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The ICTY's Conditionality Dilemma

On the Interaction of Influences of the European Union's Conditionality Policy and the International Criminal Tribunal for the Former Yugoslavia on the Development of Rule of Law in Serbia

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Abstract

The European Union has made cooperation with the International Criminal Tribunal for the former Yugoslavia a crucial condition to furthering relations with Serbia. This approach, known as "ICTY conditionality", stems from the conviction that the Tribunal is a key factor in rebuilding the rule of law in the Western Balkans. In contrast to the existing literature on EU conditionality in general or on ICTY conditionality in specific, this article emphasizes the relevance of all involved actors: it examines the interaction of ICTY conditionality, domestic factors and the ICTY's judicial performance influencing the development of the rule of law in Serbia. The article concludes that the goal of using the ICTY as a tool to establish the rule of law in Serbia has failed due to a lack of norm diffusion, although all ICTY conditionality requirements have eventually formally been fulfilled. This was not only due to inconsistent application of ICTY conditionality on the EU's side, but also on account of deficiencies in the legal operation of the Tribunal. Lastly, neither the EU's demands nor the ICTY's work fell on fruitful domestic grounds.

Keywords

European Union – EU enlargement – International Criminal Tribunal for the former Yugoslavia (ICTY) – ICTY conditionality – Serbia – rule of law – transitional justice – peace versus justice debate

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1 From Belgrade to Brussels via The Hague

Since Croatia joined the European Union recently in 2013, EU enlargement towards the Western Balkans is back on the agenda. A year earlier, the Republic of Serbia was given candidacy status after a long process of ups and downs in its relations with the EU. Although an accession date has not been set yet, Serbia will most certainly become the next Member State of the EU. The country is clearly a challenge for the Union — its turbulent past, unresolved relations to Kosovo, strong nationalism and a confusing political landscape, mainly stemming from the legacy of former Yugoslav President Slobodan Milošević,[1] are factors which make Serbia one of the toughest candidate countries the EU has to deal with.[2] Furthermore, accession is by no means without controversy in Serbia, which has made EU-Serbian relations unsteady.

The EU's relations with the Balkan countries was aimed at supporting the implementation of the Dayton/Paris and Erdut peace agreements, creating an area of political stability and economic prosperity by enhancing democracy and the rule of law, including respect for minorities and human rights, as well as revitalizing economic activity.[3] In this context, cooperation with the International Criminal Tribunal for the former Yugoslavia ("ICTY" or "Tribunal") has been one crucial condition for membership in the EU,[4] reiterated at any occasion and in any document that related to the EU-Balkan relations.[5] "ICTY

1 H. Sundhaussen, 'Serbiens extremes Zeitalter', in J. Becker and A. Engelberg (Eds), *Serbien nach den Kriegen* (Frankfurt am Main: Suhrkamp, 2008) p. 35.

2 M. Dobbels, 'Serbia and the ICTY: How effective is EU conditionality?', 6 *EU Diplomacy Papers* (2009) 1–35, at p. 5.

3 European Union: 'The stabilization and association process', available online at http://europa.eu/legislation_summaries/enlargement/western_balkans/r18003_en.htm (accessed 15 February 2014); next to region-specific approaches, relations with each Balkan country were specified in individual Stabilization and Association Agreements (SAA), which are "geared towards reconciliation, reconstruction and reform"; O. Anastasakis and D. Bechev, 'EU and the Balkans: The implications of EU conditionality', in O. Anastasakis and D. Bechev (Eds), *EU Conditionality in South East Europe: Bringing Commitment to the Process*, Conference Paper (Oxford: European Studies Centre, 2003), available online at http://www.sant.ox.ac.uk/seesox/anastasakis_publications/EUconditionality.pdf (accessed 15 February 2014) pp. 7–8.

4 The obligation to cooperate with the Tribunal includes: (a) the identification and location of persons, (b) the taking of testimony and the production of evidence, (c) the service of documents, (d) the arrest or detention of persons, (e) the surrender or the transfer of the accused to the International Tribunal (Article 29 of the Statute of the ICTY).

5 E.g., European Commission, 'Communication from the Commission. 2005 Enlargement Strategy Paper. COM (2005) 561 final' (Brussels, 2005a) p. 3, European Commission, 'Communication from the Commission to the European Parliament and the Council.

conditionality", as academics call this approach,[6] has subsequently dominated the EU's external relations agenda towards the Balkan countries.[7] With the surrender of Ratko Mladić and Goran Hadžić in May and July 2011, respectively, ICTY conditionality has fulfilled its mission.[8] In response, and albeit still reluctant to give Serbia a clear membership perspective, the European Council has granted Serbia candidacy status in March 2012.

The EU's insistence on Serbia's full cooperation with the ICTY as a condition for membership stems from the conviction that the Tribunal is a key factor in rebuilding the rule of law following the armed conflicts in the Western Balkans during the 1990s.[9] Cooperation with the ICTY is therefore seen in a context of

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Enlargement Strategy and Main Challenges 2006-2007. COM (2006) 649' (Brussels, 2006) p. 14, European Commission, 'Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2007-2008. COM (2007) 663 final' (Brussels, 2007a) p. 6, European Commission, 'Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2008-2009. COM (2008) 674 final' (Brussels, 2008) p. 48, European Commission 'Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2010-2011. COM (2010) 660' (Brussels, 2010a) p. 23.

6 *Inter alia* I. Rangelov, 'EU Conditionality and Transitional Justice in the Former Yugoslavia', 2 *Croatian Yearbook of European Law and Policy* (2006) 365–375, N.M. Rajkovic, 'The Limits of Consequentialism: ICTY Conditionality and (Non)Compliance in Post-Milosevic Serbia', Conference Paper, in: *Proceedings of the 6th Pan-European International Relations Conference, Turin, 12–15 September 2007*, available online at http://turin.sgir.eu/uploads/Rajkovic-the_limits_of_consequentialism-ecprtorino.pdf (accessed 15 February 2014), Dobbels: the European Union promises benefits such as EU membership to Serbia if and when Serbia (fully) cooperates with the ICTY. In case of failure to cooperate, sanctions are imposed on Serbia. The EU's support thus depends on the assessments of the ICTY Office of the Prosecutor whether Serbia cooperates to its full ability. Other international actors such as NATO or the US have also made ICTY cooperation conditional to their support; M. Spoerri and A. Freyberg-Inan, 'From prosecution to persecution: perceptions of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Serbian domestic politics', 11 *Journal of International Relations and Development* (2008) 350–384, at p. 365.

7 Rangelov, *loc. cit.*, p. 366.

8 Apart from the fact that EU enlargement remains a debated topic in politics and academia, another motivation for this contribution is to draw attention to a question that has — in the author's view — been insufficiently addressed in the literature: the broader impact of international criminal tribunals and courts beyond plain prosecution of criminals. As the ICTY is finally shutting down and many "lessons learned" have been formulated already, this will have to be a main focus for both legal scholars and political scientists working on transitional justice.

9 Rangelov, *loc. cit.*, p. 371; see also European Commission, 'Report from the Commission. The Stabilisation and Association process for South East Europe — Third Annual Part. COM

transitional justice and made a "litmus test of a state's moral readiness to join Europe":[10] it is reasoned that transition to peace, security and democracy depends on a society's clear break with "the illegal",[11] which includes the consolidation of the domestic judicial system and the establishment of a strong and sustainable culture of law.[12]

The ICTY conditionality approach hence raises the question whether "the pursuit of accountability for atrocities through criminal prosecutions [...] help to build the rule of law and strengthen justice systems in post-conflict societies".[13] This question will form the topic of this article. On the basis of EU

(2004) 202 final' (Brussels, 2004) p. 6; the EU follows a maximalist understanding of the rule of law: acceding countries must fulfill conditions out of Chapters 23 ("Judiciary and Fundamental Rights") and 24 "(Justice, Freedom and Security") of the EU *acquis* (all current EU rules) in order to meet the standards of a society based on the rule of law. Those include: an independent and impartial judiciary (including, e.g., guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners), the government, its officials and agents are accountable under the law, political leaders and decision-makers take a clear stance against corruption, and a transparent, efficient and fair process of preparing, approving and enforcing laws. Laws must be clear, publicized, stable, fair, and protect fundamental rights; cf., European Commission, DG Enlargement: "Rule of Law", available online at http://ec.europa.eu/enlargement/policy/policy-highlights/rule-of-law/index_en.htm (accessed 15 February 2014).

10 V. Peskin and M.P. Boduszyński, 'Balancing International Justice in the Balkans: Surrogate Enforcers, Uncertain Transitions and the Road to Europe', 5 *The International Journal of Transitional Justice* (2011) 52–74, at p. 55, similar argument by T. Freyburg and S. Richter, 'National Identity matters: the limited impact of EU political conditionality in the Western Balkans', 17 *Journal of European Public Policy* (2010) 262–280, at p. 271.

11 W. Graf, V. Kainz and Agnes Taibl, 'Transnational Justice: zwischen globalen Normen und lokalen Kontexten', in A. Pilgram, L. Böllinger, M. Jasch, S. Krasmann, C. Prittwitz, H. Reinke and D. Rzepka (Eds), *Einheitliches Recht für die Vielfalt der Kulturen. Strafrecht und Kriminologie in Zeiten transkultureller Gesellschaften und transnationalen Rechts* (Berlin: LIT, 2012) 97–124, at p. 97.

12 K. Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in K. Ambos, J. Large and M. Wierda (Eds), *Building a Future on Peace and Justice. Studies on Transitional Justice, Peace and Development* (Heidelberg: Springer, 2009) pp. 19–103, at p. 19; Rangelov criticizes the EU's focus on the extradition of war crimes suspects. According to him, domestic non-judicial transitional justice mechanisms have been ignored by the international community; Rangelov, *loc. cit.*, p. 365 and 374, M. Freeman, 'Serbia and Montenegro: Selected Developments in Transitional Justice', in *Case Studies Series* (New York, NY: International Center for Transitional Justice, 2004).

