutorial skills such as cross-examination, the use of electronic databases and the procedure to gain access to confidential material according to the Rules of Procedure and Evidence of the ICTY. Visits have allowed OTP staff and their national colleagues to work together on real case files. According to Serge Brammertz, the Chief Prosecutor of the ICTY, the relationship was transformed from the earlier vertical relationship into a rather horizontal one.<sup>34</sup> Practitioners working at the Tribunal have contributed to the trainings of judges, prosecutors and defense lawyers in Bosnia and Herzegovina by occasional lecturing.<sup>35</sup>

In 2009, the OTP launched a new program for young professionals, whereby 10 young legal assistants from the region of the former Yugoslavia are given the possibility to work at the Tribunal for a period of 6 months. This is an excellent possibility to improve their skills and expertise that contributes to capacity building on a long term basis. At the same time, the program can be successful only if the young professionals participating in the program return to their respective country following the 6 months and continue working on war crime cases at the domestic courts. Currently, there is no program in Bosnia and Herzegovina to create incentives for these young lawyers to return.<sup>36</sup> However, it might not be a real problem in practice. Legal officers from the State Court usually leave for the young professional program to improve their skills in order to go back later on to their stable position at the State Court. Their perspectives lead them back to Bosnia and there is not a high probability that they would try to build up a career abroad. Following their return they generate lively legal debates that contribute significantly to the improvement of the judicial practice.<sup>37</sup>

<sup>33</sup> Burke-White, *supra* note 2, 307.

<sup>34</sup> Speech given by Serge Brammertz, Prosecutor of the ICTY at the conference *Assessing the Legacy of the ICTY*, The Hague, February 23-24, 2010.

<sup>35</sup> Orentlicher, *supra* note 1, 123.

<sup>36</sup> Interview with Jusuf Halilagić, Secretary of Ministry of Justice, September 1, 2010.

<sup>37</sup> Interview with Judge Patricia Whalen, Court of Bosnia and Herzegovina, September 2, 2010.

Judges of the State Court have found guidance for many of the complex issues of international humanitarian law in the jurisprudence of the ICTY. A practical guideline, namely the ICTY Manual on Developed Practices, which facilitates the smooth management of trials, was published by the Tribunal and the UNICRI (United Nations Crime and Justice Research Institute) in 2009. This manual has been disseminated in Bosnia and Herzegovina in local languages and it is available on the website of the Tribunal. The publication of the Manual was a great achievement; however, its applicability by the Bosnian judiciary is still problematic due to differences between the two relevant legal systems.<sup>38</sup>

### III. Evaluation of the Impact of the ICTY on the Practice of the State Court

While the non-governmental organization of the International Center for Transitional Justice, the OSCE Mission to Bosnia and Herzegovina and others have identified a number of concerns relating to the work of the War Crimes Section of the State Court of Bosnia, its general performance has been evaluated as a positive achievement.<sup>39</sup> The progressive improvement of both the institution itself and lawyers practicing before the Court has been impressive especially considering the facts that prosecutors, judges and defense attorneys have to deal with new subject matter and work according to a new procedural code of an adversarial character.<sup>40</sup>

The indirect impact of the ICTY is clearly demonstrated by the changes in the drafting of judgments conducted by the panels of the State Court. While analytical legal reasoning was formerly not a characteristic strength of the judiciary of Bosnia and Herzegovina, today most of the judgments of the State Court have a thorough annex and footnoting system referring to the evidence, a clearly build-up structure and detailed

<sup>38</sup> Interview with Aida Trožić, Senior Professional Associate of the Centre for Judicial and Prosecutorial Training (Centar za Edukaciju Sudija i Tužilaca u Federaciji Bosne i Hercegovine), 31 August 2010.

<sup>39</sup> The Manual is available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY\\_Manual\\_on\\_Developed\\_Practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf) (last visited 29 April 2011)

<sup>40</sup> Orentlicher, *supra* note 1, 118.

