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## The ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics

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### ABSTRACT

It has been widely argued that international criminal justice is necessary for peace and security and that it promotes reconciliation. There have been few attempts to examine these claims with empirical evidence. This article examines the impact of the International Criminal Tribunal for former Yugoslavia on political thinking and behavior in Serbia. It finds that the ICTY has had thus far little direct impact on Serb leaders and political parties, the rule of law, or civic society. What impact the court has had has been indirect, the product of a network of other actors like the United States and the European Union. These network members make reference to the ICTY as they try to manage Balkan politics. This article shows that while internationalized criminal courts may punish certain individuals and develop legal norms and procedures, "judicial shock therapy" is more difficult to achieve. The ICTY has not yet pushed Serbia in a more liberal political direction, which is a foundation for progressive change in the Balkans.

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## I. INTRODUCTION

Transitional justice is now a staple of both policy makers and scholars. What to do after atrocities, and how to choose among the assortment of international and domestic strategies, is an important part of international relations and an empirically relevant subject for its students.<sup>1</sup> Within this framework, the legalities of international and internationalized criminal courts are much debated.<sup>2</sup> As an extension of this debate, there is a school of thought that asserts broad benefit from such courts, whether pertaining to the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, East Timor, Kosovo, or the International Criminal Court. Too often these assertions of far-reaching and beneficial impact are not followed by attempts to examine empirical evidence. When studied at all, legal details are more fully addressed than political or social impacts. Focusing on the International Criminal Tribunal for the former Yugoslavia (ICTY), this article starts filling in this gap, examining the court's impact thus far—not on legal punishment per se or legal development—but on its contribution to broader and inherently political outcomes.<sup>3</sup> After all, if the ICTY has indeed had an impact on “the restoration and maintenance of peace” (as stated in the UN Resolution), this cannot occur in the abstract but has to evolve through discernible changes in political ideas and domestic processes.<sup>4</sup> The following looks closely at the ICTY and developments in Serbia, which are essential to the transformation of peace and security.

First, this article will review the position of the advocates of what the authors call *judicial romanticism*, who assert that international courts like

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1. One can choose criminal prosecution whether national, international, or mixed; truth commissions with or without amnesty from prosecution; apologies; reparations; disbarment from public office; or doing nothing. There is a growing library of publications on the subject. See, e.g., *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000); *THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES* (Alexandra Barahona De Brito, Carmen Gonzalez Enriques, & Paloma Aguilar eds., 2001); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGETTING: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); A. JAMES McADAMS, *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* (1997).
  2. Again, the literature is voluminous. For some timely examples constituting the tip of the iceberg, see MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007); *CRIMINAL COURTS* (Jo Dixon, Aaron Kupchik, & Joachim Savelsbergt eds., 2007); JORDON J. PAUST, ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (3d ed. 2006).
  3. On the record of the ICTY regarding particular court cases and development of legal ideas, see in addition to the sources in *id.*: *THE PROSECUTION OF INTERNATIONAL CRIMES: A CRITICAL STUDY OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (Roger S. Clark & Madeleine Sann eds., 2003); *HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY* (2004); *OLAOLUWA OLUSANYA, SENTENCING WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (2005).
  4. S.C. Res. 827, U.N. SCOR, 3217th Mtg., U.N. Doc. S/RES/827 (1993), available at <http://www.nato.int/ifo/un/u930525a.htm>.

the ICTY are essential in transitioning states to the construction of peace and security.<sup>5</sup> Second, the article notes the absence thus far of much empirical evidence in support of these claims. Third, the article takes stock of the ICTY's impact, if any, on Serb politics. To do this, the article details changes after the ICTY was established in 1993 until early 2007, focusing specifically on: 1) political leadership and parties; 2) democratization and rule of law; and 3) Serbian society. Given that the ICTY was established at a unique juncture in Europe's history, as numerous intergovernmental organizations and a "parade of Western non-governmental organizations" made their way to countries in the East to encourage economic and political reform, this organization's relationship to other actors seeking to influence Serbia's future needs to be considered.<sup>6</sup> This article thus looks separately at the ICTY's impact on key international actors.<sup>7</sup>

The article finds that the ICTY has had little progressive effect on Serb political leaders, parties, institutional change, or society, due primarily to the staying power of traditional Serb nationalism. This nationalistic perspective views the Serbs as victims and most outsiders, including the ICTY, as the victimizer. There is some progress or liberalization in Serb politics, but not much relatively speaking and little of this change can be linked directly to the ICTY. This leads to a discussion of the value of the ICTY beyond legal punishment and legal development, and specifically its relationship to the European Union, the United States, NATO, and Council of Europe, which are also committed to the maintenance of peace in the Balkans. That is, in the transnational network of governmental and nongovernmental actors promoting peace, stability, and democracy in Serbia, this article explains the role—and hence indirect influence—of the ICTY.<sup>8</sup>

## II. JUDICIAL ROMANTICISM

The United Nations Security Council, in its Resolution 827 of 25 May 1993, which created the ICTY, stated that it was "Convinced that . . . the establishment . . . of an international tribunal and the prosecution of persons

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5. For the concept of judicial romanticism see, DAVID P. FORSYTHE, *HUMAN RIGHTS IN INTERNATIONAL RELATIONS* 89 (2d ed. 2006). The concept is acknowledged in Payam Akhavan, *Justice in The Hague*, 20 Hum. Rts. Q. 737, 740 (1998) and Ramesh Thakur, *Tyrants Under the Gun*, JAPAN TIMES, 10 Nov. 2005, which adds the idea of judicial colonialism.
  6. MILADA ANNA VACHUDOVA, *EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE & INTEGRATION AFTER COMMUNISM* 3 (2005).
  7. On the effects of the EU and Europeanization see, *TRANSFORMING EUROPE* (Maria Green Cowles, James Caporaso & Thomas Risse eds., 2001).
  8. On the notion of governance through transnational networks, see especially ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). We apply this notion on a regional rather than global basis.

responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace . . . ."<sup>9</sup> Thus from the beginning, the court was seen as a judicial organ that would have a political impact and regardless of the exact wording of UN resolutions, scholars and practitioners alike have asserted the broad and beneficial impact of the ICTY and other criminal courts.

A leading believer in the ICTY's bearing on Balkan politics has been Payam Akhavan, a distinguished legal scholar who for a time served on the court's staff. According to him, the court survived the Dayton peace agreement with its emphasis on political accommodation "and has been recognized as an essential ingredient of peace building in the former Yugoslavia."<sup>10</sup> He believes that ending impunity will lead to deterrence against future atrocities and instill other appropriate values into "the popular consciousness."<sup>11</sup> For him, "peace and [legal] accountability, far from being irreconcilable, are inextricably linked."<sup>12</sup>

Akhavan has much company in expecting that beyond particular judgments and the development of legal concepts useful for international law, or through them, the ICTY would contribute to peace and security in the Balkans, meaning primarily in Bosnia, Croatia, and Serbia. According to the staff of the Global Policy Forum, "the fact is that over the years, an expectation has persisted that the ICTY's work would or should help to reconcile the peoples of the Balkans with their violent recent history, even if only as a by-product of its central, specifically judicial aims."<sup>13</sup> Reed Brody, the counsel for Human Rights Watch, has argued a similar line, saying that court judgments that put an end to impunity contribute to democracy and the rule of law in various nations.<sup>14</sup> As Eileen Simpson puts it, one of the reasons behind the creation of the ICTY was the belief in "the need for [legal] justice in achieving reconciliation."<sup>15</sup> While the views of the first ICTY prosecutor, Richard Goldstone, on this question are quite complex and reflective, he argued at one point that "[international] justice can be a useful tool for peacekeeping or peace building."<sup>16</sup>

Judicial romanticism, thus, is not limited to academics or practitioners. In fact, these positions are just a representative sample of the views of others