13 J.E. Stromseth, 'Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?', 38 *Georgetown Journal of International Law* (2006/2007) 251–322, at p. 253.

conditionality theory and an impact theory of international criminal courts, it will be shown that, although ICTY conditionality as applied by the European Union has found a successful end, Serbia still lacks a stable rule of law system. This can — at least partly — be attributed to failures of the EU in applying ICTY conditionality, to unfavourable domestic factors, as well as to the Tribunal and its judicial performance.

The next section (Section 2) will provide the theoretical framework for this research, which will be followed by an analysis of the application of EU conditionality (Section 3.1), domestic factors that contribute to the outcome of ICTY conditionality (Section 3.2) and the performance of the ICTY (Section 3.3). A discussion of the findings will respond to the question of whether ICTY conditionality has had any impact on the development of the rule of law in Serbia (Section 3.4), followed by concluding remarks (Section 4).

2 Theoretical Framework: The Rule of Law as a Goal of EU-ization

2.1 *The Conditionality Rationale: External Hierarchical Governance*

EU conditionality, the general framework of ICTY conditionality, is the cardinal principle of EU external governance, aiming at transferring EU rules into the legislation and administration of other countries.[14] In this sense, it is used as an instrument for preparing the association of a country or enlargement of the Union: meeting the Union's requirements and thereby achieving a greater degree of convergence with the EU's socioeconomic and legal standards and political values brings a country closer to membership.[15]

From a theoretical perspective, conditionality is an inherently incentive-based bargaining strategy.[16] It has therefore been argued that the effectiveness of EU rule transfer, the ultimate goal of conditionality, can best be explained by the External Incentives Model:[17] the EU pays rewards — such as assistance or

14 In the academic literature, this process is called "Europeanization" or "EU-ization"; T. Haughton, 'When Does the EU Make a Difference? Conditionality and the Accession Process in Central and Eastern Europe', 5 *Political Studies Review* (2007) 233–246, at pp. 233–234.

15 Anastasakis and Bechev, *loc. cit.*, p. 5.

16 F. Schimmelfennig and U. Sedelmeier, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', 11 *Journal of European Public Policy* (2004) 661–679, at pp. 662 and 666.

17 The majority of scholars in the field of Europeanization agrees that the External Incentive Model is the most effective one in achieving rule transfer; e.g., Epstein and Sedelmeier, *loc. cit.*, p. 796, J. Kelley, 'International Actors on the Domestic Scene: Membership

institutional ties, from trade and cooperation agreements to association agreements or membership — if the target government complies with the conditions; it withholds the rewards or even enforces sanctions if compliance fails. According to the model, the respective government will consequently balance EU, domestic and other international pressures in order to maximize its own political benefits: EU rules are adopted (rule transfer) if the EU rewards exceed the costs for the government, even if it does not accept the normative argument underlying that specific rule (rule diffusion). This cost-benefit analysis — and thus the success of EU conditionality — depends on several factors: first, the credibility of threats and capacity to pay the rewards determined by the capacity to be open for new member states and consistency of allocation of rewards; second, on the size of domestic adoption/compliance costs, in particular public opinion on EU conditionality policy and on the presence and power of veto players, that is actors whose agreement is necessary for a change in the status quo.[18] Effective rule transfer and compliance can thus be seen as an indicator for the effectiveness of EU external governance (Fig. 1).

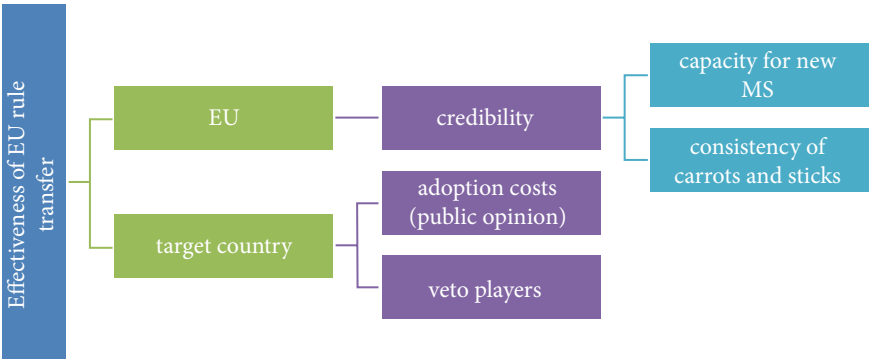

FIGURE 1 *Effectiveness of EU rule transfer according to the External Incentives Model.*

Conditionality and Socialization by International Institutions', 58 *International Organisation* (2004) 425–457, at p. 452, Anastasakis and Bechev, *loc. cit.*, p. 4, Schimmelfennig, Sedelmeier, *loc. cit.*, **pp. forthcoming**. Effective rule transfer is, pursuant Lavenex and Schimmelfennig, constituted through formal rule transfer — selecting, adopting and applying rules — as well as rule diffusion, measuring the public and elite acceptance of EU rules; S. Lavenex and F. Schimmelfennig, 'EU rules beyond EU borders: theorizing external governance in European politics', 16 *Journal of European Public Policy* (2009) 791–812, at p. 800.

18 Schimmelfennig and Sedelmeier, *loc. cit.*, pp. 663–667 or F. Schimmelfennig, 'EU political accession conditionality after the 2004 enlargement: consistency and effectiveness', 15 *Journal of European Public Policy* (2008) 918–937, at p. 921.

If applied to the specific context of ICTY conditionality, according to the External Incentives Model, it will be successful, if: the EU (firstly) bears the capacity to let Serbia accede indeed and (secondly) consistently requires cooperation with the ICTY before any rewards are given. The EU's way of sticking to these conditions is what will be called the EU's conditionality performance.[19] On the Serbian side, within the domestic performance, it is necessary that public opinion supports EU membership and generally accepts the condition of complying with the ICTY. Actors vetoing EU membership and/or cooperation with the ICTY must be absent or weak.[20]

2.2 *Transitional Justice: Justice Mechanisms as a Precondition for the Rule of Law*

The EU has made ICTY conditionality a tool in the context of establishing the rule of law in Serbia. Obviously, this is at least a legitimate starting point, as general accountability is fundamental in societies based on the rule of law: that everybody, including state officials, is subject to law and that the law is effectively enforced by a credible, independent and functioning judiciary which depicts basic fair trials rights is the starting point, if not the precondition to the rule of law.[21]

The conditions under which accountability proceedings, in theory, potentially positively impact the rule of law in the long run, have been formulated by Jane Stromseth: first, it depends on the effective disempowerment of key perpetrators who threaten stability and undermine public confidence in the rule of law; secondly, on the character of the accountability proceedings — i.e., whether they demonstrate credibility that previous patterns of abuse and impunity are rejected and that justice can be fair. The impact consequently depends on factors such as how accountability proceedings are conducted and the extent to which local perceptions of justice are altered by the proceedings. And third, it depends on the extent to which systematic and meaningful efforts at domestic capacity building are included as part of the accountability process. In these ways, a tribunal can have demonstration and capacity building effects — which constitute the ICTY's performance — that assure the impact on the rule of law in a country.[22]

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19 This question will be examined in Section 3.1.

20 In Section 3.2 these domestic factors will be subject to analysis.

21 D. Tolbert and A. Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies', 19 *Harvard Human Rights Journal* (2006) 29–62, at pp. 29, 33–34 or Stromseth, *loc. cit.*, p. 252.

22 Stromseth, *loc. cit.*, p. 257 and 262; the ICTY's performance will be analysed in detail in Section 3.3.

In the light of these theoretical considerations, the author comes to the conclusion that, *establishing the rule of law by using ICTY conditionality does not only depend on the implementation of EU conditionality* (*credibility of membership perspective and consistency of rewards and sanctions*) *and domestic factors such as adoption costs and veto players, but additionally, it depends on the performance of the ICTY as the main focus of conditionality itself. The ICTY needs to show the ability to advance basic international principles that enhance the rule of law through transitional justice*. It will be demonstrated that deficiencies in the Serbian rule of law system are partly rooted in a misapplication of ICTY conditionality as well as in the Tribunal and its judicial performance.

3 Serbia since the ICTY

3.1 *EU Conditionality Performance: The EU between Peace and Justice*

Before leaving The Hague in 2007, long-term prosecutor at the Tribunal Carla del Ponte said that "90% of all indictees brought to justice [before the ICTY] are a direct result of conditionality applied by the EU."[23] By inventing the ICTY conditionality approach, the EU has deliberately engaged in ICTY politics, making this a fundamental requirement for continuing relations, as well as regularly assessing Serbia's cooperation with the ICTY. As will be shown in the following section, ICTY conditionality could have born fruits much earlier if it had been credible and consistently applied.

3.1.1 Capacity: Membership as the Ultimate Goal?

In order to appear credible, the EU must not only be able to withhold the rewards at no or low costs to itself, but also to pay the rewards, and ultimately grant membership to Serbia: the higher the costs of membership — or other, smaller rewards — are to the EU, the more doubtful their eventual payment to the target country.[24]

In this respect, there are significant shortcomings in the application of EU conditionality. EU external governance scholars agree that enlargement is becoming

23 F. Hartmann, 'The ICTY and EU conditionality', in J. Batt and J. Obradovic-Wochnik (Eds), *War crimes, conditionality and EU integration in the Western Balkans*, *Challiot Paper 116* (Paris: European Union Institute for Security Sudies, 2009) p. 67.