<sup>40</sup> For similar positive acknowledgement from Mr Abdulhak concerning the work of the State Court see Abdulhak, *supra* note 25, 342.

reasoning.<sup>41</sup> This improvement was achieved largely by the international judges who had worked previously at the ICTY or had gained long-term experiences as practitioners in well-developed legal systems and who were appointed later on as judges of the State Court. Their work and improvement has been facilitated by international judges practicing at the State Court to a large extent. Three of the international judges who have worked at the State Court worked earlier as prosecutors at the ICTY,<sup>42</sup> and one of them was earlier a judge of the Tribunal.<sup>43</sup> Their support has made possible the fact that those judges who saw the need for changes in the prior system could adapt to the new requirements smoothly.<sup>44</sup> Bosnian officials practicing at the State Court have made an effort to embrace, where possible, the work and experience of the ICTY. The library of the Court includes a complete collection of the jurisprudence of the Tribunal, and all

<sup>41</sup> Compare the judgment adopted in the Lazarević Sreten *et al.* case (X-KRŽ-06/243) on September 29, 2008 with the one adopted in the Milorad Trbić case (X-KR-07/386) on October 16, 2009, available at <http://www.sudbih.gov.ba/?jezik=e> (last visited 29 April 2011).

The improvement is acknowledged by the comments of the OSCE on the Trbić judgment, as follows:

“The Mission is pleased to note several improvements in the clarity of Trial Panel’s reasoning, as well as in certain technical aspects of the written verdict. First, the Panel’s analysis is well structured and easy to follow. After explaining the relevant legal provisions, the Panel applies the law to the specific facts in the case, rather than simply recount the evidence. Second, throughout the Judgment, the Panel makes frequent references to the jurisprudence of the ICTY, ICTR and the Court of BiH and incorporates the legal reasoning from these decisions into its analysis. Particularly positive is the fact that, when discussing certain procedural aspects of the trial affecting the rights of the Accused, such as the admissibility of the Defendant’s prior statements, the Trial Panel takes into account the requirements of the European Convention on Human Rights (ECHR) and provides a detailed analysis of the relevant ECtHR decisions.

Furthermore, unlike other written judgments of the Court of BiH, the present Judgment contains an Annex with the important procedural decisions, a list of injured parties who filed compensation claims, a list of evidence, as well as a list of cases cited. This contributes to the clarity of the Judgment and represents a positive new practice.”

OSCE Mission to Bosnia and Herzegovina, ‘Twelfth Report in the *Milorad Trbic* Case Transferred to the Court of BiH pursuant to Rule 11bis’ (July 2010), available at [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010092009084172eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010092009084172eng.pdf) (last visited 29 April 2011), 4.

<sup>42</sup> Judge Weiner Phillip is still working at the War Crimes Section of the State Court.

<sup>43</sup> Judge Almiro Rodrigues. Orentlicher, *supra* note 1, 124.

<sup>44</sup> Interview with Patricia Whalen, *supra* note 37.

of the judges in the War Crimes Section of the State Court have been briefed on that jurisprudence.<sup>45</sup>

## C. The Limits of the Impact: Entity Level Courts

### I. The Role of Cantonal and District Courts

The State Court, just as other ad hoc international, hybrid or internationalized criminal courts, plays an essential role in prosecuting war crimes, but its capacity is limited. Although its improvement has been a great success, in itself the Court is not able to handle the high caseload that the Bosnian domestic judicial system has to face. Here the lower level courts come into play. Within the judicial system of the Federation of Bosnia and Herzegovina ten cantonal courts, the Basic Court of Brčko District and the five district courts of the Republika Srpska are competent in war crimes cases.<sup>46</sup>

The National War Crime Strategy of Bosnia and Herzegovina issued in 2008 defined the aim to conclude highly complex war crime trials within seven, and all the other, less complex cases within 15 years. The above detailed problems indicate that these deadlines might not be realistic. Although there have been proposals that all the war crime trials should be proceeded by the State Court, as a number of cantonal and district prosecutors expressed a preference in this as well, due to the pressing time limits, broad involvement of cantonal courts is part of the strategy. The State Court is clearly well-prepared for conducting war crime trials meeting international standards. At the same time, the Court in itself would not have the capacity to overcome the challenge of the present caseload. This is the point where the fact has a great significance that the direct impact of the ICTY has appeared at the level of the State Court but has not reached the level of entity courts.

All war crimes cases have been reported first to the War Crimes Section of the State Court where the categorization of cases was the subject of prosecutorial decision. Initially, the “highly sensitive” cases fell under the jurisdiction of the State Court and all the other cases were referred to entity,

<sup>45</sup> Burke-White, *supra* note 2, 342.

