THE EFFECTIVITY OF INTERNATIONAL RESPONSES TO ATROCITIES REGIMES: SERBIA AND THE ICTY.

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# TABLE OF CONTENTS

TABLE OF CONTENTS ........................................................................................................... II

ACKNOWLEDGMENTS ............................................................................................................. VII

CHAPTER 1: GENERAL INTRODUCTION .................................................................................. 1
  1. The Yugoslav secession crisis ......................................................................................... 1
  2. The Yugoslav wars .......................................................................................................... 3
  3. War crimes ..................................................................................................................... 5
  4. Reaction of the international community .................................................................... 7
  5. Challenges for the ICTY and international law ........................................................... 8
  6. Outline of the dissertation .............................................................................................. 9
  7. Structure ........................................................................................................................ 11

CHAPTER 2: THEORETICAL FRAMEWORK ............................................................................. 12
  1. International Relations Theory ...................................................................................... 14
    1.1. Realism .................................................................................................................... 14
        1.1.1. Basic assumptions ............................................................................................ 14
        1.1.2. Criticism ............................................................................................................ 16
    1.2. Liberalism .................................................................................................................. 17
        1.2.1. Basic assumptions ............................................................................................ 18
        1.2.2. Criticism ............................................................................................................ 19
    1.3. Institutionalism .......................................................................................................... 19
        1.3.1. Basic assumptions ............................................................................................ 19
        1.3.2. Criticism ............................................................................................................ 21
    1.4. Rationalism and Constructivism .............................................................................. 22
  2. International Legal Theory ............................................................................................... 24
    2.1. The Managerial Model of Chayes and Chayes ......................................................... 24
    2.2. Legitimacy Theory of Franck .................................................................................. 25
  3. Theoretical framework .................................................................................................... 26
    3.1. General considerations ............................................................................................. 26
    3.2. The theoretical model for compliance with the ICTY regime .................................... 27
        3.2.1. Deconstructed actorness ................................................................................ 27
        3.2.2. Dynamic identity formation ............................................................................ 29
        3.2.3. Strategic calculation ....................................................................................... 33
3.2.4. State capacity .............................................................................................................. 35
3.2.5. Regime quality ........................................................................................................... 35
3.3. Combining the compliance mechanisms ........................................................................... 36
4. Chapter summary ................................................................................................................. 38

CHAPTER 3: LEGAL ASPECTS OF THE ICTY REGIME ................................................................. 39
1. Outline of the ICTY regime ................................................................................................. 39
   1.1. Legal sources for the ICTY regime ............................................................................... 39
   1.2. Function of the ICTY ................................................................................................... 40
   1.3. Jurisdiction of the ICTY ............................................................................................. 40
   1.4. Structure of the ICTY ................................................................................................ 41
   1.5. State cooperation ........................................................................................................ 42
   1.6. Procedure .................................................................................................................... 44
2. Adherence: the legality of the ICTY .................................................................................... 45
   2.1. Introduction ................................................................................................................... 45
   2.2. Arguments concerning the legal basis of the ICTY ....................................................... 46
      2.2.1. Can the UN Security Council establish an international criminal tribunal? ...... 46
      2.2.2. In accordance with ‘established by law’? ............................................................... 52
   2.3. Primacy of the ICTY .................................................................................................... 54
   2.4. Perception by Serbian actors ....................................................................................... 55
   2.5. Conclusion: a perceived lack of adherence ................................................................. 56
3. Coherence: Independence and impartiality of the ICTY ....................................................... 57
   3.1. Independence ............................................................................................................... 57
      3.1.1. Fixed appointments ................................................................................................. 58
      3.1.2. Institutional independence ...................................................................................... 58
      3.1.3. Appearance of independence ................................................................................. 60
      3.1.4. Conclusion ............................................................................................................. 61
   3.2. Impartiality .................................................................................................................... 61
      3.2.1. Investigating NATO ............................................................................................... 62
      3.2.2. The Case of Ramush Haradinaj .............................................................................. 65
      3.2.3. Conclusion ............................................................................................................. 68
   3.3. Conclusion: a perceived lack of coherence ................................................................. 68
4. Determinacy ........................................................................................................................ 69
5. Chapter summary ............................................................................................................... 69
CHAPTER 4: THE RELATION BETWEEN THE ICTY AND SERBIA

1. Serbia’s compliance record with its ICTY obligations 1993-2010
   1.1. Serbian compliance during the Milošević regime
   1.2. The Koštunica – Đinđić cohabitation
   1.3. The post-Đinđić transition
   1.4. The Tadić – Koštunica cohabitation
   1.5. Consolidation of compliance

2. Serbian domestic preferences on compliance with ICTY obligations
   2.1. Politicians
      2.1.1. Wartime nationalists
      2.1.2. Right-wing populists
      2.1.3. Reformers
      2.1.4. Analysis
   2.2. Governmental services
      2.2.1. Domestic security services and the army
      2.2.2. The National Council of Cooperation and the War Crimes Prosecutor
   2.3. Non Governmental Organisations
   2.4. Public opinion
      2.4.1. ICTY-related preferences
      2.4.2. Societal context of ICTY-related preferences
      2.4.3. Analysis
   2.5. Conclusion: Serbian domestic preferences are divided
      2.5.1. General summary
      2.5.2. Applying the hypotheses

3. International Conditionality
   3.1. International conditionality during the Milošević-era
   3.2. International conditionality since the collapse of the Milošević regime
      3.2.1. United Nations
      3.2.2. United States
      3.2.3. European Union
      3.2.4. ICTY Prosecutor
   3.3. Conclusion
      3.3.1. General summary
CHAPTER 5: RECOMMENDATIONS ................................................................................. 121
1. Introduction .............................................................................................................. 121
2. Recommendations ..................................................................................................... 121
CHAPTER 6: CONCLUSION ......................................................................................... 127
BIBLIOGRAPHY ............................................................................................................. 132
1. Treaties ....................................................................................................................... 132
2. Judicial decisions ....................................................................................................... 132
   2.1. ICJ ......................................................................................................................... 132
   2.2. ICTY ..................................................................................................................... 133
   2.3. Other .................................................................................................................. 133
3. United Nations Resolutions and Documents ............................................................ 134
4. ICTY Documents ..................................................................................................... 136
5. Other international documents ................................................................................. 138
6. National legislation .................................................................................................. 139
7. Authors ..................................................................................................................... 139
   7.1. Monographies and chapters ............................................................................... 139
   7.2. Articles and papers ............................................................................................. 143
   7.3. Reports ............................................................................................................... 148
8. Media sources .......................................................................................................... 150
   8.1. Press Releases ..................................................................................................... 150
8.2. Press articles ............................................................................................................. 152
9. Miscellaneous .......................................................................................................... 156
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CHAPTER 1: GENERAL INTRODUCTION

The period between 1989 and 1992 marked the end of the Cold War. The relatively peaceful political transitions in the former states of the Warsaw Pact, the reunification of Germany and the Treaty of Maastricht’s stimulus to European integration all promised the beginning of “A New Era of Democracy, Peace and Unity” on the European continent. However, it is in this period of time that the Yugoslav wars of secession, the bloodiest conflicts in Europe since the end of World War II, commenced. In search of ways to manage these conflicts, the United Nations Security Council decided to establish the ‘International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991’ (ICTY), to prosecute and punish the perpetrators of war atrocities. This dissertation will analyse the effectiveness of this Tribunal with respect to Serbia, in order to provide useful conclusions for the improved conception and functioning of international regimes governing atrocities.

1. The Yugoslav secession crisis

The Socialist Federal Republic of Yugoslavia was formed by the six republics of Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia and Montenegro, and the two autonomous provinces of Kosovo and Vojvodina. These republics were populated by Serbs, Croats, Slovenes, Muslims, Montenegrins, Macedonians and 18 other small ethnicities. All Yugoslav republics, and especially Bosnia-Herzegovina, had a multi-ethnic population. Throughout his life, President Josip Tito succeeded in balancing the different ethnic forces in Yugoslavia. However, in 1980s the political situation in Yugoslavia gradually deteriorated, inter alia due to a fundamental crisis of the Yugoslav economic system, and the death of President Tito, which left Yugoslavia’s complex governance system without a strong leader.

4 Ibid., p. 5
On the one hand, the 1980s witnessed the resurgence of Serbian nationalism. Serbian communist leader and later president Slobodan Milošević was this nationalism’s most powerful political emanation. He cultivated a distinct Serbian national identity and stressed that the tide was turning for the Serbian people, if they acted in unity. Consistent with this philosophy, he stripped the Serbian provinces of Kosovo and Vojvodina of their autonomy and forced the adoption of discriminatory laws against Albanian Kosovars. Moreover, Milošević pursued a policy of strengthening the existing federal structure, to break the decade of political impasse. In the event that this objective could not be reached, he would strive for a redrawning of the republics’ borders in order to incorporate all ethnic Serbs into a greater Serbia. Slovenia and Croatia on the other hand, pursued a looser confederate structure. These contradicting policy objectives ultimately led to the implosion of the League of Communists of Yugoslavia in January 1990. In the following months, both republics organised free elections. In Slovenia, a coalition of nationalists and economic reformers came into power. The Croatian electorate overwhelmingly voted for the nationalist program of Franjo Tuđman’s CDU. Tuđman’s campaign and initial policy was characterised by elevated Croatian assertiveness and discrimination against Croatia’s Serb minority. On 2 October 1990, Slovenia and Croatia proposed institutional reforms that would establish a loose Yugoslav confederation, modelled on the European Community. The other republics, however, quickly rejected the proposal. Moreover, the Yugoslav National Army (JNA) commenced operations in Slovenia and Croatia to dismantle the military power of the republics and to protect the Serb minority in the Croatian region Krajina. Consequently, both republics chose the path of secession from Yugoslavia. On 23 December 1990, 86% of the Slovenian population voted in favour of independence and sovereignty, with a 93.2%
The Croatian people followed the Slovenian move on 19 May 1991, with 93,24% of the voters in favour of independence and sovereignty and a 84,94% turnout. Subsequently, on 25 June 1991, both republics declared themselves sovereign and independent states. The republics were recognised as independent and sovereign States by the European Community on 15 January 1992. The United States followed suit on 7 April 1992.

2. The Yugoslav wars


The Slovene war of independence, between the Slovenian forces and the JNA, began on 26 June 1991 and lasted only a few weeks. A truce was quickly negotiated by the European Community. The Yugoslav republics subsequently signed the Brioni Agreement of 7 July 1991, bringing a formal end to the hostilities.

The Croat war of independence was fought between the Serbia-dominated JNA and Serbian paramilitary organisations on the one hand, and the newly formed Croatian Army. The JNA retreated in November 1991 but informally continued supporting the unofficial Serbian militia. The roots of this bloody and protracted conflict lie in the presence of a significant Serbian minority, concentrated in the Krajina region. In reaction to growing Croatian nationalism, these Serbian Croats formed militias around police units, with the support of Serbia itself, and effectively sealed off Serbian areas from the rest of Croatia. The Serbian

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18 Ibid., p.352.
19 Ibid., p. 353.
23 ROGEL, supra note 5, p. 23.
25 GOW, supra note 11, p. 19.
Croats unilaterally seceded from Croatia in March 1991. Attempts by the Croat police to restore Croatian rule in these areas were met by strong Serbian resistance, supported by the JNA. All-out war commenced at the end of June 1991. From July, and until the UN brokered cease fire at the end of 1991, heavy fighting destroyed cities such as Dubrovnik and Vukovar. By the end of the year, Croatia lost one third of its territory to the Serbian militia and the JNA. Croatia eventually reoccupied its lost territory by force, in the spring and summer of 1995.

War in multiethnic Bosnia-Herzegovina erupted in April 1992, as a consequence of the irreconcilable objectives of the Muslim and Croatian communities, which favoured independence, and the Serbian community, which aspired to remain a part of Serbia-dominated Yugoslavia. The Bosnian government of President Izetbegović proclaimed independence on 6 March 1992. The Serbian community reacted by declaring the independence of the Serbian Republic of Bosnia-Herzegovina. The fighting began a few days later. Serbian forces quickly and brutally occupied two-thirds of the republic, including important economic and military facilities. They famously encircled the Bosnian capital of Sarajevo from the spring of 1992 until the summer of 1995 and bombed the city on a daily basis. The war was concluded by the combination of coercive actions by UN forces, NATO air strikes on Serbian targets in Bosnia and the Croat military operation ‘Storm’, which restored half of Bosnia-Herzegovina into Muslim and Croat control. The subsequent Dayton Agreement established a federal constitutional framework for Bosnia-Herzegovina.

War in Serbia’s southern province Kosovo, with its majority of ethnic Albanians, only commenced in 1999. In reaction to Belgrade’s policy of centralisation, the Albanian Kosovars chose the path of peaceful protest to acquire independence from Serbia. As a consequence, the situation in Kosovo remained calm during the Yugoslav secession wars.

26 ROGEL, supra note 5, p. 22.
27 POND, supra note 12, pp. 16-18.
28 ROGEL, supra note 5, pp. 35-36.
30 POND, supra note 12, pp. 16-18.
31 ibid, pp. 26-27.
33 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, 14 December 1995, 35 ILM 89.
However, as the Dayton Agreement did not produce any results on the issue of Kosovo’s status vis-à-vis Serbia, armed action became a viable option for the Albanian Kosovars. In 1998, the Kosovar Liberation Army (KLA) initiated a violent campaign against Serbian police and institutions in Kosovo. Serbia reacted with even more violence.36 Throughout 1998 and early 1999, the international community tried to stop the violence by way of a diplomatic solution. As these attempts failed, NATO decided to launch an air campaign as to force a solution.37 It took until 3 June for Milošević to accept NATO’s terms for a truce.38 The conflict came to an end on 10 June 1999, when the UN Security Council agreed on the interim international civil and security presence in Kosovo, pending a final solution for the question of Kosovo’s status.39

3. War crimes

As early as 1991, the international community was informed of grave war atrocities occurring in the Yugoslav independence wars.40 In order to take stock of the extent of these atrocities, the UN Security Council established an impartial Commission of Experts, with the task of gathering evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law during the conflicts.41 The Commission came to strong and shocking conclusions in 1994:

“The Commission finds significant evidence of and information about the commission of grave breaches of the Geneva Conventions and other violations of international humanitarian law”.42 Moreover, “the level of victimization in this conflict has been high. The crimes committed have been particularly brutal and ferocious in their execution. The Commission has not been able to verify each report; however, the magnitude of victimization is clearly enormous”.43

36 O’NEILL, supra note 34, pp. 22-24.
37 NATO, Press Statement by Dr. Javier Solana, NATO Secretary General following the Commencement of Air Operations, 24 March 1999 (http://www.nato.int/docu/pr/1999/p99-041e.htm).
38 DANNREUTHER, supra note 35, pp. 24-25
43 ibid.
Prominent among the war crimes and crimes against international humanitarian law, committed during the 1991-1995 wars, was the unlawful practice of ‘ethnic cleansing’, which means “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area”. Ethnic cleansing was executed for instance by way of murder, torture, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghettos and deportation of civilians. During the wars of 1991-1995, these crimes were primarily committed by Serbian elements in Bosnia-Herzegovina and Croatia, and to a lesser degree by Croats against the Serbian minority in Croatia and the Muslim community in Bosnia-Herzegovina. This brutal practice was repeated by Serbian forces and paramilitary organisations during their military campaign in Kosovo in 1999.

Specific instances of war atrocities include:
- The destruction of the cities of Vukovar and Dubrovnik.
- The ethnic cleansing of the Bosnian districts of Prijedor, Banja-Luka, Brčko, Foča and Zvornik by Bosnian Serbs, including the use of concentration camps.
- The relentless shelling of Sarajevo by Bosnian Serbs from 1991 until 1995, including frequent bombardment of civilian areas and hospital facilities.
- The destruction of hundreds of houses and other buildings in the Medak pocket region by Croat forces in September 1993, without a lawful military reason.
- The use by all sides of detention camps, with frequent reports of mass murder, torture and rape.
- The 1995 mass murder of civilians in Srebrenica by Bosnian Serbs, under the command of General Ratko Mladić.

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44 ibid., p. 33.  
45 ibid.  
46 ibid., pp. 34-36.  
49 ibid., p. 35, 39-41.  
50 ibid., pp. 45-46.  
51 ibid., pp. 49-51.  
52 ibid., pp. 50-51.  
53 POND, supra note 12, p. 29.
4. Reaction of the international community

Until October 1992, the international community focused exclusively on finding a diplomatic solution for the Yugoslav conflict. The European Community brokered several cease-fires that were subsequently violated. A truce for the Croatian secession war was eventually reached in January 1992, however the fighting in Bosnia continued. The only international military presence on the ground was the UNPROFOR peacekeeping mission. The United States refused to deliver soldiers for the mission, while France and the United Kingdom, the primary suppliers of blue helmets, refused to launch a well-armed intervention against the atrocities. Consequently, UNPROFOR had no mandate and insufficient manpower to coercively stop the ongoing atrocities. Moreover, it could not provide the necessary leverage on the warring parties for them to accept a negotiated solution.

As the international public opinion became increasingly informed of the ongoing atrocities, the call came from civil society to establish an international criminal tribunal that would prosecute the perpetrators of the crimes committed. However, the idea did not gather much enthusiasm with the governments of the US, the UK and France, which were involved in searching a diplomatic solution for the problem. A Tribunal would merely constitute an additional obstacle in finding that diplomatic solution. But pressure from the public opinion did not abate. In order to satisfy this call for action, the UN Security Council decided in October 1992 to establish the Commission of Experts to gather evidence of the atrocities. In early 1993, the plan for a Tribunal resurfaced, as the newly installed Clinton administration wished to display US decisive action in the Yugoslav crisis. A competition in western capitals to formulate proposals as to claim moral leadership ultimately led to UN Security Council Resolution 808, effectively establishing the ICTY. Its mission consists of three main goals: preventing further war crimes, prosecuting the perpetrators and contributing to the restoration and maintenance of peace.

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54 ROGEL, supra note 5, p. 23
56 TERRETT, supra note 20, pp. 93, 104.
58 ibid, p. 10-11, 15.
5. Challenges for the ICTY and international law

From the outset, the ICTY faced the challenge of gathering a workable budget and securing sufficient cooperation from the international community to execute its mission. As these initial problems were dealt with to an acceptable degree, the quintessential difficulty in becoming an effective tribunal was the securing of cooperation by the ex-Yugoslav states. Their cooperation with the ICTY is vital because the Tribunal does not have a police force at its disposal with the authority to arrest potential war criminals on their territory. Moreover, the Tribunal depends on the ex-Yugoslav states to procure documentary evidence or trace witnesses.\(^{62}\) According to UN Security Council Resolution 827, all States have the obligation to cooperate fully with the ICTY.\(^{63}\) Article 29 of the ICTY’s Statute refines this obligation: “States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (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.”\(^{64}\) Thus, the obligation of States to cooperate with the ICTY is strongly anchored in the formative documents of the Tribunal. However, several ex-Yugoslav States and Entities did not comply with these obligations. The most notorious and publicised cases of non-compliance concern the lack of cooperation with respect to arrest and transfer of persons indicted by the Tribunal. During the first years of the ICTY’s functioning, Serbia and the Republic of Srpska (the federal entity of Bosnia-Herzegovina of ethnic Serbs) flatly denied every request on this matter.\(^{65}\) In subsequent years, cooperation by these governments improved slightly. However, the arrest of former Serbian president Slobodan Milošević could only be secured with heavy diplomatic pressure by the United States,\(^{66}\) former president of the Bosnian Serbs Radovan Karadžić was only arrested in 2008 and General Ratko Mladić remains at large until today. Croatia for its part showed a higher level of compliance with the Tribunal’s questions for tracing and arresting suspects. However, in some cases, Croatia’s cooperation was insufficient, for instance in the case of the search for General Ante Gotovina, who was in charge of the 1995 military operation...

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\(^{64}\) Art. 29, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia. September 2009.


\(^{66}\) BEIGBEDER (2002), supra note 55, p. 73
Storm.\textsuperscript{67} Additionally, the ICTY experienced difficulties in acquiring evidence from several ex-Yugoslav States, and in particular from Serbia. As a consequence, investigations against suspects underwent significant delays.\textsuperscript{68} Importantly, Serbia’s compliance record gradually improved from 2004 onwards.\textsuperscript{69} Cooperation remained insufficient and volatile, however the improvement was such that by 2007, the ICTY’s Chief Prosecutor Carla Del Ponte – who had, on other occasions, been very critical of Serbia’s behaviour – sent the UN Security Council a positive report on Serbian compliance.\textsuperscript{70} In conclusion, a good relationship between the ICTY and the ex-Yugoslav States is of vital importance for the ICTY to fulfil its mission. However, this relationship has been troubled, in particular in the case of Serbia, thus endangering the effectiveness of the Tribunal.

6. Outline of the dissertation

As international criminal tribunals are a relatively new phenomenon, the ICTY is an important case study for international (criminal) law scholars. Research on the ICTY can produce valuable data and policy recommendations for the design and functioning of other legal regimes governing atrocities, such as the International Criminal Court. As outlined above, one of the important characteristics of the ICTY case is its dependence on the ex-Yugoslav republics in its prosecution activities, and the troubled interaction with these governments and societies, leading to a lack of compliance with their obligations towards the Tribunal. This situation inevitably leads to decreased effectiveness. It is very likely that future regimes governing atrocities will face similar problems. Since research on this topic is indispensable, this dissertation will provide a contribution, by analysing the compliance of Serbia with its ICTY obligations, the societal context of this relation and the strategies the Tribunal applied to secure better compliance. In order to make a proper analysis, a theoretical framework is warranted. This will allow a meaningful categorisation of the available information. Moreover, the interpretation of the data will be based on existing scientific insights, which naturally enhances the quality of the interpretation. The theoretical framework used in this dissertation will be based on theories of the study field International

Law and International Relations, concerning the behaviour of States.

The research questions of this dissertation are:

(1) How can the relation between the ICTY and Serbia be theorised?

(2) Which strategies did the ICTY apply in order to increase Serbian compliance with its obligations?

(3) Which improvements to compliance-inducing strategies for future international post-atrocities instruments can be identified based on the analysis of this case?

The case of Serbia has been selected for several reasons:
- In view of the overload of information, it is necessary to select one of the former Yugoslav republics.
- Serbia’s interaction with the ICTY has been particularly troublesome, prompting the ICTY and the international community to apply a variety of strategies to cope with Serbian unwillingness. The case of Serbia thus, *prima facie*, provides the richest data set with which to work.

The analysis will be conducted using primary and secondary written sources. As regards the theoretical framework, use will be made of the core publications in the field of International Law and International Relations. With respect to the legal analysis of the ICTY, the classic legal sources, as set out in Article 39 of the Statute of the International Court of Justice, will be applied. The sources used to describe and interpret the relation between the ICTY and Serbia are (1) official documents of the ICTY, the UN, the EU, the US and other international actors, (2) reports from international observers, primarily from International Crisis Group, (3) writings of academic researchers, and (4) press articles from the Serbian news agency B92, the EU observing agency Euractiv and general international sources such as the The New York Times or Reuters.
7. Structure

The theoretical framework of this dissertation is developed in Chapter 2. It is put to the test in the subsequent chapters. Chapter 3 provides a legal analysis of the ICTY. It first gives an outline of the ICTY regime, i.e. its structure and basic rules. Subsequently, the validity of its legal base and core procedural characteristics, relevant to the theoretical framework, are examined. Chapter 4 presents the compliance relation between Serbia and the ICTY, taking into account all dimensions of the relation, as theorised by Chapter 2. It will include the conclusions of Chapter 3 as concerns the particular point of view of Serbian actors. Finally, Chapter 5 will formulate general recommendations for the future management of war atrocities crises.
CHAPTER 2: THEORETICAL FRAMEWORK

This dissertation examines the effectiveness of the ICTY regime with respect to Serbia. Is this Tribunal reaching its objectives, to prosecute and convict criminals for committing war crimes in ex-Yugoslavia, and to facilitate inter-ethnic reconciliation? Superficial observation, as presented in the general introduction, reveals that the relation between the ICTY and Serbia is characterised by a certain degree of Serbian non-compliance with its legal obligations vis-à-vis the ICTY, thus endangering the goals of the Tribunal. This observation leads to three crucial questions. First, how can Serbian non-compliance be explained? Subsequently, what legal and other strategies did the ICTY apply to tackle this issue? Finally, are there other strategies to recommend that have not yet been adopted by the Tribunal?

In order to answer this type of questions, namely how an international legal regime functions in its real environment, research must work with an enormous set of unorganised data. To derive meaningful results from this bulk of information, Research Question 1 of this dissertation requires the construction of a theoretical model, which can organise the information and provide interpretative lenses for analysis. In the case of the ICTY’s effectiveness with regard to Serbia, this can be achieved using theories of International Relations, an important segment in the field of Political Science. These theories provide, among other things, explanations for the behaviour of states in certain situations, such as the question of compliance with international obligations. Moreover, legal scholars have written extensively concerning the theme of compliance with international law. Their insights can complement the International Relations theories. Therefore, this dissertation will apply theories of International Relations and International Law to describe and explain Serbia’s behaviour towards the ICTY. Furthermore, this dissertation will formulate hypotheses regarding how the ICTY and international legal regimes generally, can react to State non-compliance to enhance their effectiveness. These hypotheses will be applied in the ICTY-Serbia case. The results should show which type of strategies the ICTY used, and to what degree they were effective. Moreover, these results can indicate which strategies the ICTY did not develop. Such information can produce recommendations for future institutional design of international post-atrocities instruments.

Clearly, the objective of this dissertation transcends classic legal research. The ICTY will not only be evaluated in a legal positivist way, by analysing its legal basis and its structure. The
main focus of this dissertation is on the interaction between a legal institution and its social environment, to analyse its operation in ‘the real world’. This approach deviates from average legal research. However, it is not a bizarre or rare method in the field of International Law. The usage of behavioural theories is an established method to study international law, known as the method of International Law and International Relations. The main purposes of this sub-discipline of International Law are to facilitate the description of aspects of international law, to help explain these phenomena by identifying the factors that influence them, and to provide advice concerning institutional adaptations. This interesting interdisciplinary strand has produced research results in varying segments of international law. Noteworthy examples include the work of Simmons, who studied compliance with international monetary law, the research of Slaughter concerning the European Court of Justice, and Lamont’s analysis of compliance with ICTY arrest warrants.