24 Schimmelfennig and Sedelmeier, *loc. cit.*, p. 665; Schimmelfennig and Sedelmeier argue in this context that the credibility of rewards increases over time and the credibility of threats deceases; Schimmelfennig and Sedelmeier, *loc. cit.*, p. 666.

increasingly difficult. The EU is becoming more reluctant to commit itself to membership in general, avoiding a clear engagement. Two phenomena can be observed in this context: first, what has been called "enlargement fatigue" has spread after consensus has been reached that Romania and Bulgaria were admitted too early.[25] Countries like France and Germany are calling to "slow down accession business",[26] in part but not exclusively because they are unwilling to send further positive signs towards Turkey — a country also in line for membership.[27] Second, several Member States are putting enlargement decisions subject to referenda. This bears considerable risk to be rejected due to internal political circumstances.[28] Under these conditions, the credibility of a membership perspective has significantly decreased, which has been the cause for conditionality drawbacks in the Western Balkans, i.e. non-fulfilment of EU conditions.[29]

It should be noted, however, that at least two events have brought some hope for further enlargement: in the Thessaloniki Declaration, the European Council declared that "[t]he future of the Balkans is within the European Union" and it committed itself to actively support integration of the region into the Union.[30] The candidacy status granted to Croatia and the Former Yugoslav Republic of Macedonia in June 2004 and December 2005, respectively, was another matter-reassuring event.[31] Croatia even joined the Union in 2013. Realistically though and in spite of these positive signals, the Balkan States have had reasons to believe that they would have to suffer the trends against further enlargement, and that their accession would be severely delayed if not abandoned. Requirements set by the Union are therefore no longer seen as steps in a structured process ending with accession.[32]

3.1.2 Consistency: Member States between Peace and Justice

This uncertainty in terms of membership capacity led to inconsistencies in the application of conditionality policy on the EU's side. Consistently allocating

25 O. Anastasakis, 'The EU's political conditionality in the Western Balkans: towards a more pragmatic approach', 8 *Southeast European and Black Sea Studies* (2008) 365–377, at p. 373.

26 Dobbels, *loc. cit.,* p. 11.

27 Anastasakis *loc. cit.,* p. 373.

28 *Inter alia* Schimmelfennig, *loc. cit.*, p. 919, Epstein and Sedelmeier, *loc. cit.*, p. 799, Dobbels, *loc.cit,* p.11, Anastasakis and Bechev, *loc. cit.*, p. 3 or Anastasakis *loc. cit.,* p. 365.

29 Anastasakis and Bechev, *loc. cit.*, p. 3.

30 European Council, *Thessaloniki Declaration. EU-Western Balkans Summit: Declaration*, PRES/03/163 (Thessaloniki, 21 June 2003), available online at http://europa.eu/rapid/press-release_PRES-03-163_en.htm (accessed 15 February 2014).

31 Dobbels, *loc. cit.,* pp. 8–9.

32 Anastasakis and Bechev, *loc. cit.*, p. 14, similar: Lavenex and Schimmelfennig, *loc. cit.*, p. 793.

rewards would have meant: first, not to subordinate conditionality to other political, strategic or economic considerations, and second, to speak with one voice among the EU institutions and Member States. Consistency in both these senses increases the likelihood of rule transfer.[33]

Albeit, at some points in its relations to the Balkan states, the EU pursued a rigorous assessment of compliance with the condition to cooperate with the ICTY, at other points it allowed itself a more adaptable and pragmatic approach.[34] The main controversy, that caused disagreement within the Union with regard to the application of ICTY conditionality, was the question whether the pursuit of justice through criminal trials impedes peace and security in a country.[35] Essentially, opponents of trials fear that the prospect of prosecuting parties involved in a conflict may jeopardize fragile peace talks and rather lead to increased violence.[36] In contrast, proponents of justice lobby for the rationale "no peace without justice",[37] at least in the long run. They argue that major perpetrators of atrocities must be held legally accountable if a country is to make an effective transition to a society marked by the rule of law. The EU was utterly divided on this question: traditionally, the European Commission and the European Parliament together with The Netherlands and Belgium have promoted a strict approach to ICTY conditionality in order to foster justice.[38] On the other side, Germany, France, Italy, Greece and Spain have lined up for a more flexible view.[39] Occasionally relaxing ICTY conditionality for the sake of preserving peace, avoiding security risks and promoting stability in the region was the consequence. Other, more pragmatic priorities like boosting the chances of more pro-EU parties at

33 Schimmelfennig and Sedelmeier, *loc. cit.*, p. 666.

34 Anastasakis, *loc. cit.,* p. 366.

35 For this controversy, known as the "peace versus justice debate", see, for instance, P. Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism and Political Realism', 31 *Human Rights Quarterly* (2009) 624–654, or H. Shinoda, 'Peace-building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals', 7 *The International Journal of Peace Studies* (2002).

36 Stromseth, *loc. cit.*, pp. 253–254.

37 P. Kienlen, 'International Justice v. Local Peace? Case Study of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Reconciliation Process in the Balkans. The Reality of International Criminal Justice's Achievements with regard to Peace Building', 5 *Vienna Journal on International Constitutional Law* (2011) 632–696, at p. 637.

38 See for instance European Commission (2005a), *loc. cit.*, p. 3.

39 Dobbels, *loc. cit.,* p. 13.

elections suborned some Member States to lobby against strict ICTY conditionality as well.[40]

Rewards, such as signing a Stabilization and Association Agreements (SAA), lifting visa requirements or implementing trade agreements, were offered without significant improvements in Serbia's cooperation with the ICTY. The notion of "full cooperation" was more and more interpreted in a way as "*leading to* the arrest of the remaining fugitives"[41] and thereby lowering the threshold. In reaction, realizing that it could easily exploit and manipulate the division between the EU Member States and institutions, the Serbian authorities delayed handovers of suspects and denied access to evidence or witnesses. In June 2010, the SAA was fully ratified disregarding the two main fugitives Ratko Mladić, former high-ranking officer of the Yugoslav People's Army and Chief of Staff of the Bosnian Serb Army and indicted for war crimes, crimes against humanity and genocide, and Goran Hadžić, former President of the Republic Serbian Krajina and indicted for war crimes and crimes against humanity, were still at large.[42]

In sum, the lack of credibility of a Serbian membership perspective as well as signalling that ICTY conditionality is negotiable[43] caused noncompliance and manipulation on the Serbian side, albeit not a flat refusal to fulfil membership criteria.[44]

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40 Hartmann, *loc. cit.*, p. 67 and Anastasakis *loc. cit.,* pp. 366, 373–374; their goal was to sustain a critical mass of EU accession supporters among the national population and political elites in order to keep Serbia on the European instead of nationalistic road.

41 Hartmann, *loc. cit.*, p. 73; emphasis added.

42 Belgrade Centre for Human Rights, *Human Rights in Serbia 2011. Legal Provisions and Practice Compared to International Human Rights Standards. Series Report 17* (Belgrade: Belgrade Centre for Human Rights, 2012) p. 324; Amnesty International Deutschland, 'Serbien (Einschließlich Kosovo). Amnesty Report 2012', available online at http://www.amnesty.de/jahresbericht/2012/serbien-einschliesslich-kosovo (accessed 15 February 22014); several other factors such as the unclear relation to Kosovo or delays in necessary reforms are nonetheless hindering Serbian EU membership; J. Reuter, 'Serbien auf dem Weg nach Europa?', in Becker and Engelberg, ed., *op. cit.*, pp. 287 and 292, and Sundhaussen, *loc. cit.*, p. 32.

43 Consistency in the application of ICTY conditionality was lacking over time, internally and when considering different cases: with respect to Croatia, many consider that ICTY conditionality has less strictly been applied than towards Serbia; e.g., Anastasakis, *loc. cit.,* pp. 368–369 and J.L. Miller, P.C. McMahon and K. Broyhill, 'The ICTY as a Realist Institution: International Courts, Accountability Networks, and Transitional Justice', Conference Paper (Seattle, 2011), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900500 (accessed 15 February 2014) p. 25.

44 Freyburg and Richter, *loc. cit.*, p. 264, Dobbels, *loc. cit.,* p. 16.

3.2 *Domestic Performance: High Adoption Costs*

In addition, it became clear that ICTY conditionality compliance comes along with high political adoption costs for the Serbian government: the public's reaction towards the Tribunal as well as strong veto players were considerable factors in the cost-benefit calculus of the Serb executive, lowering its incentives to fulfil the EU's requirements for membership.[45]

3.2.1 Serbian Public Opinion: The Necessary Evil

This is why a positive public perception of the ICTY would not only have been important for the achievement of the Tribunal's own goals, including the triumph of the rule of law over the instinct for revenge after periods of communal violence, by triggering a change of the legal culture.[46] It was also a crucial factor for the effectiveness of ICTY conditionality.

As the work of the ICTY touches directly upon the Serbian national identity, compliance with the Tribunal's requirements was politically difficult to sell to the population:[47] most of the Serb indictees before the ICTY are still seen as national heroes by large parts of the population. Their indictments represent a challenge to the conviction that their nationals fought a just war and were victims rather than perpetrators. In addition, a majority perceives the ICTY as a political instrument with an anti-Serbian bias, not trusting its capacity and willingness to provide fair trials.[48] Cooperation with the Tribunal was therefore a delicate issue, which became more and more unpopular over the years, being favoured — if at all — only for utilitarian reasons such as increasing the chances of EU integration.[49] It is seen as a "necessary evil" on the road to Europe.[50]

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45 E.g., R. Epstein and U. Sedelmeier, 'Beyond Conditionality: International Institutions in Post-Communist Europe after Enlargement', 15 *Journal of European Public Policy* (2008) 795–805, at p. 801, Peskin and Boduszyński, *loc. cit.*, p. 57, Anastasakis, Bechev, *loc. cit.*, p. 13 or T. Ristic, 'Relations with the ICTY as an Obstacle for Serbia's Joining the EU', 1 *Security Studies Journal* (2008) 13–22, at p. 14.