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9. See S.C. Res. 827, *supra* note 4.
  10. Akhavan, *supra* note 5, at 739.
  11. *Id.* at 749.
  12. *Id.* at 751.
  13. Staff, Institute for War and Peace Reporting, The Hague Tribunal and Balkan Reconciliation, Global Policy Forum, *available at* <http://www.globalpolicy.org/intljustice/tribunals/yugo/2006/0721reconciliation.htm>.
  14. *Id.* at 4.
  15. Eileen Simpson, *Stop to the Hague: Internal Versus External Factors Suppressing the Advancement of the Rule of Law in Serbia*, 36 GEORGETOWN J. INT'L L. 1255 (2005).
  16. Richard J. Goldstone, *Justice as a Tool for Peace-Making*, 28 N.Y.U. J. INT'L L. & POL. 485, 501 (1996). Compare his comments noting some weakness in legal justice compared to truth commissions in RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 65, 71 (2000).

who extrapolate from the ICTY's record of judging individuals and developing legal concepts and procedures to argue that internationalized legal justice has various political effects on the nation-states involved. For instance, one goal of the ICTY is to use available legal punishments to create broader political impact on security, reconciliation, and peace.<sup>17</sup>

### III. THE PAUCITY OF EVIDENCE

On this matter, it appears that lawyers propose and social scientists dispose. Most of the assertions about the ICTY's anticipated broader impact come from those in the legal profession, and they leave it to social scientists to compile whatever relevant evidence exists. As Eric Stover and Harvey M. Weinstein show, there have been very few studies following up on these important assertions: "Many . . . astute writers and political leaders have extolled the virtues of criminal trials but seldom are such assertions grounded in empirical data. Indeed, a primary weakness of writings on justice in the aftermath of war and political violence is the paucity of objective evidence to substantiate claims about how well criminal trials or other accountability mechanisms achieve the goals ascribed to them."<sup>18</sup> This same evaluation, namely that claims about different forms of transitional justice have not been subjected to testing, can be found in other publications.<sup>19</sup>

This unfortunate condition is not due solely to disciplinary boundaries but is also the result of methodological problems inherent in studying the effects of external actors on domestic processes. As Alex Pravda observes, assessing the impact of international actors on domestic changes in post-communist Europe is no simple feat; multiple causations, or the situation where many domestic and international variables are working simultaneously, makes it impossible to specify the precise amount of change brought forth by any single actor.<sup>20</sup> In the post-communist context in particular, teasing out the independent effect that any single international organization or government has had on domestic change is impractical, given the large number of Western

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17. See, e.g., PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 16 (2002).
  18. ERIC STOVER & HARVEY WEINSTEIN, MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 4 (2004).
  19. See Pierre Hazan, *Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice*, 88 Int'l Rev. Red Cross 19 (2006); Leslie Vinjamuri & Jack Snyder, *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice*, ANN. REV. POL. SCI. 345 (2004). It may be the case that there has been a greater effort to track the political impact of truth commissions than of criminal courts. See in particular TRISTAN ANNE BORER, TELLING THE TRUTHS: TRUTH TELLING AND PEACE BUILDING IN POST-CONFLICT SOCIETIES (2006); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2002).
  20. On sorting out international from domestic, see Alex Pravda, *Introduction*, in DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE: VOLUME 2 INTERNATIONAL AND TRANSNATIONAL FACTORS 5–7 (Jan Zielonka & Alex Pravda eds., 2001).

actors that have been involved in the region.<sup>21</sup> Moreover, although more than a decade has passed since the ICTY was established, it arguably takes many years and perhaps generations to discern changes that would augur genuine peace or a shift in political culture. In spite of these challenges, it is not impossible to undertake an empirically-grounded analysis of the claims made about international criminal justice in a country targeted by an international court. One such study of international criminal justice in Bosnia concluded that the impact of the ICTY was slight.<sup>22</sup> Perceptively, Rachel Kerr regards the ICTY as inherently political, linked as it is to claims about peace, security, and reconciliation. Foreshadowing some of our conclusions, she asserts that the ICTY's impact on Bosnia was non-existent regarding reconciliation but was useful as a lever applied by others.

#### IV. SERBIA SINCE THE ICTY

Given that the ICTY was created in large part by Western states within the UN to avoid costly intervention in the Balkans but who wanted to give the appearance of doing something, it is hardly surprising that the court failed to stop or even reduce violence in the Balkans. Although Payam Akhavan—in a classic exercise of judicial romanticism—argues the contrary, the short-term impact of the ICTY on the disintegrating Yugoslav state was obvious and disappointing: it neither stopped nor deterred violence.<sup>23</sup> The Bosnian war was of course terminated by US-led mediation in 1995 in which criminal justice was downplayed. Violence continued in Kosovo until NATO's intervention in 1999. What then can be said of the ICTY's other objectives, namely its ability to push Serbia toward peace and reconciliation?<sup>24</sup>

##### A. Illiberal Elites and Serb Nationalism

As of early 2007, there is little evidence that the ICTY has significantly changed Serbian elite behavior in any obvious way. Presumably, the con-

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21. For similar assertions, see *id.* at 1–27; Karen E. Smith, *Western Actors and the Promotion of Democracy*, in *DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE*, *supra* note 20, at 31–57; see also Robert O. Keohane & Stanley Hoffmann, *Conclusion: Structure, Strategy, and Institutional Roles*, in *AFTER THE COLD WAR: INTERNATIONAL INSTITUTIONS AND STATE STRATEGIES IN EUROPE, 1989–1991*, at 388 (Robert O. Keohane, Joseph S. Nye & Stanley Hoffmann eds., 1993).
  22. Rachel Kerr, *The Road from Dayton to Brussels? The International Criminal Tribunal for the Former Yugoslavia and the Politics of War Crimes in Bosnia*, 14 *EUR. SEC.* 319 (2005). See also RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* (2004). While she sees the ICTY as part of a broad political process, she argues that the trials themselves have not been politicized.
  23. See Akhavan, *supra* note 5, at 751.
  24. Simpson, *supra* note 15.

viction of Bosnian Serbs and others for gross violations of human rights should have forced Serbs to re-examine their political views and especially the notion of the nefarious non-Serbs blocking achievement of a justified Greater Serbia. This has not happened. Midway through the first decade of the twenty-first century, the politics of illiberal nationalism and anti-Western hostility continue to dominate Serbian politics. There is broad agreement that the ICTY's indictment of many Serbs, and the conviction of a few, did little to shock elites into shame or encourage a more liberal, tolerant political culture.<sup>25</sup>

While some positive changes have occurred, much remains the same. Milosevic lost power in Serbia in September 2000, though seven years after the ICTY was established and only after elections that he himself chose to call. In fact, Serbia's so-called "democratic revolution" that pushed Milosevic from power had little broad or sustained effect. As Vjeran Pavlakovic observes, the true level of democratic change in Serbia still remains to be seen.<sup>26</sup> Ridding the country of Milosevic was an important step forward, but it was hardly sufficient for liberal change to take hold. This was not only because of the legacy of Milosevic's rule and his use of mythology, history, and political symbols to maintain power, but it was also due to the fact that subsequent Serbian elites have failed to pursue policies that diverged significantly from the goals of their former leader.