The theoretical framework on state compliance with international law will be developed in this chapter. First, subsections 1 and 2 for this chapter will provide an outline of the different theoretical schools in the International Relations and International Law literature. I have made the deliberate choice to give a comprehensive overview of this literature, in order to sketch the broader context of the proposed framework and to legitimise the choices that were made during its conception. Subsequently, the theoretical framework itself will be presented.

1. International Relations Theory

There is an enormous diversity of theories dealing with international relations. They can be categorised in several theoretical schools that share core assumption on the nature of international relations. The theoretical debate has been dominated by the struggle between classical Realism and Liberalism for a long time. However, during recent years, new insights have been developed by Institutionalism and Constructivism.

1.1. Realism

Realism is the oldest theory of international relations, originating from work by Thucydides, Machiavelli and Hobbes. Additionally, it is the most frequently used theory of International Relations. Further, it closely reflects the vision of politicians and diplomats on the nature of international relations. As a consequence, this theoretical strand is the natural point of departure in an overview of International Relations theories.

1.1.1. Basic assumptions

In the Realist view on the world, the state is the principal and dominant actor. State interactions and conflicts shape international relations. Consequently, the role of non-state entities, like international organisations and NGOs, is minimised. These states are perceived as unitary entities: the individual preferences of domestic entities are aggregated into one external policy through formal and informal decision-making mechanisms. All noteworthy internal policy differences are solved before the state takes action on the international level. Furthermore, the unitary state is a rational actor: given its predefined interests, a state considers the different modes of reaction to a particular situation, weighing the benefits against the costs and ultimately selecting the option with the most desirable result.

80 VIOTTI, KAUPPI, supra note 78, p. 55.
81 VIOTTI, KAUPPI, supra note 78, pp. 6-7.
States operate in an environment of international anarchy. This does not signify a world of chaos and war. Rather, it indicates the absence of a central government or authority on the international level that is capable of upholding peace and enforcing agreements or obligations on states. In this world, no state can be absolutely certain of the intentions of other states. Confronted with this uncertainty and with the military capabilities of other states, national security and state survival are the determining factors of state behaviour. States will only choose those courses of action that are compatible with these interests. The classical Realist mechanism to regulate this anarchic environment is the ‘balancing of power’: states will try to balance the impact of an emerging power, by forming counter-alliances, thus upholding an equilibrium.

Realists are skeptical about the success of international cooperation. They believe that this cooperation will always be restrained by the uncertainty resulting from anarchy and states’ principal focus on national security. Cooperation will thus only thrive when it is in line with states’ interests. On the contrary, states will ignore agreements if they cease to correspond with their interests. They will similarly disregard international law. States’ relations are dominated, moreover, by the relative distribution of power, which means that powerful states usually dictate the terms of these relations. International law consequently reflects this relative power distribution: it has little or no independent effect on state behaviour. Therefore, international law will change when the relative power distribution shifts.

How is this model applicable to the question of compliance with international law? First, Realism predicts that a state will make a rational decision, weighing costs against benefits, based on its predefined interests, if it will or will not comply with international legal obligations. These interests are predominantly security-related. The fact that an obligation has a legal character is not of importance. Second, this strategic calculation can be influenced by external factors, namely the use of power by other states to pressure the non-compliant state into complying. Realists will thus focus on the role of international ‘carrots

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82 ABBOTT, supra note 72, p. 364.
83 JACKSON, SØRENSEN, supra note 79, pp. 68-69
84 BURCHILL, supra note 77, p. 37.
85 ibid., p. 38.
86 JACKSON, SØRENSEN, supra note 79, p. 69.
88 ABBOTT, supra note 72 at p. 365.
and sticks’ to explain compliance with international law: “Compliance on the part of a weaker state would reflect the successful projection of coercive power on the part of a more powerful state, while non-compliance would be symptomatic of a failure or an inability of a powerful state to project its power over large distances”. Finally, contemporary Realists refine the process of state strategic calculation by introducing the interest of the state’s reputation as a reliable contractual partner in this calculation. However, this is only a specific adaptation of the general principle of strategic calculation to the situation of an international regime of legal obligations: compliance is only assured through external incentives.

1.1.2. Criticism

At the outset of the Cold War, Realism became the dominant perspective on international relations. However, numerous scholars have rightly criticised Realism’s view on the world, and formulated alternative models.

A first set of critiques relates to Realism’s conception of the state. First of all, other scholars assert that states are not the only relevant actors in international relations. They argue that international organisations, like the European Union or the United Nations, play an increasingly important role in coordinating state actions and thus constraining states’ freedom to take action. A related matter of interest for certain researchers is the influence exerted by non-governmental organisations on state behaviour, such as Amnesty International in the realm of human rights. More attention for these type of actors makes it possible to grasp the reality of international relations in a better way. Secondly, Realism is criticised for its unitary image of the state, attaching little importance to dynamics within the state or interactions between the international level and domestic non-state actors. This theoretical deconstruction of the state facilitates a better understanding of the origins and of the dynamic character of a state’s external policy.

89 LAMONT, supra note 76, p. 25.
91 VIOTTI, KAUPPI, supra note 78, p. 84.
A second important critique is aimed at Realism’s idea of the rational state, taking decisions following a weighing of costs and benefits on the basis of predetermined preferences. This implies that states have static identities with never-changing preferences. Such perspective on state decision-making leaves no room for the redefinition of these preferences and interests as a result of external influences. Research on this topic could show in what situations, to what extent and through which mechanisms states incorporate internationally endorsed values into their own preferences.

Thirdly, according to critics, Realism’s assertion that international law has no independent effect is flawed. Guzman claims that states invest a lot of time and energy into developing international law. Furthermore, scholars have analysed the explanatory power of international law for state behaviour and discovered that it indeed has an independent effect. Mitchell, for example, established that variance in the institutional design of the oil pollution regime explains variance in state compliance with the regime.

1.2. Liberalism

Realism’s classic theoretical rival is Liberalism. This theoretical strand was traditionally associated with its positive view on human nature, its belief in progress and the triumph of human reason over fear. Consequently, unlike Realism, Liberalism is convinced of the ever-increasing importance of cooperation, prevailing over international anarchy, its insecurities and conflicts. Liberalism has often been reduced to this normative agenda, due to a perceived lack of positivist core presumptions. In order to address this issue, Andrew Moravcsik, a leading scholar of contemporary Liberalism, proposed “a set of core assumptions on which a general restatement of positive liberal International Relations theory can be grounded.”

95 JACKSON, SØRENSEN, supra note 79, pp. 106-107.
97 Ibid., p. 515.
1.2.1. Basic assumptions

First of all, Liberalism considers individuals and private groups, with differing interests and societal influence, as the principal actors in international politics.\(^9\) States are not the only relevant actors, as Realism dictates; non-state actors play a role on the international level, communicating with each other independent of their government and pressuring states to take certain actions. Moreover, states themselves are not unitary. They are composed of individuals, interest groups and bureaucracies with different preferences. These actors shape state policy through competition, coalition and compromise.\(^9\) In this view, the state is a representative institution and the external policy of a state is the outcome of the preference struggle between domestic actors with variable influence.\(^1\) Logically, state policy is dependent of changes in domestic politics that lead to a shift in the societal compromise on a given policy topic. Additionally, as all states try to further their domestically shaped preferences on the international level, the interaction between those differing state preferences shapes state behaviour. When preferences of different states are compatible, cooperation is highly probable. When these preferences are contradictory, this deadlock can cause serious state tension and conflict. This situation can lead to the coercion of states into the relinquishment of its preferences. Finally, when the preferences of states are mixed, an exchange of policy concessions is possible. This analysis of state behaviour differs fundamentally from Realist ideas, stressing that international relations are driven by power distribution and downplaying the importance of the intentions of states.\(^1\)

By stressing the importance of domestic actors in the formulation of state policy, Liberalism provides an essential component for the analysis of state compliance with international law. First of all, compliance analysis has to take account of the internal political and societal situation of a state. This method can give invaluable information on how certain state policy is formed, which domestic actors are influencing government to adopt a certain position, and how strong the position is anchored to the domestic preference set. The information acquired by this analysis automatically leads to strategies to influence that policy, for if one

\(^9\) Ibid., p. 516.
\(^9\) VIOTTI, KAUPPI, supra note 78, p. 199.
\(^1\) MORAVCSIK, supra note 96, p. 518.
\(^1\) Ibid., pp. 520-522.
identifies the actors that oppose certain state policies, one naturally discovers who to support in order to change the outcome of the domestic preference struggle.

1.2.2. Criticism

Liberalism makes a good attempt at deconstructing the state and state policy, by shifting the focus to the domestic level. However, as was the case with Realism, Liberalism has a static view on the formation of these preferences. State preferences can shift as a consequence of a domestic change in the relative power distribution of societal actors. Yet, Liberalism does not elaborate on the possible role of a redefinition of preferences due to social learning by these societal actors. Thus, a purely Liberal analysis lacks a very important aspect of human and international interaction and needs to be complemented with a more dynamic approach to preference formulation.

1.3. Institutionalism

Institutionalism or Regime Theory achieved prominence after World War II when academics and politicians realised that systematic interstate cooperation is necessary to tackle global issues. Moreover, International Relations observers witnessed an explosion of international organisations and treaties. From the late 1960s onward even the most powerful states increasingly relied on international institutions to manage certain policy areas. Today, Institutionalism is the third traditional theoretical strand in international relations.

1.3.1. Basic assumptions

International institutions or regimes are structures of rules and norms that govern state action in particular areas. These rules vary in formality, from informal cooperation arrangements to legally binding treaties containing clear obligations. These regimes are often managed by international organisations.\(^\text{102}\)

For Institutionalists, states are the primary actors in international relations: the coordination of state action is their main interest. Similar to Realism, states are conceptualised as rational unitary actors operating in an anarchical environment. Most institutionalists recognise that state policy is constructed in an internal decision-making process where domestic actors compete for varying policy outcomes. However, they choose to make abstraction of this internal process in order to simplify their analysis.

In the institutionalist idea of international relations, relative state power and competing interests are key factors in explaining state behaviour. Additionally, they emphasise the importance of uncertainty: states are skeptical regarding international cooperation since in an anarchical world they can never be certain that their partner-states will respect the terms of a cooperation agreement. Institutionalists believe that this systemic inefficiency can be resolved by international regimes, for institutions can help alleviate the lack of trust between states and promote cooperation. This is achieved by the cost reducing measure of creating and enforcing agreements, characteristic of such regimes: Institutions, as the European Union, first of all provide a well-known environment for the conclusion of future agreements, with predictable procedures. Additionally, regimes often contain measures for monitoring and punishing non-compliance by states, such as the dispute settlement procedure of the World Trade Organisation. The unattractive alternative of these institutions is foremost an unorganised, thus highly unpredictable setting for concluding agreements, and subsequently state’s own responsibility for assessing and punishing the non-compliance of its counterparts. Even powerful states have an interest in respecting these regimes, since general compliance makes the behaviour of other states more predictable. Consequently, Institutionalists assert that these regimes themselves have an influence on states behaviour: not only state power and interests can explain compliance or non-compliance. The specific features of a regime can induce more or less compliance. A quick and efficient enforcement mechanism, for example, will provide more stress on states to comply, than a weak monitoring instrument, only requiring an annual report.

103 KEOHANE, supra note 102, p. 86
104 JACKSON, SØRENSEN, supra note 79, p. 120.
105 GUZMAN, supra note 93, p. 1840.
106 KEOHANE, supra note 102, p. 86.
107 MITCHELL, supra note 94, p. 429.
Institutionalist insights are highly useful when studying compliance with international law, as international law is a specific variant of international regimes. Thus, when analysing state compliance with international law, it will be necessary to examine the features of the particular regime and the interaction of its features with state behaviour.

1.3.2. Criticism

While taking stock of the evolution of Institutionalism, Keohane identified a few important critiques on this theory. The relevant critiques are described here. First of all, in the real world, states possess the only real power. Consequently, international institutions are fundamentally insignificant. A classical example is the failure of the UN to achieve collective security. Keohane, an important Institutionalist scholar, naturally claims that this assertion is overstated and points out that in many situations institutions can alter state behaviour. Secondly, critics state that there is no natural harmony between the preferences of the states that negotiate the creation of a regime. In the absence of this harmony, hard bargaining will be necessary to find a compromise. Sometimes this compromise will not be found, thus the creation of a regime will be impossible. Institutionalism cannot satisfactory explain this situation.\textsuperscript{108}

Keohane, however, does not elaborate on two very important flaws of Institutionalism. In the first place, Institutionalism, as Realism and Liberalism, lacks attention for the influence of social interaction on the identity and preferences of actors. By considering preferences as static, there is no room for persuasion or social learning. The second flaw is the Institutionalist abstraction of the internal dynamics of the state in formulating state policy.

\textsuperscript{108} KEOHANE, supra note 102, pp. 86-88.
1.4. Rationalism and Constructivism

The three theoretical strands presented above have a common conception of an actor in International Relations. First, these actors are rational, as they are capable of identifying the most effective and efficient reaction to a given stimulus. Second, the identities and interests of actors are treated as exogenously given: the identity and the interests of an actor are predefined to interaction with other actors. This interaction has no important influence on the definition of an actor’s identity and interests.

This rationalist conception of an actor has important consequences for understanding compliance with international obligations, such as international law. According to rationalist compliance models, the behaviour of a non-compliant state can only be changed by an optimal use of incentives and punishment. This position is adopted by Schimmelfennig and Sedelmeier with the ‘external incentives model’ from their authoritative study on EU conditionality in the accession process of Central and Eastern European Countries. They predict that improved compliance is contingent upon “(i) the determinacy of conditions, (ii) the size and speed of rewards, (iii) the credibility of threats and promises, and (iv) the size of adoption costs”. It is self-evident that these variables influence the strategic calculations of a rationalist actor. However, Rationalists as Schimmelfennig and Sedelmeier treat the actor’s identity and interests as pre-given: the interaction does not change them.

Since the end of the Cold War, Constructivist writers have vigorously attacked this rationalist consensus. Jackson and Sørenson give a clear account of the Constructivist point of departure:

“Constructivists [...] argue that there is no external, objective social reality as such. The social and political world is not a physical entity or material object that is outside human consciousness [...] It exists only as inter-subjective awareness among people [...] It is a set of ideas, a body of thought, a system of norms, which has been arranged by certain people at a

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109 In International Relations literature, the rationalists conception of actors is foremost attributed to neorealism and institutionalism (often labeled as neoliberalism). However, as stated above, this paradigm is also used by liberalism.

110 BURCHILL, supra note 77, p. 216.


particular time and place. If the thoughts and ideas that enter into the existence of international relations change, then the system itself will change as well.  

Thus, not only material factors, such as the distribution of power, are important, but also the ideas and beliefs that give meaning to those material factors, such as friendship, shared values or rivalry. Moreover, Constructivists, have a dynamic view on International Relations, as the system can change through a change in actions by the relevant actors.

This point of departure leads to a very interesting conception of the actors in International Relations. First of all, actors define their interests in a specific situation on the basis of their identity, “relatively stable, role-specific understandings and expectations about self”. Moreover, whereas Rationalist theories conceptualise actors as atomistic, Constructivism asserts that actors’ identities are constituted by the institutionalised norms, values and ideas of their social environment; their interests are influenced through constant social interaction, thus endogenous to it.

Constructivist logic can be easily applied in the context of compliance with international law. Through internalisation – via social learning - of the content of an international norm, the identity and interests of an actor will be redefined. In this model, actors increasingly comply because it is the appropriate thing to do, in view of their adapted identity. Contrary to rational actor compliance, which requires a constant weighing of costs against benefits to decide if the actor will comply, Constructivism predicts a more stable relationship between the actor and the international regime, because, ultimately, the use of incentives and punishment would become obsolete, as actors comply automatically, pursuant a logic of appropriateness, instead of the rationalist logic of consequences.

113 JACKSON, SØRENSEN, supra note 79, p. 253.
114 Ibid., p. 255.
115 WENDT, supra note 111, p. 391.
117 LAMONT, supra note 76, p. 33.
2. International Legal Theory

The question of compliance with international legal obligations not only caught the attention of International Relations scholars, but also prompted International Law scholars to design explanatory models of the relation between an actor and its international legal obligation. Chayes and Chayes, and Franck have formulated the most innovative contributions.

2.1. The Managerial Model of Chayes and Chayes

Chayes and Chayes assume that there is a propensity of states to comply with international legal obligations, in other words a ‘compliance pull’. They mention three reasons to prefer this assumption. First of all, compliance is economically more efficient than a constant recalculation of costs and benefits. Second, it is only with their consent that states become bound by treaty obligations. Thus, treaty obligations normally correspond to the interests of the parties. Thirdly, as states acknowledge that the treaties they ratify are legally binding upon them, they have a sense of obligation to respect specific treaty provisions. Chayes and Chayes subsequently conclude that deliberate violations of treaties, although possible, are uncommon. Most instances of noncompliance with treaty obligations are involuntary, originating from “(1) ambiguity and indeterminacy of treaty language, (2) limitations on the capacity of parties to carry out their undertakings, and (3) the temporal dimension of the social and economic changes contemplated by regulatory treaties”. This type of noncompliance cannot be addressed by international sanctioning, but by a more global ‘managerial’ approach. The authors suggest such measures as improved dispute settlement to identify ambiguous obligations more precisely, technical and financial assistance to tackle capacity deficits and more transparency in the behaviour of other signatories.

Chayes and Chayes’ basic assumption has important similarities with the Constructivist approach in International Relations. However, their reasoning is more intuitive and largely ignores the question which specific social processes foster the ‘compliance pull’. Moreover,
the arguments supporting the ‘compliance pull’ are easily tackled. For example, a state consenting to treaty obligations, such as chapter VII of the UN Charter, has no control over the future products of these provisions; notably, in casu obligations stemming from Resolutions of the UN Security Council. In that case, logic dictates that the pull to comply with these obligations will be much weaker.

In any case, Chayes and Chayes provide the international compliance literature with a useful additional perspective, as every international regime must assure that its subjects have the managerial capacity and sufficient information to fulfil their obligations. Moreover, capacity building is an interesting strategy to induce social learning, thus identity change of the actors governed by the regime.

2.2. Legitimacy Theory of Franck

Franck’s basic assumption is that, “in a community organized around rules, compliance is secured – to whatever degree it is - at least in part by perception of a rule as legitimate by those to whom it is addressed”.\(^{124}\) He defines ‘legitimacy’ as “that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process”.\(^{125}\) The stronger the legitimacy of a rule, the stronger its compliance pull on the addressees of the rule.\(^{126}\) The strength of the compliance pull of rules, independent of other circumstances, is determined by four factors: determinacy, symbolic validation, coherence and adherence. The determinacy of a rule denotes the clarity and transparency of its message.\(^{127}\) Symbolic validation refers to communicating the authority of the rule through a ritual or institutionalised behaviour,\(^{128}\) such as the signature of heads of state. Coherence of a rule means that it is consistent in its application.\(^{129}\) Adherence is the degree to which a rule corresponds to rules on rule-making (secondary rules) in the procedural framework of an organised community.\(^{130}\)

\(^{125}\) ibid.
\(^{126}\) ibid., p. 712.
\(^{127}\) ibid., p. 713.
\(^{128}\) ibid., p. 726.
\(^{129}\) ibid., p. 737.
\(^{130}\) ibid., p. 752.
With its focus on legitimacy, Franck underlines the influence of the quality of a rule, independently of strategic calculations or social learning. In so doing, he adds a very important insight to the International Relations theories, whose primary focus is on processes surrounding the rule and the compatibility of a rule with the identity of an actor. Moreover, as this perspective focuses on the aspects of the rule itself, it does not directly contradict the theoretical approaches that, thus far, have been illustrated. Consequently, these approaches can be easily complemented with Franck’s perspective.

3. Theoretical framework

3.1. General considerations

The aforementioned theories each stress the importance of particular factors as to explain state behaviour. However, in view of the complexity of social relations, it is advisable to combine these monocausal theories into one coherent multi-causal model, tailor-made for a particular topic. In case of the relation between the ICTY and Serbia, creating a multi-causal model is warranted, so as to involve all factual layers of the case and consequently, to chart all possible strategies for improving Tribunal effectiveness in its relation with Serbia. Importantly, one must assure that the model is internally consistent. This is achieved by clarifying the interface between the different theoretical components. In general, different components will be applied to different aspects of a given set of facts. For example, Liberalism gives important insights into how domestic actors influence state policy, while Constructivism predicts ways to change the preferences of these domestic actors. In that case, the different theories do not offer competing solutions on the same analytical level. However, certain contradictory outcomes between the different compliance mechanisms will arise. These contradictions will be dealt with in section 3.3.

3.2. The theoretical model for compliance with the ICTY regime

The theoretical model of this dissertation consists of five different pillars: The first pillar, ‘desconstructed actoriness’, describes the structure of the relationship between the ICTY regime and Serbia, by defining the relevant actors. The other pillars describe the mechanisms the ICTY regime can apply in order to improve Serbian compliance (hereinafter: ‘compliance mechanisms’). The pillars ‘dynamic identity formulation’, ‘cost-benefit decision-making’ and ‘state capacity’ contain mechanisms that operate given a certain regime content. The last pillar, ‘rule quality’, addresses the procedural characteristics of the ICTY regime itself, and its impact on Serbian compliance.

These five pillars contain 6 different types of specific hypotheses. These are Domestic hypothesis 1 (D1), Internalisation hypotheses 1-5 (I1-5), Acculturation hypotheses 1-3 (A1-3), Conditionality hypotheses 1-4 (Co1-4), Capacity hypothesis 1 (Ca1) and Regime Quality hypotheses 1-3 (Q1-3).

3.2.1. Deconstructed actoriness

How one conceptualises actors is based on the insights of Liberalism. The basic actor of analysis in not the State or the interest group, but the individual; all complex actors are aggregates of individual humans. Driven by their nature, individuals form larger entities, such as families, firms, non-commercial associations, interest groups and states, to achieve certain goals. All individuals have an identity, consisting of individual preferences, such as an opinion on state intervention in the economy, or gay rights, based on their hard material interests and their values. The individuals constituting a larger entity, hereinafter a complex actor, compete and ally through formal and informal decision taking processes, to define the collective identity of the complex actor.

Thus, Serbia\textsuperscript{122} is a complex actor, consisting of individuals, who interact with the government both individually and through sub-state or interstate collective actors, such as

\textsuperscript{122} The Republic of Serbia became a sovereign and independent State only on 5 June 2006. Following the collapse of the Socialist Federal Republic of Yugoslavia (FRY), Serbia has been a republic within the Federal Republic of Yugoslavia from 1992 until 2003. Between 2003 and 2006, it was part of the State Union of Serbia and Montenegro (S&M). Serbia is legal successor to the State Union. This dissertation will only focus on the politics of the Republic of Serbia, as an independent State, or as part of FRY or S&M. The politics of FRY and S&M will be
firms and human rights NGOs. These individuals formulate state identity through elections of the lawmakers and executives and other forms of societal pressure such as opinion polls, demonstrations and lobbying. The defined state identity is thus the result of the preference struggle between domestic actors. Importantly, an international atrocities regime has a certain level of direct access to sub-state actors. This generates the possibility to change the preferences of a state by interacting with these domestic actors. In other words, by supporting these actors, such as providing material facilities, awarding additional legitimacy for their cause, or providing opportunities to criticise the government (for instance by issuing reports to the international community on Serbian non-compliance), the ICTY can influence the domestic preference struggle in Serbia.

**Hypothesis D1:** The more the ICTY regime can build linkages with Serbian domestic actors and support these actors, the more effective the compliance mechanisms will be.

As regards the actors constituting the ICTY regime (hereinafter: ICTY regime actors), we uphold a broad definition. They are, first of all, the ICTY’s organs, such as the Office of the Prosecutor and the Judges. Moreover, they include all governmental entities and private actors, mandated or supported by the governmental entities, which are active in acquiring Serbian compliance with the ICTY. Examples include the United Nations Security Council, the European Union, and the United States. This broad definition is warranted since the operation of the regime in practice is fragmented between organically separate, but functionally connected actors. For instance, the incentives and sanctions of the regime are decentralised: the ICTY itself does not have the capacity to apply them. The United States, on the other hand, has strong financial leverage over Serbia. The United States and the ICTY do not constitute elements of the same formal organisation. However, the moment the United States applies financial pressure on Serbia as to improve compliance, they are functionally united.

attributed to Serbia, as long as it implies policy on cooperation with the ICTY with respect to the Serbian territory. In other words, a functional approach towards the definition of Serbia is chosen.

3.2.2. Dynamic identity formation

The Constructivist conception of an actor’s identity, as understandings and expectations about the self, influenced through constant social interaction, is adopted. As a consequence, a change in the social environment can have its effects on the identity, and, thus, on the behaviour of individual Serbs and complex Serbian actors, such as political parties and government services. In other words, identities are dynamic. It follows that, by influencing the social environment of Serbs, the ICTY can trigger changes in Serbia’s compliance with its ICTY obligations.

This model incorporates two compliance mechanisms through which the social environment influences the identity of Serbian actors. The first mechanism is internalisation. Central to the European literature on internalisation is the work of Jeffrey Checkel. Based on Checkel’s research, a group of scholars adopted a set of hypotheses on the internalisation mechanism, for the autumn 2005 special edition of *International Organization* on socialisation processes in the European Union. These five hypotheses will be adopted since, first of all, they are rooted in social and experimental psychology. Thus they transcend the flawed accuracy of a political scientist’s ‘gut feeling’. Second, they constitute the most convincing operationalisation of internalisation mechanisms today.

Checkel’s hypotheses differentiate between two types of internalisation. Type I internalisation, *role playing*, concerns the non-calculative adoption by an actor of certain behaviour seen as appropriate by the social environment in which the actor operates. However, no reflective internalisation based on a communicative process, such as a discussion, will have occurred. Behaviour is adopted unconsciously and becomes a non-motivated habit. Type I internalisation is not useful in the case of Serbia and the ICTY, as this case involves core elements of Serbian national identity. One must expect that Serbian actors are very well aware of Serbian obligations under the ICTY regime, and the symbolic importance of national policy towards these obligations. Therefore, increasing compliance with the ICTY regime through unconscious role playing is *prima facie* extremely unlikely.