46 D.E. Arzt, 'Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone', 603 *The Annals of the American Academy of Political and Social Science* (2006) 226–239, at pp. 226 and 227.

47 Schimmelfennig, *loc. cit.*, p. 920 and Epstein and Sedelmeier, *loc. cit.,* p. 799.

48 D. Orentlicher, *Shrinking the Space for Denial. The Impact of the ICTY in Serbia* (New York, NY: Open Society Justice Initiative, 2008) p. 11 or Belgrade Centre for Human Rights, OSCE Mission to Serbia, *Attitudes towards war crimes issues, ICTY and the national judiciary* (2011), available online at http://www.osce.org/serbia/90422 (accessed 15 February 2014) p. 79.

49 The majority of the Serb population favours the government's goals of EU-membership — most of the Serbs see their country clearly as a part of Europe; A. Dzajic-Weber, *Länderinformation Serbien. Geschichte, Staat und Politik* (Bonn: Deutsche Gesellschaft für

3.2.2 Veto Players: Covering the Past

Providing a comprehensive view on the power dynamics in Serbia concerning the ICTY or the EU is beyond the scope of this paper. However, two main actors vetoing ICTY conditionality need to be mentioned: firstly, the Serbian government itself with Vojislav Koštunica at its top did not agree with ICTY conditionality — although more subtle than others.[51] A second actor is the security sector, especially the police and the army.[52]

Theoretically being responsible for conducting investigations in war crimes, tracking and arresting suspects and allocating police and military archives, the security forces had all possibilities to actually prevent cooperation with the Tribunal by simply not complying with these tasks.[53] The reasons for this situation are simple: the security sector remains largely unreformed since Milošević[54] and outside democratic control.[55] Changes at the top have not prevented the lower levels from keeping a firm grip on old structures and being loyal to old regime elites.[56] For the police, the secret service and especially the

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Internationale Zusammenarbeit (GIZ), 2013), available online at http://liportal.giz.de/serbien/geschichte-staat.html?fs=12%2527%2522#c19777 (accessed 15 February 2014) p. 11.

50 P.C. McMahon and D.P. Forsythe, 'The ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics', 30 *Human Rights Quarterly* (2008) 412–435, at p. 423, similar: M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia, 7 *Journal of International Criminal Justice* (2009) 89–96, at p. 93.

51 E.g., Dobbels, *loc. cit.,* p. 21, J. Obradovic-Wochnik, 'Strategies of denial: resistance to ICTY cooperation in Serbia, in: Batt and Jelena Obradovic-Wochnik, *op. cit.*, 29–47, at p. 29, Reuter, *loc. cit.*, p. 301, Schimmelfennig, *loc. cit.*, p. 930.

52 Obradovic-Wochnik, *loc. cit.*, 30.

53 Obradovic-Wochnik, *loc. cit.*, p. 30, B. Ivanišević, 'Against the Current — War Crimes Prosecutions in Serbia', in *Prosecutions Case Studies Series* (New York, NY: International Center for Transitional Justice, 2007) pp. 13–14.

54 President of Serbia from 1990, President of the Federal Republic of Yugoslavia (FRY) from 1997 until 2000; as FRY President, he was also President of the Supreme Defense Council of the FRY and the Supreme Commander of the Yugoslav Army.

55 Peskin and Boduszyński, *loc. cit.*, p. 59, Obradovic-Wochnik, *loc. cit.*, p. 30 and Orentlicher, *op. cit.*, p. 41.

56 Dobbels, *loc. cit.,* p. 24, similar: D. Saxon, 'Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia', 4 *Journal of Human Rights* (2005) 559–572, at p. 567 and Obradovic-Wochnik, *loc. cit.*, p. 31; for instance, Ratko Mladić, former Commander of the Bosnian Serb Army, was shielded and supported by the Serbian Army, whereas Radovan Karadžić (President of Republika Srpska and Supreme Commander of its armed forces, indicted for genocide, crimes against humanity and war crimes) has allegedly been hidden by the Serbian Secret Service for some time; Dobbels, *loc. cit.*, p. 23, Obradovic-Wochnik, *loc. cit.*, p. 29-30, Carla del

Army, hindering ICTY cooperation meant protecting former or current colleagues who often had a war crimes past themselves.[57]

Decriminalizing the security forces and bringing them under control, thereby overcoming their veto position, hence lied in the hand of politicians and depended on their will and courage. However, the Serbian government led by Vojislav Koštunica had no interest in conflicting with the veto of the security sector.[58] Consciously taking advantage of disagreements about the application of ICTY conditionality within the EU, Koštunica slowed down cooperation or prevented it himself. He always only made the minimal effort possible to fulfil the EU's conditions in order to appease Brussels and at the same time not scaring off his nationalist supporters.[59]

The actual motives to hamper cooperation with the ICTY of Vojislav Koštunica are unknown, but it seems at least possible that the political costs of advocating cooperation were too high: although the population did not completely object cooperation with the Tribunal, public opinion also did not give him a positive sign towards fulfilling the ICTY's demands. The strong veto position of the security sector which was able to actually obstruct cooperation with the ICTY might have effaced the last bit of willingness of the Serbian government to show real efforts to cooperate with the Tribunal.[60] Thus, a rather negative public opinion and strong opposing societal forces functioned as a brake for cooperation and eroded the efficiency of EU ICTY conditionality.

3.3 *ICTY Performance: The Mammoth Task*

Failures on the EU's side in applying ICTY conditionality and the rather hostile domestic response to EU requirements left little room for the Tribunal to perform in a way that would have fostered true justice in the former Yugoslavia

Ponte, *Madame Prosecutor. Confrontations with Humanity's Worst Criminals and the Culture of Impunity, A Memoir*. (New York, NY: Other Press, 2008) pp. 166–167, Reuter, *loc. cit.*, p. 301.

57 Dobbels, *loc. cit.*, p. 24, Hartmann, *loc. cit.*, p. 73, H. Bohnet and Isabelle Nijhof, *Vergangenheitsaufarbeitung in Serbien: Chancen und Hindernisse. Country Report*, Foundation Konrad Adenauer (2012), available online at http://www.kas.de/serbien/de/publications/31404/ (accessed 15 February 2014) p. 2.

58 The only person actively pursuing full cooperation with the ICTY as well as reforming the security sector, Prime Minister Zoran Đinđić, was assassinated by those very security forces members; Igor Jovanovic, 'Serbia: A Long Way To Go', *Transitions Online* 11/13 (2004) p. 2, Obradovic-Wochnik, *loc. cit.*, p. 30 and N. Mappes-Niediek, 'Der Mord an Djindjić und seine Folgen, in Becker and Engelberg, *op. cit.*, pp. 57–86.

59 Dobbels, *loc. cit.*, pp. 19–20 or del Ponte, *op. cit.*, pp. 115, 198.

60 Orentlicher, *op. cit.*, p. 40.

and thereby contributed to establishing a culture of law in the region. It remains however to be assessed whether deficiencies in the system of the ICTY itself have also contributed to this effect. It will become clear that the Tribunal's potential of having a strong impact on the rule of law in Serbia was significantly reduced by weak demonstration and capacity building effects.

3.3.1 Demonstration Effects: That Law Can Be Fair

The most direct forms through which accountability proceedings contribute to strengthening the rule of law in post-conflict societies with demonstration effects include: ending the atrocities, removing the criminals from the region and preventing future atrocities by dispelling impunity of perpetrators in high positions. They are aimed to ensure the local population that old patterns of impunity and exploitation are no longer tolerated and that law can be fair.[61]

In addition, efficient and fast sentencing, actual and perceived fairness, the inclusion of victims and rendering justice to them as well as access to truth are demonstration effects of a criminal tribunal that would help to restore public confidence in the rule of law.[62] Citizens must be confident that disagreements can be resolved fairly and without resorting to violence, that they will be protected from state- and non-state actors and that legal and political institutions will guarantee rather than violate basic human rights. Failures such as letting "big fish" run free or biased trials, on the other hand, have to be avoided at all costs.[63] In short, justice needs not only to be done, but also be seen to be done.[64]

3.3.1.1 *Ending Atrocities*

In "put[ting] an end" to the on-going "widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia",[65] the ICTY has failed in many instances: when it was established in 1993, the war in Bosnia and Herzegovina continued for two more years and the genocide in Srebrenica in 1995 was not prevented. Even a few years later, armed conflict in Kosovo and the deportation and abuse of ethnic Albanians occurred, led by the same leaders who were already indicted for crimes in Bosnia and Herzegovina and in Croatia.[66]

61 Stromseth, *loc. cit.*, p. 262, Orentlicher, *op. cit.*, pp. 53–55.

62 Kienlen, *loc. cit.*, p. 652, Orentlicher, *op. cit.*, p. 13 and J.N. Clark, 'Judging the ICTY: has it achieved its objectives?', 9 *Southeast European and Black Sea Studies* (2009) 123–142, at p. 127.

63 Stromseth, *loc. cit.*, pp. 252–253, 262–263.

64 Arzt, *loc. cit.*, p. 235.

65 United Nations Security Council 25/05/1993, S/RES/827, p. 1.

66 P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', 95 *The American Journal of International Law* (2001) 7–31, at p. 9.