Milosevic's successor Vojislav Kostunica illustrates the continued prominence of illiberal, chauvinistic nationalism in Serbia. Kostunica was chosen by the Democratic Opposition of Serbia (DOS), a coalition of eighteen political parties, to run against Milosevic in the 2000 Presidential elections.<sup>27</sup> Tellingly, the nationalistic Kostunica was the most moderate politician to run in the 2000 elections; yet even from this position, Kostunica did not criticize the substance of Milosevic's policies. Although supported by some liberal domestic groups (as well as a significant amount of aid from the US), the DOS carried the day only because of the backing of former army and paramilitary troops. Put differently, the DOS's victory was due in part to the backing of those who had planned and executed the wars in Croatia and Bosnia.<sup>28</sup> Once in power, President Kostunica did not try to moderate Serbian illiberal nationalism but instead blamed Milosevic and the international community for Serbia's failures.<sup>29</sup>

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25. Sabrina P. Ramet, *The Sirens and the Guslar: An Afterward*, in *SERBIA SINCE 1989: POLITICS AND SOCIETY UNDER MILOSEVIC AND AFTER* 395 (Sabrina P. Ramet & Vjeran Pavlakovic eds., 2005). This view is confirmed by a 2006 report, *INTERNATIONAL CRISIS GROUP, SERBIA'S NEW CONSTITUTION: DEMOCRACY GOING BACKWARDS* 15–16 (8 Nov. 2006); Simpson, *supra* note 15, at 1276.

26. Vjeran Pavlakovic, *Serbia Transformed?*, in *SERBIA SINCE 1989*, *supra* note 25, at 14.

27. *Id.* at 26–27.

28. *Id.* at 29.

29. See Roger Cohen, *Death of Milosevic: An Appraisal; To His Death in Jail, Milosevic Exalted Image of Serb Suffering*, *N.Y. TIMES*, 12 Mar. 2006, at 11, available at <http://www.>

Although the short-term impact of Milosevic's departure did not result in an immediate or significant liberal shift, faint signs of progress were apparent from 2000–2003, when the DOS dominated Serb politics and debates often centered on Serbia's relations with the West and cooperation with the ICTY. Although the problems between President Kostunica and Prime Minister Zoran Djindjic were blamed on the latter's openness to the West, their battles were far more complicated and nuanced.<sup>30</sup> To be sure, Kostunica and Djindjic were more alike than different and both claimed a similar goal for Serbia: to be fully integrated into Europe and become a modern democratic state.<sup>31</sup> Given the alleged "liberal" credentials of the DOS but also the unthinkable alternatives, the West put a great deal of faith in the DOS parties. However, the coalition proved corrupt, politically insensitive to average Serbs, and it relied on undemocratic means to achieve its goals. In response to criticisms, DOS officials remained aloof and unmoved; as Obrad Kestic puts it, the implicit attitude of the DOS politicians was, "We are the best that Serbia has. We are the only ones committed to carrying out reform. If we fail, the reforms will fail and Serbia will be doomed."<sup>32</sup>

Prime Minister Djindjic did appear to have a close personal relationship with the US Ambassador William Montgomery, and in June 2001, the Prime Minister provoked the first major crisis within the DOS by pushing forward a decree that meant the government of Serbia would adopt the ICTY statute as domestic law.<sup>33</sup> This allowed for the transfer of Milosevic to the custody of the tribunal and it shifted the discussion within Serbia about the need for cooperation with the ICTY and the legal changes that were required to allow this to happen.

Djindjic's assassination in the spring of 2003 led some to assume that his death was due solely to his desire for further cooperation with the West (some assert that it was because Djindjic had promised to arrest and transfer Ratko Mladic to The Hague).<sup>34</sup> Djindjic's liberalism or promises regarding Milosevic should not be over-emphasized. In fact, before his assassination, the popularity of the DOS was on the steady decline and the Prime Minister's popularity lagged, and he too resorted to chauvinistic nationalism and anti-Western rhetoric. Djindjic's assassination was the final straw for

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ny-times.com/2006/03/12/international/europe/12assess.html?\_r=1&th=&oref=. For a longer version see MISHA GLENNY, *THE FALL OF YUGOSLAVIA* (1992). There is a Victimology Society of Serbia in Belgrade, <http://www.vds.org.yu/indexE.html>.

30. Obrad Kestic, *An Airplane with Eighteen Pilots*, in *SERBIA SINCE 1989*, *supra* note 25, at 106.
31. *Id.* at 107.
32. *Id.* at 109.
33. Eric D. Gordy, *Postwar Guilt and the Responsibility in Serbia*, in *SERBIA SINCE 1989*, *supra* note 25, at 173.
34. Iavor Rangelov, *International Law and Local Ideology in Serbia*, 16 *PEACE REV.* 3 (2004).

the DOS's reign; Serbs not only felt ignored by the government but feared that lawlessness and corruption would be Serbia's future.

In the December 2003 election, the DOS made a disappointing showing while the Serbian Radical Party (SRS) won the single greatest number of votes of any party, repeating this feat in the presidential elections in the summer of 2004. The return of the SRS and Milosevic's Socialist Party (SPS) to the political scene cannot be construed merely as a total defeat for liberal elements. It was also a warning to the moderates: too much infighting, corruption, and neglect for the common person has its consequences.<sup>35</sup> Nonetheless, Kostunica's party managed to cobble together a minority coalition and again reunite Serbia's moderate, democratic parties. This recent revival of a democratic opposition has been matched by a slight but notable change in the tone of the more nationalist parties. Although campaigning on a platform that included promises to liberate "lost" Serbian lands and discontinue all cooperation with the ICTY,<sup>36</sup> the Radical Party has also adopted pro-European slogans.

As of June 2006, support for the SRS remained high, with 40 percent of those polled supporting the SRS and just 21 percent supporting the more moderate Democratic Party of Serbia (DS) which leads the country's minority government.<sup>37</sup> This means that parties that are either opposed to or are ambivalent about European integration control more than 70 percent of the seats in parliament, and the ultra-nationalists control approximately one-third of the seats in every parliamentary committee.<sup>38</sup> Debates among politicians about the international community and specifically the ICTY further expose the agenda of Serbia's dominant political elite, painting—as one report suggests—"a rather gloomy picture of how the minds of members of the Serbian political elite work."<sup>39</sup> One deputy described the ICTY as a "great evil for the Serbs," another called it a "political monster," while a third deputy explained that the court's role was to try "supposed" war criminals.<sup>40</sup>

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35. Can Karpat, Serbian Radical Party: The Hubris of Serbian Political Scene, Global Challenges Research, 4 May 2005, available at <http://www.axisglobe.com/article.asp?article=830>.

36. Kesic, *supra* note 30, at 117.

37. Ekrem Krasniqi, *EU offers to help Serbia Amid Radicalization Concerns*, EU OBSERVER, 16 June 2006, available at <http://euobserver.com/9/21893>.

38. International Crisis Group, *Serbia's U-Turn*, at i (2004), available at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN015598.pdf>.

39. HUMANITARIAN LAW CENTER, *TRANSITIONAL JUSTICE REPORT SERBIA, MONTENEGRO AND KOSOVO, 1999–2005 (2006)*, available at <http://www.b92.net/eng/download.phtml?35394,0,0> [hereinafter *TRANSITIONAL JUSTICE REPORT*].

40. *Id.* at 13.

## B. Democratization and the Rule of Law

Serbian politics cannot be interpreted simplistically, and the continued presence of nationalist parties and leadership in fact exist alongside undeniable positive trends that complicate this picture. Various studies conducted by Freedom House confirm that although Serbia is far from being a consolidated liberal democracy, institutional changes associated with democratization are underway. Serbia's rankings continue to improve in every sector Freedom House evaluates. Table 1 provides sector-specific Freedom House data to measure the extent of recent liberal, democratic change in the former Yugoslavia (until 2003) and Serbia. More than a decade after the ICTY was created and six years since Milosevic's departure from politics, signs of reform are evident, but the country is still defined as a "hybrid" or "transition" government.