Type II internalisation, normative persuasion, concerns changes in actor identity and behaviour through active processes of argumentative persuasion.\textsuperscript{138} It will be applied in this case. The central assumption is that Serbian behaviour towards the ICTY regime can change, as a consequence of argumentative persuasion by the ICTY regime actors, affecting the identity of Serbian actors. The argumentative persuasion can, for instance, occur in contacts between Tribunal and Serbian officials. This assumption is operationalised by the aforementioned hypotheses:

\textit{Hypothesis I1: Internalisation-based compliance is more likely the more Serbian actors are in a novel and uncertain environment and thus cognitively motivated to analyse new information.}

\textit{Hypothesis I2: Internalisation-based compliance is more likely the more Serbian actors have few prior, ingrained beliefs that are inconsistent with the socialising agency's message.}

\textit{Hypothesis I3: Internalisation-based compliance is more likely if the socialising agency/individual is an authoritative member of the Serbian in-group to which the target belongs or wants to belong.}

\textit{Hypothesis I4: Internalisation-based compliance is more likely if the socialising agency/individual does not lecture or demand but, instead, acts out principles of serious deliberative argument.}

\textit{Hypothesis I5: Internalisation-based compliance is more likely the more the interaction between ICTY-regime actors and Serbian actors occurs in less politicized and more insulated, in-camera settings.}\textsuperscript{139}

\textit{Hypothesis I6: Internalisation-based compliance is more likely the more frequently ICTY-regime actors and Serbian actors interact.}\textsuperscript{140}

\textsuperscript{138} Ibid., p. 812.
\textsuperscript{139} Ibid., p. 813.
\textsuperscript{140} This sixth hypothesis is derived from the articles of Beyers, Lewis and Gheciu, based on the five original hypotheses, in the aforementioned 2005 \textit{International Organization} issue. See: CHECKEL, Jeffrey T., ZURN, Michael, Getting Socialized to Build Bridges: Constructivims and Rationalism, Europe and the Nation-State. \textit{International Organization}, vol. 59, 2005, no. 4, p. 1055.
Type II internalisation turns on the active acceptance of the content of a legal regime. However, it has been observed that although many states officially accept human rights regimes, their domestic policy does not coincide with this endorsement (this situation is called ‘decoupling’).  

Moreover, full internalisation of norms is often utopian in international relations, particularly on a sensitive topic such as human rights. These insights prompted Goodman and Jinks to describe an alternative pathway for compliance with international legal regimes, which is acculturation. They have formulated an important contribution to compliance literature, since it fills a conceptual gap in existing theories and it is moreover supported by impressive interdisciplinary literature. Accordingly, it is the second compliance mechanism based on dynamic identity formation.

Acculturation is described as “the general process of adopting the beliefs and behavioural patterns of the surrounding culture”. Acculturation implies that “varying degrees of identification with a reference group generate varying degrees of cognitive and social pressures – real or imagined – to conform”. Cognitive pressures are the internal social-psychological costs of noncompliance (such as cognitive dissonance) and the social-psychological benefits of compliance (such as cognitive comfort). Social pressures are comparable mechanisms, originating from the external environment, such as shaming and shunning by the reference group in case of non-compliance, or back-patting and other forms of approval by this group in case of compliance. These internal and social pressures impel actors to comply with the norms of the reference group, since they seek cognitive comfort and social status. Obviously, Type II internalisation and acculturation share a common core of constructivist propositions on the dynamic character of an actor’s identity. However, the core issue of Type II internalisation is the active assessment of the content of a legal regime through argumentation, followed by a conscious change of the actor’s identity. The core issue of acculturation, on the other hand, is the assessment of the social relation between the actor and the reference group: the actor changes its behaviour because the...

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143 Ibid.: all theoretical components are backed by insights from social psychology or organisational sociology.
144 Ibid., p. 638.
145 Ibid., p. 639; Acculturation can thus be considered as an operationalisation of the socialisation mechanism coined ‘social influence’ by Checkel and Zürn, in the aforementioned 2005 International Organisation volume (CHECKEL, ZÜRNM, supra note 140, p. 1053.)
146 Ibid., pp. 640-641.
reference group engages in such behaviour. Applying the acculturation principle to the case of Serbia and the ICTY would mean that Serbian actors (state officials, NGOs, public opinion, etc.) commence supporting the ICTY regime the moment they perceive the international community, which established and supports the ICTY, as a reference group. Thus, conditions must be created for the international community to be considered as a reference group and, in a subsequent phase, to maximise the force of the social and cognitive pressures accompanying the social relation between Serbia and the international community. The following hypotheses on the likelihood of acculturation-based compliance can be derived from the ‘social impact theory’ as applied Goodman and Jinks:

**Hypothesis A1:** Acculturation-based compliance is more likely the more Serbian actors value the social relation with the international community.

**Hypothesis A2:** Acculturation-based compliance is more likely the more Serbian actors are in contact with the international community and ICTY officials.

**Hypothesis A3:** Acculturation-based compliance is more likely the more Serbian actors are receptive to the content of the ICTY regime.

As already mentioned, acculturation can lead to decoupling. Moreover, in case of the ICTY regime and Serbia, a situation of decoupling is very likely, in view of the centrality of nationalism and opinions on the Yugoslav wars to contemporary Serbian identity. Decoupling in the ICTY-Serbia case would amount to an official Serbian endorsement of the goals of the ICTY and recognition of Serbia’s obligations towards the Tribunal, combined with (partial) non-compliance in reality. This situation will be called ‘incomplete acculturation’. Importantly, incomplete acculturation can evolve into full compliance with the ICTY. In their 2008 follow-up article, Goodman and Jinks describe specific mechanisms, already firmly established by other scholars, which contribute to closing the decoupling gap:

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147 Ibid., p. 643.
148 Ibid., p. 642.
149 Too strong differences between the ICTY regime and the identity of the Serbian actor would trigger “cognitive cues that the would-be reference group is importantly dissimilar from the target actor”, which would decrease the possibility of acculturation. Thus, there is a certain degree of interaction between acculturation and the persuasion-argument, since acculturation will be less likely if the ICTY regime is less consistent with the actor’s identity. However, this link is only accepted in case of extreme incompatibility with the regime. (GOODMAN, JINKS, 2004, supra note 142, p. 683).
Formal endorsement of the ICTY regime by the Serbian government can evoke considerable shifts in the ‘domestic political opportunity structure’, meaning that it can serve as “an important catalyst for the emergence and mobilization of social movements toward greater policy reform”. In other words, the endorsement will enhance the legitimacy and the persuasion power of domestic actors supporting the ICTY regime. Consequently, it will increase their power in the domestic preference struggle. A specific instance of this mechanism is the demand of domestic actors for public consistency, which will make the continued discrepancy between official acceptance and persistent non-compliance increasingly difficult to defend.

Incomplete acculturation is difficult to sustain as a consequence of the Serbian actor’s internal wish to avoid cognitive dissonance. This effect is in fact an instance of second phase acculturation based on cognitive pressures: the first phase of acculturation caused decoupling. The gap between policy and reality is subsequently bridged by the same mechanism. Logically, the effect will be contingent upon the intensity of the actor’s contra-ICTY preferences.

In case of incomplete acculturation, the international community will in time learn that official Serbian compliance is not reflected in its actual policy. In this case, Serbia will need to increase its actual compliance level, in order to continuously receive the same level of social benefit. This effect is, as the previous effect, an instance of second phase acculturation. However, in this case, the effect is caused by social pressures.

### 3.2.3. Strategic calculation

Serbian actors are considered as social agents with dynamic identities. These actors react to external stimuli based on their dynamic identity. The selection of a response to an external stimulus in conformity with an actor’s identity is conceptualised as a strategic calculation.

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150 GOODMAN, JINKS, 2008, supra note 141 at 734.
151 Goodman and Jinks label this the external audience effect of the ‘civilising force of hypocrisy’ (Ibid., pp. 738).
152 Ibid., pp. 738-740.
153 Ibid., pp. 742.
The basis of the strategic calculation is the following:

1) If an ICTY obligation completely corresponds with the identity of a Serbian actor— in other words, the Serbian actor has incorporated the norm in his or her identity since the beginning of the ICTY regime or due to internalisation or acculturation—then the Serbian actor will favour compliance with the ICTY obligation.

2) If an ICTY obligation does not completely correspond with the identity of a Serbian actor, then the actor will make a cost-benefit calculus to decide in favour or against compliance. This calculus can be adapted by the ICTY by providing incentives or punishments that encourage or coerce the actor into compliance. In other words, the regime can apply a policy of conditionality.

Conditionality is the third compliance mechanism. The crux of the matter for conditionality is to determine effective incentives or punishments. This effectiveness is operationalised by the hypotheses from the research of Schimmelfennig and Sedelmeier.

_Hypothesis Co1:_ Serbia will comply more with ICTY obligations if these obligations are modelled as conditions for rewards and the more determinate they are.

Determinacy denotes a degree of legal formality and clearness of the rule.¹⁵⁴

_Hypothesis Co2:_ The level of Serbian compliance is contingent of the size and speed of the rewards.¹⁵⁵

_Hypothesis Co3:_ Serbian compliance will be stronger, the more credible threats and promises are.¹⁵⁶

This denotes an effectively organised compliance system that is able to withhold a reward with only low costs for itself and ensure high consistency in the allocation of rewards and the absence of competing sources of rewards at a lower cost for Serbia.

¹⁵⁴ SCHIMMELFENNIG, SEDELMEIER, _supra_ note 112, p. 664.
¹⁵⁵ Ibid., p. 665.
¹⁵⁶ Ibid., p. 665.
Hypothesis Co4: the level of compliance depends on the size of the other side of the strategic calculus, namely the adoption costs.

These costs vary with the level of domestic protest against compliance, and the distribution of protest among veto players, the domestic actors for which agreement is necessary to change the status quo.157

3.2.4. State capacity

As Chayes and Chayes have pointed out, non-compliance can be partially explained by lack of capacity of the particular state. Thus, the ICTY regime must invest in Serbian capacity to improve its compliance.

Hypothesis Ca1: Serbian compliance will improve if the capacity of its relevant governmental services is enhanced.

3.2.5. Regime quality

The compliance mechanisms mentioned above all describe how a Serbian actor can be driven by the ICTY regime actors to favour compliance with the content of the ICTY regime. The actor’s immunity to these mechanisms necessarily varies with the gap between the content of the regime and the actor’s identity. For instance, a Serbian war veteran, convinced of the nationalist Greater Serbian idea will be difficult to be persuaded of the merits of the ICTY regime. However, part of the gap between the regime and the adverse identity can be closed by the procedural quality of the regime. In other words, if the actor perceives the regime, irrespective of its content, to be in accordance with right processes, the regime is legitimate and exercises a compliance pull in itself. Accordingly, ‘regime quality’ is the fourth compliance mechanism of this model.

In order to operationalise this concept into hypotheses, Franck’s adherence (Q1) and coherence (Q2) and Franck’s and Chayes & Chayes’s determinacy (Q3) are applied.158

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157 Ibid., p. 666.
158
Hypothesis Q1: Serbian compliance will be stronger the more Serbian actors believe that the ICTY regime has a valid basis in international law.

If the basis of the ICTY regime in international law is contestable, then this it is an easy way for recalcitrant Serbian actors to legitimise non-compliance. Conversely, a valid legal basis of the ICTY regime will enhance legitimacy with Serbian actors and induce compliance.

Hypothesis Q2: Serbian compliance will be stronger the more Serbian actors perceive the ICTY regime’s rules are applied coherently in different cases.

First of all, coherence denotes impartiality: if the ICTY applies its rules on the other ex-Yugoslav states or NATO members equally, Serbian compliance will be stronger. Moreover, the mere fact of institutional independence, irrespective of the actual comparison with other states’ cases, will have a positive effect on Serbian compliance.

Hypothesis Q3: Serbian compliance will be stronger the more determinate the ICTY regime’s rules towards Serbia are.

A rule will only be found to be legitimate, thus open to compliance, if the Serbian addressee can assess the precise content of the rule. Following this reasoning, very specific requests under Art. 29 of the ICTY Statute will be found more legitimate than vague formulations of Serbian obligations.

3.3. Combining the compliance mechanisms

The five compliance mechanisms described above (internalisation, acculturation, conditionality, capacity, and regime quality) have been theoretically separated. However, in practice they operate at the same time. Thus, interaction, both reinforcing and counterproductive, can be expected.

Symbolic validation is not applied here, since its functioning is partly covered by ‘adherence’ (Does the originator of the regime have the authority to create the regime?) and ‘acculturation’ (Does the actor perceive the originator of the regime as a reference group?).
Interaction has, first, a reinforcing effect. This will be likely in the following cases:

- If the regime quality is perceived as positive, then the other compliance mechanisms will face less resistance. Accordingly, weak regime quality due to procedural deficiencies, such as compromised impartiality of the Prosecutor or an invalid legal basis of the ICTY itself, will provoke strong resistance with Serbian actors, in case of contested regime content.

- Serbian state capacity building efforts by the ICTY, entailing intensive cooperation between officials on a technical level, will create a positive environment for internalisation and acculturation.

- In case of incomplete acculturation, the gap between official Serbian policy and policy in practice can also be closed by internalisation, both in the domestic arena (as a result of the enhanced legitimacy of domestic actors supporting the ICTY regime) or between the ICTY regime actors and the Serbian government itself (since acculturation leading to official endorsement precludes overt hostility towards the regime content, thus decreasing resistance to internalisation).

Second, the interaction between compliance mechanisms can result in a counterproductive effect. This is the case with the use of conditionality. In general, conditionality creates a domestic ownership problem: changes in Serbian policy would be seen as the result of external imposition by the international community.\(^{159}\) The conditions are not linked to morality and justice, but to rewards and punishments. This can reinforce contra-ICTY regime aspects of Serbian actors’ identities. Consequently, too much emphasis on compliance through conditionality can hinder compliance through acculturation and internalisation.\(^{160}\)

\(^{159}\) CHECKEL, Jeffrey T., Compliance and Conditionality. ARENA working papers WP 00/18. Oslo, ARENA Center for European Studies, 2000, p. 4.

\(^{160}\) GOODMAN, JINKS, 2004, supra note 142, p. 701.
4. Chapter summary

Evaluation and redesign of international legal regimes such as the ICTY regime requires the application of theoretical lenses, in order to produce meaningful results. Consequently, Research Question 1 of this dissertation required the conception of a theoretical framework, as presented in this chapter. It is based on the International Law and International Relations method. It is a multi-causal model, covering all factual layers of the case and a wide array of strategies for an international legal regime to improve state compliance. The framework will be applied to the case of Serbia and the ICTY in the following chapters.
CHAPTER 3: LEGAL ASPECTS OF THE ICTY REGIME

The theoretical framework, presented above, predicts that the procedural quality of the ICTY regime will have an independent effect on Serbian compliance, since the more Serbian actors would perceive the ICTY regime procedurally correct, the more the regime itself would issue a compliance pull on these actors. Three specific hypotheses were derived based on this general presumption:

- Hypothesis Q1: Serbian compliance will be stronger the more Serbian actors believe that the ICTY regime has a valid basis in international law.
- Hypothesis Q2: Serbian compliance will be stronger the more Serbian actors perceive the ICTY regime’s rules are applied coherently in different cases.
- Hypothesis Q3: Serbian compliance will be stronger the more determinate the ICTY regime’s rules towards Serbia are.

First, a general outline of the ICTY regime will be presented. Subsequently, the regime will be evaluated on its legal basis, its coherence and its determinacy, and the perception of Serbian actors regarding these topics will be considered.

1. Outline of the ICTY regime

1.1. Legal sources for the ICTY regime

The ICTY regime is governed by the following basic documents:

- The UN Charter, of which Chapter VII constitutes the Tribunal’s legal basis;
- UN Security Council Resolution 827, establishing the ICTY;
- The ICTY Statute, annexed to Resolution 827;
- The Decision on Jurisdiction by the Appeals Chamber in the Case Prosecutor v. Tadić, stating its interpretation of the ICTY’s jurisdiction.
1.2. Function of the ICTY

UN Security Council Resolution 827, establishing the ICTY, enumerates three main goals for the Tribunal:

- Prosecuting persons who are responsible for the violations of international humanitarian law in the territory of the former Yugoslavia.
- Preventing further war crimes.
- Contributing to the restoration and maintenance of peace.\(^{161}\)

1.3. Jurisdiction of the ICTY

The jurisdiction \textit{ratione materiae} of the Tribunal is set out in Articles 2 through 5 of the ICTY Statute:

- Article 2 of the Statute grants to the Tribunal jurisdiction over \textit{grave breaches of the Geneva Conventions of 1949}.\(^{162}\) According to the ICTY Appeals Chamber, this provision is only applicable in the context of international conflicts.\(^{163}\)
- Article 3 declares the Tribunal competent to decide upon \textit{violations of the laws or customs of war}.\(^{164}\) The Tribunal has given a very wide interpretation to this Article, ruling that it includes all serious violations of international humanitarian law, other than the violations of Article 2, 4, and 5. These include violations in internal conflicts.\(^{165}\)
- Article 4 confers the Tribunal with jurisdiction over the \textit{crime of genocide}.\(^{166}\)
- Article 5 gives the Tribunal jurisdiction over \textit{crimes against humanity}, committed either in a national or international conflict.\(^{167}\)

There has been substantive debate on the interpretation and the legality of these provisions. The defence for the first defendant, Mr. Tadić, argued that his alleged crimes fell outside the scope of these articles. This gave the Tribunal the opportunity to interpret the provisions.\(^{168}\)

\(^{162}\) Art. 2, ICTY Statute, \textit{supra} note 64.
\(^{164}\) Art. 3, ICTY Statute, \textit{supra} note 64.
\(^{166}\) Art. 4, ICTY Statute, \textit{supra} note 64.
\(^{167}\) Ibid., art. 5.
The jurisdiction of the Court *ratione temporae and loci*, as defined in Article 8 of the Statute, is very broad: the Court can prosecute persons for crimes committed in the territory of the former Yugoslavia since 1 January 1991.\textsuperscript{169} Thus, contrary to the Statute for the International Criminal Tribunal of Rwanda,\textsuperscript{170} the temporal jurisdiction of the ICTY is open-ended. This broad definition gave the Prosecutor the power to commence investigations on atrocities committed in Kosovo during the 1998-1999 conflict.\textsuperscript{171} The logic behind the choice for 1 January 1991 was that it was a neutral date, contrary to, for instance, the day of the Croatian and Slovenian declarations of independence (25 June 1991), or the day of the JNA’s intervention in Slovenia (27 June 1991), for it does not imply a choice of the qualification of the conflict as internal or international, which would have its impact on the applicable law. Moreover, the UN Secretary General had received reports of crimes committed against Serbs, occurring prior to June 1991. Thus, 1 January 1991 implied absolute neutrality in the conflict.\textsuperscript{172}

Article 6 of the ICTY Statute states that the Tribunal’s jurisdiction *ratione personae* encompasses all natural persons. Thus, the languages leaves open the possibility of prosecuting non-nationals from the former Yugoslavia Republics.

### 1.4. Structure of the ICTY

The ICTY consists of three main organs: the Chambers, the Office of the Prosecutor, and the Registry.

The Judiciary of the ICTY has 3 Trial Chambers and 1 Appeals Chamber.\textsuperscript{173} The Appeals Chamber is shared with the ICTR. The Chambers are staffed by 16 permanent judges. They are supported by a maximum of 12 *ad litem* judges, who help manage the Chambers’

\textsuperscript{168} Prosecutor v. Tadić, Decision on Jurisdiction, *supra* note 163, pp. 49-51.
\textsuperscript{169} Art. 8, ICTY Statute, *supra* note 64.
\textsuperscript{170} Pursuant Article 1 of the ICTR Statute, the Rwanda Tribunal has only jurisdiction over crimes committed in 1994.
\textsuperscript{171} HAZAN, *supra* note 57, pp. 130-131.
\textsuperscript{173} Art. 11, ICTY Statute, *supra* note 64.
The judges are appointed by the UN General Assembly from a list approved by the UN Security Council. The judges elect, amongst themselves, a President. On several occasions, the President has played an important role in the development of the ICTY. Antonio Cassese, for instance, the first President, who served from 1993 to 1997, was heavily involved in making the Tribunal operational. Moreover, he was in the international spotlight on several occasions, seeking support from the international community to improve the effectiveness of the Tribunal.

The Prosecutor, supported by a qualified staff, is responsible for the investigation and prosecution of suspects of crimes falling within the jurisdiction of the Tribunal. The Statute ensures the formal independence of the Prosecutor from other organs of the Tribunal. Moreover, the Prosecutor may not receive instructions from governments or other actors, such as the Security Council. He or she is appointed by the Security Council, pursuant to nomination by the UN Secretary General. The Prosecutor is the main representative of the ICTY on the international plane, in view of his or her task, and is key to the determination of the overall strategy of the Tribunal towards the former Yugoslav states. The past Prosecutors are Richard Goldstone, Louise Arbour and Carla Del Ponte. The position is currently held by Serge Brammertz.

The Registry is responsible for the administration and servicing of the Tribunal. The Registry is led by the Registrar, who is appointed by the UN Secretary General, based on the nomination of the ICTY President.

1.5. State cooperation

Since the ICTY does not have its own police force competent to arrest suspects or gather evidence, it must rely on the cooperation of states, especially the former Yugoslav states.

\[^{74}\text{ibid., art. 12.}\]
\[^{75}\text{Art. 13bis, 13ter, ICTY Statute, supra note 64.}\]
\[^{76}\text{ibid., art. 14.}\]
\[^{77}\text{ICTY website (http://www.icty.org/sid/155).}\]
\[^{78}\text{See for instance: ICTY, President Cassese has engaged in a series of high-level European contacts. Press Release, 1 February 1996 (http://www.icty.org/sid/7421).}\]
\[^{79}\text{Art. 16, ICTY Statute, supra note 64.}\]
\[^{80}\text{ibid., article 17.}\]
The obligation to cooperate is expressed in UN Security Council Resolution 827.\textsuperscript{181} The legal source of this obligation is Article 25 of the UN Charter, declaring that all member states have the duty to carry out the decisions of the Security Council in accordance with the UN Charter.\textsuperscript{182} This obligation includes all members of the UN Security Council, and, therefore, those members having voted against the decision or members of the UN that are not a member of the UN Security Council.\textsuperscript{183}

The obligation of states to cooperate with the ICTY is further developed in Article 29 of the ICTY Statute:

\begin{quote}
1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
   
   (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.\textsuperscript{184}
\end{quote}

Rule 7bis of the ICTY’s Rules of Procedure and Evidence states in general that in case of non-compliance of a State with its obligations under Article 29 of the ICTY Statute, the President of the Tribunal, advised by a Judge, a Trial Chamber or the Prosecutor, may inform the UN Security Council of the non-compliance.\textsuperscript{185} This procedure is reiterated for the specific instances of non-compliance with a request for deferral of a case,\textsuperscript{186} the principle of non bis in idem,\textsuperscript{187} and the failure to execute a warrant or transfer order.\textsuperscript{188}

\begin{footnotes}
\textsuperscript{184} Art. 29, ICTY Statute, supra note 64.
\textsuperscript{185} Rule 7bis, ICTY Rules of Procedure and Evidence, IT/32/Rev. 44, 10 December 2009.
\textsuperscript{186} Ibid, Rule 11.
\textsuperscript{187} Ibid., Rule 13.
\textsuperscript{188} Ibid., Rule 59 and 61.
\end{footnotes}
The FRY’s obligation to cooperate with the ICTY is repeated in the Dayton Agreement of 1995. In the General Framework Agreement (GFA), all parties, including the FRY, agreed to “cooperate fully with all entities involved in the implementation of this peace settlement, [...] which are otherwise authorised by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law”. Moreover, the obligation to cooperate with the ICTY was explicitly mentioned in the Annexes to the Agreement. Of importance to the FRY’s legal position is its commitment to sign the relevant agreements on behalf of the Republic of Srpska and to ensure its compliance. Finally, Serbia’s obligation to cooperate, based on the Dayton Agreement, was recognised by the International Court of Justice in 2007, and non-cooperation was found to be a violation of the Dayton Agreement, Article VI of the Genocide Convention, and Serbia’s duties as a member of the United Nations.

1.6. Procedure

The permanent judges of the Tribunal have, pursuant to Article 15 of the Statute, the responsibility to decide on the Tribunal’s Rules of procedure and evidence. The basic rules, however, are set out in the Statute:

- Investigations are initiated by the Prosecutor, ex-officio or based on information acquired from other sources. In case a prima facie case can be established, the Prosecutor prepares an indictment and transmits it to a judge of the Trial Chamber. Subsequently, the Trial Chamber judge examines the indictment. If satisfied that a prima facie case exists, the judge confirms the indictment.
- The Trial Chambers have the obligation to ensure a fair and expeditious trial. The basic rights of the accused include the presumption of innocence, language assistance, adequate

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189 Article IX, Dayton General Framework Agreement, supra note 33.
190 Article X, Annex 1A, Dayton General Framework Agreement, supra note 33.
191 Preamble, Dayton General Framework Agreement, supra note 33.
193 Art. 15, ICTY Statute, supra note 64.
194 Ibid., art. 18.
195 Ibid., art. 19.
196 Ibid., art. 20.
time to prepare his defence, trial without undue delay, legal assistance, and the possibility to use witnesses on his behalf.¹⁹⁷

- Judgements by the Trial Chambers are rendered by a majority of the judges and motivated.¹⁹⁸ The only penalty a Trial Chamber can impose is imprisonment. In deciding on the duration of the penalty, the judges are obliged to make use of general practice in the courts of the former Yugoslavia.¹⁹⁹

- Convictions can be affirmed, reversed or revised by the Appeals Chamber, pursuant an appeal by the defendant or the Prosecutor, on the grounds of error regarding a question of law or error of fact.²⁰⁰

2. Adherence: the legality of the ICTY

2.1. Introduction

According to Hypothesis Q1, Serbian compliance will be stronger the more Serbian actors believe that the ICTY regime has a valid basis in international law. Thus, ideally, the Tribunal should have a generally accepted legal basis. However, instead of taking a classical approach to establish the Tribunal, by way of a treaty, the UN Security Council chose a resolution as legal basis for the Tribunal.