However, one should note that the Tribunal faced considerable problems in beginning its work during the first years: its existence was unprecedented and not even its founders in the Security Council actually believed in its functioning.[67] When Srebrenica happened, the Tribunal had only pronounced 14 indictments and one suspect in custody — there was thus no reason to fear the ICTY yet. Thus, one has to raise the question what could and would have happened if the Tribunal had not been established at all? Since the Kosovo conflict ended, the region has at least not fallen back into a situation permitting the commitment of war crimes: even the separation of Montenegro in 2006 and the declaration of independence by Kosovo in 2008 passed relatively quietly.[68]

3.3.1.2 *Preventing Future Atrocities by Dispelling Impunity*

Ongoing atrocities could not be stopped. But were at least future atrocities prevented indirectly, in the long run? The long-term deterrent effect of criminal proceedings before the ICTY cannot be satisfyingly determined yet.[69] Still, the trials against Slobodan Milošević or Ratko Mladić and other high-level personalities, whether political or military, have "powerfully demonstrated that nobody is above the law."[70] With the transfer of Milošević to The Hague, the Tribunal had suddenly gained a degree of credibility previously unforeseen,[71] which has certainly contributed to the courage of establishing further international or internationalized tribunals:[72] the ICTY has broken the "psychological, political and legal barriers that existed against international criminal justice"[73] and at the same time reversed *de facto* impunity granted by the Dayton Agreement in 1995.[74]

67 M.C. Bassiouni, 'Justice and Peace: The Importance of Choosing Accountability Over Realpolitik', 35 *Case Western Reserve Journal of International Law* (2003) 191–204; the ICTY's first suspect was arrested in 1994 in Germany, transferred to The Hague only in April 1995 when his trial began a few days later. The judgment in *"Prijedor"* (*IT-94-1*) *Duško Tadić* was handed down not earlier than May 1997; ICTY: "'Prijedor' (IT-94-1) Duško Tadić", available online at http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf (accessed 15 February 2014) p. 1.

68 Orentlicher, *op. cit.*, pp. 16–18.

69 Orentlicher, *op. cit.*, p. 16.

70 Clark (2009), *loc. cit.*, p. 125.

71 D. Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Success and Foreseeable Shortcomings', 26 *The Fletcher Forum of World Affairs* (2002) 7–21, p. 7 or Orentlicher, *op. cit.*, p. 54.

72 Clark (2009), *loc. cit.*, pp. 125–126.

73 Bassiouni, *loc. cit.*, p. 200.

74 Bassiouni, *loc. cit.*, p. 199; the ICTY's contributions to the development of substantive and procedural international humanitarian and criminal law must also be named in this

3.3.1.3 *Disempowerment of War Criminals and Removing them from the Region*

Disempowering criminals from important societal or political posts is essential in post-conflict environments as by showing disrespect for peaceful and democratic means of politics, they can no longer act as ideals for the population.[75]

The ICTY's impact in this respect is mixed: on the one hand, the indictment of Milošević in 1999 for instance helped to bring about Serbia's transition to a democratically-elected government in 2000. Milošević, although still supported by significant parts of the population, was domestically discredited and stigmatized as a delinquent and liar and internationally isolated.[76] This effect of public indictments can certainly contribute to peace-building.[77] On the other hand, the relatively low number of convictions did little to shock old regime elites into shame or encourage a more liberal, tolerant culture. There was no clear cut with Milošević's legacy and his goals. It was not until 2008 that the first truly pro-European and anti-nationalistic government was elected.[78]

It can thus hardly be argued that removing criminal leaders from Serbia has caused a moderation of nationalistic rhetoric and sentiments among national politicians and the population. Nevertheless, and thanks to the impartial judicial justice by the ICTY, accountability as a value took stronger roots in the former Yugoslavia.

3.3.1.4 *Fairness of the Proceedings*

From the outset of its existence, the ICTY was confronted with criticism of being biased and not providing fair trials, expressed especially by Serbs. The perception of double-standard not only arose because the majority of indictees were ethnic Serbs,[79] but in particular due to the reluctance of the Office of

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context. Drawing a clear line between legal and illegal deeds in the context of an armed conflict will certainly help to prevent future crimes that albeit are generally perceived as criminal acts, but were so far not defined as such; Kienlen, *loc. cit.*, pp. 651–652 and ICTY, 'Assessing the Legacy of the ICTY. A Conference of the International Criminal Tribunal for the Former Yugoslavia. Background Paper' (2010), available online at http://www.icty.org/sid/10292 (accessed 15 February 2014) p. 1.

75 Tolbert, *loc. cit.*, p. 8 and F. Mégret, 'The Legacy of the ICTY as Seen Through Some of its Actors and Observers, 3 *Goettingen Journal of International Law* (2011) 1011–1052, at pp. 1029–1030.

76 Akhavan (2001), *loc. cit.*, p. 18.

77 Akhavan (2001), *loc. cit.*, p. 7.

78 McMahon and Forsythe, *loc. cit.*, pp. 418 and 421.

79 B. Hall, 'Using hybrid tribunals as trivias: Furthering the goals of post-conflict justice while transferring cases from the ICTY to Serbia's domestic war crimes tribunal', 13 *Michigan State Journal of International Law* (2005) 39–61, at pp. 47–48 or Arzt, *loc. cit.*, p. 234.

the Prosecutor to investigate crimes committed by NATO forces in Kosovo,[80] and to the fact that Croatian President Franjo Tudjman or any of his ministers, as well as high-level personalities from Bosnia and Herzegovina or Kosovo, have never been indicted.[81] Although this lack of balance is indeed regrettable, ethnically evened out investigations would have been accompanied with a significant risk of perverting the truth. Besides, ethnical or political considerations should not be significant to the decisions of an independent prosecutor.

The fact that before the ICTY only international law was applied, that Western countries provided most of the financial support and staff to the ICTY as well as that it was Western actors who issued most pressure to cooperate with the Tribunal, only enforced the perception of the ICTY as being a political institution instead of a judicial one.[82] Serb nationalists and the media persistently used this rationale to demonstrate the victimization of Serbs and to radicalize Serbian politics.[83]

Yet, to ultimately achieve democratization and rule of law, confidence in judicial independence and fairness is essential.[84] This lack of confidence in the

80 Kienlen, *loc. cit.*, pp. 667–668; for most Serbs it was incomprehensible that their President was to appear before a court for committing war crimes, while the same "Western actors", who wanted to speak justice over Milošević, were committing crimes themselves during the bombardments.

81 W. Kaleck, *Mit zweierlei Maß. Der Westen und das Völkerstrafrecht* (Berlin: Klaus Wagenbach, 2012) p. 55; Akhavan (2001), *loc. cit.*, p. 19; Hall, *loc. cit.*, p. 48. Carla del Ponte describes in her memoires a planned indictment against Tudjman but that he died before it could be issued; del Ponte, *op. cit.*, p. 246.

82 Kienlen, *loc. cit.*, pp. 669–671; Akhavan (2001), *loc. cit.*, p. 19. No judges and prosecutors of Balkan origin were employed at the ICTY. This was unfortunate, as it implicitly confirms the notion that Serbs are unable to address their own past impartially and properly. Including them in the judicial process would have sent a signal towards adherence to the theoretical principle of individual criminal responsibility, not blaming a whole nation, which would have contributed to the credibility of the Tribunal; Hall, *loc. cit.*, p. 48 and Spoerri and Freyberg-Inan, *loc. cit.*, p. 373.

83 Reuter, *loc. cit.*, p. 299, see also Rangelov, *loc. cit.*, p. 372 and Stromseth, *loc. cit.*, p. 274. The media were — among others — incited by Milošević himself who many times questioned the legitimacy of the ICTY. In his initial appearance for instance, he stated: "I consider this Tribunal [a] false Tribunal and indictments false indictments. It is … [an] illegal organ!"; see video on the ICTY video channel: http://www.youtube.com/watch?v=7S3CIMpDEjU&feature=youtu.be (accessed 15 February 2014), at 2:12 min.

84 J. Hagan and S. Kutnjak Ivković, 'War Crimes, Democracy, and the Rule of Law in Belgrade, the Former Yugoslavia, and Beyond', 605 *The Annals of the American Academy of Political and Social Science* (2006) 129–151, at p. 135.

ICTY has had adverse effects upon its ability to promote justice in the former Yugoslavia.[85]

3.3.1.5 *Rendering Justice to the Victims*

One of the goals of the ICTY was to "redress" violations of international humanitarian law and thus to convince the victims of the wars that justice was being rendered to them. This could only partly be achieved.[86] In this respect, the underlying legal system of the ICTY's procedure — the common law system — and its peculiarities, such as a limited space for victims in the proceedings, the weak position of judges, tiring and sometimes intimidating cross-examinations as well as plea-bargainings, caused grave confusions in the Balkan region, where the civil law system prevails.[87]

The practice of plea-bargaining was developed in order to speed up trials:[88] in this process, the accused accepts culpability and thereby releases the prosecutor to prove beyond reasonable doubt his/her individual criminal responsibility, which often results in more lenient sentences.[89] The resulting inconsistent sentencing for the same crimes provoked frustration for victims and questions about legal certainty and foreseeability in the ICTY proceedings.[90] In addition,

85 Hall, *loc. cit.*, p. 48.

86 Clark (2009), *loc. cit.*, p. 127.

87 Kienlen, *loc. cit.*, p. 676; Kaleck, *op. cit.*, p. 115..

88 Arzt, *loc. cit.*, p. 235; twenty plea-bargaining agreements have been concluded; cf. ICTY: "Guilty Pleas"; http://www.icty.org/sections/TheCases/GuiltyPleas (accessed 15 February 2014).

89 Kienlen, *loc. cit.*, p. 663; one example is the case of Ivica Rajić, a commander of Bosnian Croat units, pleaded guilty to grave breaches of the Geneva Conventions, among them willful killing of civilians, sexually assaulting women and robbery. The attack on Stupni Do under his command resulted in deaths of 37 Muslim children, men and women, only six of whom were combatants. Rajić's sentence foresaw 12 years of imprisonment. In 2011, he got early release; ICTY; "'Stupni Do' (IT-95-12) Ivica Rajić", available online at http://www.icty.org/x/cases/rajic/cis/en/cis_rajic.pdf (accessed 15 February 2014) p. 1.