As illuminating as these measures of democratization are, they do not show the significant legal changes that are also in the works that relate directly and indirectly to the ICTY's mission. In July 2003, for example, the *Law on the Organization and Justification of State Organs in Proceedings against Perpetrators of War Crimes* was adopted by the Serbian Assembly.<sup>41</sup> This meant, as was true of Croatia and Bosnia-Herzegovina, special judiciary organs were established to prosecute war crimes committed in the territory of the former Yugoslavia. Initially discounted because its members were selected by the Serbian Assembly, the existence of a Serbian War Crimes Prosecutor's Office and a War Crimes Chamber in the District Court in Belgrade have not only raised consciousness of war crimes; they also provide real possibilities for the future of judicial reform, rule of law, and efforts to address past abuses. By the end of 2005, eight trials were held before domestic Serbian courts and all were deemed "professional." Amnesty International, which remains generally concerned with Serbia's lack of political will in cooperating with the ICTY, acknowledged in 2005 that the War Crimes Chamber within the District Court in Belgrade appears to be acting in accordance with internationally accepted norms.<sup>42</sup>

Other laws related to peace building, prevention of future human rights violations, strengthening the rule of law, and promoting reconciliation are also on the books, including the *Law on Accountability for Human Rights Violations*, the *Law on Free Access to Information of Public Importance*, and the *Law on Assumption of Jurisdiction for Military Courts, Military Prosecution*. In addition, reparations programs have been adopted and implemented. The existence of such legal initiatives, alongside improvements in sectors associated with de-

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41. It was amended in December 2004. *Id.* at 25.

42. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CONCERNS ON THE IMPLEMENTATION OF THE "COMPLETION STRATEGY" OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (June 2005).

**Table 1**  
**Democratic Change in Serbia**

	1999–2000	2001	2002	2003	2004	2005	2006
Democracy	5.67	5.04	4.00	3.88	3.83	3.75	3.71
Corruption	6.25	6.25	5.25	5.00	5.00	5.00	4.75
Independent Media	5.75	4.50	3.50	3.25	3.50	3.25	3.25
Judicial Framework	5.75	5.50	4.25	4.25	4.25	4.25	4.25

Note: In 2004, Freedom House started to look at Serbia alone. Previously its ranking on the former Yugoslavia included Montenegro. The scale is 1 to 7, with 1–2 signifying a consolidated democracy, 3 a semi-consolidated democracy, 4–5 a transitional government or hybrid regime, and 6–7 a consolidated authoritarian regime. Source: Freedom House, Nations in Transit 2006: Serbia (2006), available at <http://www.freedomhouse.hu/pdfdocs/serbia2006.pdf>.

mocratization, point to important parallels in the ICTY's mission—even if one is unable to link the court directly to these domestic institutional changes.

### C. Changes in Serb Society

It is difficult to discern the exact reason for the return of radical, ultra-nationalist parties to Serbia since 2003. Was it pushback against the DOS's cooperation with the West and specifically its cooperation with the ICTY? Was it related to negotiations over Kosovo's status or Montenegro's separation from Serbia? Or, was the deteriorating support for the moderates due to their incompetence, infighting, or association with corruption? Given the many possible causes, it is wrong to assume that the popularity of ultra-nationalist parties is the result of DOS cooperation with the ICTY. In fact, although there are not many opinion polls available that track Serb attitudes toward cooperation with the West, those that do exist suggest a slightly positive change toward the ICTY—despite the popularity of the ultra-nationalist parties. Ironically, rather than disappearing from the political landscape, debates about the ICTY and the need for cooperation with this organization continue unabated.

Studies conducted in 2003 and 2004 indicated that Serbians are beginning to think somewhat more positively about cooperation with the ICTY. For example, while in October 2003, 50.7 percent of Serbs polled thought that members of the Yugoslav army should stand trial for war crimes, six months later, 53.4 percent supported this outcome.<sup>43</sup> Clearly, Serbians remain

43. CENTRE FOR CIVIL-MILITARY RELATIONS, *The Serbian and Montenegrin Public on Reform of the Army, 4th Round of the Survey (2004)*, available at <http://www.ccmr-bg.org/cms/view.php?id=1891>.

ambivalent about the ICTY and most see cooperation as a “necessary evil.” Other polls taken in confirm a slow improvement in the public’s sentiment about the ICTY. While only 11 percent of Serbs polled in December 2004 completely approved of cooperation with the ICTY (which included extradition),<sup>44</sup> by January 2006, 16 percent of those polled felt this way; moreover, 46 percent approved of cooperation even though they still characterized it as a necessarily evil.<sup>45</sup>

Distrust of the ICTY may be a result of ignorance, as many Serbs claim that they know little about its operation. In 2004, some self-described “moderate Serbs” acknowledged that they mistakenly believed that there had not been any indictments by the ICTY for crimes committed against Serbs, even though by that point sixteen non-Serb individuals had been indicted for such crimes.<sup>46</sup> Polls conducted by the Belgrade Centre for Human Rights and Strategic Marketing in 2004 and 2005 confirmed this lack of understanding, with some 72 percent of the Serbs polled indicating that they did not even know what the ICTY does.<sup>47</sup> In 1999, the ICTY created an outreach program to offset such problems. Although no systematic research has been done on the effects of this outreach, one Balkan commentator maintained that “To be sure, few of the messages coming from The Hague have resonated with local audiences in Serbia as intended.”<sup>48</sup> In the same year another commentator concluded that the ICTY’s outreach program had very little visibility among the Serbian population.<sup>49</sup>

One cannot understand public perceptions of the ICTY without appreciating the role of the media in Serbia. As the International Center for Transitional Justice puts it, “[W]idespread distrust of the Tribunal . . . is . . . fueled by state propaganda [that is frequently inaccurate and depicts the court] as anti-Serb.”<sup>50</sup> Case in point, when a TV channel started to provide live coverage of the ICTY proceedings in 2001, other media outlets responded by inviting guests and editorials to “counterbalance” the comments made at the trials. At the same time, some of the progress that has been made in changing Serb attitudes has been linked directly to the media’s willingness to let the voices of the victims be heard.

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44. The International Republican Institute Poll: Serbia January 2006 (on file with authors).

45. *Id.*

46. TRANSITIONAL JUSTICE REPORT, *supra* note 39, at 39.

47. *Id.*

48. Rangelov, *supra* note 34.

49. Stephanie Mahieu, *Commanders vs. Perpetrators? Post-War Justice in the Former Yugoslavia: The Ovcara Trials before the ICTY and Domestic Courts*, Paper Presented at Europa-University Viadrina, Frankfurt (7 Aug. 2004).

50. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, SERBIA AND MONTENEGRO: SELECTED DEVELOPMENTS IN TRANSITIONAL JUSTICE 3 (Oct. 2004), available at <http://www.ictj.org/images/content/1/1/117.pdf> [hereinafter SERBIA AND MONTENEGRO].

A noticeable shift in attitudes came only after the June 2005 showing of a video on Serbian television which implicated Serb paramilitaries in the Srebrenica atrocities. The showing set into motion an “avalanche” of diverse public reactions.<sup>51</sup> Following the broadcast, some SRS deputies stepped up their attacks on media outlets and organizations they declared were “enemies of the people,” maintaining that the massacre photographs were an insult to the dignity of the Serbian people.<sup>52</sup> On the other hand, representatives of other nationalistic political groups expressed their regrets. While reactions varied, the broadcast nonetheless spawned unprecedented coverage of the Srebrenica massacre; between 1 January 2003 and 2 June 2004, eighteen print media operations in Serbia published 816 texts on Srebrenica compared to as many as 676 texts in the month following the June broadcast.<sup>53</sup>

The full impact that this media coverage will have is still unknown; yet the attitudes about the war, including public acknowledgement of the crimes committed, are showing signs of a shift. Following the 2005 screening of the Srebrenica video in The Hague, Serbian Prime Minister Vojislav Kostunica declared that “The government and those bodies in charge of this investigation took the appropriate measures in order to bring to justice all those who took part in that shameful crime and who are still in Serbia.”<sup>54</sup> A month later, Serbian President Boris Tadic attended the tenth anniversary of the atrocities in Srebrenica, though he did not speak. Yet, his historical visit to Bosnia was covered by every Belgrade daily newspaper, and Serbia’s Foreign Minister participated in a live televised dialogue about the event.