<sup>46</sup> Organization of Security and Cooperation in Europe, *supra* note 2, 9.

cantonal or district courts.<sup>47</sup> The guideline for determining the sensitivity of a case was to be found in the “Orientation Criteria for Sensitive Rules of the Road Cases”. The most significant factor was whether there was a prospect for witness intimidation or whether local political conditions hindered fair trials.<sup>48</sup>

A significant step forward to manage war crimes cases was the creation of the national database for unresolved and reported war crime cases. To date, it indicates that approximately 1,400 cases with 10-16,000 suspects are to be proceeded by domestic courts. All the cases have to be submitted to the State Court which then decides whether to delegate any of them to the entity level courts.<sup>49</sup> The main factor in making such decisions is the complexity of the case. Highly complicated cases will be commenced by the State Court itself, while the less complicated ones will be dealt by the entity level courts.

## II. Fragmentation within the Domestic Judiciary

Discrepancies have appeared with regard to the implemented law within the Bosnian judicial system due to the fact that the criminal code of the former Socialist Federal Republic of Yugoslavia remained in force. The implementation of different codes leads to significant differences between the sentencing policy of the State Court and the entity level courts.<sup>50</sup>

According to a 2008 report of the Human Rights Watch, trials at cantonal and district courts in cases of crimes committed during the war, were generally conducted under the old criminal code of the former

<sup>47</sup> Human Rights Watch, *supra* note 29, 6.

<sup>48</sup> Human Rights Watch, ‘Still Waiting – Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts’ (2008) available at <http://www.hrw.org/en/reports/2008/07/09/still-waiting-0> (last visited 29 April 2011), 10.

<sup>49</sup> Interview with Jusuf Halilagić, *supra* note 36.

<sup>50</sup> “For instance, an entity court has sentenced a defendant convicted of cruel treatment of prisoners to a term of one year and eight months’ imprisonment even as the State Court has sentenced another defendant charged with a comparable act to imprisonment for a period of ten-and-a half years.”

Organization of Security and Cooperation in Europe, ‘Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina’ (2008) available at [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2\\_010122311504393eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2_010122311504393eng.pdf) (last visited 29 April 2011), 8.

Yugoslavia.<sup>51</sup> The High Representative and the Parliamentary Assembly of the Council of Europe have expressed their concerns about the lack of harmonization of the law applicable to war crimes.<sup>52</sup> In addition, the Constitutional Court of Bosnia and Herzegovina also declared in the Maktouf case that the implementation of different criminal sanctions to similar crimes by the state and entity courts may constitute illegal discrimination. Moreover, the Court urged the entity level courts to apply the new Criminal Code of Bosnia.<sup>53</sup>

The question is how to implement the decision of the Constitutional Court in judicial practice. The initial proposals for a possible mandate of the State Court to issue specific directives to the entity level courts with orders to implement the new Criminal Code of Bosnia and Herzegovina was abandoned due to the argument that it would violate the fundamental principle of the independence of the judiciary. According to the statement of Milorad Novkovic, the President of the High Judicial and Prosecutorial Council, judges must be given the discretionary power to decide which code to implement in a specific case. There are intense efforts to harmonize the practice of courts, but the only one institutional tool for coordination of judicial work is the organization of regular meetings with officials practicing at the State Court and the entity level courts. His firm opinion is that harmonization issues should be solved in the way of case law and the power to decide about which law to implement should remain basically in the hand of judges. Nevertheless, he stated, cantonal courts recently prefer implementing the new Criminal Code to the one of the former Yugoslavia. Implementation of the old code is a real problem and a more frequent phenomenon rather in the practice of the district courts of the Republika Srpska. He emphasized that a much more significant issue is how to accomplish the aims of the National War Crime Strategy, how to commence trials as quickly as possible, and this task should be given the highest priority.<sup>54</sup> This stance is understandable from the point of view of the political circumstances, namely, that one of the preconditions for the closure

<sup>51</sup> Human Rights Watch, *supra* note 48, 52.

<sup>52</sup> Organization of Security and Cooperation in Europe, *supra* note 50, 6.

<sup>53</sup> Constitutional Court of Bosnia and Herzegovina, Case of Abduladhim Maktouf, Decision on Admissibility and Merits, AP-1785/06, available at [http://www.ccbh.ba/eng/odluke/povuci\\_pdf.php?pid=73135](http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=73135) (last visited 29 April 2011), paras 80-92.