90 Kienlen, *loc. cit.*, pp. 663–665; the sentencing practice of the ICTY was a major critique in general as it was often perceived as very lenient when compared to the crime. Especially, some acquittals or turnovers of judgments by the Appeals Chamber caused frustration. For example, Blaškić was sentenced to 45 years of imprisonment for grave breaches of the Geneva Conventions and for war crimes, the Appeals Chamber reduced this sentence to nine years; one month later, he got early release; ICTY; "Lašva Valley (IT-95-14) Tihomir Blaškić", available online at http://www.icty.org/x/cases/blaskic/cis/en/cis_blaskic.pdf (accessed 15 February 2014) p. 1. Another case is the acquittal of Ante Gotovina, Croatian Commander of the Split Military District of the Croatian Army and overall commander of the southern portion of Krajina during the "Operation Storm", a military operation

victims no longer had the chance to uncover the truth about crimes committed to them.[91] In that sense, plea-bargainings might be counterproductive to the ICTY's goals of bringing justice to victims or providing a historical truth.[92]

A particular challenge for victims participating in court lays in cross-examinations — especially when conducted by self-representing accused like Milošević, Karadžić or Šešelj.[93] In the ICTY's system, it is not foreseen that witnesses have legal representation, practically leaving them alone in court. Outside, victims also complain about missing support and the absence of genuine protection. Due to lacking funding, there is no follow-up with witnesses after they testified in The Hague.[94] In general, victims feel little consideration before, during and after the proceedings — in their local, inquisitorial legal system, at least at trial, victims have a much greater role to play.[95]

Some of these disappointments to the victims, stemming from the ICTY's alien legal procedure, could have been avoided, had the Tribunal been based on the legal tradition of its target countries. It would in general have been better understood, accepted and perceived as fair and just by the people in the region. In addition, differences to local courts, which were from the outset on supposed to take over the task of legally addressing past war crimes, would have been reduced, conferring the ICTY a greater legitimacy on the field. This would probably have enhanced cooperation with the Tribunal.[96]

3.3.1.6 *Access to Truth and Addressing the Past*

Due to these shortcomings, the Tribunal was not only geographically, but also psychologically distant from those most affected by the atrocities it was

allegedly having the purpose of expelling all Serbian population. See, for a comprehensive substantial critique of the Appeals Chamber judgment, J.N. Clark, 'Courting Controversy. The ICTY's Acquittal of Croatian Generals Gotovina and Markač', 11 *Journal of International Criminal Justice* (2013) 399–423.

91 On the other hand, when combined with confessions and sincere expressions of remorse, guilty pleas can contribute to reconciliation in the former war region, when by confirming the true nature of a criminal enterprise, sending out a message on the legitimacy of the ICTY and its functions, and acknowledging personal suffering of the victims; Saxon, *loc. cit.*, pp. 560–561.

92 Kienlen, *loc. cit.*, pp. 665–666 and Rangelov, *loc. cit.*, p. 372.

93 Vojislav Šešelj was founder and president of the Serbian Radical Party and indicted for war crimes and crimes against humanity.

94 Kienlen, *loc. cit.*, pp. 672–673.

95 Kienlen, *loc. cit.*, p. 676; victims were, e.g., not allowed to tell their stories, but only to answer strictly to questions. The possibility of written testimony (Rule 89f), gives even less room to be heard; Clark (2009), *loc. cit.*, pp. 127–128.

96 Kienlen, *loc. cit.*, p. 677.

investigating and prosecuting.[97] Therefore, it would have been even more important for the Tribunal to make its investigative and judicial work clear to the people in the region, thereby submitting a Court-established judicial truth, which is a "cornerstone of the rule of law".[98] This process entails three components: first, establishing a judicial truth, second, spreading this truth out to its addressees, and third, encountering attempts to distort this truth.

The ICTY's court-established truth is hardly deniable or changeable by historical, political and moral tests,[99] and its archives can serve as the basis for acknowledging responsibility and addressing Serbia's war crimes past.[100] This has the potential to create a long-term political impact.[101] However, the Tribunal's effort to spread its findings was insufficient, especially in the beginning of its existence. Most legal professionals at the ICTY took public relations for granted or as not being of their concern.[102] As a consequence, very few people in the former Yugoslavia regard themselves as at least "considerably" aware of the organization and manner of operation of the ICTY.[103] A program

97 Stromseth, *loc. cit.*, pp. 260, 268.

98 ICTY Trial Chamber: *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T*bis*, Sentencing Judgment, 5 March 1998, para. 21.

99 A. Ljubojević, '"Tomorrow People, where is your past?". Transitional Justice Mechanisms and Dealing with the Past in Serbia and Croatia', 1 *International Journal of Rule of Law, Transitional Justice and Human Rights* (2010) 82–89, at p. 82.

100 K. Ristić, 'Silencing Justice: War Crimes Trials and the Society in Former Yugoslavia', 3 *Südosteuropa Mitteilungen* (2012) 32–43, at p. 33.

101 Kienlen, *loc. cit.*, pp. 656–657; there is a dispute about the question whether establishing any sort of "truth" is a task of a criminal tribunal at all. A constructive contribution has been made by Dan Saxon who supports a differentiated view on "the truth" by saying that tribunals should acknowledge that each community has a right to its version of history (historical truth) — "provided that the version is based on historical facts" (legal truth); Saxon, *loc. cit.*, p. 568. The Tribunal's Statute provides that judgments are only to be issued if and when "guilt has been proved beyond reasonable doubt" (Rule 87). Thereby, the ICTY claims for itself to find at least a legal truth by determining the only "reasonable" view on crimes.

102 Ljubojević, *loc. cit.*, p. 80 and Arzt, *loc. cit.*, p. 230; for instance, only recently it has been acknowledged that comprehensive translation of the ICTY materials and records, such as trial protocols and evidence, into the local languages of the target societies would have an important impact on identification with the proceedings and the established truth; F. Höpfel, 'Internationale Strafgerichtshöfe und Rechts(kultur)entwicklung' in Pilgram, Böllinger, Jasch, Krasmann, Prittwitz, Reinke and Rzepka, *op. cit.*, 141–148, at p. 145. The first press release in Serbian, e.g., was issued in the year 2000; Orentlicher, *op. cit.*, p. 95.

103 Belgrade Centre for Human Rights, *Public Opinion in Serbia. Attitudes towards the International Criminal Tribunal for the Former Yugoslavia* (*ICTY*) (2003), available online at

to reach out to the Tribunal's target societies, including ICTY offices in the region, was only established in 1999.[104] By keeping close ties to important stakeholder such as national and international governmental and non-governmental organisations, the media or the local judiciaries, the outreach program aims at promoting the Tribunal's record in ending impunity and stimulating the process of dealing with the past in the former Yugoslavia.[105]

However, notwithstanding these endeavours, the Tribunal still faces "considerable mistrust by the local population."[106] For too long, it had left the population of the Balkan un- and misinformed about its proceedings, making no effort to encounter truth distorting anti-Hague messages about Serb victimization, spread out by accused like Milošević or Šešelj and the Serbian media.[107] Until now, multiple versions of the truth build new national narrative traditions in

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http://english.bgcentar.org.rs/images/stories/Datoteke/attitudes%20towards%20the%20international%20criminal%20tribunal%20for%20the%20former%20yugoslavia%20icty%202003.pdf (accessed 15 February 2014) p. 13; Spoerri and Freyberg-Inan, *loc. cit.*, p. 373; Belgrade Centre for Human Rights (2011), *loc. cit.*, p. 13.

104 The outreach program is not funded by the UN, but by voluntary contributions. In Tolbert's opinion, this demonstrates the view that the Tribunals impact on the region in general, let alone the justice systems, was of marginal interest to UN policy-makers; Tolbert, *loc. cit.*, pp. 14–15. Indeed, in the beginning, its founders did not believe the ICTY to actually function. The need of making the Tribunal's work relevant for the local populace and legal systems was thus simply not seen. In addition, initially, the Tribunal did not have any mandate to construct, improve or strengthen domestic justice systems or assisting in war crimes prosecutions; Kienlen, *loc. cit.*, pp. 678–679 and E. Simpson, 'Stop to The Hague: Internal versus External Factors Suppressing the Advancement of the Rule of Law in Serbia', 36 *Georgetown Journal of International Law* (2004-2005) 1255–1287, at p. 1285.

105 ICTY, *ICTY Annual Outreach Report* (The Hague, 2011), available online at http://www.icty.org/x/file/Outreach/annual_reports/annual_report_2011_en.pdf (accessed 15 February 2014) p. 5; Orentlicher, *op. cit.*, pp. 97–98; F. Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY', 6 *Journal of International Criminal Law* (2008) 655–665, at p. 663.

106 ICTY (2011), *op. cit.*, p. 5.

107 Jovanovic, *loc. cit.*, p. 5; Orentlicher, *op. cit.*, p. 95. Opinion polls confirm that denial and the feeling that Serbs are victims is still deeply rooted in Serbia; Klarin, *loc. cit.*, p. 93. Local media would have been an important actor in disseminating the message of fair trials before the ICTY, which were indeed lengthy, complex and technical, but thereby accurate and the opposite of "show trials". Instead of explaining decisions of the ICTY, each national group used the opportunity of short summaries of the ICTY proceedings to create and present their own version of the history of the war; Saxon, *loc. cit.*, p. 563. Consequently, public perception in Serbia were hardly influenced by what the prosecution and judges were actually doing in The Hague, but rather by the views of the local political, academic and cultural elites; Klarin, *loc. cit.*, p. 90.

the Balkans:[108] for instance, the Serb view of the history of the breakup of the former Yugoslavia rejects the assumption of a predominant Serb responsibility.[109] As it could not spread its court-established truth, the Tribunal is consequently brushed away as "victor's justice",[110] and "culture of denial" takes roots.[111] Attitudes towards the Tribunal have hardly changed over the years.[112] Although the ICTY still claims that its outreach initiatives "cement the Tribunal's contribution to peace and justice in the former Yugoslavia,"[113] observers rather note that these "social goals dropped out of the mandate by the practice".[114]

3.3.2 Capacity Building Effects: The War Crimes Chamber — What Would Not Have Happened

Next to the Tribunal's ability to convey demonstration effects, efforts towards capacity building in the local judiciaries are just as important in order to contribute to the establishment of the rule of law. The idea is that accountability trials do not just stand apart from ordinary and on-going reform, but that they influence the legal landscape of the target country. Principles like the condemnation of atrocities, the importance of fair trials in order to determine responsibility, the need for effective and impartial procedures for resolving future disputes more generally as well as substantial international (criminal and humanitarian) law must be embedded in the domestic practices. Engaging in the reestablishment of justice domestically should, in the long run, strengthen the domestic legal system and its institutions in a sustainable manner.