Bratislav Grubacic, a publisher and media analyst, confirms that ever since the showing of the Srebrenica video, something has fundamentally changed in Serbia, the “wall of denial . . . began to crack. . . . [and] Serbs are becoming . . . more sober after being drunk all these years of wars.”<sup>55</sup> Grubacic further claims that the government’s statements (though not yet acted upon) regarding the government’s willingness to cooperate with the tribunal and trips by Mladic and Karadjic to The Hague indicate that Serbs are finally beginning to come to terms with their past. The 2006 commemoration of Srebrenica prompted Serbian Deputy Premier Ivana Dulic-Markovic to admit that “Srebrenica remains on the conscience of all humanity,” and she also promised that those who committed the massacre would be brought to justice and punished for the sake of “reconciliation in Bosnia-Herzegovina, the region and Europe.”<sup>56</sup>

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51. TRANSITIONAL JUSTICE REPORT, *supra* note 39, at 20.

52. *Id.* at 17.

53. *id.* at 2 n. 3.

54. *Srebrenica, Serbia and the ICTY*, EURO-REPORTERS, 3 June 2005.

55. Barry Wood, *Serbs Slowly Come to Terms with Srebrenica Massacre*, VOA NEWS, 13 July 2005.

56. Zdravko Ljubas, *Do not forget Srebrenica massacre, survivors say*, DEUTSCHE PRESSE-AGENTUR, 11 July 2006, available at [http://news.monstersandcritics.com/europe/news/article\\_1179900.php](http://news.monstersandcritics.com/europe/news/article_1179900.php).

To be sure, there are some groups within Serbian society that are bent on changing public attitudes and have aligned their organization's goals with those of the West and the ICTY in particular. Especially since 2000, there is some evidence that Serbian civil society is, at long last, actively debating the war and Serb responsibility. After significant growth in the 1990s, the non-governmental sector in Serbia had stagnated by 2005, but according to the US Agency for International Development (USAID), the most successful and well-known NGOs in this sector were rights-based organizations focused on reconciliation and human rights.<sup>57</sup> Several such NGOs stand out because of their efforts to confront Serbia's nationalist past and the militarization of Serb society, and because they explicitly call for cooperation with the ICTY.

Established in 1992, the Humanitarian Law Centre (HLC) is perhaps the most well-known human rights organization in the country, if not the region. With a main office in Belgrade and several others throughout the country and in Kosovo and Montenegro, the HLC provides information, legal analysis, and hosts conferences and seminars on transitional justice. As a vocal advocate for cooperation with the ICTY, leaders of this organization, namely its founder Natasa Kandic, have often been the target of scorn by nationalists. At the same time, the international community has credited Ms. Kandic and the organization for their efforts to bring greater truth, justice, and reconciliation to Serbia.<sup>58</sup> The HLC includes some seventy lawyers, researchers, and human rights advocates who are committed to providing the ICTY with objective information and expert analysis in war crimes trials.

In 2004, the HLC signed a protocol with like-minded NGOs in Sarajevo and Zagreb to collaborate and consolidate information related to war crimes and to promote reconciliation. Working with other Serb NGOs, including Women in Black, Transparency Serbia, and the Centre for Nonviolent Action, the HLC works at the grassroots level to raise Serb awareness of past crimes and encourage reconciliation. Without exaggerating the importance of any single organization, it is fair to say that changes in Serb society are underway. As the International Center for Transitional Justice put it, "[there is] a reasonably dynamic NGO movement" in Serbia and although NGOs remain weak compared with the government, "reformist stalwarts like Radio TV B92 . . . [will help rights-based NGOs] . . . play a positive and active role in any transitional justice initiatives."<sup>59</sup>

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57. For the USAID NGO sustainability index, see USAID Europe and Eurasia: 2005 NGO Sustainability Index, available at [http://www.usaid.gov/locations/europe\\_eurasia/dem\\_gov/ngoindex/2005/index.htm](http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2005/index.htm).

58. On behalf of the organization, Natasa Kandic, the director of the Humanitarian Law Centre, received the Homo Homini Award in 2003 for her ongoing defense of human rights and truth. See *People in Need, Previous Recipients of the Homo Homini Award*, at <http://www.clovektisni.cz/index2en.php?parent=548&sid=404&id=549>.

59. SERBIA AND MONTENEGRO, *supra* note 50, at 13.

All of this suggests that while political leadership and institutions remain largely illiberal in Serbia, moderate values and progressive institutional change are also evident. NGOs, while still marginalized by mainstream politicians, are thriving and, importantly, they link their organization's goals to further cooperation with the ICTY. Furthermore, a few top Serbian officials have started to acknowledge the country's past and articulate a desire for some accountability. In July 2006, Deputy Premier Dulic-Markovic put it this way, "A crime must neither be hidden, nor remained unpunished. It is impossible to erase pain or change the past, but we can and must jointly reach the truth and justice."<sup>60</sup> In regard to Serbia's future, this does suggest that at the least some elites are heading in the direction the West hoped for when it established the ICTY. At the same time, the question remains: what role, if any, did the ICTY play in inspiring these changes?

## V. THE ICTY AND NETWORKS IN EUROPE

The disappointing reality related to the effects of the ICTY on Serbia is twofold. First, as of this writing in early 2007, there are few signs of progressive liberal change in Serbia. Second, of the liberal changes that have occurred, there is no way to establish a direct causal link between the ICTY and these outcomes. As previously mentioned, some members of Serb society acknowledge that cooperation with the ICTY is a necessary evil and a few high-profile NGOs have linked their organization's mission to the goals of the court, but beyond this there is not sufficient proof to link the ICTY in any direct way to peace and liberal change in Serbia. With this said, the ICTY has not been irrelevant or wholly ignored; in fact, the ICTY and its objectives remain important topics of conversation within Serbia and cooperation with the ICTY is a perpetual (if inconsistent) requirement for economic assistance and future association with Euro-Atlantic institutions and Western countries. It would thus be wrong to suggest that the ICTY has had no effect whatsoever.

The following section examines the ICTY's influence in Serbia, which is indirect and operates through its close relationships with other international actors. The ICTY's influence then comes from its ability to help set the international community's agenda toward Serbian affairs, to provide information and legal expertise related to war crimes, and, most importantly, to enlist other more powerful international actors to its cause. Rather than irrelevant, this article contends that the court plays a critical role in the network of governments, regional organizations, and NGOs committed to peace build-

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60. Ljubas, *supra* note 56.

ing in Serbia and the region.<sup>61</sup> Similar to the role played by NGOs in the transnational advocacy networks described by Margaret Keck and Kathryn Sikkink, the court's benefit comes from its ability "to persuade, pressure, and gain leverage over more powerful organizations and governments."<sup>62</sup>

Although it has little economic power or direct coercive capacity, the ICTY nevertheless plays an important role in keeping the international community focused on Serbian legal justice issues. In this way, and when other interests do not conflict or override, the ICTY's presence encourages other international actors to broaden their narrow agendas and embrace the court's mission. In line with the extensive literature on transnationalism and networks, the rest of this paper provides evidence for the court's indirect influence—however modest—on outcomes in Serbia because of its role in Europe's networked order.<sup>63</sup>

### A. Transnational Influences in Serbia

Although the literature on the impact of external actors on domestic behavior is considerable, there is an unmistakable consensus among scholars looking at the role of international-level variables on the European continent. Regardless of the country or sector, Europeanization, or the emergence and development at the European level of distinct structures of governance, has led to "distinct and identifiable changes" in both member and nonmember states.<sup>64</sup> Yet, these European-level influences still tend to play only a secondary (rather than primary) role in shaping political, economic, and social outcomes.<sup>65</sup> Even in post-communist countries, Milada Vachudova

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61. Governments and IGOs were, no doubt, supported by a number of NGOs. We do not have space here to try to track the influence of the latter type of actors, but there are websites that provide information on the involvement of NGOs that help gather evidence for the ICTY or provide training/education. See Hugh Griffiths, *Evidence Gathering: The Role of NGOs*, CRIMES OF WAR (2001), available at [http://www.crimesofwar.org/tribunalmag/relate\\_ngo\\_print.html](http://www.crimesofwar.org/tribunalmag/relate_ngo_print.html) for the former and the websites for the International Center for Transitional Justice, and Human Rights First for the latter.

62. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 2 (1998).

63. On the evolution of the literature on transnationalism, see BRINGING TRANSNATIONAL RELATIONS' BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., 1995); see also THE POWER OF HUMAN RIGHTS (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999). For a sampling of the literature on the definition of networks, see Tanja A. Borzel, *Organizing Babylon - On the Different Conceptions of Policy Networks*, 76 PUB. ADMIN. 253 (1998); Walter W. Powell, *Neither Market Nor Hierarchy: Network Forms of Organization*, 12 RES. ORG. BEHAV. 295 (1990). On networks in international politics, see SLAUGHTER, *supra* note 8; AMITAI ETZIONI, FROM EMPIRE TO COMMUNITY (2004); ANNE HOLOHAN, NETWORKS OF DEMOCRACY: LESSONS FROM KOSOVO FOR AFGHANISTAN, IRAQ, AND BEYOND (2005).

64. On the effects of EU members see TRANSFORMING EUROPE, *supra* note 7, at 1.

65. See, e.g., EUROPE UNBOUND: ENLARGING AND RESHAPING THE BOUNDARIES OF THE EUROPEAN UNION (Jan Zielonka ed., 2002); INTERNATIONAL DIMENSIONS OF DEMOCRATIZATION: EUROPE AND THE AMERICAS (Laurence Whitehead ed., 2001).

finds that external factors are successful when domestic liberal reformers have interests that coincide with those of the international community, or when the strategies used by the EU are clear and directly linked to rewards or punishment.<sup>66</sup> More often than not, Judith Kelly concludes that it takes the presence of domestic reformers, strong, clear direction from the EU, as well as backing from other powerful international stakeholders to push difficult reforms forward.<sup>67</sup>

These findings suggest that the ICTY's ability to affect change in Serbia is highly limited, and judicial romanticism faces a tough sell indeed. This is because the ICTY has no coercive capacity, less independent enforcement capability than national courts, and an unsure diplomatic and economic base. "These tribunals have limited mandates and resources, restricted powers of subpoena, and no authority to make arrests. With such limitations, they can never come close to meting out justice to all war criminals, let alone serve as a beacon for reconciliation in countries torn apart by ethnic cleansing and genocide."<sup>68</sup> Although this view is accurate in the sense of the ICTY's inability to independently reward or sanction Serbia, it is also incomplete since the ICTY has never existed in isolation from other international organizations and relationships in Europe, nor did its creators ever imagine that the court would be the sole mechanism to enforce international legal justice. Given the number and power of these other international organizations, Serbia should, in fact, represent an easy test of the ability of courts and international justice to exert broad and significant influence.

Much research on Europeanization attributes the structures of governance to the EU alone, though scholars focusing on the post-communist context credit a number of external actors, both governmental and nongovernmental, with promoting positive political and social change. This is why Karen Smith refers to the "Western project" in the East and includes within it the activities of several major intergovernmental organizations, Western governments, and NGOs (rather than a single focus on the EU).<sup>69</sup> Others interested in understanding conflict prevention, minority rights policies, and regional stability look at the role and activities of the United States, OSCE, NATO, and the Council of Europe, as well as the European Union.<sup>70</sup> This is because external

66. VACHUDOVA, *supra* note 6, at 257.

67. Judith Kelley, *Does Domestic Politics Limit the Influence of External Actors on Ethnic Politics?* 4 *HUM. RTS. REV.* 34 (2003).

68. STOVER & WEINSTEIN, *supra* note 18, at 11.

69. Karen Smith, *Western Actors and the Promotion of Democracy*, in *DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE*, *supra* note 20, at 31.

70. On the OSCE, see *COMPARATIVE CASE STUDIES ON THE EFFECTIVENESS OF THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES: THE POSSIBILITIES FOR PREVENTIVE DIPLOMACY* (Wolfgang Zellner, Randolph Oberschmidt & Claus Neukirch eds., 2004); Gregory Flynn & Henry Farrell, *Piecing Together the Democratic Peace: The CSCE, Norms, and the "Construction" of Security in the Post-Cold War Europe*, 53 *INT'L ORG.* 505 (1999). On NATO and the role of other organizations, see Dan Reiter, *Why NATO Enlargement Does Not Spread Democracy*, 25 *INT'L SEC.* 41 (2001). On the role of the Council of Europe, see DENIS HUBER, *A DECADE WHICH MADE HISTORY: THE COUNCIL OF EUROPE 1989-1999* (1999).

actors interested in promoting liberal change in post-communist countries like Serbia shared a common, if loose set of stated objectives, usually relied on similar strategies to achieve their goals, and often coordinated their activities.<sup>71</sup> Moreover, these actors functioned in a unique, nonhierarchical way; they worked side-by-side in different but reinforcing ways, with close, open lines of communication at the core of their relationship. Put differently, a network order developed to promote stability and political reform in the former Eastern bloc.<sup>72</sup>

In Serbia, this network included most notably the EU and its strategy of membership conditionality, but its efforts were reinforced and supplemented by the US government as well other intergovernmental and nongovernmental organizations.<sup>73</sup> The year 1993 provides an apt starting point for understanding these overlapping, networked relationships, as that is when both the ICTY was established and the EU developed explicit political and economic criteria for future EU members. The Copenhagen Criteria included political, economic, and legal conditions that were required for future EU members and a comprehensive accession strategy to ensure that while EU membership would be withheld, benefits and rewards were appropriately doled out to encourage positive change.

With considerable success leveraging behavior in Central European states, the EU established a similar accession process with Balkan countries by 1999. The Stabilisation and Association Process (SAP), while more generous with market access and financial assistance than similar agreements had been with countries in Central Europe, included tougher political criteria. Specifically, Balkan states not only had to make visible progress in fulfilling the Copenhagen Criteria, but they were required to cooperate with the ICTY.<sup>74</sup> In successive reports starting in 2002, the EU made the ICTY's mission a priority and emphasized Serbia's need to respect its international obligations in this area, lest it become an obstacle to integration.<sup>75</sup>

By 2005, the EU's Enlargement Commissioner, Olli Rehn, openly stated its support for the ICTY, saying "I am pleased that Serbia and Montenegro has finally made significant progress in co-operating with the Hague Tribunal. . . . Accession negotiations proper cannot even be considered until the country has achieved full co-operation with ICTY."<sup>76</sup> He further added that

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71. On the evolution of these relationships and their unique behavior toward each other, see PATRICE C. McMAHON, *TAMING ETHNIC HATRED: ETHNIC COOPERATION AND TRANSNATIONAL NETWORKS IN EASTERN EUROPE* 26–101 (2007).
  72. Walter W. Powell, *Neither Market Nor Hierarchy: Network Forms of Organization*, 12 *RES. ORG. BEHAV.* 295, 303 (1990).
  73. See *DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE*, *supra* note 20.
  74. VACHUDOVA, *supra* note 6, at 252.
  75. FEDERAL REPUBLIC OF YUGOSLAVIA STABILISATION AND ASSOCIATION REPORT, SEC 3 (2002) 343 (Apr. 2002).
  76. Olli Rehn, Press Release, Member of the European Commission, Progress in the Western Balkans (13 Apr. 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/220&format=HTML&aged=1&language=EN&guiLanguage=en>.

Radovan Karadzic and Ratko Mladic must be brought to justice. Although some progress was subsequently noted by EU officials, talks were suspended in May 2006 and have remained so until the time of writing because of Serbia's failure to fully cooperate with the ICTY.