The UN Secretary General, responsible for drafting a proposal for the Tribunal, acknowledged in his preparatory report that in establishing the Tribunal, a treaty would have been, in the normal course of events, the chosen approach. This procedure would allow a detailed debate on the rules of the Tribunal. Furthermore, it would allow the states involved in the negotiation of the treaty to exercise their sovereign will to the fullest, since they would be able to freely choose to become member of the Tribunal. However, the Secretary General recognised that the classical method would have major disadvantages. First, the negotiation and ratification of a treaty requires a considerable time. Second, the Tribunal would only be effective if the former Yugoslav States would ratify the treaty. And

¹⁹⁷ Ibid., art. 21.
¹⁹⁸ Ibid., art. 23.
¹⁹⁹ Ibid., art. 24.
²⁰⁰ Ibid., art. 25.
their ratification was far from guaranteed. For instance, the Federal Republic of Yugoslavia stated that it preferred domestic prosecution for war criminals. Thus, in view of the urgency of the situation and necessary effectiveness of the future Tribunal, the Secretary General advised the UN Security Council to establish the ICTY by way of resolution, based on Chapter VII of the UN Charter, which would be binding on all states.

Some members of the UN Security Council made reservations about the application of a resolution as to establish an international criminal tribunal. According to China, “an international tribunal should be established by concluding a treaty so as to provide a solid legal foundation”. Brazil concurred with this position. Their opposition, however, was not as fundamental as to vote against Resolution 827. Consequently, the Resolution was adopted unanimously. However, the unprecedented decision of the Council to establish an international tribunal, continued to cause controversy. For instance, the first defendant before the Tribunal, Mr. Tadić, attacked the legal basis of the Tribunal. Answering Tadić’s argument in its famous decision on jurisdiction, the Appeals Chamber ruled that it had a solid legal base. The following paragraphs contain first an overview of the legal arguments in this discussion, used in the Tadić Case and scholarly debate. Second, the issue of primacy of the Tribunal will be addressed. Third, the opinion of Serbian actors is reviewed, as they are the target audience to which the adherence-hypothesis will be applied.

2.2. Arguments concerning the legal basis of the ICTY

2.2.1. Can the UN Security Council establish an international criminal tribunal?

The UN Security Council can take measures to restore or maintain peace, as identified in Chapter VII of the UN Charter. Article 39 of the Charter determines the conditions for applying Chapter VII. The article states that the Council must determine a situation as a

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203 Report of the Secretary-General of 3 May 1993, supra note 201, p. 7
205 Ibid., p. 36
‘threat to the peace’, a ‘breach of the peace’ or an ‘act of aggression’. Subsequently, it can decide on the appropriate measure, in accordance with Articles 41 and 42. 207 Some contest that the Council could establish the ICTY based on these provisions. This legal controversy will be discussed in three parts. First, a general overview of UN Charter interpretation rules will be presented. Subsequently, the specific application of Charter Articles 39, 41 and 29 will be analysed. Third, the effect of subsequent endorsement by the international community will be evaluated.

**Which are the rules of interpretation of the UN Charter?**

The legality of the UN Security Council’s decision turns on the interpretation of Articles 39 and 41 of the UN Charter. Consequently, determining the appropriate rules of interpretation is of vital importance.

The basic rules of treaty interpretation are set out in the 1969 Vienna Convention on the Law of Treaties. Although the Convention does not have retroactive force, 208 its provisions are relevant for the 1945 UN Charter, since they constitute a codification of customary international law. 209 Article 31(1) of the Convention states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Moreover, subsequent practice, which establishes the agreement of the parties regarding treaty interpretation, shall, amongst other sources of interpretation, be taken into account. 210 If the meaning of a provision remains ambiguous or the result is manifestly absurd or unreasonable, recourse can be taken to the preparatory work of the treaty and the circumstances of its conclusion. 211 The inclusion of ‘object and purpose’, ‘subsequent practice’, and the omission of a reference to the law applicable at the time of the conclusion of a treaty, first included in the draft treaty, clearly opens the door for an evolutionary interpretation of treaties. 212 Moreover, the International Court of Justice (ICJ) has accepted this approach in the Aegean Sea Continental Shelf Case. The Court, interpreting the treaty at

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207 Article 39, Charter of the United Nations, supra note 182.
212 SLOAN, supra note 209, pp. 105-107.
issue in the case, held that the meaning of the treaty concept ‘territorial status’, as it is a
generic term, is presumed to change according to the evolution of the law.\textsuperscript{213}

More specific guidance for UN Charter interpretation can be found in case law of the ICJ. On
the subject of constituent treaties of international organisations, the ICJ stated in the
\textit{Legality of the Use by a State of Nuclear Weapons in Armed Conflict} Advisory Opinion that
“these new subjects of law are endowed with a certain autonomy”, and that “the very
nature of the organisation created, the objectives which have been assigned to it by its
founder, the imperatives associated with the effective performance of its functions, as well
as its own practice, are all elements which may deserve special attention when the time
comes to interpret these constituent treaties”.\textsuperscript{214} Moreover, in \textit{Certain Expenses of the
United Nations} Advisory Opinion, the Court held on the subject of UN Charter interpretation
that “each organ must, in the first place at least, determine its own jurisdiction”.\textsuperscript{215} Examples
of evolutionary interpretation by the UN organs include the voting procedures in the UN
Security Council (Art. 27(3) of the Charter) and the evolving competence of the UN General
Assembly in granting the status of a non-self-governing territory. (Art. 73 of the Charter).\textsuperscript{216}

In conclusion, the primary responsibility for interpreting the provisions of Chapter VII lies
with the UN Security Council itself. Moreover, the UN Charter does not contain a procedure
or an organ to review the legality of the Council’s actions.\textsuperscript{217}

\textbf{Is there a ‘threat to the peace’, pursuant Article 39 of the UN Charter?}

UN Security Council Resolution 827 defined the conflict in the former Yugoslavia as “a threat
to international peace and security”.\textsuperscript{218} Tadić’s defense, however, denied this qualification,
since the conflict in the former Yugoslavia lacked an international character, required for the
application of Chapter VII of the UN Charter. The defense considered the conflict as confined
to the internationally recognised borders of the independent state of Bosnia-Herzegovina.

\begin{itemize}
\item\textsuperscript{213} ICJ, \textit{Aegean Sea Continental Shelf} (Greece v. Turkey), ICJ Reports, 1978, p. 32.
\item\textsuperscript{214} ICJ, \textit{Legality of the Use by a State of Nuclear Weapons in Armed Conflict}, Advisory Opinion, ICJ Reports, 1996,
p. 74-75.
\item\textsuperscript{216} ZACKLIN, Ralph, The Amendment of the Constitutive Instruments of the United Nations and Specialized
\item\textsuperscript{217} BODLEY, Anne, Weakening the Principle of Sovereignty in International Law: the International Criminal
Tribunal for the Former Yugoslavia. \textit{New York University Journal of International Law and Politics}, vol. 31, 1998-
\item\textsuperscript{218} UN Security Council Resolution 827, 25 May 1993, UN Doc. S/RES/827, preamble.
\end{itemize}
Moreover, according to Tadić, the ties between the warring parties had never been proven, and must be considered as terminated since the existence of the disputed Bosnian-Serb entity.\footnote{Prosecutor v Tadić, Brief to Support the Motion on the Jurisdiction of the Tribunal, Case No. IT-94-1 (23 June 1995), p. 4.}

The definition of the conflict as a ‘threat to the peace’, as provided in the Resolution, is supported by two arguments. First, it would be possible to define the conflict as an international conflict. This position is defended by the Commission of Experts in view of “the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves”.\footnote{Final Report of the Commission of Experts, supra note 22 at p. 13.}

Moreover, the conflict caused substantial risks for adjoining states.\footnote{Prosecutor v. Tadić, Decision on Jurisdiction, supra note 163, separate opinion of Judge Sidhwa, par. 61.} The Appeals Chamber itself held that the conflict had both internal and international aspects.\footnote{Prosecutor v. Tadić, Decision on Jurisdiction, supra note 163, p. 43.} Second, the Appeals Chamber held that even if the conflict was merely internal, it could still be defined as a ‘threat to the peace’ in the sense of the UN Charter. Indeed, the Security Council has a long practice of treating cases of internal conflict and civil war, such as Congo in 1960, Southern Rhodesia in 1968, South Africa in 1977, Liberia and Somalia in the early 1990s, as threats to the peace.\footnote{Ibid., p. 14; KERR, Rachel, The International Criminal Tribunal for the former Yugoslavia: an exercise in law, politics and diplomacy. Oxford, Oxford University Press, 2004, p. 16.} Moreover, the Council issued a reinterpretation of the concept ‘threat to the peace’ in 1992, stating that the “absence of war and military conflicts amongst States does not in itself ensure international peace and security”.\footnote{Note by the President of the Security Council, 31 January 1992, UN Doc. S/23500, p. 3.} However, one can argue that reliance on past Council practice to decide on the legality of a Council decision is circular, since the settled practice could itself be illegal.\footnote{ALVAREZ, José E., Nuremberg Revisited: The Tadić Case. European Journal of International Law, vol. 7, 1996, no. 2, p. 256.}

**Can the creation of an international tribunal be based on Article 41 of the UN Charter?**

Resolution 827 does not clarify the legal basis for the creation of the ICTY. However, it must be held that, since it is a measure applied to address a threat to the peace and it does not involve the use of force, the legal basis is Article 41 of the UN Charter.\footnote{Prosecutor v. Tadić, Decision on Jurisdiction, supra note 163, p. 17.}
Article 41 states the following:

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”.

The defence for Tadić attacked the use of Article 41 of the UN Charter on two grounds. First, establishing a Tribunal does not fit into the categories of possible measures envisaged in Article 41. Second, the measures of Article 41 must be executed by member states of the UN, not by the organisation itself.

Tadić’s defence argued that, although the enumeration of measures in Article 41 is non-exhaustive, they are limited to the categories of political, economic and communications measures. Consequently, it would not have been the intention of the UN Charter’s drafters to include measures involving judicial action in the scope of the Council’s powers. The Appeals Chamber disagreed, stating that the list of Article 41 is merely illustrative, not exclusive. In view of the UN Charter’s rules of interpretation, the decision of the Chamber seems warranted since it supports the evolutionary interpretation of the Charter and leaves the responsibility for interpretation with the Council itself.

Second, the defence stated that Article 41 only permits measures to be executed only by the member states of the UN, because member state implementation is all that is mentioned in the article, and the Tribunal is not executed by member states. The Appeals Chamber, however, based on a literal lecture of Article 41, decided that it includes action by the member states and the UN itself. Moreover, the Chamber held that if an international organisation can act through its members, it can implement measures through its own organs, since implementation of collective measures by member states is only a second best option. However, there is no legal basis for this argument. On the contrary, some state

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227 Article 41, Charter of the United Nations, supra note 182.
228 Prosecutor v Tadić, Brief to Support the Motion on the Jurisdiction of the Tribunal, supra note 219, p. 5; supported in BUISMAN, Caroline, Defence and Fair Trial. In: HAVEMAN, Roelof, KAVRAN, Olga, NICHOLLS, Julian, eds., Supranational Criminal Law: a System Sui Generis. Antwerp, Intersentia, 2003, p. 188.
229 Prosecutor v. Tadić, Decision on Jurisdiction, supra note 163, p. 17.
230 Ibid. p. 18
that there is an implicit understanding among UN members that some actions sanctioned by
the organisation require the involvement of national intermediaries. 231

Can the UN Security Council establish a judicial organ?

Article 29 of the UN Charter, in general, gives the power to the UN Security Council to
establish subsidiary organs in the exercise of its functions. 232 Tadić’s defence argued that the
UN Security Council does not have the competence to set up a judicial organ. However, the
Appeals Chamber held that the Council does not need judicial powers to set up a judicial
organ. It did not delegate its own power to the Tribunal, it merely chose an instrument to
execute its power dealing with threats to the peace. 233 In support of this position, the
Chamber referred to the ICJ Effect of Awards Advisory Opinion. In this case, the ICJ stated
that the UN General Assembly, not having judicial functions under the UN Charter, was
exercising its power to regulate staff relations, when establishing the UN Administrative
Tribunal. 234

Subsequent approval by the international community

As mentioned above, subsequent practice indicating the consent of the parties of a treaty
can serve as valid treaty interpretation. 235 Applying this principle to the case of the ICTY, it is
clear that the international community, in the framework of the UN General Assembly,
approved the establishment of the Tribunal because the Assembly has referred to the ICTY
on numerous occasions: it welcomed the establishment of the ICTY and the commencement
of procedures, it urged states to cooperate with the Tribunal, it requested action by the
Prosecutor on specific issues and it has encouraged the provision of the necessary resources
to the ICTY, including the allocation of funding by the UN itself. 236 Consequently, in view of

231 ALVAREZ, supra note 225, pp. 255-256.
232 Article 29, Charter of the United Nations, supra note 182.
233 Prosecutor v. Tadić, Decision on Jurisdiction, supra note 163, pp. 18-19.
234 ICJ, Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion,
ICJ Reports, 1954, p. 61.
235 Article 31, par. 3 (b), Vienna Convention on the Law of Treaties, supra note 208; SLUITER, Göran, International
236 UN General Assembly Resolution 48/153, 20 December 1993, UN Doc. A/RES/48/153, preamble 5 and par. 8
(unanimous); UN General Assembly Resolution 48/251, 14 April 1994, UN Doc. A/RES/48/251, par. 7 and 9
(unanimous); UN General Assembly Resolution 49/196, 23 December 1994, UN Doc. A/RES/49/196, par. 8-9 (150
Y, 0 N, 14 A, 21 Non-voting); UN General Assembly Resolution 49/205, 23 December 1994, UN Doc.
A/RES/49/205, preamble 5 and par. 9 (unanimous); UN General Assembly Resolution 49/242, 20 December 1993,
UN Doc. A/RES/49/242, par. 2 (unanimous).
the UN Charter interpretation, based on subsequent practice, the establishment of the ICTY must be held legal.

Conclusion

The discussion on the lawful application of Chapter VII turns on the interpretation of the UN Charter’s provisions. It is clear that the Security Council, in establishing the ICTY, made an unprecedented interpretation of its powers under Article 41. However, there are two good arguments to consider the decision as lawful. First, UN Charter interpretation allows an evolutionary approach, with broad auto-interpretation powers for the UN organs themselves. Second, even if the interpretation is considered as unlawful at first, this defect is cured by the subsequent practice of the UN General Assembly, indicating the consent of the UN Charter parties to the revised interpretation.

2.2.2. In accordance with ‘established by law’?

The legality of the ICTY has not only been questioned based on the provisions of the UN Charter. A second line of criticism focuses on the compatibility with Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention of Human Rights (ECHM), which ensure that a tribunal with the function of determining a criminal charge must be established by law.\(^{237}\) The European Commission on Human Rights interpreted this provision as requiring an act of Parliament as to ensure that the judicial organisation is not dependent on the discretion of the executive.\(^{238}\) Tadić’s defence argued that the establishment of the ICTY does not fulfil this criterion, since it “is not the result of a decision making process under democratic control, necessary to create a judicial organisation in a democratic society, but rather the result of a mere executive order.”\(^{239}\) In its decision, the Appeals Chamber evaluated the argument, based on three distinct interpretations of the ‘established by law’-provision.


\(^{238}\) European Commission of Human Rights, *Zand v Austria*, DR 70, p. 80.

The first interpretation, submitted by the defence and supported by the aforementioned human rights case law, indeed requires the establishment by a Parliament. However, the Appeals Chamber decided that the distinction of legislative, executive and judicial power does not apply in the setting of the United Nations, since there is no clear legislative organ, competent to determine laws that are directly binding on international legal subjects. Consequently, this interpretation can only be upheld with respect to judicial organisation on a national level and has no application in international law.\textsuperscript{240} The reasoning of the Court, however, is unsatisfactory, since it ignores the intent behind the rule, which is the prevention of undemocratically and arbitrarily organised judicial proceedings. The rule could be easily transposed to the international plane, for instance by the condition of using a treaty, a decision by the UN General Assembly, or by leaving prosecution to the national level.\textsuperscript{241}

The Appeals Chamber’s second interpretation holds that ‘established by law’ means that the Tribunal must be established by a body with a limited power to take binding decisions, such as the UN Security Council.\textsuperscript{242} However, as one critic pointed out, this argument merely assumes what is contested, the power of the Council to establish a Tribunal.\textsuperscript{243}

The third interpretation of ‘established by law’ is that it must be established in accordance with the rule of law, meaning that it must meet the proper international standards, guaranteeing procedural fairness. The Appeals Chamber noted that the ICTY fulfilled this criterion, based on an examination of the Statute and the Rules of Procedure and Evidence.\textsuperscript{244} Importantly, the European Court of Human Rights came to the same conclusion in \textit{Naletilić v. Croatia}.\textsuperscript{245} However, doubts have been raised regarding the guarantees for procedural fairness. For instance, the unique mixture of civil law and common law procedures leaves the Tribunal’s procedures open to an unsatisfactory critique by both civil law and common law lawyers.\textsuperscript{246}

\textsuperscript{240} \textit{Prosecutor v. Tadić}, Decision on Jurisdiction, \textit{supra} note 163, p. 22.
\textsuperscript{241} BUISMAN, \textit{supra} note 228, p. 190; ALVAREZ, \textit{supra} note 225, pp. 257-258.
\textsuperscript{242} Ibid.
\textsuperscript{243} ALVAREZ, \textit{supra} note 225, p. 258.
\textsuperscript{244} \textit{Prosecutor v. Tadić}, Decision on Jurisdiction, \textit{supra} note 163, pp. 23-24.
\textsuperscript{246} ALVAREZ, \textit{supra} note 225, pp. 258-259.
2.3. Primacy of the ICTY

The creation of an international tribunal demands clarification of the relationship between national prosecution of crimes and their prosecution by the international tribunal. In case of the ICTY, Article 9 of its Statute proclaims concurrent jurisdiction for national courts and the Tribunal to prosecute crimes within the jurisdictional scope of the Tribunal. However, Article 9 paragraph 2 gives primacy to the Tribunal’s jurisdiction, meaning that the Tribunal can request national courts to defer to the competence of the Tribunal.\(^{247}\) The primacy principle is further developed in rule 9 of the ICTY’s rules on Procedure and Evidence, which identifies three situations sanctioning the Tribunal’s request that a state defer a specific case:

- in case “the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime”.\(^{248}\)
- in case “there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted”.\(^{249}\)
- in case “what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal”.\(^{250}\)

Whereas the first two situations have a limited scope, the third situation is very widely formulated, leaving the ICTY the possibility to exercise primacy in every case it prosecutes. Moreover, the authority to determine if the ICTY can exercise primacy lies with the Tribunal itself. Consequently, the primacy-rule, enforceable against UN members pursuant Article 25 of the UN Charter, anchors the dominant position of the ICTY in its relation with national courts.

The choice of primacy is extraordinary.\(^{251}\) Consequently, the attack on its legality by Tadić’s defence did not come as a surprise. The main counterargument against primacy is that it is an unlawful incursion into the sovereignty of states. The Appeals Chamber, however, was not convinced. It noted, first, that UN Charter Article 2 paragraph 7, prohibiting UN

\(^{247}\) Art. 9, ICTY Statute, supra note 64.
\(^{248}\) Rule 9, ICTY Rules of Procedure and Evidence, supra note 185.
\(^{249}\) Ibid.
\(^{250}\) Ibid.
interference in the domestic jurisdiction of a state, makes an exception for measures adopted under Chapter VII of the Charter. As the Tribunal is such type of measure, the Appeals Chamber concluded that the primacy-rule is lawful. Second, the judges held that Bosnia-Herzegovina, the relevant domestic jurisdiction in the specific case, had accepted jurisdiction of the Tribunal. Third, according to the Appeals Chamber, the nature of the offences attracts universal jurisdiction for which sovereignty cannot be used to shield the perpetrators from this jurisdiction. The judges solemnly claimed that “it would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.”

The Appeals Chamber’s clear dismissal of the sovereignty argument in favour of the Tribunal’s primacy has been criticised for being ill founded. It is evident that the principles and purposes of the UN, enumerated in Articles 1 and 2 of the Charter, are a difficult balance between conflicting concepts as maintaining international peace and security, sovereign equality and self-determination. There is no apparent hierarchy. The clear dismissal of state sovereignty by the UN Security Council, in adopting the primacy-rule, would violate this balance. Thus, according to this line of critique, a more cautious balance between sovereignty and human rights was in order.

2.4. Perception by Serbian actors

Serbia’s initial position towards the ICTY is set out in a letter dated 23 May 1993, from the Federal Republic of Yugoslavia (FRY) to the UN Secretary General. First, the FRY expressed its wish to prosecute and punish the perpetrators of war crimes committed in the territory of the former Yugoslavia under national law. Second, the FRY denied the legality of the Tribunal, since it found that the UN Security Council does not have the power under Chapter VII of the UN Charter to establish a Tribunal. Establishing a Tribunal would have required a treaty or at least action by the UN General Assembly. Moreover, the measure was to be considered discriminatory, since other situations of human rights violations, such as Korea, Viet Nam and Cambodia, were not prosecuted by the international community. Finally, the

252 Prosecutor v. Tadić, Decision on Jurisdiction, supra note 163, pp. 28-29.
254 Prosecutor v. Tadić, Decision on Jurisdiction, supra note 163, p. 32.
255 ALVAREZ, supra note 225, pp. 259-260.
FRY claimed that the extradition of nationals would be impossible in view of its constitution. The government position was supported by Yugoslav scholars such as Professor Kosta Čavoški of the Belgrade Law Faculty.

The FRY’s initial position was ostensibly adapted with the signing of the Dayton Agreement of 1995. However, at various times after the signing of the Dayton Agreement, Serbian officials have denied the legality of the ICTY, as an argument for not cooperating with the Tribunal.

2.5. Conclusion: a perceived lack of adherence

Hypothesis Q1 predicts that Serbian compliance will be stronger the more Serbian actors believe that the ICTY regime has a valid basis in international law. To test this hypothesis, several points have been taken into consideration. First, the legal basis of the Tribunal was assessed. Although the establishment of the ICTY was unprecedented in UN practice, there are strong arguments to consider the legal basis of the Tribunal as correct. However, it must be admitted that not all legal scholars accept the lawfulness of the ICTY’s establishment. Second, the specific discussion of the primacy principle uncovered weaknesses in the Appeals Chamber reasoning, which bluntly defended the lawfulness of the principle. In sum, as the international community was in search for an effective answer to the crisis in the Balkan region, it applied innovative legal techniques, of which the legality is more easily attacked than other, more traditional options. Thus, it comes as no surprise that Serbian actors have considered the ICTY as illegal under international law. Consequently, based on Hypothesis Q1, it is not likely that the legal basis of the ICTY will have a positive effect on the compliance of Serbia with its obligations vis-à-vis the Tribunal.

258 See infra, pp. 71, 73; BUISMAN, supra note 228, p. 186.
3. Coherence: Independence and impartiality of the ICTY

According to Hypothesis Q2, Serbian compliance will be stronger the more Serbian actors perceive the ICTY regime’s rules are applied coherently in different cases. To apply this hypothesis, use will be made of the concepts ‘independence’ and ‘impartiality’. The independence and impartiality of the ICTY judges and the Prosecutor are formally enshrined in the ICTY Statute. The interpretation of these concepts will be based on Article 14 of the ICCPR and Article 6 of the ECHR, which guarantee inter alia the right to be judged by an independent and impartial tribunal.

Theoretically, independence and impartiality can be separated from each other: the focus of independence lies on the structure and organisation of a Tribunal in relation to other sources of power, whereas impartiality deals with the existing or presumed bias of a judicial decision-maker. The information in the following paragraphs will be organised based on this distinction. However, it is clear that the concepts are empirically interlinked. For instance, structural dependency potentially causes a presumption of partiality. Consequently, a razor-sharp distinction is impossible.

3.1. Independence

Independence in the context of municipal law refers to the independence of the tribunal from the executive and legislative branches of state power. Transposed to the situation of the ICTY, it denotes the Tribunal’s independence from the UN and its member states. According to human rights case law, independence must be assured on several levels. Relevant for the ICTY are the following:
- fixed appointments;
- institutional independence;
- the appearance of independence.

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259 Art. 12 par. 1, art. 13 par. 1, ar. 16 par. 2, ICTY Statute, supra note 64.
260 European Commission of Human Rights, Crociani v. Italy, DR 147, p. 220.
261 Supreme Court of Canada, Valente v. The Queen, 2 SCR 673; European Court of Human Rights, Findlay v. United Kingdom, 24 E.H.R.R. 221, par. 73; UN Human Rights Committee, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984, par. 3; EMMERSON, Ben, ASHWORTH, Andrew, Human Rights and Criminal Justice. London, Sweet & Maxwell, 2001, p. 367.
\section*{3.1.1. Fixed appointments}

The Judges of the ICTY are appointed by the UN General Assembly, upon advice of the UN Security Council, for a renewable period of four years.\footnote{Art. 13bis, ICTY Statute, supra note 64.} The appointment by these organs, comparable to municipal executive and legislative organs, is in conformity with international human rights standards.\footnote{European Court of Human Rights, \textit{Campbell and Fell v. United Kingdom}, 24 \textit{E.H.R.R.} 165, par. 78.} However, the renewable term of only four years has been criticised, as being too short. Consequently, there is the possibility of political pressure on Tribunal judges seeking re-election by the organs of the UN.\footnote{JOHNSON, Scott T., On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia. \textit{International Legal Perspectives}, vol. 10, 1998, no. 1, p. 119.} However, Buisman notes that the European Court of Human Rights does not require judges to be appointed for life, as long as they are appointed for a fixed period.\footnote{BUISMAN, supra note 228, p. 196.} In the case of Campbell and Fell against the United Kingdom, for instance, it approved of a period of only three years.\footnote{ECHR, \textit{Campbell and Fell v. United Kingdom}, supra note 263, par. 80.} Consequently, it is likely that the Human Rights Courts would find the ICTY’s four year period in accordance with human rights law. As the ICTY Prosecutor is elected by the UN Security Council, upon nomination by the UN Secretary General, for a renewable term of four years,\footnote{Art. 16, ICTY Statute, supra note 64.} one can reach the same conclusion. More problematic is the fact that the UN Security Council has the discretionary authority to terminate the existence of the ICTY.\footnote{Article 39 and 41, \textit{Charter of the United Nations}, supra note 182.} However, such an extreme action seems very difficult to take for two reasons. First, untimely termination of the Tribunal would probably evoke strong protest from the human rights community and international public opinion. Second, the members of the UN Security Council do not share the same strategic goals. It is likely that a proposal to terminate the ICTY would meet skepticism in the Council itself and come under close scrutiny.