<sup>54</sup> Interview with Milorad Novković, President of the High Judicial and Prosecutorial Council, 31 August 2010.

of the Office of the High Representative and the assistance of the European Union is the proper and effective enforcement of the war crime strategy.<sup>55</sup> At the same time, from a legal point of view it raises serious concerns with regard to the principle of legality.

### III. Challenges Faced by the Entity Level Courts

In addition to the concerns related to the principle of legality, the caseload of the entity level courts is reaching high numbers that they cannot cope with. There are fundamental problems that hinder their ability to face this challenge. Opposed to the State Court which is well-improved in logistics and expertise, they have limited financial and technical resources, in certain entities there is a lack of specialization and expertise among judges, prosecutors and defense attorneys, and the system of support and protection of witnesses is too weak to conduct proceedings that would meet international standards ensuring fair and safe proceedings in war crimes cases.<sup>56</sup>

In 2008, the High Judicial and Prosecutorial Council itself concluded that the staffing levels of prosecutor's offices, as well as the technical facilities and the level of specialization and expertise are inadequate to handle the loads of war crime cases.<sup>57</sup> This seems to be the greatest challenge hindering the proper management of war crime trials. The borderline between the State Court and entity level courts seems to create the limits of the possible direct and indirect impact of the ICTY.

The possible impact of training programs of the ICTY organized in The Hague for the transfer of knowledge is limited by the simple fact that cantonal courts do not employ legal officers who could be sent to participate

<sup>55</sup> Interview with Stephanie Barbour, Legal Adviser on War Crimes and Transitional Justice, Judicial and Legal Reform Section, OSCE Mission to Bosnia and Herzegovina, 30 July 2010.

<sup>56</sup> Human Rights Watch, *supra* note 48, 3.

For a more detailed report about the problems concerning witness protection see Organization of Security and Cooperation in Europe, 'Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing' (2010) available at [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122314375593eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf) (last visited 29 April 2011).

<sup>57</sup> Human Rights Watch, *supra* note 48, 21.

in these trainings.<sup>58</sup> Therefore, the benefits of the program can reach mainly the State Court as an institution and cannot reach cantonal courts. Milorad Novkovic, President of the High Judicial and Prosecutorial Council did not qualify the 3-4 days visits and the young professional program as having a significant effect on the work of the judiciary. In his opinion, it would be much more useful to send practicing prosecutors to the ICTY for 3-4 months so that they would be able to contribute immediately to the prompt management of war crimes cases. This view is clearly determined by the pressing need for getting over the war crime trials. This kind of program could be clearly as beneficial as the young professional program, but currently there are no financial resources reserved for this aim.

The involvement of entity level judges and prosecutors in local training on the practice of the ICTY currently seems to occur randomly. Training is held in accordance with the annual program of the Centers for Judicial and Prosecutorial Training or occasionally by various other organizations. Most participants in the audience of judicial trainings on the management of war crime cases are judges from the State Court and prosecutors from the Office of the Prosecutor of Bosnia and Herzegovina. Judges, in general, are obliged to participate in training four days per year, but this training does not need to be held on the topic of international criminal law even if it is about judges dealing with war crimes cases. At the same time, although three judges are needed for the hearing of a war crime case, at most of the entity level courts three judges with expertise in international criminal law cannot be found. In these cases judges express their interest to the Centers for Judicial and Prosecutorial Training to attend trainings on international humanitarian law and international criminal law. Training is not facilitated by the fact that there is no local commentary on international criminal law (understandably it takes time for academic actors as well to explain the applicability of these rules in the Bosnian legal system) therefore, training is held on the basis of materials prepared by the lecturers.<sup>59</sup>

<sup>58</sup> The problem was specifically indicated in the National War Crimes Strategy. At the time of its adoption, beside the State Court only the cantonal court of Sarajevo employed 2 legal officers, 'National War Crimes Strategy of Bosnia and Herzegovina' (December 2008).

<sup>59</sup> Interview with Aida Trožić, *supra* note 38.