At the same time, the EU relied on economic incentives to encourage Serbian leaders to change their course. It pledged to help stabilize the country's political and economic situation by offering practical ways of assisting Serbia, but it nonetheless remained fixed on the arrest of Mladic and other high-profile indicted war criminals.<sup>77</sup> After a meeting in late 2006 with Serbia's leaders, the ICTY Chief Prosecutor Carla Del Ponte urged the EU to stick by its position and refrain from further talks with Serbia until Mladic was arrested.<sup>78</sup>

As is well-understood in Serbia, the EU (like the ICTY) does not exist in isolation. The EU's strategy of membership conditionality to pressure Serbia to abide by its commitments to the ICTY was similar to the strategies used by other international actors seeking peace and political change in the region. Initially working closely with the World Bank, the US government has also consistently conditioned its economic assistance to Serbia on the country's cooperation with the ICTY. In a few high-profile cases, including the handover of Milosevic in 2001, the US has forced Serbia's hand to abide by court's demands. After Milosevic was handed over, both the US and the World Bank promoted economic development in the Balkans, with the US explicitly stating that its willingness to support World Bank assistance for Serbia depended upon its further cooperation with the ICTY.<sup>79</sup>

Although the World Bank adopted a different strategy in 2002, opting not to condition financing in Serbia on the government's cooperation with the ICTY, Washington has maintained its support for the ICTY. In 2004, the US refused to disburse the last \$25 million of its \$100 million assistance package for Serbia because of its failures in this one regard.<sup>80</sup> Again, in early 2005, it declared that it was withholding another \$10 million of assistance, calling on the "authorities in Belgrade to cooperate fully with the Tribunal by arresting and transferring fugitive indictees, particularly Ratko Mladic, to face justice in The Hague."<sup>81</sup> The United States remains cautiously optimistic that liberal changes are underway, but it remains steadfast in the need for more cooperation with the ICTY and specific arrests by the Serb government.<sup>82</sup>

77. Krasniqi, *supra* note 37.

78. *UN Prosecutor Urges Arrest of Top Serbian War Crimes Fugitives*, VOA NEWS, 2 Oct. 2006, available at <http://www.voanews.com/english/2006-10-02-voa39.cfm>.

79. Press Release, US Department of State, Yugoslavia: World Bank Assistance (11 May 2001), available at <http://www.state.gov/r/pa/prs/ps/2001/2845.htm>.

80. SERBIA AND MONTENEGRO, *supra* note 50, at 4.

81. Press Release, U.S. Department of State, Serbia and Montenegro Assistance (13 Jan. 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/40915.htm>.

82. Jeffery Thomas, *U.S. wants more Serbian Cooperation with War Crimes Tribunal: Rice urges Serbian President Tadic to do everything he can*, U.S. STATE DEPARTMENT, 8

Other international actors also broadened their agendas, taking up the cause of international criminal justice in their relationships with Serbia. In 2004, for example, NATO reached out to Balkan countries, hoping they could meet the requirements for its Partnership for Peace (PfP) Program. However, in addition to previously defined political and economic criterion, NATO added that Balkan countries needed to abide by ICTY demands. As the Norwegian Ambassador to Serbia explained, the PfP program will only happen after “the well-known individuals, General Ratko Mladic in the first place, come to their senses and turn themselves in’ to the International Criminal Tribunal for the former Yugoslavia (ICTY).”<sup>83</sup>

Using a slightly different strategy, the Council of Europe has closely monitored the cooperation of former Yugoslav states with the ICTY, issuing regular reports that address countries’ responses to the ICTY.<sup>84</sup> As a 2003 report states, cooperation with the ICTY is a top concern and it is one of the crucial issues discussed in the context of requests for membership in the Council of Europe.<sup>85</sup> Since Serbia was admitted as a member in April 2003, the Council has continued monitoring Serbia’s progress in this area, noting that even when cooperation with the ICTY has stalled, Serbia has increasingly taken part in multilateral and regional Council of Europe events. In this way, the Council of Europe has retained its commitment to the ICTY’s mission while Serbia has become, as one Council of Europe report put it, enmeshed in European laws and practices.<sup>86</sup>

## B. Network Effects in Croatia and Bosnia

Such networked pressures were also at play in other Balkan states, though with more tangible signs of success in both Croatia and Bosnia. In 1997, after months of close negotiations between Croatia and the United States, during which the US government indicated that it would block crucial IMF and World Bank loans to Croatia, ten Bosnian Croats surrendered themselves

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Sept. 2006, available at <http://www.america.gov/st/washfile-english/2006/September/200609081549591CJsamohT1.910037e-02.html>.

83. *Officials: Serbia-Montenegro’s Bid Hinges on Mladic’s Extradition*, S.E. EUR. TIMES, 4 Mar. 2005, available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2005/03/04/feature-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2005/03/04/feature-01).
84. For an overview of COE monitoring with attention to cooperation with the ICTY, see Serbia and the Council of Europe, available at [http://www.coe.int/T/E/Com/About\\_Coe/Member\\_states/e\\_Serbia.asp](http://www.coe.int/T/E/Com/About_Coe/Member_states/e_Serbia.asp).
85. SECRETARY GENERAL, SERBIA AND MONTENEGRO: COMPLIANCE WITH OBLIGATIONS AND COMMITMENTS AND IMPLEMENTATION OF THE PRE-ACCESSION CO-OPERATION PROGRAMME: SG/INF (2003) 28, 7 July 2003, ¶ 18.
86. SECRETARY GENERAL, SERBIA AND MONTENEGRO: COMPLIANCE WITH OBLIGATIONS AND COMMITMENTS AND IMPLEMENTATION OF THE PRE-ACCESSION CO-OPERATION PROGRAMME, SG/INF(2004) 8, 16 Feb. 2004.

to the ICTY.<sup>87</sup> By early 2003, Croatia had progressed so much that it signed a Stabilisation and Association Agreement (SAA) with the EU and applied for membership, though EU officials insisted that despite Croatia's ability to fulfill economic criteria, it needed to continue to improve its record on war crimes. By April 2004, the EU Commission's Opinion on Croatia's application for membership was positive, noticeably stressing the ICTY Prosecutor's declaration that Croatia was "Now cooperating fully with the ICTY."<sup>88</sup> Though still mindful of important international justice concerns, the EU rewarded Croatia by agreeing to open accession negotiations.

As the European Commissioner for Enlargement explained, "I am very pleased that Croatia has responded positively to the need to fully cooperate with the Tribunal . . . it goes without saying that Croatia must maintain this degree of cooperation with the Tribunal, leading to the resolution of the one remaining issue, namely, the location, arrest and transfer of General Ante Gotovina to The Hague."<sup>89</sup> Although Croatia's conservative Prime Minister Ivo Sanader had sworn in 2001 not to hand over any indicated war criminals, he ultimately could not fulfill this promise. After this explicit signal and warning from the EU, he authorized the country's chief public prosecutor to lead a more aggressive investigation of General Gotovina, and within two months, the Croatian general was arrested in the Canary Islands. Almost immediately, the EU opened membership talks with Croatia, hoping this process would send a clear signal to Serbia that the EU does follow through on its promises.<sup>90</sup>

In Bosnia, Bosnian Serbs were arguably as uncooperative as leaders in Serbia and Croatia, but they too have succumbed to transnational pressures, and the ICTY's achievements there have been duly noted by others.<sup>91</sup> The best example is the demise of Bosnian President Biljana Plavsic (representing the RS), who stressed in January of 1997 that there would be no cooperation with the ICTY.<sup>92</sup> Despite this statement, by the year's end Plavsic had dismissed Ratko Mladic from the Bosnian Serb Army, citing pressure from the international community as the reason why it was impossible for him to remain. In 2001, the President herself voluntarily surrendered to the ICTY and by 2004, both the EU and NATO were dangling membership before Bosnia, noting specifically the country's significant progress in certain areas while stepping up pressure to increase cooperation with the ICTY.