\section*{3.1.2. Institutional independence}

Institutional independence concerns a tribunal’s capacity to exercise its judicial function and duties independently from other actors.\footnote{JAYAWICKRAMA, Nihal, The Judicial Application of Human Rights Law. Cambridge, Cambridge University Press, 2002, p. 516.} In case of the ICTY institutional independence, although formally upheld in the ICTY Statute, is partly lacking with respect to the activities of
the Prosecutor. The ICTY Prosecutor is responsible for the investigation and prosecution of
suspects. In theory, he or she carries out this task independently, receiving instructions from
no other power. However, as has been stated before, the Office of the Prosecutor lacks a
police force, capable of autonomously arresting indictees or gathering evidence. Consequently, the Prosecutor is inherently dependent on the cooperation of the states of
the former Yugoslavia. Moreover, the ICTY is dependent on other states, especially the
United States and its NATO allies, in exercising its task. This situation of dependency is
manifested on two distinct levels. First, the Prosecutor required the international
community to provide key logistical support. For instance, NATO forces in Bosnia were used
to arrest war crimes indictees. NATO members, however, were very reluctant to give this
support in the wake of the 1995 Dayton Agreement, as not to risk political instability in the
region and casualties amongst their forces. Additionally, the Prosecutor needed
intelligence information from states such as France, the United Kingdom, the United States
and Germany for the collection of evidence against indictees. Yet, until 1999, these states
refused to provide the Prosecutor with vital intelligence on the conduct of Milošević with
respect to the Yugoslav wars. In 1999, when it became clear that a peaceful solution to the
Kosovo crisis could not be reached with Milošević in charge in Serbia, these states changed
their tactics, providing the Prosecutor with valuable information. Second, the ICTY
depends heavily on the international community, especially on the United States and the
European Union, to apply pressure and conditionality on Serbia, so as to ensure cooperation
with the ICTY. The most notable example of this situation is the arrest and transfer of
Milošević to the ICTY in 2001, following strong financial pressure by the United States.
This pressure is again contingent of the broader political goals of these states. Likewise, it
provides these states with substantial leverage over the Prosecutor.

It is clear that the activities of the Prosecutor are potentially constrained by the preferences
of the international community. However, there are strong indications that the successive
Prosecutors have tried to act independently within these constraints. For instance, Louise
Arbour, the Tribunal’s Prosecutor from 1996 until 1999, was confronted with the refusal of
NATO members to hunt down and arrest war crimes indictees in Bosnia. However, Arbour
actively pressured these countries to change their policies: she started keeping new

270 Art. 16 par. 1-2, ICTY Statute, supra note 64.
271 HAZAN, supra note 57, pp. 67-73.
272 Ibid, p. 130.
273 See infra, pp. 100-101.
indictments sealed, as not to warn the targeted war crimes suspects and reduce the risk to
NATO forces while arresting these suspects. Subsequently, she threatened to disclose the
unwillingness of these countries to the public to act on sealed indictments. Ultimately,
Arbour’s strategy contributed to a policy change of NATO members, as they began arresting
war crimes indictees from June 1997 onwards.\footnote{HAZAN, supra note 57, pp. 95-98.}
Another example of Arbour’s independent
prosecution policy is the indictment of Milošević on 24 May 1999 concerning alleged war
Although at first sight the indictment was in conformity with NATO's
military action in the region, it was issued during a period of diplomatic consultations
between Milošević and NATO. Consequently, the indictment was not well received by
Western diplomats, fearing a destabilisation of the diplomatic process.\footnote{HAZAN, supra note 57, p. 145.}
Moreover, Carla Del Ponte, Arbour’s successor, claims Arbour feared NATO would grant
Milošević immunity from prosecution, in a move to end the protracted conflict. A public indictment prevented
this option.\footnote{DEL PONTE, Carla, Mevrouw de Aanklager. Zutphen, De Bezige Bij, 2008, p. 136.}
The Prosecutor’s strive for independence is best illustrated by Del Ponte
herself. She relentlessly pressured Western governments to coerce Serbia into cooperation
with the ICTY, provoking criticism from for instance UN Secretary General Kofi Annan, who
found her activities to be too politicised in view of her mandate. Del Ponte however ignored
Annan’s complaint.\footnote{ibid, pp. 158-159.}
She also sought independence in her prosecutorial choices. For
instance, in the autumn of 2003, Del Ponte pursued the indictment of four Serbian generals,
including the popular Sreten Lukić, who headed the early-2003 operation Saber, arresting
thousands of alleged Serbian criminals. The United States urged her to postpone these
indictments so as not to destabilise the Serbian political climate. Del Ponte, however, did not
change her planned course of action.\footnote{RAMET, Sabrina P., PAVLAKOVIĆ, Vjeran, Serbia since 1989. Politics and Society under Milošević and After.
Washington, University of Washington Press, 2005, p. 44; DEL PONTE, supra note 277, p. 315.}

3.1.3. Appearance of independence

The test of tribunal independence includes the question as to whether the tribunal is
perceived as independent.\footnote{JAYAWICKRAMA, supra note 269 at p. 517.}
In the area of human rights law, it is defined as, “whether an
informed and reasonable person would perceive the tribunal as independent”.\footnote{Ibid., p. 518; See also ECHR, Campbell and Fell v. United Kingdom, supra note 263, par. 81.}

Upon
reviewing the objective information on the independence of the ICTY, presented above, it is likely that the informed and reasonable person will have, at minimum, doubts regarding the independence of the ICTY.

Serbian officials have questioned the independence of the ICTY on numerous occasions. For instance, following the NATO air strikes in 1999, the FRY Minister of Foreign Affairs characterised the ICTY as a NATO tribunal and an instrument of United States foreign policy. A more thorough overview of Serbian opinions on the ICTY will be presented in the next chapter.

3.1.4. Conclusion

The independence of the ICTY has been evaluated based on three specific criteria: (1) the structure of appointments, (2) institutional independence, and (3) the appearance of independence. It is clear that the Tribunal’s ties with the international community, and NATO in particular, compromise its institutional independence. Even if subsequent Prosecutors try to emancipate the ICTY from the international community, these constraints are inherent to its functioning. Consequently, the Tribunal’s appearance of independence is damaged, especially in the opinion of Serbian actors.

3.2. Impartiality

The condition of impartiality concerns the protection against actual and presumed bias of a judicial decision-maker. Actual bias refers to the subjective bias of a decision-maker. Presumed bias on the other hand denotes the appearance of bias, derived from the behaviour of the decision-maker or the lack of procedural guarantees to achieve impartiality. Whereas the focus with independence lies on structural aspects, impartiality concerns the lack of bias of individual Tribunal officials.

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282 LAMONT, supra note 76, p. 91.  
284 BUISMAN, supra note 228, p. 205.
The ICTY’s impartiality has been questioned by Serbia and, at some moments, by other actors. Several specific cases have particularly damaged the impartial image of the ICTY in Serbia. These are the investigation of the NATO military campaign, which concluded that NATO did not commit war crimes, and the alleged preferential treatment of Albanian Kosovar politician Ramush Haradinaj.

### 3.2.1. Investigating NATO

In order to stop a humanitarian catastrophe in Kosovo, NATO conducted the air campaign called ‘Operation Allied Force’ against the FRY from 24 March to 10 June 1999. During the air campaign Prosecutor Arbour received demands to investigate whether some of NATO’s actions could be considered as war crimes. Consequently, on 14 May 1999 Arbour established a ‘Review Committee’ with the mandate to advise the Prosecutor whether there was sufficient legal basis to conduct an official investigation into NATO’s air campaign. The report of this Committee contains a general assessment of the bombing campaign and a review of specific incidents such as the bombing of a civilian passenger train on the railway bridge near Grdelica, the attack on a refugee convoy near Meja village, the bombing of the Serbian TV and Radio Station RTS and the attack on the Chinese embassy. In reviewing these incidents, the Committee came to the conclusion that although NATO made some mistakes and erroneous judgements, an in-depth investigation of NATO’s actions would not be justified. The stated reasons in the report for not conducting an in-depth investigation include, a lack of clarity regarding the applicable law, and the unlikelihood of acquiring sufficient evidence to substantiate potential charges. Based on this report, Prosecutor Del Ponte decided not to open an investigation into NATO’s conduct.

The Committee’s conclusion contrasted heavily with the reports by human rights organisations Amnesty International and the International Committee of the Red Cross (ICRC). Amnesty International concluded that, in several instances, NATO violated its obligations under the laws of war. Notable examples include the attack on RTS, a civilian target (Article 52 (I) of Protocol I of the Geneva Conventions), and the attack on the railway
bridge near Grdelica, breaching the obligation to abort an attack the moment it is evident that the attack struck civilians (Article 57 (2) (b) of Protocol I of the Geneva Conventions). The Report of the ICRC also addressed the working methods of the Committee and its possible bias in favour of NATO. The following critiques of ICRC and others have been formulated:

- The Committee has been criticised for the selection and treatment of sources in assessing NATO’s actions. As regards NATO documents, The Committee stated “it has tended to assume that the NATO and NATO countries’ press statements are generally reliable and that explanations have been honestly given”. To the ICRC and other observers, the value the Committee has given to these NATO materials is shocking. For instance, the ICRC rapporteur was astounded by the superficiality with which the Committee assessed NATO’s assertion that the attack on the studios of RTS was solely aimed at destroying the Serbs army’s system of command and control. He noted that, in view of the public controversy on this attack, a more thorough investigation into NATO’s behaviour was warranted. The approach towards NATO documents is the more surprising since NATO refused to answer detailed questions from the Committee, limiting itself to only a vague reply concerning the precautions used to limit civilian casualties. As NATO itself was under investigation, and it displayed unwillingness to cooperate fully with the investigation, a more cautious approach towards information originating from the Alliance would have been appropriate. A second critique regarding source management concerns the apparent superficiality of the review. The Committee did not conduct any interviews with NATO personnel, nor did it request information from the FRY, since official channels did not exist with the FRY at that point in time. It is difficult to assess if the Committee’s poor source management springs from external constraints or from an internal lack of impartiality. In any case, its behaviour raises an appearance of partiality.

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290 The report itself is confidential. However, an analysis and several quotes can be found in HAZAN, supra note 57, pp. 135-138.
291 ICTY report on NATO bombing campaign, supra note 285, par. 90.
293 Ibid., p. 137.
294 ICTY report on NATO bombing campaign, supra note 285, par. 12, DEL PONTE, supra note 277, p. 94.
295 ICTY report on NATO bombing campaign, supra note 285, par. 7.
In general, several sources find the quality of the analysis by the Committee below the required level. These authors refer to the use of vague legal concepts, shortcomings in legal reasoning and failure to apply the relevant concepts.296

The Committee primarily investigated incidents involving civilian casualties.297 This selection excludes the assessment of incidents with material damage, although such incidents may have been violations of the laws of war. Particular examples include the bombing of the Danube bridges at Novi Sad or the destruction of power plants and factories. These incidents have not been evaluated with respect to their legality.298

In the event of doubt, the Committee and the Prosecutor seemed to give the benefit of the doubt to NATO. This appears to be the case with respect to the attack on the bridge near Grdelica. In this particular incident, a NATO aircraft fired two bombs at a railway bridge. The first bomb hit a passing train. As the bridge itself was not destroyed, the aircraft fired a second bomb, which hit the train again. The Committee admitted having divided views regarding the legality of the deployment of the second bomb. Moreover, as to the accusation that the train was intentionally targeted, the Committee merely noted, “another interpretation is equally available”. Yet, even in this clear event of doubt, it advised the Prosecutor not to initiate further investigations on the matter.299 Prosecutor Del Ponte followed the advice of the Commission. The ICRC, however, regretted this decision, since it had similar doubts with respect to the legality of NATO’s action.300 At first sight, a more thorough investigation or more robust grounds for not investigating the matter further seem necessary. The lack of either of these creates an image of partiality.

The Committee has been criticised for insufficiently investigating NATO’s use of cluster bombs, especially on the city of Niš. Analogously to Amnesty International, the Committee found that there is no treaty prohibiting the use of cluster bombs301. However, according to Amnesty International, their use entails a high risk of violating the prohibition of indiscriminate attack, as set out in Article 51 paragraphs 4 and 5 of the Geneva Conventions Additional Protocol I.302 The Committee on the other hand superficially compared the use of

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297 ICTY report on NATO bombing campaign, supra note 285, par. 13.
298 BENVENUTI, supra note 296, p. 508.
299 ICTY report on NATO bombing campaign, supra note 285, par. 61-62.
300 HAZAN, supra note 57, p. 136.
301 ICTY report on NATO bombing campaign, supra note 285, par. 27.
302 Amnesty International Report, supra note 289, p. 18.
cluster bombs with the ICTY’s Martić case. Milan Martić, a political leader of the Croatian Serbs ordered an attack on Zagreb with Orkan rockets in May 1995. In this case, rockets landed in an area with no military targets in the vicinity; according to the Trial Chamber the attack was aimed at terrorising the Zagreb population. Without any factual argument presented, the Committee immediately found no indication that NATO used cluster bombs in a similar manner. As an ICTY Trial Chamber has considered the issue of cluster bombs in depth, it is very disturbing that the Committee dealt with this matter so poorly. Again, at least an impression of partiality is evoked.

To conclude, the evaluation of the ICTY Review Committee’s report on the NATO Operation Allied Force uncovered inadequacies in the Committee’s methodology and substantive conclusions. They appear to be of such a degree as to evoke an impression of partiality. Whether there is subjective bias on the part of the Committee or the Prosecutor is more difficult to assess. As to the reason of the apparent partiality, one can easily point to the link between the investigation and the structural constraints of the ICTY’s investigation policy, as presented above with regard to the issue of independence. It is at least likely that Arbour and Del Ponte received pressure from NATO members to abort the investigation or risk losing their cooperation, which has been vital for the Prosecutors to carry out their tasks. However, as to the actual occurrence and the extent of NATO pressure, “[n]o one knows”.

3.2.2. The Case of Ramush Haradinaj

In general terms, the Serbian public believes that the ICTY is prejudiced against Serbians, as most of the Tribunal’s indictees are Serbians. Moreover, Serbs have a perception that indictees from other ethnicities receive favourable treatment. A similar concern of perceived bias in the operation of the ICTY was raised by the Russian delegates in the UN Security Council.

304 ICTY report on NATO bombing campaign, supra note 285, par. 27.
305 HAZAN, supra note 57, p. 139
307 For instance the cases of the Bosniac defendants Naser Oric, Enver Hadzihasanovic and Amir Kubura (See Orentlicher, supra note 306, p. 82).
One of the most visible appearances of bias to Serbians was the trial of Ramush Haradinaj, a former Commander of the Kosovar Liberation Army (KLA) and Prime Minister of Kosovo from December 2004 until March 2005. He was charged with 17 counts of crimes against humanity and 20 counts of violations of the laws or customs of war, for his actions and those of his forces during the KLA 1998 campaign against Serbian civilians and governmental services in Kosovo.\footnote{ICTY, Indictment against Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj Released to the Public. Press Release, 10 March 2005 (http://www.icty.org/sid/8631).} Serbian perceptions of the Tribunal’s bias in this case stem, first of all, from Haradinaj’s acquittal in early 2008 by Trial Chamber I (pending appeal).\footnote{ICTY Trial Chamber I, Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Judgement, Case No. IT-04-84-T (3 April 2008), p. 277.} Haradinaj was found not guilty by the Trial Chamber, since the Prosecutor could not provide sufficient evidence linking him to crimes committed by KLA forces.\footnote{Ibid., pp. 261-265.} The acquittal provoked sharp reactions by Serbian politicians, naming Haradinaj a war criminal and a terrorist. The acquittal, according to Belgrade, is evidence of international bias in favour of Albanians.\footnote{INTERNATIONAL CRISIS GROUP, Will the Real Serbia Please Stand Up? Crisis Group Europe Briefing N° 49, 23 April 2008, p. 11.}

However, this perception of bias is less easy to uphold when taking into account the circumstances of the case. During the investigation of the Haradinaj case, the ICTY faced difficulties securing evidence from an important number of witnesses. Some witnesses refused to testify before the Trial Chamber for fear of retaliation. Consequently, the Trial Chamber could not hear the testimony of several key witnesses.\footnote{Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Judgement, supra note 310, p. 7, 18.} Moreover, during the investigation of the Kosovo indictments, Prosecutor Del Ponte claimed to be confronted by reluctance from UNMIK to deliver evidence to the Tribunal. A possible explanation for this reluctance is the fact that UNMIK saw Haradinaj as a crucial actor in acquiring political stability in Kosovo.\footnote{DEL PONTE, supra note 277, pp. 427-434.} In spite of these difficult circumstances, the Prosecutor showed vigour in pursuing the case against Haradinaj. During her tenure, Del Ponte publicly informed the UN Security Council of UNMIK’s lack of cooperation with the ICTY.\footnote{UN Security Council Provisional Verbatim Record of the 5328th Meeting, 15 December 2005, UN Doc. S/PV.5328, p. 12.} Moreover, she expressed her concern with respect to the intimate relationship between the Haradinaj and UNMIK officials to UN Secretary General Annan.\footnote{DEL PONTE, supra note 277 at pp. 431-432.} Following Haradinaj’s acquittal, the team of Prosecutor Brammertz requested a retrial from the Appeals Chamber, arguing that the Trial Chamber, in view of the intimidated witnesses, erred in law by giving the Prosecutor...
insufficient time to secure evidence from key witnesses.\textsuperscript{317}

A second source of presumed ICTY bias in the Haradinaj case concerns the conditions of his provisional release. In March 2006, following his provisional release in 2005, the ICTY Appeals Chamber allowed him to continue his activities as a politician in Kosovo, including public appearances, subject to the approval by UNMIK, the United Nations administration of Kosovo.\textsuperscript{318} His return to active politics was heavily supported by UNMIK and involved diplomats, convinced that Haradinaj could have a positive contribution to Kosovo’s future status.\textsuperscript{319} Prosecutor Del Ponte did not agree with the Appeals Chamber’s decision, as, in her opinion the appearance of Haradinaj in the media had a chilling and intimidating effect on victims and witnesses. And as expected, the Serbian public, even ICTY supporters, reacted with animus to this decision, considering it as an example of the Tribunal’s bias against Serbs.\textsuperscript{320}

To sum up, the Haradinaj case is a recent example of ICTY conduct perceived as partial by the Serbian public. As regards the Prosecutor, this assessment seems unfair. It is well established that the Prosecutor aimed at getting Haradinaj convicted: Del Ponte tried to address the unfavourable environment of witnesses in Kosov and Brammertz chose to appeal the judgement of the Trial Chamber. Moreover, Del Ponte’s team appealed to the initial decision to let Haradinaj resume his political activities.\textsuperscript{321} As regards the judges in the case, their presumed or actual bias is more difficult to assess. At first sight, their judgement on the merits does not raise a presumption of bias. They explicitly recognised the unfavourable circumstances to secure evidence from witnesses. Moreover, one cannot blame a judge for acquitting an indictee for a lack of convincing evidence. Regardless, a thorough examination of the judges’ behaviour in this case lies outside the scope of this dissertation. On the other hand, the Trial Chamber’s treatment of Haradinaj’s request to return to active politics can give rise to a presumption of bias, since the decision clearly corresponds with the policy goals of the international community with respect to Kosovo and, as has been noted, the ICTY depends on the international community to effectively

\begin{footnotes}
\item[319] INTERNATIONAL CRISIS GROUP Europe Briefing N° 49, supra note 312 at p. 11.
\item[320] ORENTLICHER, supra note 306, pp. 83-84.
\item[321] Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahima, Decision on Ramush Haradinaj’s Modified Provisional Release, supra note 318, p. 1.
\end{footnotes}
3.2.3. Conclusion

The analysis of two test cases for the impartiality of the ICTY – the investigation into NATO’s Operation Allied Force and the Tribunal’s handling of the Haradinaj case – has shown that there are circumstances that can create an impression of partiality, in favour of NATO and ethnic groups other than Serbs. Consequently, it is unsurprising that Serbian actors largely perceive the ICTY as biased towards Serbia.\textsuperscript{322}

3.3. Conclusion: a perceived lack of coherence

Hypothesis Q2 predicts that Serbian compliance will be stronger the more Serbian actors perceive the ICTY regime’s rules are applied coherently in different cases. Coherence was defined as independence and impartiality. Analysis of the ICTY shows that its institutional independence and its impartiality in important cases, as the investigation into NATO and the treatment of the Haradinaj case, can be questioned. The independence and impartiality of ICTY appear to be compromised on several occasions, but this does not warrant a general negative conclusion on the ICTY’s independence and impartiality, sufficient to reject all ICTY investigations and procedures as flawed. However, in the opinion of Serbian actors, which have a more adversarial relation with the ICTY, the examples described above are evidence of a general problem of dependency and bias of the ICTY. Consequently, based on Hypothesis Q2, the perceived lack of coherence in the perception of Serbian actors is likely to not have a positive impact on Serbia’s compliance.

\textsuperscript{322} See infra, pp. 90-91.
4. Determinacy

While the lack of determinacy can be a serious impediment to compliance with international obligations, no such situation seems to arise in the relation between Serbia and the ICTY. As was described above, Serbian obligations are precisely described in Article 29 of the ICTY Statute, and further elaborated in the ICTY Rules of Procedure and Evidence. Additionally, the Office of the Prosecutor continuously reminds Serbia of the content of its obligations, by sending the Serbian government specific requests on cooperation. Analysis of the case has not uncovered important problems in making the precise content of Serbia’s ICTY obligations clear to Serbian actors. On the contrary, the debate with Serbian actors is dominated by questions of political feasibility of executing these requests. It is of course likely that specific requests have not always been sufficiently clear to Serbian actors, due to mistakes or inaccuracies by the ICTY. However, and in accordance to Hypothesis Q3, in general the ICTY regime’s rules appear sufficiently determinate as not to hinder Serbian compliance.

5. Chapter summary

In this chapter, the main aspects of the ICTY regime have been described. Second, the ICTY regime was tested on its procedural qualities. As provided in the theoretical framework of Chapter 2, the regime quality test was operationalised using the factors adherence, coherence and determinacy. According to the hypotheses developed in the theoretical framework, the presence of these factors in the ICTY regime would have a positive influence on Serbian compliance with its ICTY obligations.

As regards the adherence of the ICTY regime, its legal basis is generally accepted in the international community. However, the UN Security Council used the unprecedented technique of a resolution and not a treaty to establish the Tribunal. This fact has been an easy cue for Serbian actors to attack the legality of the Tribunal, as to legitimise non-compliance. The coherence of the ICTY regime, further concretised into the concepts independence and impartiality, has been compromised on several occasions. While these

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323 The assessment of determinacy does not involve the question of legality of Serbia’s obligations as proclaimed by the ICTY Statute and the Rules of Procedure and Evidence. This question is addressed above, in subsection 2 of this chapter.

occasions do not seem to warrant a general negative conclusion on this topic, the doubts are sufficient to trigger the perception by Serbian actors that the Tribunal is biased against Serbia. Finally, the ICTY regime rules seem sufficiently determinate to facilitate Serbian compliance.

To sum up, there are considerable flaws in the procedural qualities of the ICTY regime. While an observer would probably not give a negative evaluation to the ICTY regime’s procedural quality as a whole, it is likely that Serbian actors, skeptical of ICTY regime content, will do so.

In the next chapter, Serbian preferences with respect to the Tribunal will be further explored, and the strategies of the ICTY to cope with these preferences will be analysed.
CHAPTER 4: THE RELATION BETWEEN THE ICTY AND SERBIA

While the previous chapter was focused on the procedural merits of the ICTY, this chapter explores the different layers of the relation between the ICTY and Serbia. The analysis does not follow the structure of the theoretical framework. First, an overview of Serbia's compliance record with its ICTY obligations will be presented. Second, the preferences of Serbian actors with respect to the ICTY will be analysed. In this subsection, use will be made of those hypotheses from the theoretical framework that concern structural aspects of Serbian society, out of the direct control of the Tribunal. Third, three types of ICTY strategies – international conditionality, dynamic identity-based strategies and capacity building – will be discussed. The hypotheses directly related to ICTY behaviour will be applied in these subsections. The analysis of the three types of strategies will provide conclusions that will be used to formulate proposals for future international regimes governing atrocities, in Chapter 5.