However, the ICTY was not designed to capacitate judicial institutions in its constituencies. And thus, little effort was made to make the ICTY's work relevant to the national justice systems in the region. There was no deliberate involvement in judicial reforms.[115]

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108 Ljubojević, *loc. cit.*, p. 81.

109 Stromseth, *loc. cit.*, p. 274 or Orentlicher, *op. cit.*, pp. 86–87; Saxon, *loc. cit.*, p. 562.

110 Reuter, *loc. cit.*, p. 299.

111 Orentlicher, *op. cit.*, pp. 86–92, similar: Saxon, *loc. cit.*, p. 562.

112 Orentlicher, *op. cit.*, p. 96 and Klarin, *loc. cit.*, p. 96.

113 ICTY (2011), *op. cit.*, p. 3.

114 Kienlen, *loc. cit.*, p. 679; the ICTY itself actually never did any research about its broader impact on the target societies.

115 Tolbert, *loc. cit.*, p. 14; there was however one exception: according to the Rule of the Road program, established pursuant an agreement reached in 1996 in Rome between the Dayton Accords, the ICTY Prosecutor would review all war crimes prosecutions and assess whether a *prima facie* case existed. However, after the domestic prosecutor received the relevant OK, s/he was left alone by the ICTY; Tolbert, *loc. cit.*, p. 14.

In the aftermath of the wars, ordinary national courts of Serbia and Montenegro were not equipped to deal with the complexity of war crimes cases. Key obstacles included: bias on the part of judges and prosecutors, poor case preparation by prosecutors, inadequate cooperation from the police in the conduct of investigations, poor cooperation between the states on judicial matters, and ineffective witness protection mechanisms. In addition, key legal issues remain unresolved, including the admissibility of witness statements taken by the ICTY and the extent to which the doctrine of command responsibility is recognized in the national law of each country.[116] And thus, although the ICTY Statute allows for a referral of cases and investigative material to domestic jurisdictions, only one such case has been referred to Serbia.[117]

Until a specialized War Crimes Chamber was established at the Belgrade District Court in July 2003, together with a special unit within the Serbian police (War Crimes Investigation Service in Serbia's Ministry of Interior) as well as a War Crimes Prosecutor's Office, there were very few war crimes cases conducted before Serbian courts.[118] From then on, the War Crimes Prosecutor had the exclusive responsibility for prosecutions involving war crimes, crimes against humanity and genocide.[119] The first trial before the new War Crimes Chamber began in March 2004 under close monitoring by the ICTY.[120]

116 B. Ivanisevic and J. Trahan, *Justice at Risk. War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, Human Rights Watch (2004), available online at http://www.hrw.org/print/reports/2004/10/13/justice-risk (accessed 15 February 2014) p. 2.

117 This was in 2007 the case of Vladimir Kovačević, who was later found unfit to stand trial by the Belgrade District Court; cf. ICTY: "Status of Transferred Cases"; http://www.icty.org/sid/8934 (accessed 15 February 2014). In total eight cases involving 13 suspects have been referred to the region, mainly to Bosnia and Herzegovina. It is left to the Organization for Security and Cooperation in Europe (OSCE) to monitor referred cases and report to the ICTY Prosecutor. Should the Prosecution be determined that the trial is not being conducted according to international standards, it can request the Referral Bench under Rule 11*bis* of the Rules of Procedure and Evidence of the ICTY to revoke its initial decision of referral.

118 Stromseth, *loc. cit.*, p. 275, V. Dimitrijevic, 'Domestic war crimes trials in Serbia, Bosnia-Herzegovina and Croatia', in Batt and Obradovic-Wochnik, ed., *op. cit.*, p. 86; its establishment had experienced many objections — even the Minister of Justice was against it. The environment had only become supportive after the assassination of Prime Minister Zoran Đinđić, who had always supported war crimes courts; Orentlicher, *op. cit.*, p. 65 and Dimitrijevic, *op. cit.*, p. 86.

119 Article 21 of the *Act on the Organization and Jurisdiction of State Bodies in War Crimes Proceedings*, Official Gazette of the Republic of Serbia, 67/2003.

120 Freeman, *op. cit.*, p. 6.

Although the ICTY did not play a formal role in the establishment of the War Crimes Chamber, war crimes trials would probably not have happened in Serbia, had the ICTY not been established.[121] The ICTY was helpful in creating the political space for Serbia to assume a serious role in prosecuting 1990s-era atrocities and dealing with the burden of war crimes in all its dimensions. This was a great achievement on the road towards the rule of law.

Whereas the Tribunal's impact on the War Crimes Chamber's actual operation was also modest, it transferred considerable amounts of evidence;[122] know-how transfer and trainings should not be underestimated.[123] Dissemination of expertise was partly active and partly passive: the fair process and procedural practices that could be observed at the ICTY provided for a model that could be copied by local courts. Indeed, some of these innovations have been implemented in the Serbian criminal code. In addition to that, the Tribunal organized regular trainings for local legal staff in The Hague. Those seminars touched upon substantive and procedural international criminal law, in particular legal institutes like command responsibility and other forms of liability, as well as victim protection measures.[124]

Until now, there are significant deficiencies in the functioning of the War Crimes Chamber. Investigations of war crimes have been and are still obstructed by different forces such as the police or the state security boycotting the gathering of evidence, or political actors from within the radical and nationalistic spectrum threatening the prosecutor, judges and even victims and witnesses. The state authorities on the other hand hesitate to pronounce public support for the War Crimes Chamber.[125] Secondly, in the fear of putting

121 Orentlicher, *op. cit.*, p. 53.

122 The evidence stems from investigations that had not led to any indictment. In addition, the local War Crimes Prosecutor has access to the Tribunal's evidence database. Pursuant a change in the law establishing the War Crimes Chamber in 2004, ICTY's evidence could actually be used in local proceedings; Orentlicher, *op. cit.*, p. 69.

123 P.C. McMahon and J. Miller, 'From Adjudication to Aftermath: Assessing the ICTY's Goals beyond Prosecution', 13 *Human Rights Review* (2012) 421–442, at p. 433.

124 Orentlicher, *op. cit.*, pp. 70–71 and 73; the ICTY summarizes its capacity-building efforts as bolstering staffing capacity in key areas and professional development, developing curricula and materials an international law that is tailored to each national jurisdiction's legal framework, access to the ICTY's materials and expertise; cf. ICTY: "Capacity Building"; http://www.icty.org/sections/Outreach/CapacityBuilding (accessed 15 February 2014).

125 To the contrary, the Witness Protection Unit of the Ministry of Justice for instance is even trying to keep witnesses from testifying themselves; cf. for example: OSCE Mission to Serbia, *War Crimes Before Domestic Courts. OSCE monitoring and empowering of the domestic courts to deal with war crimes* (2003), available online at http://www.osce.org/

himself at odds with the political and military elite in Serbia, the War Crimes Prosecutor is still reluctant to employ the legal liability concept of command responsibility. This resulted in almost no indictments of higher-ranking military or even political officials.[126] A third striking problem is the lack of regional cooperation among Bosnia, Serbia and Croatia, or even obstruction of the work of the other country's war crimes courts: witnesses are prohibited to testify, evidence is not submitted or the court publicly denounced as biased.[127]

Notwithstanding these shortcomings, in particular a lack of "political space"[128] of the prosecutor, accountability proceedings in Serbia improve. At least in numbers, the War Crimes Chamber features an impressive record of a total of 398 prosecuted persons, involving 2918 victims.[129]

3.4 *Assessment of the Findings: ICTY Negotiality or the Missing Link to Morality*

The creation of the rule of law in any country is a highly complex process, which probably lasts generations and where many domestic and international factors work simultaneously,[130] making it difficult to untangle their individual contributions. Criminal trials are only one such factor.[131] In order to analyse this process in Serbia and evaluate the different impact the various actors involved had, it has been hypothesized that establishing the rule of law by

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serbia/13494 (accessed 15 February 2014) pp. 48–54; Belgrade Centre for Human Rights, *Human Rights in Serbia and Montenegro 2005. Legal Provisions, Practice and Awareness in the State Union of Serbia and Montenegro Compared to International Human Rights Standards. Series Report 9* (2006) p. 469; Belgrade Centre for Human Rights, *Human Rights in Serbia 2006. Legal Provisions and Practice Compared to International Human Rights Standards. Series Report 10* (2007); Belgrade Centre for Human Rights, *Human Rights in Serbia 2007. Legal Provisions and Practice Compared to International Human Rights Standards. Series Report 11* (2008) pp. 236–237; Belgrade Centre for Human Rights, *Human Rights in Serbia 2009. Legal Provisions and Practice Compared to International Human Rights Standards. Series Report 13* (2010) p. 373; Belgrade Centre for Human Rights (2012), *op. cit.*, pp. 331-333 and 336; Orentlicher, *op. cit.*, p. 76.