87. Akhavan, *supra* note 5, at 810.

88. VACHUDOVA, *supra* note 6, at 253.

89. EU Press Release, The European Union opens accession negotiations with Croatia, IP/05/1222 (4 Oct. 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1222&format=HTML&aged=0&language=EN&guiLanguage=en>.

90. Nicholas Wood, *Croatian turnaround led to general's arrest*, INT'L HERALD TRIB., 27 Dec. 2005, available at <http://www.ihf.com/articles/2005/12/27/news/balkans.php>.

91. See Kerr, *The Road from Dayton to Brussels?*, *supra* note 22.

92. Akhavan, *supra* note 5, at 807.

## VI. CONCLUSION

The ICTY has had only about a decade to achieve multiple and ambitious goals. Thus, it is premature to suggest that this research represents a comprehensive or definitive assessment of the court's impact on Serbian politics or the restoration and maintenance of peace. However, the decidedly mixed empirical record in Serbia exposes the problems with the claims made by judicial romantics about international courts. To recap the evidence, there have been notable achievements, but also setbacks. As of late 2006 Ratko Mladic (not to mention Radovan Karadzic) remains at large, though Serbian officials promise to do everything possible to track him down, and eleven of his alleged aides are on trial in Serbia for sheltering the former wartime army chief.<sup>93</sup> Also, in April 2007, a surprising ruling by Serbia's War Crimes Court convicted four Serbs of war crimes against civilians. In its first court-ruling related to the massacres at Srebrenica, the Belgrade judge Goradana Bozilovic-Petrovic said that guilt for these crimes was proven beyond any doubt, suggesting that the country's judiciary might indeed be heading in the right direction.<sup>94</sup>

Although the authors were not able to garner sufficient support for the claims of judicial romantics, that the ICTY independently or clearly influenced outcomes or imposed international dictates on Serbia, it is not argued that the court was irrelevant to developments in this country. Instead, this research tracked the ICTY's influence beyond individual punishment and legal outcomes by examining the court's ability to frame the issue of transitional justice and leverage other more powerful international actors. It argued that the court's effects must be considered in the context of the networked order in Europe. In this network pushing for change in Serbia, other international actors, namely the EU, the US, and NATO have worked alongside the ICTY to support its mission and its efforts to carry out legal justice. Because these other, more powerful stakeholders adopted the ICTY's mission and made their relationships with Serbia conditional upon Belgrade's cooperation with the ICTY, the court has indirectly shaped domestic discourse and outcomes. Thus, it is only in this secondary, circuitous way that the ICTY contributed even marginally to liberal politics in Serbia—and hence to the restoration and maintenance of peace in the Balkans. It might be argued that the EU and the US could have done more in this regard, but the fact remains that these two actors in particular did bring about attention to ICTY dictates.

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93. *Four alleged Mladic aides plead not guilty before Belgrade court*, SE. EUR. TIMES, 21 Nov. 2006, available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/newsbriefs/setimes/newsbriefs/2006/11/21/nb-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/newsbriefs/setimes/newsbriefs/2006/11/21/nb-01).

94. *Serbia Convicts 4 in Killing of Srebrenica Muslims in 1995*, INT'L HERALD TRIB., 10 Apr. 2007, available at <http://www.iht.com/articles/2007/04/10/news/serbia.php>.

Given the growth and popularity of international courts around the world, important concerns and questions remain. The first and most obvious concern is the lack of any evidence to indicate that the ICTY itself was or could be successful in promoting broader political change in Serbia. Although the court's mission was amplified through other regional organizations and Western governments, and faint signs of liberal progress are indeed evident, Serbia has rather effectively resisted the broader goals of the ICTY. Put simply, the Serb culture of nationalism and victomology has been a tough nut to crack.<sup>95</sup> In Belgrade, there has been no equivalent of Bosnia's Biljana Plavsic (of the RS); no high official in Belgrade has issued a *mea culpa* and voluntarily gone to The Hague. In fact, in 2006 the Serb leadership used a new constitution to reassert its control over Kosovo, with more than 95 percent of the voters supporting this action.<sup>96</sup> This is hardly a sign of a shift in political attitudes at either the elite or mass level.

Moreover, while the hypothetical cannot be definitively answered, it is intriguing to ask whether similar transnational pressures could have achieved the same results in Serbia in the absence of the ICTY. After all, transnational and transatlantic actors still had the Copenhagen document (and numerous other mechanisms and tools) as a reference for a liberal road map. Still, it cannot be forgotten that other international actors were only marginally interested in transitional justice and they lacked the specific mechanisms (or desire) to make war crimes a central focus. Without the court, it is quite possible that Western actors would have downplayed transitional justice, if not ignored it completely. The ICTY's value in this network is thus not derived from its size, resource base, or coercive capability but from its unique focus, legal expertise, and positioning, *vis-à-vis* other international actors.<sup>97</sup> In this case, it cannot be denied that the court helped frame the international community's agenda and objectives in Serbia, and its presence shaped discourse at both the international and domestic levels.

A second concern is the financial cost of international courts and the inherent tradeoffs that were made. Robert Hayden firmly believes that the ICTY has not only been ineffective in promoting liberalization in the Balkans but argues that it has undermined reconstruction efforts, given the West's limited resources.<sup>98</sup> The ICTY budget in 1993 was about \$275,000; the next year, its financial needs jumped to \$11 million. For 2004–2005 alone, the

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95. This view is confirmed by the International Crisis Group. SERBIA'S NEW CONSTITUTION, *supra* note 25.

96. *Id.*

97. WOLFGANG H. REINICKE & FRANCIS DENG, CRITICAL CHOICES: THE UNITED NATIONS, NETWORKS AND THE FUTURE OF GLOBAL GOVERNANCE xi–31 (2000).

98. Robert M. Hayden, Justice Presumed and Assistance Denied: The Yugoslav Tribunal as Obstruction to Economic Recovery, unpublished paper, used by permission (on file with authors).

UN estimated that the ICTY required more than \$327 million to conduct its work.<sup>99</sup> This amount is quite a deal more than the budgets for other international organizations involved in helping to rebuild Balkan countries. Without trying to put a price tag on legal justice, the expense of the ICTY until 2005 totaled almost \$1 billion.<sup>100</sup> Given this, as well as the opportunity costs lost in the process of focusing on international justice, expense should not be ignored as the need and utility for courts elsewhere are contemplated.

Third, this research on the ICTY and Serbia raises troubling questions for criminal courts in other regions. Serbia is a small country in Europe with a clear goal of becoming part of the Euro-Atlantic community. Although it may be unique in terms of the staying power of nationalism, it does make us speculate on the probable success of international courts in other less institutionalized environments.<sup>101</sup> How can international courts like those in Africa or Asia help frame issues and leverage powerful allies to their cause in places where there are no comparable regional organizations or states interested in providing economic rewards for abiding by international dictates?

Given these findings, the effects of international justice should neither be presumed nor asserted, and more empirical research on the broader effects is required. While methodologically challenging, it is quite possible to evaluate the effects of international courts beyond legal punishment. However, as suggested here, these evaluations may also cast doubt on whether international courts contribute to the restoration and maintenance of peace, at least in the first generation after atrocities. If they remain a staple of international relations, perhaps the focus should be on individual punishment and legal development. Their practical impact is more likely to take the "bad guys" off the streets than to make a clear and important contribution to peace and reconciliation.

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99. Press Release, United Nations, GA/AB/3594, Fifth Committee Takes up 2004–2005 Budgets for Rwanda, Former Yugoslavia Tribunals, available at <http://www.un.org/News/Press/docs/2003/gaab3594.doc.htm>.

100. Hayden, *supra* note 98.

101. Thanks to both Stephen Saideman and Linda Bishai for this comment on Serbia.