1. Serbia’s compliance record with its ICTY obligations 1993-2010

An overview of Serbian compliance with its ICTY obligations is presented in the following paragraphs. The history of Serbian compliance contains several distinctive phases. For every phase, the analysis is split into three parts: a brief assessment of the political situation in Serbia, a general assessment of Serbian compliance and a more detailed analysis of its compliance with specific obligations under Article 29 of the ICTY Statute.\(^\text{325}\)

1.1. Serbian compliance during the Milošević regime

The regime of Slobodan Milošević, FRY President until October 2000, was hostile towards cooperation with the ICTY. Its initial position – non-recognition of the legality and jurisdiction of the Tribunal – was formally abandoned with the 1995 Dayton Agreement,

\(^{325}\) See supra, p. 43.
since the agreement included recognition of the obligation to cooperate with the ICTY.\textsuperscript{326} However, ICTY President Cassese reported in 1996 the continued refusal of the FRY to recognise the authority of the Tribunal.\textsuperscript{327} Moreover, the overall record of Serbian compliance with its obligations towards the ICTY, from the establishment of the Tribunal until the end of Milošević’s rule, is extremely poor. Consequently, the ICTY reported the non-compliance by the FRY on numerous occasions.\textsuperscript{328} The most visible instance of non-compliance was the refusal of the FRY to arrest persons indicted by the Tribunal, which were presumed to reside on the FRY’s territory. Of special concern to the ICTY were the ‘Vukovar Three’ (Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin), who were allegedly responsible for the murder of 260 unarmed men after the fall of Vukovar,\textsuperscript{329} and Ratko Mladić and Radovan Karadžić, who were indicted for planning, instigating or ordering the commission of genocide, crimes against humanity, and war crimes in Bosnia and Herzegovina.\textsuperscript{330} In the case of Mladić, it was reported that he was even allowed to make a public appearance in Belgrade.\textsuperscript{331} The FRY did transfer Dražen Erdemović and Radoslav Kremenović to the ICTY in March 1996 for the purpose of questioning with respect to the 1995 massacre of Srebrenica.\textsuperscript{332} However, they were not yet indicted by the ICTY. Consequently, the FRY policy of non-extradition of Serbs indicted by the Tribunal, could be upheld.\textsuperscript{333} A second important aspect of the FRY’s policy of non-compliance was its inability to enact domestic legislation to provide a framework for cooperation with the ICTY.\textsuperscript{334} Thirdly, the FRY’s non-compliance policy became painfully clear to the ICTY when the FRY refused to issue a visa to Prosecutor Arbour and her team, who wished to conduct

\begin{itemize}
\item \textsuperscript{326} See supra, p. 44.
\item \textsuperscript{327} ICTY, President Cassese takes stock of current co-operation between Croatia, the FRY and the Tribunal. Press Release, 6 February 1996 (http://www.icty.org/sid/7420).
\item \textsuperscript{329} Letter Dated 25 April 1996 from the President of the ICTY Addressed to the President of the Security Council, UN Doc. S/1996/319.
\item \textsuperscript{330} Letter Dated 11 July 1996 from the President of the ICTY Addressed to the President of the Security Council, UN Doc. S/1996/556.
\item \textsuperscript{332} ICTY, Erdemovic and Kremenovic transferred to The Hague, Press Release, 30 March 1996 (http://www.icty.org/sid/7387).
\item \textsuperscript{334} Letter Dated 8 September 1998 from the President of the ICTY Addressed to the President of the Security Council, UN Doc. S/1998/839, p. 2.
\end{itemize}
investigations into alleged war atrocities in Kosovo in October 1998.  

1.2. The Koštunica – Đindić cohabitation

In the first years after the fall of Milošević, Serbian policy with respect to the ICTY was determined by the power struggle between FRY President Vojislav Koštunica, from the centre-right nationalist party DSS, and Serbian Prime Minister Zoran Đindić, from the pro-Western ‘Democratic Party’ (DS). Although the two were briefly together in the broad Serbian coalition government of the ‘Democratic Opposition of Serbia’ (DOS), Koštunica’s DSS had already withdrawn from the Serbian cabinet by 17 August 2001. As regards the ICTY, Koštunica, together with an important part of the Serbian political elite, considered the Tribunal as illegitimate and anti-Serbian, and opposed cooperation with it. Đindić, however, was more willing to cooperate with the Tribunal, as to assure Western economic support. Consequently, the FRY’s compliance with its ICTY obligations from the fall of Milošević until early 2003, although improved in comparison to the Milošević era, can be characterised as “complicated and varied”, “far from being full and proactive” and “affected by the political instability within the coalition government”. The ICTY further reported that cooperation from the federal level was weak, while cooperation on the level of the Republics was better, although only in selected areas and on only a case-by-case basis.

As regards the arrest and transfer of indicted persons to the ICTY, the FRY’s policy made a positive turn with the arrest of former President Milošević on 1 April 2001 and his subsequent transfer to The Hague on 28 June 2001. Influenced by strong American pressure, the Đindić government arranged the transfer. President Koštunica on the other hand, was opposed to it. It must be noted that Milošević’s transfer is a notable exception

338 ORENTLICHER, supra note 306, pp. 28-29.
340 ibid.
342 ORENTLICHER, supra note 306, pp. 29-30.
to an otherwise very recalcitrant position of the FRY towards the arrest and transfer of ICTY indictees. By October 2002, the FRY had transferred only 14 indictees to The Hague. Most of them had voluntarily surrendered, while those arrested by the FRY were Bosnian Serbs without political or military significance to Belgrade.\footnote{ICTY, Address by the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Mrs. Carla del Ponte, to the United Nations Security Council. Press Release, 30 October 2002, \url{http://www.icty.org/sid/8056}, p. 2.} Moreover, no progress at all was achieved with respect to top fugitives such as Radovan Karadžić and Ratko Mladić. The latter appeared to be still under the protection of the Yugoslav Army.\footnote{UN Security Council Provisional Verbatim Record of the 4429th Meeting, 27 November 2001, UN Doc. S/PV.4429, p. 13.}

A second strain in the FRY’s relation with the ICTY concerned its refusal to give the Prosecutor access to valuable military archives, including the minutes of the Supreme Defence Council. Del Ponte attributes this refusal, \textit{inter alia}, to Serbian fears concerning the effect disclosure would have on the cases against Serbia, brought before the ICJ by Bosnia and Croatia, in the event the content of these documents would fall into the hands of the ICJ.\footnote{ibid, p. 3; DEL PONTE, supra note 277, p. 292.}

A third major obstacle in the relation between the ICTY and the FRY concerned the protection of ‘insider witnesses’, who would be able to present decisive evidence to the Tribunal. Indeed, the FRY notified several of the potential witnesses that, by being in contact with the Prosecutor, they risked violating domestic law, which protects official and military secrets. Moreover, the distribution of waivers to these witnesses was incomplete, and, thus, not reassuring to them.\footnote{ICTY, Address by the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Mrs. Carla Del Ponte, to the United Nations Security Council. Press Release, 30 October 2002, \url{http://www.icty.org/sid/8056}, p. 3.} Of especially grave concern was the FRY’s pressure on Zoran Lilić, former President of Yugoslavia, not to give evidence to the Court in the case against Milošević.\footnote{DEL PONTE, supra note 277, p. 221.}

A last important hurdle for the ICTY was the lack of sound domestic legislation enabling the FRY to cooperate with the Tribunal. On 11 April 2002, the Serbian Parliament adopted the ‘Law on Cooperation’ with the ICTY. However, Article 39 of this law crucially prohibits the extradition of any person indicted by the ICTY after the entry into force of the law.\footnote{ICTY, Annual Report 2002, 4 September 2002, UN Doc. S/2002/985, par. 227.}
Consequently, Serbia’s non-compliance in this period did not limit itself to refusing cooperation on a practical level, but instead amounted to blatant refusal of jurisdiction of the ICTY, in clear violation of its legal obligations.

1.3. The post-Đinđić transition

On 4 February 2003, the FRY was replaced by the State of Serbia and Montenegro (S&M). \(^{349}\)

One month later, on 12 March 2003, Serbian Prime Minister Zoran Đinđić was murdered. His tragic assassination triggered a period of reform in Belgrade. First of all, the new Serbian Prime Minister Zoran Živković, initiated a major police action called ‘Operation Saber’, against organised crime in general and any governmental institution allegedly involved in the assassination specifically. \(^{350}\)

Second, Serbian politicians showed willingness to improve Serbian compliance with its ICTY obligations. \(^{351}\) Consequently, The ICTY reported that “[c]ooperation with Serbia and Montenegro is improving but continues to be complex, partial and varied” and that overall, “cooperation is still neither full nor proactive”. \(^{352}\)

As regards the transfer of indictees to the ICTY, S&M extradited seven alleged war criminals in this period of time. Importantly, several of these indictees did not merely surrender themselves voluntarily, but were arrested by Serbian authorities. \(^{353}\)

However, no progress was made with respect to the arrest of top fugitives Mladić and Karadžić, while at least Mladić was reported to reside in Serbia. \(^{354}\)

S&M continued to be reluctant to deliver sensitive documents to the Prosecutor, in view of the proceedings before the ICJ. \(^{355}\) However, following a binding Trial Chamber order, the Prosecutor started to receive some of these documents. \(^{356}\)

\(^{349}\) RAMET, PAVLAKOVIĆ, _supra_ note 279, p. 38.

\(^{350}\) Ibid.

\(^{351}\) ORENTLICHER, _supra_ note 306, p. 32.


\(^{354}\) UN Security Council Provisional Verbatim Record of the 4838\(^{18}\) Meeting, 9 October 2003, UN Doc. S/PV.4838, p. 12

\(^{355}\) DEL PONTE, _supra_ note 277, p. 303.

Progress was also made with respect to domestic legislation regarding the cooperation with the ICTY. Using its temporary emergency powers following the Đinđić assassination, the Serbian government adapted the 2002 Law on Cooperation. The controversial Article 39, which prohibited the Serbian government to extradite a person indicted after the entry into force of the law, was struck.\footnote{ICTY, Annual Report 2003, 20 August 2003, UN Doc. S/2003/829, par. 243.}

All in all, a more positive assessment of S&M’s compliance with its ICTY obligations in this period seems legitimate. However, this improvement did not imply a general acceptance of the ICTY regime in Serbia. This is evidenced by the strong Serbian reaction against the unsealing of the indictment of four Yugoslav generals on 20 October 2003. Particularly, the indictment of General Sreten Lukić, who was considered the hero of Operation Saber, provoked fierce protest from Serbian politicians.\footnote{ICTY, Indictment Unsealed in the Case the Prosecutor v. Nebosja Pavkovic, Vladimir Lazarevic, Vlastimir Djordjevic and Sreten Lukic. Press Release, 20 October 2003 (http://www.icty.org/sid/8176); RAMET, PAVLAKOVIĆ, supra note 279, p. 44.} According to Prosecutor Del Ponte, Serbian Prime Minister Živković even warned her that the arrest warrant against General Lukić made Serbian cooperation with the Tribunal impossible.\footnote{DEL PONTE, supra note 277, p. 307.}

1.4. The Tadić – Koštunica cohabitation

Serbian politics from 2004 until the spring of 2008 is characterised, yet again, by a cohabitation of nationalist and pro-Western forces. In the December 2003 Serbian Parliamentary elections, the nationalist forces gained a clear victory. Koštunica’s DSS gained 18% of the votes, while the extreme right (Serbian Radical Party) SRS received 28%. In general, 61% of the electorate voted either right wing or nationalist.\footnote{INTERNATIONAL CRISIS GROUP, Serbia’s U-Turn. ICG Europe Report N° 154, 26 March 2004, p. 4.} As it was impossible for the SRS to find a parliamentary majority, Koštunica’s DSS formed a minority government without SRS or DS, but with the tacit support from Milošević’s former party, the Socialist Party of Serbia (SPS).\footnote{Ibid, p. 11.} Consequently, Koštunica became Prime Minister of Serbia. In June 2004, the Serbian Presidential election was won by the DS party leader Boris Tadić, who favoured reforms, Euro-Atlantic integration and cooperation with the ICTY.\footnote{MATIĆ, 2004, supra note 336, p. 3 and 11.} However, as the role of the president is limited and largely symbolic, the key executive powers...
determining compliance with the ICTY obligations were held by the Koštunica government. \textsuperscript{363} Since this minority government was dependent on the SPS support, a worsening of Serbian compliance was expected. \textsuperscript{364}

As regards Serbian compliance with its ICTY obligations, the Tribunal reported that “[F]rom the beginning of 2004 Serbia and Montenegro practically suspended any cooperation with the Tribunal”. \textsuperscript{365} This situation prompted the ICTY to notify the UN Security Council concerning the matter. \textsuperscript{366} However, following the election of pro-Western President Tadić in June 2004, international conditionality policies and pressure within Koštunica’s coalition, Serbian compliance improved markedly, but failed to be complete. \textsuperscript{367} This level of compliance, notwithstanding some variation, was upheld until early 2008. \textsuperscript{368}

Serbia facilitated the transfer of numerous suspects from July 2004 onwards, including Generals Lukić and Pavković. \textsuperscript{369} However, these transfers primarily concerned voluntary surrenders. Moreover, the indictees, following their surrender, received financial rewards and were praised as heroes and patriots. \textsuperscript{370} Serbia continued its reluctance to arrest the six remaining fugitives believed to be residing in Serbia until 2007, when it performed two successful operations to track and arrest ICTY indictees, including the third-most wanted fugitive Zdravko Tolimir. \textsuperscript{371} However, Serbia did not succeed in locating or arresting Ratko Mladić despite the repeated promise that he would be apprehended ‘soon’. Moreover, Prosecutor Del Ponte reported not to be “convinced that Serbia is ready to arrest Mladić. For a number of reasons, the authorities may still prefer to force him to surrender voluntarily”. \textsuperscript{372}

\begin{itemize}
\item \textsuperscript{363} Ibid., p. 3; ORENTLICHER, \textit{supra} note 306, p. 33.
\item \textsuperscript{366} ICTY, Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Reports Serbia and Montenegro’s Non-Cooperation to the Security Council. Press Release, 4 May 2004 (\url{http://www.icty.org/sid/8433}).
\item \textsuperscript{370} LAMONT, \textit{supra} note 76, p. 111; ORENTLICHER, \textit{supra} note 306, p. 33.
\item \textsuperscript{372} UN Security Council Provisional Verbatim Record of the 5453\textsuperscript{rd} Meeting, 7 June 2006, UN Doc. S/PV.5453, p. 11.
\end{itemize}
Serbia approved access to its archives for ICTY investigations in May 2006. From then onwards, the Prosecutor reported positively on the access to documents. Similar progress was achieved with respect to acquiring waivers for witnesses. Of particular importance in acquiring this progress were the efforts of the President of the National Council for Cooperation Rasim Ljajić.\(^{373}\)

### 1.5. Consolidation of compliance

Two events on the political level had a positive impact on Serbia’s compliance with respect to its ICTY obligations. First of all, the Serbian electorate granted incumbent President Tadić a second term as President in February 2008. Tadić won the presidential election with only a two percent margin from the SRS candidate Nikolić.\(^{374}\) Second, plagued by internal differences over its international policy following Kosovo’s proclamation of independence, the government of Prime Minister Koštunica collapsed in March 2008.\(^{375}\) Tadić’s DS party gained a victory in the subsequent elections. In June 2008, DS formed a coalition with SPS on a pro-European platform. DS technocrat Mirko Cvetković became the new Prime Minister.\(^{376}\)

The change of government had a positive effect on Serbia’s compliance with its ICTY obligations. In 2008, the ICTY noted Serbia’s adequate responses to several requests for assistance.\(^{377}\) During 2009, cooperation improved further, as the ICTY reported Serbian compliance with the majority of its requests.\(^{378}\)

The most visible aspect of Serbia’s improved compliance was the arrest of Radovan Karadžić on or shortly prior to 21 July 2008.\(^{379}\) As the Belgrade District Court ruled positive on the

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374 ICG Europe Briefing N° 49 supra note 312, p. 2.
375 ibid., p. 1.
legality of his extradition, Karadžić was transferred to the ICTY on 30 July 2008. Although Karadžić’s arrest is an example of its increasing cooperation with the Tribunal, Serbia had not succeeded in locating or arresting the last two remaining ICTY fugitives, Ratko Mladić and Goran Hadžić. Prosecutor Brammertz stated in early 2010 that their arrest “is the absolute highest priority” and that “a very limited group of people are entrusted with arresting the fugitives, while a significant number help to hide them.”

On ICTY access to documents, the Tribunal reported difficulties with respect to some archives in 2008, while by 2009 nearly all important requests were addressed. With respect to ICTY access to witnesses, the Tribunal was assisted by the Serbian War Crimes Prosecutor to secure important evidence and give witnesses the necessary protection. The ICTY again recognised the positive role of the National Council of Cooperation for acquiring this level of compliance.

2. Serbian domestic preferences on compliance with ICTY obligations

In the analysis of the compliance pattern of a state with a certain international legal regime, research into the domestic preferences of that state is of paramount importance. As has been demonstrated in the theoretical framework presented in Chapter 2, a state as a whole needs to be deconstructed into multiple domestic actors and the preferences of these domestic actors determine the state’s position with respect to international obligations. The previous paragraphs have given a general outline of the Serbian political situation with respect to the ICTY. The following paragraphs contain an in depth analysis of the preferences of all relevant Serbian actors. These actors are politicians, relevant governmental services, NGOs and the public opinion. Subsequently, the collected data will be screened for their

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correlation with the following hypotheses of the theoretical framework, as to assess the effectiveness of ICTY compliance strategies:

- **Hypothesis I1:** Internalisation-based compliance is more likely the more Serbian actors are in a novel and uncertain environment and thus cognitively motivated to analyse new information.
- **Hypothesis I2:** Internalisation-based compliance is more likely the more Serbian actors have few prior, ingrained beliefs that are inconsistent with the socialising agency’s message.
- **Hypothesis I3:** Internalisation-based compliance is more likely if the socialising agency/individual is an authoritative member of the Serbian in-group to which the target belongs or wants to belong.
- **Hypothesis A1:** Acculturation-based compliance is more likely the more Serbian actors value the social relation with the international community.
- **Hypothesis A3:** Acculturation-based compliance is more likely the more Serbian actors are receptive to the content of the ICTY regime.
- **Hypothesis Co4:** the level of compliance depends on the size of the other side of the strategic calculus, namely the adoption costs.
- **Hypothesis Q1:** Serbian compliance will be stronger the more Serbian actors believe that the ICTY regime has a valid basis in international law. (adherence-test)
- **Hypothesis Q2:** Serbian compliance will be stronger the more Serbian actors perceive the ICTY regime’s rules are applied coherently in different cases.

These hypotheses will be applied as far as they predict the structural impediments or catalysts for ICTY compliance in the Serbian domestic context. The ICTY remains passive in this analysis. The strategies adopted by the ICTY itself will be analysed later on.

2.1. Politicians

The Milošević regime itself was implied in the war atrocities committed during the Yugoslav wars. Consequently, it consistently influenced Serbian society with anti-ICTY propaganda, and the regime’s total lack of cooperation is no surprise. This clearly hostile policy came to an end with the fall of Milošević. International Crisis Group has categorised Post-Milošević

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386 ORENTLICHER, supra note 306, p. 27.
Serbian politicians in three different groups: wartime nationalists, right-wing populists and reformers. They have been deeply divided over the issue of cooperation with the ICTY with positions ranging from virulent obstruction, pragmatic compliance, to compliance on moral grounds.

2.1.1. Wartime nationalists

Wartime nationalists are still strongly represented in Serbian politics, most notably through the Serbian Radical Party (SRS) of ICTY-indictee Vojislav Šešelj. The SRS, received over 29% of the votes cast in the 2008 Parliamentary elections. This party has been the political voice of extreme Serbian nationalism since the 1990s and it has been connected by the ICTY to paramilitary groups active during the wars in Bosnia, Croatia and Kosovo. Moreover, SRS has a reputation of using violence and intimidation in its political activities. Examples of SRS unsuited behaviour include attacking a cabinet member on the basis of her Croatian ethnic background, and throwing a shoe at a cabinet member during the 2009 debate regarding more autonomy for Vojvodina province. A very clear example of the party’s extreme views was party leader Šešelj’s television statement in 1993 that Muslims would be slaughtered with rusty spoons. The SRS has a strong anti-ICTY profile. In parliamentary discussions for instance, SRS deputies have expressed their support for Ratko Mladić, who they called a hero. Additionally, they accused the ICTY of killing Milošević and discriminating against Serbs. Moreover, they denied or minimised violence by Serbs, while stressing the hardships and losses of Serbs in the Balkan conflicts. Most notably, SRS called the arrest of Karadžić in July 2008 “horrible” and evidence of the consolidation of Tadić’s “dictatorship”.

Following SRS’s refusal to ratify the Stabilisation and Association Agreement with the EU in

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387 ICG Europe Report N° 154, supra note 360, p. 4.
388 These three possible opinions on the ICTY do not correspond to the three categories of political parties.
390 Ibid. p. 5.
393 ICG Europe Report N° 154, supra note 360, p. 5.
394 ORENTLICHER, supra note 306, p. 61.
2008, party deputy leader Timoslav Nikolić left the SRS and established the Serbian Progressive Party (SNS). Consequently, the future political power of Serbian ultranationalism is uncertain at this point in time.

The second wartime nationalist political party still of importance today, is the Socialist Party of Serbia (SPS). In the past, it was headed by Slobodan Milošević. In the 2008 Parliamentary elections, SPS acquired almost 8 percent of the votes cast. Until recently, the SPS had a negative position towards the ICTY. For instance, in 2004 SPS pressured Koštunica’s minority government, in need of the Socialists’ support, to stop all arrests and transfers to The Hague. Similar to SRS deputies, SPS members of Parliament have glorified ICTY indictees, denied or minimised violence by Serbs and emphasised war crimes committed against Serbs. A telling example was the labelling of President Tadić’s apologies to Bosnia on the Srebrenica massacre as “shameful”. In June 2008, SPS joined the DS-led cabinet, which is held responsible for the arrest of Karadžić and the improvement in compliance with the ICTY. On the arrest of Karadžić, the SPS leadership reacted that although it was not involved with the arrest, Serbia must respect its domestic and international obligations. This could be evidence of a softening of SPS policy with respect to the ICTY and war crimes.

2.1.2. Right-wing populists

The conservative populist and nationalist party DSS, led by Vojislav Koštunica, played a crucial role in Serbian politics from 2000 until 2008, as holder of the office of President of the FRY until 2003 and as major partner in Serbian coalition governments led by Koštunica. The party received 18% of the votes cast in the 2004 Parliamentary elections. However, in the 2008 Parliamentary elections, popular support for its coalition with the smaller party NS dropped to 11%. During DSS’s years in power, DSS hindered reform, obstructed purges in

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401 HLC 2006, supra note 396, p. 35.
402 B92, RIK: Pro-EU coalition wins 102 seats. Supra note 389.
403 ICG Europe Report N° 154, supra note 360, p. 4.
404 B92, RIK: Pro-EU coalition wins 102 seats. Supra note 389.
the army and security forces of Milošević supporters and opposed reform of the judiciary.405

As already mentioned, Koštunica and DSS disapproved of the ICTY and only reluctantly cooperated with the Tribunal under threat of international isolation. Koštunica’s DSS is officially in favour of Serbian accession into the EU. However, during Koštunica’s tenure as Prime Minister he found a powerful ally in Russia, especially in opposing Kosovo’s 2008 declaration of independence.406 Moreover, Koštunica seemed willing to risk isolation from the Euro-Atlantic community over losing Kosovo.407

Koštunica has made negative comments on the ICTY on multiple occasions. In general, he described the Tribunal as illegitimate, politicised and anti-Serb. In particular, the described the anti-Serb character of the ICTY as being evidenced by the fact that it has indicted too many Serbs.408 On other occasions, he identified the ICTY with NATO,409 or called it “the last hole on the flute”,410 and once remarked in a TV show that he felt sick when thinking of the Tribunal.411 In 2008, Koštunica called the ICTY’s acquittal of Kosovar leader Haradinaj a “complete mockery of justice” and stated that “Serbia had every right to question the legitimacy of the The Hague Tribunal as an institution capable of reaching just verdicts”.412 On the other hand, in 2007 Koštunica did recognise the need for Serbia to arrest the remaining ICTY fugitives, including Mladić and Karadžić.413

In sum, DSS has shown an ambivalent stance on cooperation with the ICTY. One of the most symbolic implementations of this policy is the transfer of the four generals who were indicted in 2003. Upon their voluntary surrender, they were treated as national heroes. For instance, on the day of his transfer to The Hague in February 2005, General Lazarević had a

406 ICG Europe Briefing N° 49, supra note 312, p. 7.
411 RAMET, PAVLAKOVIĆ, supra note 279, p. 34.
meeting with Koštunica and the Serbian Orthodox Patriarch Pavle. Two government ministers subsequently escorted him to his plane.  

2.1.3. Reformers

The reformist forces in Serbian politics are headed by the Democratic Party (DS) of the assassinated Prime Minister Zoran Đinđić and current President Boris Tadić. In general, DS is in favour of major reforms and integration in the Euro-Atlantic community, and he is prepared to respect Serbia’s international obligations. In the 2008 Parliamentary elections, the DS-led list ‘For a European Serbia – Boris Tadić’ received 38.75% of the votes.

Prime Minister Đinđić was an essential ally of the ICTY in securing the arrest of Slobodan Milošević. Of importance to note is his personal connection with Prosecutor Carla Del Ponte. She reported positively on their first encounter in Belgrade, in January 2001. During the following months they met secretly on several occasions, near Del Ponte’s house in Lugano and in the tax-free zone of Schiphol airport. Đinđić promised her to extradite Milošević to The Hague, even if he needed to abduct him. Later on, in 2002, he arranged secret meetings for Del Ponte with Generals Perišić and Pavković, to discuss their cooperation with the Tribunal. However, Đinđić did not motivate his cooperation with the Tribunal on moral grounds, as if cooperation is necessary to acquire justice. Instead, he legitimised the Milošević arrest and transfer on pragmatic reasons, such as the prospect on EU membership for Serbia and international financial support.