126 Ivanišević, *loc. cit.*, pp. 8–9.

127 E.g., Belgrade Centre for Human Rights (2012), *op. cit.*, pp. 327–328; regional cooperation has improved a little bit with Croatia when an agreement was concluded that permits mutual extraditions of one country's own nationals for criminal proceedings; European Commission (2010a), *loc. cit.*, p. 8.

128 Orentlicher, *op. cit.*, p. 75.

129 Republic of Serbia, Office of the War Crimes Prosecutor: "Cases", available online at http://www.tuzilastvorz.org.rs/html_trz/predmeti_eng.htm (accessed 15 February 2014).

130 McMahon and Forsythe, *loc. cit.*, p. 416.

131 Saxon, *loc. cit.*, pp. 567–568.

using ICTY conditionality does not only depend on the implementation of EU conditionality and domestic factors, but additionally, it depends on the performance of the ICTY as the main focus of conditionality itself: the ICTY needs to show the ability to advance basic international principles that enhance the rule of law through transitional justice.

The EU's de facto approach of not strictly demanding the fulfilment of ICTY conditionality requirements and thereby signalling that those requirements were negotiable caused noncompliance, manipulation and delay on the Serbian side — although, in the end, all EU requirements were met.[132] In fact, this brought the whole mission of the ICTY into danger, whose mandate had to be prolonged repeatedly.

This is how the hesitant, volatile attitude of the EU depicting a lack of credibility and consistency significantly impeded achievements within the broader context in which ICTY conditionality was placed: the establishment of the rule of law. It has undermined the credibility of the Tribunal itself, preventing it to spread a culture of law.[133] In addition, the EU's wavering standpoint gave the Serbian authorities the chance to place ICTY cooperation in a — if any — utilitarian framework and treat it as nothing more than the "necessary evil" for reintegration into the democratic international community.[134] For Serbia, ICTY conditionality compliance was based on a pure cost-benefit calculus. As true social transformation is missing in this calculus, the long-term impact conditionality is supposed to have on the rule of law, will not grasp. Both sides failed to make the ICTY a moral imperative for Serbia to come to terms with the role of Serbs in atrocities committed in Croatia, Bosnia and Herzegovina and Kosovo or for transitional justice.[135]

132 Freyburg and Richter, *loc. cit.*, p. 264; Dobbels, *loc. cit.,* p. 16.

133 As mentioned, transformation from a political system in which the law serves "the strong" to a system in which everybody, including "the strong", abide the law is a difficult process, which might be even complicated further by international involvement. For that reason, one has to acknowledge that each time EU Member States have advocated for a more lenient approach towards ICTY conditionality, they might have had good reasons to do so: balancing the different political forces in order appease an escalating situation can sometimes indeed be the more promising approach than strictly applying pressure. Thus, being more flexible on ICTY conditionality might — in some cases — have had a positive impact on democratic consolidation in Serbia as well. However, in the context of the ICTY's impact, the flexible course of action has undermined its potential to be a player itself in spreading the rule of law.

134 Orentlicher, *op. cit.*, pp. 101–102.

135 Saxon, *loc. cit.*, p. 566.

This gap could have been filled by the ICTY, had it advanced those basic international principles that enhance the rule of law through transitional justice. In this respect, the Tribunal was to a large extent successful in deterring violence, ridding a country of its war criminals and fighting their impunity: trying military and political leaders in The Hague cleared the ground for a more responsible government, paving Serbia's way towards Europe.[136] Thanks to the ICTY, every war criminal in Serbia had to fear prosecution, whether international or national. The Tribunal has shown that an international justice system is feasible; and along that way, it has enormously contributed to the development of international criminal law. And even if the Tribunal's legal functioning was confusing to the population in Serbia, most legal academics praise the fairness of the proceedings and their high judicial standard.[137] Those were strong positive demonstration effects.

Enhancing the rule of law would have, however, also included conveying a culture of law through the Tribunal's own judicial performance. Unfortunately, ICTY actors were not convinced enough that drawing the broader picture of accountability goals could be done by them.[138] An alien legal system underlying the procedures of the Tribunal bearing huge difficulties especially for victims, lenient sentences and difficult access to the court-established truth therefore break the positive image of the Tribunal. An especially dramatic failure was certainly the reluctance to address the nationalistic manipulation of the ICTY's work and to explain its goals, procedures and achievements to the population in Serbia. All this could have been avoided — had the Tribunal's founders taken its broader mandate of having an impact on the target societies seriously from the beginning on.

Modest efforts to assist domestic capacity-building could not compensate the ICTY's failures with respect to demonstration effects.[139] Albeit, spurring the creation of a specialized war crimes court is an important success and by cooperating closely with the OSCE — an organization that works in the field of local judicial empowerment — the Tribunal has taken advantage of its unclear initial mandate in the best possible way.

David Tolbert's[140] words probably summarize best the most acknowledged assessment of the Tribunal: "On the one hand, the ICTY's achievements have

136 Tolbert and Solomon, *loc. cit.,* pp. 36–37.

137 See for instance Tolbert, *loc. cit.*, p. 8 or Orentlicher, *op. cit.*, p. 133.

138 Mégret, *loc. cit.*, pp. 1036–1037.

139 Stromseth, *loc. cit.*, p. 269.

140 From 2004 to 2008 deputy chief prosecutor of the International Criminal Tribunal for the former Yugoslavia and President of the Center for Transitional Justice since 2010; cf., ICTJ: "David Tolbert", available online at http://ictj.org/about/david-tolbert (accessed 15 February 2014).

exceeded the boldest hopes of its creators. However, in several important aspects, it has failed to make a difference in the region itself."[141]

Thus, the Tribunal could not fully make up for the failures of the EU and of the Serbian government with respect to spreading the rule of law through ICTY conditionality. The message that law can be fair and just and that domestic accountability proceedings are necessary and feasible was neither communicated by the EU, nor by the ICTY, nor by Serbian elites. A sense for and a culture of law was not conveyed. The Tribunal's work has thus not brought about the changes in values that the EU was aiming for when putting ICTY conditionality in the context of establishing the rule of law in Serbia.[142]

As Serbia is not marked by a long lasting tradition of the rule of law, this was an ambitious task, indeed: the time during the Tito regime is qualified as a "political vacuum",[143] where law was an instrument of the ruling class; under Milošević, corruption in all state and societal structures, including the judicial system, even raised.[144] Marked by this tradition, people in the former Yugoslavia simply believed the ICTY to be an instrument of the Western powers to assert their control and influence over the region in the manner of the "right of the strong": the ICTY simply did not — and still does not — stand for justice and reconciliation. Instead, it stands for conditionality and the threat of international isolation in case of non-compliance with conditionality requirements — decreasing the Tribunals potential of being a tool in building the rule of law in Serbia.[145] Breaking this vicious circle would have been only possible through strong demonstration and capacity building effects, enhancing the rule of law.

141 Tolbert, *loc. cit.*, p. 7.

142 Dobbels, *loc. cit.,* p. 29; the Serbian judiciary remains the area that raises the most concerns regarding the implementation of the rule of law in line with European standards throughout the years: political influence, partiality of judges and non-application of fair trial rights frame the picture; e.g. European Commission, 'Serbia and Montenegro. 2005 Progress Report. COM (2005) 461 final' (Brussels, 2005b) p. 10, European Commission (2006), *loc. cit.*, p. 46, European Commission (2007a), *loc. cit.*, pp. 6 and 46, European Commission (2008), *loc. cit.*, p. 3, European Commission, 'Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2009-2010. COM (2009) 533' (Brussels, 2009) p. 54, European Commission, 'Serbia Progress Report. Commission Staff Working Paper. COM (2010) 660' (Brussels, 2010b) p. 10, European Commission, 'Serbia 2007 Progress Report. Commission Staff Working Document. COM (2007) 663 final' (Brussels, 2007b) p. 17, European Commission, 'Serbia 2012 Progress Report. Commission Staff Working Paper. COM (2012) 600 final' (Brussels, 2012) p. 9.

143 Saxon, *loc. cit.*, p. 562.

144 Dzajic-Weber, *loc. cit.*, p. 7.

145 Spoerri and Freyberg-Inan, *loc. cit.*, p. 368.

4 Conclusion: The Western Dream versus Balkan Reality

The evaluation of the ICTY's impact on the development of a rule of law is thus mixed: while it did have capacity building effects on the functioning of the War Crimes Chamber, those effects have regrettably not "spilled over" to the judicial system as a whole. And while it has contributed to peace and justice through fair trials, the idea of a true culture of law has not visibly taken root in Serbia yet.

ICTY conditionality in the sense of making Serbia comply with ICTY demands was as such successful, although endangered by inconsistencies in its application and unfavourable national conditions. The author nevertheless concludes that the aim of enhancing the rule of law in Serbia through ICTY conditionality was hardly accomplished due to misconceptions in the functioning of the ICTY and grave misperceptions of its work. Essentially, the outcome of ICTY conditionality can be described as the following: *rule transfer*, the goal of EU conditionality, has taken place: in the end, all demands of the EU to cooperate with the ICTY were fulfilled. However, there was no alternation of the principles that underlie those demands: Serbia has not addressed its past in all political, societal and legal dimensions and Serbia has not developed a culture of accountability; thus no *rule diffusion* has taken place that would go beyond the formal fulfilment of ICTY and EU requirements. As a consequence, no culture of law took root that could have led to the establishment of the rule of law. Both ICTY conditionality performance on the side of the EU and the performance of the ICTY as well as domestic factors have contributed to this outcome.

Despite this assessment, one has to acknowledge that the ICTY has provided more justice than national courts could or have provided,[146] and has thereby contributed to stable peace. The author therefore follows those who acknowledge that "[t]he region was better off with the tribunal than without."[147]

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146 Clark (2009), *loc. cit.*, p. 136

147 Mégret, *loc. cit.*, p. 136