With regard to the perspectives of defense lawyers, it must be emphasized that the OKO provides training and support to defense attorneys working at the State Court. Unfortunately, no similar body exists to support attorneys who represent defendants at cantonal and district courts. OKO trainings are theoretically open to any interested attorney, but in practice, they would most likely only be known to attorneys who practice at the State Court.<sup>60</sup> However, there is one official who is employed by the OKO specifically for training defense attorneys practicing before cantonal courts.<sup>61</sup>

## D. Concluding Remarks

Conclusions can be drawn first concerning the recent state of the Bosnian judicial system and secondly with regard to the international intervention into the domestic criminal legal procedures, in general.

The introduction of the adversarial system into the Bosnian criminal legal procedure led to the need for well-trained advocates prepared for a more active role in the proceedings. Through the training of the OKO the access to the expertise and knowledge about the practice of the ICTY is ensured. On the other hand, the training and qualification is not sufficiently systematic. An official and uniform certificate system could be beneficial for ensuring the best representation of the accused in war crimes cases where the role of well-trained defense counsel is especially significant for the enforcement of the principle of equality of arms due to the eventual complexity of cases.

In order to open up the possibility of the trainings managed or assisted by the personnel of the ICTY for the judges and prosecutors of the entity level courts as well as for the lawyers practicing at the State Court, legal officers should be appointed for the assistance of judges and prosecutors of the cantonal and district courts. However, this is again a clearly internal affair of the State of Bosnia and Herzegovina.

<sup>60</sup> Human Rights Watch, *supra* note 48, 48-49.

Further concern was emphasized by the report with regard to equality of arms, namely that defense attorneys seem to be in general at a disadvantage compared to prosecutors.

<sup>61</sup> Interview with Stephanie Barbour, *supra* note 55.

The locally organized training play a central role in the improvement of the judicial and prosecutorial practice, and the involvement of entity level judges and prosecutors is essential for the proper management of war crime trials. This issue has been addressed by two projects that provide assistance to the Centers for Judicial and Prosecutorial Training for the organization of trainings. One of them called “Support of war crimes cases in Bosnia and Herzegovina” is organized by the UNDP and the “War crimes justice project” is managed by the OSCE/ODIHR, ICTY and UNICRI. The projects will be concluded at the end of 2011. Also entity level judges and prosecutors have been involved in the program, and another important focus of the project is to train future trainers which will hopefully contribute to future capacity building to a large extent.<sup>62</sup> A broad involvement and contribution of international experts is needed for the success of these programs.

The overall monitoring of war crime trials rests today in the hand of domestic actors. The Supervisory Board of Implementation of the War Crimes Strategy submits regular reports to the Council of Ministers. To date, thirteen such meetings took place.<sup>63</sup> The close international monitoring disappears, since the proceeding in the last Rule 11bis case is at the appeals stage. Therefore, the attention of academic researchers became more significant than ever. It is the responsibility of those academic stakeholders who have conducted in-depth research in the practice of the Bosnian judiciary to return to the country with the results of their analysis, translate their papers and conclusions into the local language in order to strengthen the awareness of the local judiciary that the attention of the international community is still present.<sup>64</sup>

At last, a general conclusion can be drawn as well based on the example of Bosnia and Herzegovina. The characteristics of the domestic legal system should be taken into consideration and be paid more respect in

<sup>62</sup> Interview with Jusuf Halilagić, *supra* note 36.

<sup>63</sup> *Id.*

<sup>64</sup> For example, it would be extremely useful, if the results of the excellent research conducted within the framework of the DOMAC project were translated into B/C/S and published in the region so that these states which were - among others - the subject of case-studies, could benefit from the project. See the reports issued by the DOMAC project available at <http://www.domac.is/reports/> (last visited 29 April 2011).

the case of the international intervention, which might have gone too far in this specific case. The introduction of the adversarial system led to a number of challenges which have been detailed above in the present paper. On the other hand, local judges and prosecutors had strong expertise and experience in the inquisitorial procedure. This has led the author to the conclusion that although the Bosnian legal system was in need of improvement for the proper management of war crime trials in order to meet international standards, the already existing inquisitorial system of the criminal procedure could have been a stronger basis for progressive changes. At the same time, with regard to substantive criminal law one may conclude that the adoption of the new Criminal Code and the lack of harmonization of domestic judicial activity led to the violation of the principle of legality that is a too high prize to pay for uniformity between international and national criminal law.