Current Serbian President and DS party leader Boris Tadić has continued the cooperative stance towards the ICTY of his predecessor. Moreover, he and other reformist politicians have increasingly based this policy on moral grounds, since the assassination of Đinđić. In the beginning of his first mandate in 2004, President Tadić apologised to the people of

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416 892, RIK: Pro-EU coalition wins 102 seats. Supra note 389.
417 See supra, p. 73.
419 ORENTLICHER, supra note 306, p. 29.
Bosnia for war crimes committed by Serbians. He repeated this apology to the Croatian people in 2007 and called the actions of General Mladić one of the darkest pages of Serbian history.\footnote{B92, Tadić: It was my duty to apologize. 25 June 2007 (http://www.b92.net/eng/news/politics-article.php?yyyy=2007&mm=06&dd=25&nav_id=42021).} In July 2008, his DS colleague, Prime Minister Cvetković welcomed the arrest of Karadžić, referring not to international conditionality, but to Serbia’s international and domestic obligations. He called the arrest a big step for Serbia and urged the remaining fugitives to surrender voluntarily.\footnote{B92, Cvetković calls on remaining fugitives to surrender. 22 July 2008 (http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=07&dd=22&nav_id=52121).}

### 2.1.4. Analysis

The end of the Milošević era did not bring a clear break with the past, since anti-ICTY rhetoric continued to be propagated by Serbian nationalist political parties such as SRS, SPS and DSS. They have significantly hindered Serbian compliance with its ICTY obligations. Importantly, an number of these politicians were connected with the wartime Serbian government. Consequently, prior ingrained beliefs in the political arena hindered compliance with the ICTY (Hypothesis I2). Moreover, in the early years of the post-Milošević era, cooperation with the ICTY was motivated on instrumental and not on moral grounds. Even in 2007, reformist members of parliament were reluctant to actively counter anti-Hague and pro-Mladić outbursts by ultranationalist deputies.\footnote{HLC, 2007, supra note 395, pp. 32-33.} However, politicians like President Tadić have progressively legitimised their support for the ICTY on moral grounds. This new moral stance is combined with real progress in Serbian compliance with the ICTY. These politicians face enduring criticism from nationalist forces, such as Koštunica, who still pushes for Serbia to question the Tribunal’s legitimacy.\footnote{B92, Koštunica: Arrest “portrayed” as success. 23 July 2008 (http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=07&dd=23&nav_id=52131).} A most recent example of the political differences on Serbia’s war crimes past is the 31 April 2010 Parliamentary resolution condemning the 1995 Srebrenica massacre.\footnote{B92, MP’s adopt Srebrenica declaration. 31 March 2010 (http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=03&dd=31&nav_id=66160).} Only 127 of 250 deputies voted in favour of the resolution,\footnote{Ibid.} as DSS and SRS MP’s opposed its content.\footnote{BALKAN INSIGHT.COM, Adoption of Srebrenica Declaration Draws Mixed Reactions. 31 March 2010 (http://www.balkaninsight.com/en/main/news/27039/).} Clearly, the activism and political power of authoritative members of the Serbian in-group who support the ICTY and
wish to come to terms with Serbia’s bloody past is growing (Hypothesis I3 and A3). However, as the pro-ICTY politicians still only constitute a slim and vulnerable majority, the adoption costs of an ICTY compliance policy risk being high (Hypothesis Co4).

2.2. Governmental services

2.2.1. Domestic security services and the army

The domestic security services, residing under the Ministry of the Interior, remained largely unreformed and were kept outside democratic control for a long time. They are strongly motivated to block cooperation with the ICTY because its personnel – for instance the elite-unit ‘Red Berets’ – and its leadership – for instance General Lukić – have been implied in war atrocities during the Yugoslav wars. Accordingly, it has been reported that these services possess information on war crimes, but that they keep the information secret as not to compromise their own officials.

Like the security forces, the Serbian army has been insufficiently reformed following the collapse of the Milošević regime. Proper civilian control is lacking. Very worrisome has been the presence of officers, implied in war atrocities, who continued to serve in the highest echelons of the army. These include Chief of Staff General Pavković and General Lazarević, who were both commanders of the Serbian army during the Kosovo conflict. As has been stated before, they only surrendered to the ICTY in 2005, following heavy pressure by the Serbian government. In general, the army has not purged its ranks of persons who have been implicated in the war crimes of the 1990s. As regards cooperation with the ICTY, Prosecutor Del Ponte claims that the army has protected Ratko Mladić, at least until 2005. For instance, he received his army salary until 2002, and his army pension until

428 ORENTLICHER, supra note 306, p. 31; ICG Balkan Report N° 126, supra note 410 at pp. 18-20.
Moreover, in a November 2002 meeting with Del Ponte, the army top refused any cooperation with the ICTY on tracking down Mladić, as his arrest was allegedly a civilian matter. Del Ponte’s accusation is \textit{inter alia} confirmed by the Humanitarian Law Center, a Belgrade-based NGO.\footnote{DOBBELS, \textit{supra} note 429, p. 37.}

Clearly, the domestic security services and the army have a negative impact on Serbian compliance with its ICTY obligations. Their officials, many of them having participated in the war crimes, are likely to have prior ingrained beliefs on nationalism and war atrocities. Consequently, strong resistance to internalisation and acculturation with respect to the ICTY regime is expected (Hypothesis I2 and A3). Additionally, there is no information on authoritative members of the security service community or the army supportive of the ICTY, who would be able to exercise a pro-ICTY influence on these services. On the contrary, police and army Generals Lukić, Pavković, Lazarević and Đorđević have been sentenced by the ICTY for war crimes. (Hypothesis I3). As regards international coercion to cooperate, these services are a veto-player, raising the domestic costs of compliance (Hypothesis Co4).

\textbf{2.2.2. The National Council of Cooperation and the War Crimes Prosecutor}

Not all governmental services have obstructed the work of the ICTY. A notable example of good cooperation is the National Council of Cooperation. This Council was established by the Law on Cooperation of April 2002 with the task of coordinating the government’s responses to requests from the Tribunal.\footnote{ORENTLICHER, \textit{supra} note 306, p. 30.} These requests primarily concern waivers for witnesses concerning their obligation not to disclose state and official secrets, and access to documents. The Council has gradually become a decisive factor in securing Serbian cooperation. By November 2004, Del Ponte mentioned the positive efforts of the Council in delivering waivers for witnesses to cooperate with the Tribunal.\footnote{UN Security Council Provisional Verbatim Record of the 5086th Meeting, 23 November 2004, UN Doc. S/PV.5086, p. 12.} And following the appointment of Minister Rasim Ljajić as chairman of the Council, cooperation between the ICTY and the Council further improved. For instance, the Council enhanced the coordination

\footnote{DEL PONTE, \textit{supra} note 277, pp. 245-247.}

\footnote{HLC 2006, \textit{supra} note 396, p. 16.}

\footnote{435 HLC 2006, \textit{supra} note 396, p. 16.}

\footnote{UN Security Council Provisional Verbatim Record of the 5086th Meeting, 23 November 2004, UN Doc. S/PV.5086, p. 12.}
between itself and other services of the Serbian government.\textsuperscript{438} The Council’s positive performance led the ICTY to consistently commend the Council and its chairman for their efforts to secure full compliance with Serbia’s ICTY obligations.\textsuperscript{439} Importantly, Ljajić efforts to cooperate with the ICTY seem to be based not on instrumental but on moral grounds. For instance, he considered the arrest of Zdravko Tolimir in 2008 a clear signal to the remaining ICTY fugitives that there can be no escape from justice.\textsuperscript{440} And in 2010, he said that the parliamentary resolution condemning the Srebrenica massacre was to be adopted because of moral reasons and the prospect of regional reconciliation.\textsuperscript{441}

Another Serbian government actor delivering a positive contribution to Serbian compliance is the War Crimes Prosecutor, established following the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, of 1 July 2003.\textsuperscript{442} The first and current War Crimes Prosecutor is Vladimir Vukčević.\textsuperscript{443} Over the years, he has offered valuable assistance to the ICTY. First of all, his office promptly provided protection for ICTY witnesses who were being threatened.\textsuperscript{444} Second, Vukčević has been intensely involved in the search and arrest of ICTY fugitives such as Stojan Župljanin and Radovan Karadžić.\textsuperscript{445} Vukčević has frequently stated in the Serbian media that efforts to search and arrest the remaining fugitives Mladić and Hadžić are continuously made.\textsuperscript{446} Moreover, Vukčević legitimised Serbian compliance with its ICTY obligations on moral grounds, “not because of The Hague, but for the sake of justice and apology to the victims, which morality and the verdict of the International Court of Justice in The Hague commits us to”.\textsuperscript{447}

The Council, under the lead of Ljajić, and War Crimes Prosecutor Vukčević have evolved into
pro-compliance actors. It is not clear if this compliance is due to prior beliefs corresponding to the ICTY regime of the Council’s members, or if the compliant behaviour was developed through ICTY’s exercise of compliance mechanisms. What is clear is that both Ljajić and Vukčević demonstrated having internalised or having acculturated to the ICTY regime content, as they legitimise compliance on moral grounds. Subsequently these officials, both having a high profile in Serbian media, can serve as authoritative members of the Serbian in-group, increasing the strength of internalisation processes in Serbian society (Hypothesis I3).

2.3. Non Governmental Organisations

There are several Serbian NGOs active in the field of human rights and war atrocities. Prominent examples are the Humanitarian Law Center, the Helsinki Committee on Human Rights and the Belgrade Centre for Human Rights. These organisations are active in the field of truth-seeking and informing Serbian society, reconciliation, promoting justice and pressuring the Serbian government towards better compliance with the ICTY.448 They are used by foreign researchers, including the author of this dissertation, as authoritative sources on Serbia’s policy in dealing with its war crimes past. These NGOs have been subject to criticisms by politicians and several media sources, who have labelled them as traitors. In 2008 there were even reports of violent intimidation against HLC and its executive director Nataša Kandić.449

Serbian Human Rights NGOs can serve as an authoritative member of the Serbian in-group. They can promote internalisation of ICTY regime content and consequently improve compliance (Hypothesis I3). However, as radical forces contest their activities, their work is considerably hindered.

2.4. Public opinion

During the years since the establishment of the ICTY, the Serbian public has been regularly questioned on their opinion on the ICTY and related matters. These results present an interesting insight into the preferences of Serbian society. Of course, survey results must be used with care, as the respondent’s preferences are only a proxy to the preferences of a whole population. However, two factors warrant the use of these results as indication of broad trends in Serbian society. First, most surveys have been carried out by experienced polling bureaus whose reports offer satisfying details on used methodology. Second, in writing the following paragraphs, use has often been made of several surveys over a considerable period of time, as to triangulate the results of each survey with others. The general picture delivered by the survey results is a society that is skeptical about the Tribunal, just like many political leaders and government services. Results concerning ICTY-related preferences are presented first. Subsequently, an insight in broader societal processes is given.

2.4.1. ICTY-related preferences

An important majority of the Serbian population has a negative attitude towards the ICTY. In the 2003 Belgrade Centre for Human Rights (BCHR) survey, 58% of the respondents reported a negative attitude towards the Tribunal, while only 8% had a positive attitude.\(^{450}\) The predominantly negative Serbian perception of the ICTY has not diminished in recent years. A joint OSCE-BCHR survey in 2009 indicated that 72% of the Serbian respondents had a negative view on the ICTY. Only 14% had a positive view on the Tribunal.\(^{451}\) Moreover, according to the 2009 Gallup Balkan Monitor survey, 81% of Serbs believe that the ICTY does not serve the interests of the region.\(^{452}\)

The 2009 OSCE-BCHR survey indicated that a negative view on the ICTY is foremost motivated by the belief that the Tribunal is biased against Serbs or only tries Serbs.\(^{453}\) The

\(^{451}\) OSCE, BELGRADE CENTRE FOR HUMAN RIGHTS, Public perception in Serbia of the ICTY and the national courts dealing with war crimes. 2009, slide 7.
\(^{453}\) OSCE, BCHR 2009 survey, supra note 451, slide 8.
perception of anti-Serb bias was already widely held (at 69%) in 2004. Additionally, in 2009, a majority of Serbian respondents (58%) believes that the ICTY judges are generally biased. Moreover, 54% of Serbs asserts that ICTY proceedings do not establish truth, while 35% believe that these proceedings only partially establish truth. Only 6% of respondents entirely trust the truth-establishing function of the ICTY.

As to the question of cooperation with the ICTY, there appears to be a negative trend in the opinion of Serbs. While in 2003 an overwhelming majority of 84% favoured cooperation with the Tribunal, by 2009 this majority had decreased to a mere 55%. Equally worrying is that during this reporting period (2003-2009) only 15% of respondents based their support to cooperation on moral grounds, in order to do justice. Consequently, the majority of cooperation supporters were guided by instrumentalist motives such as integration in the world community and to (and only to the extent necessary to) avoid sanctions.

Remarkable is the fact that a considerable portion of Serbs does not find itself well informed on the activities of the ICTY. In 2003, only 6% of Serbian respondents indicated that they were well informed, while 64% indicated that they were not well informed. Data from 2004 until 2009 show a gradual increase of self-reported knowledge of the ICTY. In 2009, 47% of Serbian respondents claimed to be well informed, while 50% reported to be not well informed. Thus, although the Serbian public seems better informed on the Tribunal than in the past, there is still a serious information problem, which may partially cause negative perceptions towards the Tribunal.

Another potential reason for the continued hostility towards the ICTY is the persisting popularity of high profile indictees Ratko Mladić and Radovan Karadžić. Both wartime leaders have been considered heroes by a significant portion of Serbian society. Even in 2008, 33% of Serbian respondents considered Karadžić a hero, while only 17% saw him as a

455 OSCE, BCHR 2009 survey, supra note 451, slide 24.
456 ibid, slide 19.
457 ibid, slide 17.
460 OSCE, BCHR 2009 survey, supra note 451, slide 5.
criminal and a significant 42% found that he was neither of both. Moreover, 47% of Serbian respondents believed that Karadžić is innocent of most crimes with which he is charged. Accordingly, a significant majority of Serbian respondents in the 2009 OSCE-BCHR survey opposed the arrest and extradition of Karadžić (62%) and Mladić (64%) to the ICTY, while only 23-25% was in favour. These results are mirrored in 2008 polling data presented by Angus Reid Global Monitor, although less outspoken: 54% of Serbian respondents opposed the extradition of suspects to the ICTY, while 42% supported extraditions.

A third potential reason for Serbian hostility towards the Tribunal is a lack of acceptance that several serious war atrocities for which Serbs bear responsibility actually occurred. An important majority of respondents, stable through the reporting period from 2001 until 2009, have heard of war atrocities such as the 1.000-day siege of Sarajevo, the heavy loss of civilian life in Sarajevo due to Serbian snipers and the 1995 Srebrenica massacre. However, the low figure of respondents believing these atrocities actually occurred is worrisome: only 46-50% of respondents believed the Srebrenica massacre to be true, while only 38-53% had this view on the Sarajevo siege. The recent debates in the Serbian Parliament may have had a positive influence on Serbian perceptions on the Srebrenica massacre: while in an early-2010 survey 55.2% of Serbian respondents still believed that Srebrenica was a crime amongst other, deliberately exaggerated by enemies and the media, only 6.7% flatly denied the crime. Still, Serbian society is far from generally accepting the existence of war crimes committed by Serbs.

### 2.4.2. Societal context of ICTY-related preferences

The hostility towards the ICTY of a significant majority of the Serbian public opinion must be assessed in the light of general attributes of Serbian society. First, even in the 2008 Parliamentary elections, the ultranationalists of SRS still received 29,22% of the votes cast.

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462 ANGUS REID GLOBAL MONITOR, Karadžić A Criminal for Only 17% of Serbs. 1 August 2008 (http://www.angus-reid.com/polls/view/31402/Karadzic_a_criminal_for_only_17_of_serbs#).
467 HELSINKI COMMITTEE FOR HUMAN RIGHTS, Helsinki Bulletin N° 58. February 2010, p. 3.
468 B92, RIK: Pro-EU coalition wins 102 seats. Supra note 389.
This result is symptomatic of a strong nationalist undercurrent in Serbian society. Nationalism has traditionally been an important element in Serbian politics and the wars of the 1990s intensified its importance.\textsuperscript{469} The Milošević era propaganda combined nationalism with victimhood. According to this discourse, Serbs are under attack and need to defend themselves.\textsuperscript{470} This discourse clearly resonated strongly with Serbian society and the NATO bombing campaign on Serbia must have strengthened this process. Consequently, Serbian society is still characterised by denial of Serbian war crimes. Ramet explains this phenomenon as having been induced by the shame felt for the Serb atrocities, since denial is a common psychological reaction to shame. Moreover, denial would lead to a critical response against actors who import the repressed shame.\textsuperscript{471} The most prominent of these actors is of course the ICTY.

Second, Serbian society is characterised by distrust. In 2009 a majority of Serbs reported that they distrust their government and evaluate their government’s work negatively. Figures for both variables had decreased with respect to preceding years,\textsuperscript{472} and the results on government performance correspond to data from the 2004 BCHR survey.\textsuperscript{473} Moreover, only a shrinking minority of Serbian respondents (35% in 2006, 26% in 2008 and 20% in 2009) feels itself represented by a political party.\textsuperscript{474} A telling example of Serbian distrust in its own political institutions is Serbian respondent’s answer to the question ‘who they believe the most when it comes to war crimes and the ICTY’. A shocking majority of 54% reported to trust no one, while the media was the most trusted domestic institution (27%). Only 4% trusted its politicians the most.\textsuperscript{475}

Third, as the EU has used strong conditions related to ICTY compliance with respect to Serbian integration, Serbian opinions on EU accession are relevant. Several surveys in 2008 and 2009 indicate that between 50 and 70% of Serbs are in favour of Serbian integration into the European Union.\textsuperscript{476} However, just over half of Serbian respondents in a 2008 survey

\begin{flushright}
\textsuperscript{470} ORENTLICHER, supra note 306, p. 28.
\textsuperscript{471} RAMET, 2007, supra note 414 at pp. 5-6 and 21.
\textsuperscript{472} GALLUP, Balkan Monitor 2009, supra note 452, p. 17.
\textsuperscript{473} BCHR, 2004 survey, supra note 454 at p. 11.
\textsuperscript{474} Ibid., p. 28.
\textsuperscript{475} OSCE, BCHR 2009 survey, supra note 451, slide 44.
\end{flushright}
state not (or only a little) to trust the European institutions.477

2.4.3. Analysis

Surveys performed from 2003 until 2009 indicate that there are significant differences between the ICTY regime and Serbian identities. Importantly, the majority of the Serbian society thinks negatively of the ICTY and perceives the Tribunal as biased against Serbs. Widespread disbelief of the actual occurrence of several well-documented war atrocities and continued support for the ultranationalist SRS evinces prior ingrained beliefs contrary to the ICTY regime content, embedded in a nationalist ideology (Hypothesis I2 and A3). As regards possibilities for international coercion, domestic costs originating from the public opinion can be a considerable constraint to a pro-ICTY policy (Hypothesis Co4). On a more positive note, there is a slight majority in favour of cooperation with the Tribunal, mostly motivated on instrumentalist grounds. Moreover, Serbian positive or neutral stance towards EU accession indicates Serbian public opinion largely values the social relation with the EU. (Hypothesis A1).

2.5. Conclusion: Serbian domestic preferences are divided

2.5.1. General summary

The previous paragraphs have sketched the preferences of the most important Serbian actors vis-à-vis the ICTY. In general, Serbian actors are deeply divided over the ICTY regime and Serbian compliance with it, ranging from a virulent anti-ICTY stance, over reluctant and pragmatic compliance, to morally motivated compliance. During recent years, compliance has improved, although it remains incomplete, and the country’s DS leadership has progressively motivated compliance on the basis of morality and justice. Moreover, a majority of Serbs approves of compliance. However, anti-ICTY feelings are still strong in Serbian society and the opinion that the ICTY is biased against Serbs is widely shared.

2.5.2. Applying the hypotheses

The theoretical framework of Chapter 2 has identified a number of hypotheses that predict stronger Serbian compliance if its conditions are fulfilled. These hypotheses prescribe both structural impediments and catalysts of compliance, and strategies for the ICTY to enhance compliance. The preceding paragraphs have dealt with the former aspect. The strategies the ICTY can apply will be dealt with subsequently.

- **Hypothesis I1**: Internalisation-based compliance is more likely the more Serbian actors are in a novel and uncertain environment and thus cognitively motivated to analyse new information.

At first glance, the end of Milošević’s reign in 2000 brought about a novel and uncertain environment, with the possibility for Serbia to completely reorient itself. However, post-Milošević Serbia has been characterised by considerable continuity with the Milošević era. Many Milošević-regime officials and politicians stayed in office, while nationalist rhetoric dominated the political debate. Moreover, the ICTY was perceived as an outsider and has been associated with NATO, thus threatening the continued Serbian nationalist identity. Consequently, the circumstances for Serbian actors to be motivated to analyse new information, as to internalise ICTY regime content, were insufficiently established.

- **Hypothesis I2**: Internalisation-based compliance is more likely the more Serbian actors have few prior, ingrained beliefs that are inconsistent with the socialising agency’s message.

**Hypothesis A3**: Acculturation-based compliance is more likely the more Serbian actors are receptive to the content of the ICTY regime.

These two hypotheses essentially deal with the same issue, from the perspective of two different compliance mechanisms (internalisation and acculturation). This issue is the degree of incompatibility of existing Serbian preferences with ICTY regime content. The preceding paragraphs have shown that nationalism and anti-ICTY beliefs have been persistent in Serbian society, while government vetting of war atrocities accomplices has not systematically occurred. Moreover, only 15% of Serbs favours compliance with the ICTY on moral grounds, while the majority of pro-compliance Serbs is motivated by instrumentalist reasons such as EU accession. Consequently, internalisation of and acculturation to ICTY
regime content appears to be impeded by too wide a discrepancy with the identity of many Serbian actors.

- **Hypothesis I3**: Internalisation-based compliance is more likely if the socialising agency/individual is an authoritative member of the Serbian in-group to which the target belongs or wants to belong.

While the Milošević regime has virulently opposed the ICTY regime during its reign, post-Milošević leaders at first did not wish or dare to take a pro-ICTY regime position based on moral grounds. However, since 2004, DS politicians headed by Boris Tadić and his coalition partner Rasim Ljajić have motivated their support for the ICTY on moral grounds. Other morally guided supporters of ICTY-compliance include War Crimes Prosecutor Vukčević and human rights NGOs. Thus, although anti-ICTY rhetoric from nationalist forces is still strong, the political debate on the ICTY has seen a surge in pro-ICTY actors, who can function as authoritative members of the Serbian in-group. Consequently, according to this hypothesis, internalisation of ICTY regime content will become more likely in the future, and a positive influence on Hypotheses I2 and A3 is expected.

- **Hypothesis A1**: Acculturation-based compliance is more likely the more Serbian actors value the social relation with the international community.

A good proxy for social relations with the international community in the case of Serbia is the relation with the EU and the accession process. The current Serbian president and government have a strong pro-EU policy. Additionally, a majority of Serbs favour accession to the EU. However, a significant number of politicians and the public opinion is less enthusiastic of EU accession, instead favouring stronger ties with Russia. Additionally, Serbs, generally, do not trust the EU institutions. Consequently, the influence on acculturation processes of the value Serbian actors attribute to the social relation with ICTY-supportive international actors is questionable.

- **Hypothesis Co4**: the level of compliance depends on the size of the other side of the strategic calculus, namely the adoption costs.

Serbian politicians, government institutions and the public opinion are divided over
compliance with the ICTY. Consequently, future compliance acts induced by international coercion, such as the arrest and extradition of Mladić and Hadžić, face high and unpredictable domestic costs as the number of veto-players remains significantly high.

**Hypothesis Q1:** Serbian compliance will be stronger the more Serbian actors believe that the ICTY regime has a valid basis in international law (adherence-test).

**Hypothesis Q2:** Serbian compliance will be stronger the more Serbian actors perceive the ICTY regime’s rules are applied coherently in different cases.

In Chapter 3, it was argued that Serbian actors can identify good reasons to doubt the adherence and the coherence of the ICTY. Moreover, some evidence of Serbian doubt concerning these issues was presented. Evidence of the opinion of politicians and survey data of Serbian society has reinforced this conclusion, especially with respect to the perceived bias of the Tribunal. Consequently, no positive impact from ICTY regime adherence and coherence can be expected.

### 3. International Conditionality

As is established in the theoretical framework, the behaviour of Serbian actors can be adapted by applying international conditionality (incentives and punishments). The force of this conditionality can influence the strategic calculation of Serbian actors in favour of compliance with ICTY obligations, while the underlying identities that dictate the original strategic calculation of these actors, are treated as static. Applying this conditionality on Serbia has been the international community’s dominant strategy. This policy will be presented in the following paragraphs. Moreover, its effectiveness will be assessed based on the conditionality-hypotheses of the theoretical framework:

**Hypothesis Co1:** Serbia will comply more with ICTY obligations if these obligations are modelled as conditions for rewards and the more determinate they are.

**Hypothesis Co2:** The level of Serbian compliance is contingent of the size and speed of the rewards.
Hypothesis Co3: Serbian compliance will be stronger, the more credible threats and promises are.

Hypothesis Co4: the level of compliance depends on the size of the other side of the strategic calculus, namely the adoption costs.

3.1. International conditionality during the Milošević-era

The FRY during the Milošević years had a dismal compliance record with its ICTY obligations. Its non-compliance was frequently reported by the ICTY to the UN Security Council. However, these reports were not met by a solid UN strategy to address the FRY’s non-compliance. The most notable actions by the international community were the UN Security Council Presidential Statement in May 1996 and UN Security Council Resolution 1207 in November 1998, both deploring the FRY’s refusal to cooperate. Consequently, action by the international community was in general limited to paper protest. This choice was probably motivated by the desire not to risk the collapse of the Dayton Agreement negotiations and implementation, and, thus to prioritise stability over justice. After all, a tough position toward the FRY on the matter of compliance with ICTY obligations, as proposed by the Bosnian delegation at Dayton, could have weakened the FRY’s commitment to the Agreement.

Additionally, the credibility of international paper protests was undermined by the international community’s lack of direct support for the ICTY. Western governments were reluctant to share information with the Tribunal. Moreover, NATO countries at first refused to order their forces in Bosnia-Herzegovina to arrest persons indicted by the ICTY. Consequently, war crimes suspects continued their normal lives, a situation which gravely undermined the authority of the Tribunal. The situation improved from June 1997 onwards, when UN forces made a first arrest in Slovenia, followed by multiple arrest operations by NATO in Bosnia Herzegovina in the subsequent period. The change in policy can be inter

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478 See supra, p. 72.
480 HAZAN, supra note 57, pp. 67–73; LAMONT, supra note 76, p. 104.
481 HAZAN, supra note 57, pp. 90–91.
482 Ibid. p. 98.
\emph{alia} attributed to the strong activism by Prosecutor Louise Arbour to force these arrests and by the 1997 change of government in the UK, bringing the more ICTY-friendly Labour government into office.\footnote{Ibid. pp. 90-98.}

To conclude, from 1993 until the end of the Milošević regime in 2000, there was no noteworthy policy of conditionality by the international community of which the size and speed of rewards can be assessed on its effectiveness (Hypothesis Co 2). Moreover, the credibility of the paper protests by the UN was undermined by the reluctance of Western governments to support the ICTY (Hypothesis Co 3). Consequently, the international community did not have any serious impact on the FRY’s behaviour with respect to its ICTY obligations.

### 3.2. International conditionality since the collapse of the Milošević regime

Since the end of the Milošević regime, Western governments have become increasingly willing to apply incentives and punishments to coerce Serbia into complying with its ICTY obligations. The conditionality policy of the most important ICTY regime actors (the United Nations, the United States, the European Union and the ICTY) in this case will now be discussed.

#### 3.2.1. United Nations

The end of the Milošević regime did not entail a change in policy of the UN with respect to Serbia’s lack of compliance. The UN Security Council frequently discussed the cooperation of Serbia with the Tribunal’s President, and Prosecutor, based on their regular reports.\footnote{See for instance: UN Security Council Provisional Verbatim Record of the 4838\textsuperscript{th} Meeting, 9 October 2003, UN Doc. S/PV.4838; UN Security Council Provisional Verbatim Record of the 5453\textsuperscript{rd} Meeting, 7 June 2006, UN Doc. S/PV.5453.} However, the UN did not take coercive measures on this matter. Consequently, the UN only served as a forum where the assessment of the ICTY could be presented to the international community.
3.2.2. United States

Since 2001, the United States has frequently applied conditions relating to compliance with ICTY obligations on its financial aid to Serbia. The principal mechanism of this policy is Congress’s annual decision to make part of US financial aid contingent upon certification by the Administration that Serbia complies with several conditions. Additionally, the decision to support Serbian requests for loans to international financial institutions, such as the IMF, is linked to the certification. The conditions imposed by Congress are: compliance with the ICTY obligations, ending support to autonomous Serbian institutions in Bosnia, and ensuring the rule of law and minority rights. Compliance with the ICTY is further specified as giving ICTY investigators access to the Serbian territory, providing documents, and arresting and transferring indictees. From 2003 onwards, the condition to make all practicable efforts to arrest and transfer Ratko Mladić was added. It has been observed that Serbian compliance follows the pace of the US certification process. In the period prior to the certification deadline, Serbian compliance improves, while compliance deteriorates in the period following the deadline, and so on.

The most notable result of US conditionality was the arrest and extradition of Milošević in 2001. Congress had set the certification deadline for 31 March 2001. Presumably to avoid losing US aid, the government of the Republic Serbia initiated an arrest operation against Milošević on 30 March. Milošević surrendered to the Serbian security services in the early hours of 1 April 2001. Subsequently, the administration certified the FRY’s compliance with its ICTY obligations, which allowed the continuation of financial assistance to the FRY. However, Milošević’s arrest did not automatically mean that Serbian politicians were willing to transfer him to the ICTY. Again, the US applied considerable coercion, threatening to boycott an international donor conference for the FRY. Since the public finances of the FRY

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486 U.S., H.R.2673, Making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for the fiscal year ending September 30, 2004, and for other purposes, 108th Congress, Section 572 (c); U.S., H.R.3288, Making appropriations for the Departments of Transportation, and Housing and Urban Development, and related agencies for the fiscal year ending September 30, 2010, and for other purposes, 111th Congress, Section 7072 (c).


were in a disastrous condition, a successful donor conference was important to the FRY. Consequently, the Đinđić government arranged Milošević’s extradition on 28 June 2001. During the donor conference the next day, Western governments pledged 1,28 billion dollars of support to the FRY.489

As a consequence of the certification process, the US has on several occasions suspended part of its aid. This happened for instance when Serbian compliance deteriorated following the December 2003 parliamentary elections ($ 16 million suspended), in early 2005 ($ 10 million suspended) and in the spring of 2006 ($ 7 million suspended).490

To conclude, the US has developed a consistent policy of conditionality towards Serbia, through its process of certification for financial aid. First, the conditions for receiving the aid have been clearly stated in annual legislative bills and are considerably specific, even going as far as mentioning Mladić. However, the annual assessment is made by the Administration. While this gives the necessary flexibility to the policy, it also entails the risk that the conditions become unpredictable or watered down (Hypothesis Co 1). Second, the freezing and unfreezing of financial aid was closely linked with Serbian compliance in the immediate period preceding these decisions. Moreover, in the case of the possible boycott of the 2001 donor conference, the size of the reward was important. When conditionality was tied to only a modest amount of financial aid, the effect is doubtful (Hypothesis Co 2). Third, as the US Administration has shown consistency in its conditionality, by freezing financial aid on several occasions, the threats and promises concerning its financial aid were credible (Hypothesis Co 3).

### 3.2.3. European Union

The first mentioning of ICTY conditionality towards Serbia can be found in the April 1997 General Affairs Council conclusions on the development of the relations between the EU and the South East European Countries (SEECs: Croatia, Bosnia Herzegovina, Serbia, Montenegro, and the Former Yugoslav Republic of Macedonia). The prospect of improved trade relations, financial aid and economic cooperation was made contingent on fulfilling several political conditions, including democratic institutions, respect for human rights and

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compliance with ICTY obligations. However, this policy did not produce notable improvement in the cooperation by Serbia.

The conditionality mechanisms that did produce results were introduced only a few years later. First, the EU launched its Stabilisation and Association process (SAP) for the SEECS, which included the prospect of improved trade relations, financial assistance, assistance for democratisation and civil society, cooperation in justice and home affairs and a political dialogue. Moreover, it entailed the possibility of a Stabilisation and Association Agreement (SAA) with the EU, providing a more advanced and tailor-made relationship. Importantly, the SAP explicitly referred to the conditionality policy initiated in 1997. Second, from 2000 onwards the EU has given the SEECS a clear perspective on EU membership. The ultimate ‘carrot’ of EU membership and the intermediate perspective on the conclusion of an SAA have been the main ingredients in the EU’s conditionality policy towards Serbia.

The conclusion of the SAA with the EU is particularly suitable for political conditionality as it provided the EU with numerous veto points during the conclusion process: First, the Commission, instructed by the Council of Ministers, carries out a feasibility study concerning the opening of negotiations. The conclusions of the study must receive a positive assessment of the Council. Subsequently, the Commission proposes negotiating directives, for which the Council’s approval is necessary. The negotiations are conducted by the Commission. Upon conclusion of the negotiations, the SAA must first be initialled. Later it must be signed by EU representatives. Finally it needs ratification of all parties. As the SAA is a mixed agreement, it requires ratification by both the EU institutions and all EU member states.

Following the wave of transfers of indictees by Serbia in the spring of 2005, the EU decided to commence negotiations with Serbia concerning the conclusion of an SAA.

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compliance subsequently worsened and it missed the 30 April 2006 deadline set by the EU to arrest Ratko Mladić.496 Consequently, in May 2006 the EU decided to suspend the negotiations, which would only be resumed the moment Serbia was in full compliance with its ICTY obligations.497 However, in June 2007 the EU softened its approach. As Serbia’s compliance record had improved and the EU was afraid its relations with Serbia would deteriorate in view of the final status talks over Kosovo, it decided to reopen the negotiations, even though Mladić was not yet arrested.498 Further softening its conditionality, the EU initialed the SAA in November 2007 and signed it on 29 April 2008, to boost the chances of the pro-western candidates in the 2008 presidential and parliamentary elections.499 At the moment of writing, the SAA is still not ratified by the EU, due to the strict policy of the Netherlands on this topic. However, following the favourable report of Prosecutor Brammertz in the fall of 2009, the EU brought the trade provisions of the SAA into force, using an Interim Trade Agreement.500

Together with the annual certification process of US aid, the European Union’s condition of ICTY compliance in the framework of the SAP has been the most visible example of international conditionality towards Serbia. Accordingly, the EU’s policy has been attributed with some influence on Serbian behaviour. For instance, the 2003 Thessaloniki Summit, where the EU enhanced the SAP and reiterated the prospect of EU membership, coincided with the transfer of several Serbian indictees.501 EU conditionality – a positive feasibility study required improved compliance with ICTY obligations – contributed to the sudden flood of extraditions by Serbia to the ICTY in 2005.502 Moreover, the arrest and extradition of Radovan Karadžić in July 2008 occurred only a few weeks after the DS-led pro-EU government, with a clear wish for accession to the EU, took office.503 However, based on the conditionality hypotheses, considerable shortcomings in the EU conditionality policy can be

498 ORENTLICHER, supra note 306, p. 34; DOBBELS, supra note 429, p. 21.
499 KIM, supra note 497 at p. 6.
501 DOBBELS, supra note 429, p. 13.
503 See supra, p. 78.
identified. As regards Hypothesis Co 1, the conditions are indeed formulated as conditions for a reward, being the conclusion of an SAA and future EU membership. However, Dobbels concluded that the condition is insufficiently determinate. The EU’s terminology is consistent, using terms such as unconditional and full compliance, which should be progressively met. This, of course, leaves considerable margin to the Council of Ministers to decide if a certain level of compliance is sufficient. Predictably, the Council was divided over the issue. Several countries such as the Netherlands advocated a strict assessment. Serbia would only fulfill the condition if the ICTY Prosecutor would declare Serbia to be in full compliance with its obligations. This would entail the extradition of Mladić and Karadžić. Other countries, such as Austria, Germany, France, Spain, and Italy had a more flexible stance. In their opinion, Serbia needed to have sufficient immediate rewards as to prove the credibility of the Union’s policy and to bolster Serbian reformist forces. This disparity, naturally, led to a decreased determinacy of the required condition. Likewise, this situation jeopardised the credibility of the condition, the requirement for effectiveness under Hypotheses Co 3. The member states were divided over the issue, with several big member states favouring the flexible approach. Consequently, although the Dutch blockade was likely to delay the SAA process, Serbia did not need to fear a serious crack down in its relations with the EU if it did not fully comply with its obligations (for instance arrest and extradite Mladić), as long as it showed considerable commitment and a fair level of compliance.

Another problem with EU conditionality relates to the size and immediacy of the rewards. The conclusion of the SAA and especially the prospect of EU membership are of considerable importance for Serbia. However, these ‘carrots’ do not possess the immediate coercive power of the US threat to freeze financial support and block a donor conference. Therefore, it is unsurprising that the EU has been unable to force the extradition of Mladić.

### 3.2.4. ICTY Prosecutor

Over the years, the ICTY Prosecutors have increasingly become more active in pressuring the international community to coerce Serbia into compliance with its ICTY obligations. As was already mentioned, Prosecutor Louise Arbour was especially successful in persuading NATO member states to let their units arrest ICTY indictees in Bosnia Herzegovina from 1997 onwards. In doing so, she did not avoid open confrontation. For instance, while other NATO

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504 DOBBELS, supra note 429, pp. 15-17 and 20.
506 LAMONT, supra note 76, p. 110.
members commenced arresting ICTY indictees, France still refused to cooperate. Arbour publicly condemned France’s recalcitrance to cooperation with the Tribunal. Shortly thereafter, France’s cooperation with the Tribunal improved.\footnote{HAZAN, supra note 58, pp. 101-103} As a result, Western operational support bolstered the image of the Tribunal in the Balkan region. Subsequently, from 2000 onwards Prosecutor Del Ponte focused on toughening the international community’s policy towards Serbia itself. Her basic guiding principle was to believe in applying strong international pressure on Serbia to coerce the country into compliance with its ICTY obligations.\footnote{See for instance DEL PONTE, supra note 277, p. 459.} In order to accomplish this, she invested a lot of energy in personal contacts with international political leaders. For instance, in 2001 she personally tried to convince officials as US Secretary of State Colin Powell, French President Jacques Chirac, and German Chancellor Gerard Schröder to increase pressure on the FRY to arrest and extradite Milošević to The Hague.\footnote{Ibid, p. 154 and 175-177.} In 2002, she appealed to NATO Secretary General Robertson to not include the FRY in the Partnership for Peace program as long as it did not fully comply with its ICTY obligations.\footnote{Ibid., p. 237.} Moreover, Del Ponte’s periodical reports on Serbia’s compliance record acquired an important status in the EU conditionality mechanism, as they became the primary point of reference to assess Serbian compliance with the EU’s conditions in the SAP framework.\footnote{ORENTLICHER, supra note 306, p. 69; EURACTIV.COM, Serbia talks broken over Mladid, 3 May 2006. (http://www.euractiv.com/en/enlargement/serbia-talks-broken-Mladic/article-154929); B92, Yet another deadline given by the European Union for the extradition of Ratko Mladic has come and gone, 1 May 2006. (http://www.b92.net/en/news/in_focus.php?id=94&start=1455).} She has defended a strict EU conditionality policy towards Serbia,\footnote{DEL PONTE, supra note 277, p. 478.} and openly urged the Union to maintain that policy at the time the EU wished to soften its stance.\footnote{EURACTIV.COM, No EU-Serbia pact while war criminals are free, says Del Ponte. 27 June 2007 (http://www.euractiv.com/en/enlargement/eu-serbia-pact-war-criminals-free-del-ponte/article-164976).} Her successor since 2008, Serge Brammertz, although presenting himself as a less assertive and more diplomatic person, promised to continue Del Ponte’s tough policy.\footnote{JURIST – PAPER CHASE, New ICTY prosecutor toes Del Ponte line on Serb cooperation with war crimes court. 14 January 2008 (http://www.jurist.law.pitt.edu/paperchase/2008/01/new-icty-prosecutor-towing-del-ponte.php).} Like Del Ponte, his reports have been key in the EU’s assessment of its conditionality policy towards Serbia.\footnote{WOEHREL, 2010, supra note 503, p. 4.}

It is apparent that Prosecutor Del Ponte, especially, has progressively taken responsibility for the coordination of the international community’s conditionality policy towards Serbia, by
continuously lobbying western governments to keep pressure on the Serbian government using material incentives and punishments. As such, a fair degree of consistency between the ICTY’s assessment of Serbia’s performance and the policy of the international community was made possible. However, a few remarks must be made:

- It can be doubted that the ICTY Prosecutor is the most appropriate official to execute this task. As he or she does not have any legal authority over state governments, the Prosecutor can only make use of lobbying and media coverage to induce the international community into a policy of conditionality. Consequently, such policy is inherently ad hoc and very sensitive to political developments.

- While Del Ponte may have been successful in inducing Western governments to stress the need for compliance with ICTY obligations, this did not prevent inconsistent policies between the different international actors. For instance, while Del Ponte was campaigning for the transfer of the four Serbian generals, indicted in 2003, the US government was negotiating with Serbia on a compromise, entailing the immunity of the generals in exchange for the arrest and transfer of Ratko Mladić. It is clear that a stronger coordination between international actors is warranted.

- Close association with the conditionality policy of Western states makes the Prosecutor vulnerable to criticisms of politicising the ICTY and having an anti-Serb bias. As was described above, these sentiments are present in Serbian society and political life.

- The international community’s policy, as advocated by Del Ponte, stressed material rewards for Serbian compliance. This focus risks the association of the ICTY with international coercion, not with justice and reconciliation.

\[516\] DEL PONTE, supra note 277, p. 312.

\[517\] This argument will be explored in the next section of this chapter.
3.3. Conclusion

3.3.1. General summary

Since the end of the Milošević regime, the ICTY has generally relied on the conditionality policies of the US and the EU to accomplish improved compliance by Serbia with its ICTY obligations. Moreover, ICTY Prosecutor Del Ponte actively pushed international actors to apply this policy. International conditionality has contributed to several compliance events. The most notable example is the direct link with US financial aid and the arrest and extradition of Milošević. Additionally, the EU conditionality policy in the framework of the SAP and the prospect of EU membership has exercised influence on Belgrade’s policy regarding the ICTY on several occasions. However, it did not result in the extradition of Ratko Mladić, and Radovan Karadžić was only arrested in 2008. Moreover, the necessity of conditionality itself, still exercised in 2010, is evidence of continuing negative sentiments among key Serbian actors towards the ICTY and its mission.518

3.3.2. Applying the hypotheses

The theoretical framework contains several hypotheses with respect to the effectiveness of international conditionality policies. These policies have been assessed in the preceding paragraphs. The following general conclusions can be drawn.

- Hypothesis Co1: Serbia will comply more with ICTY obligations if these obligations are modelled as conditions for rewards and the more determinate they are.

US and EU conditions are modelled as conditions for rewards. The content of the conditions is sufficiently clear. However, there is considerable flexibility in their assessment. While on the one hand this gives the international community room for a policy tailor-made to the situation, it also makes possible the watering down of the conditions.

- Hypothesis Co2: The level of Serbian compliance is contingent of the size and speed of the rewards.

518 See infra, section 4 of this chapter.
International conditionality was most effective in case of US coercion to acquire the arrest and transfer of Milošević. The EU’s policy of using the SAA and the prospect of future membership as a carrot appears to have affected Serbia, but the policy has not been as effective and immediate as US actions in 2001, because the EU’s policy did not impose considerable and direct costs on Serbia.

- **Hypothesis Co3: Serbian compliance will be stronger, the more credible threats and promises are.**

International conditionality policies have not always been that credible. First, the EU’s policy was weakened by internal differences between member states, making it clear that the EU was unwilling to risk a total deterioration of the EU-Serbia relationship over the ICTY. Second, although the US and the EU were continuously induced by the Prosecutor to apply a policy of conditionality towards Serbia, their policies were insufficiently coordinated. Moreover, the central role of the Prosecutor in conditionality policies, as developed by Del Ponte, is open to criticism. Consequently, a better coordination of international coercion seems necessary.

- **Hypothesis Co4: the level of compliance depends on the size of the other side of the strategic calculus, namely the adoption costs.**

As was described in the previous section of this chapter, the most important factor impeding the effectiveness of international conditionality policies has been the existence of considerable domestic costs for Serbian politicians to pursue a policy of compliance. Although the number and strength of domestic veto-players appears to have decreased, resistance to full compliance with the ICTY is still considerably strong.
4. Dynamic Identity-based Strategies

The conception of actor identity as dynamic is a core tenet of the theoretical framework, since it entails the possibility of changing anti-ICTY identities into pro-ICTY identities, through mechanisms of internalisation and acculturation. This improves the chance of compliance with ICTY obligations. Moreover, compliance based on pro-ICTY identities will be more stable than mere conditionality-induced compliance. Consequently, dynamic identity-based strategies to induce compliance with ICTY obligations offer an attractive alternative to strategic calculation-based conditionality policies.

The role of dynamic identity mechanisms in fostering Serbian compliance will be mapped in the following paragraphs. First, the possible effects of internalisation and acculturation in this case, as far as they were possible to measure, will be briefly presented. Second, the dynamic identity-based strategies applied by ICTY regime actors will be described, followed by sources exercising an anti-ICTY influence on Serbian identities. It will be argued that not only external sources induce anti-ICTY identities, but also the activities of the ICTY itself.

In order to assess the dynamic identity-based strategies discussed below, the internalisation and acculturation hypotheses that relate to actions the ICTY can directly take, will be applied:

- **Hypothesis I4**: Internalisation-based compliance is more likely if the socialising agency/individual does not lecture or demand but, instead, acts out principles of serious deliberative argument.

- **Hypothesis I5**: Internalisation-based compliance is more likely the more the interaction between ICTY-regime actors and Serbian actors occurs in less politicized and more insulated, in-camera settings.

- **Hypothesis I6**: Internalisation-based compliance is more likely the more frequently ICTY-regime actors and Serbian actors interact.

- **Hypothesis A2**: Acculturation-based compliance is more likely the more Serbian actors are in contact with the international community and ICTY officials.
4.1. Traces of internalisation and acculturation in the ICTY-Serbia relation

In the framework of this dissertation, it has been impossible to assess the individual impact of processes of internalisation and acculturation in detail, as they are difficult to isolate from each other, from the effect of international conditionality, and from prior beliefs. However, based on section 2 of this chapter, a few tentative remarks can be made.

It was described earlier how Serbian society is a difficult setting for processes as internalisation and acculturation to operate. Surveys targeted at Serbian public opinion have shown that only a minority of 15% of respondents believe that Serbia should comply with its ICTY obligations because of principles as justice and morality. During the years of activity for the Tribunal, this number did not change, and the level of support for ICTY compliance, irrespective of the motivation, dropped significantly. Moreover, there is still considerable denial in Serbian society that war atrocities by Serbians actually occurred.\textsuperscript{519} One can deduce from these results that the ICTY did not succeed in triggering a broad internalisation of or acculturation to ICTY regime content in Serbian society.

It was described earlier that post-Milošević politicians at first were divided over the ICTY and that no one motivated compliance on moral grounds. Additionally, Serbia’s compliance with the ICTY, especially the extradition of indictees, has been closely linked to international conditionality policies. Thus, the role of internalisation and acculturation seems to have been minimal for a long time. However, the strength of political actors supporting compliance with ICTY obligations on the basis of moral arguments, such as Boris Tadić and Rasim Ljajić, has grown continuously since 2004. The most recent evidence of the internalisation of or acculturation to ICTY regime content is the 2010 adoption of a Parliamentary resolution condemning the 1995 massacre of Srebrenica. However, it is not clear from the available data whether these evolutions are due to the influence of the ICTY or to exclusive internal Serbian dynamics, or what specific mechanism was dominant. A more thorough analysis of specific data, such as interviews with Serbian politicians, is necessary.

However, this conclusion does not hinder the analysis of the core issue of this dissertation, which is the identification of adopted and other possible strategies for the ICTY to increase

Serbian compliance. The ICTY dynamic identity-related strategies will be addressed subsequently.

4.2. ICTY dynamic identity-related strategies

4.2.1. The potential persuasive power of broadcasting ICTY Trials

An important opportunity of the ICTY regime actors to adapt Serbian identities to ICTY regime content was the broadcast of the trial against Slobodan Milošević, in its first weeks followed by over half of Serbian households.\(^{520}\) As this trial concerned the involvement of the highest Serbian leadership in the Yugoslav wars, the Milošević trial had the potential of educating and confronting Serbian society with the criminal policies of its political leaders and military. Such catharsis could have decreased denial and increased support for war crimes prosecution, including the activities of the ICTY.

However, the much-anticipated positive effect of the Milošević trial did not occur, due to several factors. First, Milošević chose to represent himself, which gave him the possibility of directly addressing the Serb audience.\(^{521}\) Second, the Prosecution made a tactical error, opening the trial with the war in Kosovo. This gave Milošević the chance to address the NATO bombing campaign of 1999, playing on negative feelings in Serbian society.\(^{522}\) For instance, his opening argument on the Kosovo charges contained a video and a slide show presentation showing the destruction the NATO bombing campaign inflicted on Serbia.\(^{523}\) Consequently, he was able to present Serbia as the victim of western aggression, a version of the facts that resonated with the Serbian audience. Third, during the proceedings Milošević displayed superior knowledge of the facts and context, which often gave the impression of the Prosecution losing the argument.\(^{524}\) Fourth, the FRY leadership did not use the trial as an opportunity to open a genuine public debate on Serbia’s war crimes past. Instead, President Koštunica claimed that the Prosecution put the whole Serbian nation on

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\(^{521}\) ORENTLICHER, supra note 306, p. 74.


\(^{523}\) SCHARF, supra note 520, p. 918.

\(^{524}\) ORENTLICHER, supra note 306, p. 74.
Finally, Milošević died a few weeks before the Trial Chamber would announce its judgement. As such, no legal authority has been able to judge his actions in the Yugoslav wars. This gives considerably more space for his supporters to continue denying Milošević’s guilt, than in case a verdict was actually produced.

All in all, the trial of Milošević did not bring a landslide change in Serbian perceptions on the war crimes in the Balkan, or on the ICTY. However, one particular aspect of the Milošević trial is often cited as being a serious eye-opener for the Serbian public. This is the broadcast of a 12-minute video showing a Serbian police unit killing 6 prisoners from Srebrenica in June 2005. The video dominated the Serbian media for the following period and caused a shock wave through Serbian public opinion. Prime Minister Koštunica and President Tadić immediately condemned the killings.

4.2.2. Changing the negative image of the ICTY: the Outreach Program

Since its inception, the Milošević regime continuously presented a negative image of the ICTY to the Serbian public. This negative framing of the ICTY did not encourage Serbian society to favour compliance with the ICTY and consequently posed a threat to the Tribunal’s effectiveness. However, for several years the ICTY took no initiatives to address its negative image in the region. On the contrary, it did not engage with the societies at all: the Tribunal did not translate important documents, such as indictments and judgements, to regional languages until 1999 and it issued its first press release in regional languages only in 2000. Moreover, part of the ICTY staff did not consider outreach activities to the communities affected by the Tribunal as its task. As a result of this situation, the Serbian public was largely uninformed of the Tribunal’s activities, and anti-ICTY propaganda remained unchallenged for years.

In view of the negative perceptions on the ICTY in Serbia and the Balkan region in general, the ICTY, decided to establish an Outreach Program. Its main goals are to explain the work of

\[525\] Ibid, p. 79.
\[528\] See supra, p. 80.
\[529\] ORENTLICHER, supra note 306, pp. 65-66.
\[530\] Even in 2003, 64% of Serbian respondents reported to be ill informed of the ICTY. See: BCHR 2003 survey, supra note 450, p. 14.
the ICTY and address the negative effects of misperceptions and misinformation on the Tribunal, by providing and disseminating information on the Tribunal, encouraging debate and engaging local legal professionals, NGOs, victims and educational institutions.\textsuperscript{531} As part of the Tribunal’s completion strategy, to prepare the conclusion of its tasks, the Outreach Program was made responsible for improving the capacity of the ex-Yugoslav states to prosecute war crimes on their own.\textsuperscript{532} In view of these goals, a good working Outreach Program appears to be the ideal instrument for the ICTY to influence Serbian actors’ perceptions of the ICTY and to induce pro-compliance opinions.

The outreach activities are coordinated from The Hague and primarily carried out by local Outreach offices in Sarajevo, Belgrade, Zagreb and Priština.\textsuperscript{533} It has rapidly expanded its operations, from only 2 activities in 1999 to 81 in 2007. A significant portion of activities were organised in Serbia or for the benefit of Serbian actors.\textsuperscript{534}

The main categories of outreach activities include:
- translation of the ICTY website in the regional languages;\textsuperscript{535}
- dissemination of important ICTY documents in regional languages;\textsuperscript{536}
- broadcasting trial procedures on the website in English and regional languages;\textsuperscript{537}
- organisation of symposia and workshops on the work of the ICTY,\textsuperscript{538} such as the ‘Symposium for the media from ex-Yugoslavia’ in October 1999.\textsuperscript{539}
- organisation of visits to the ICTY by students, journalists, judicial officials and police investigators.\textsuperscript{540}

More details on specific Outreach activities can be found in the ICTY Completion Strategy Reports to the UN Security Council.\textsuperscript{541} Additionally, the ICTY website contains a complete list of organised activities.\textsuperscript{542}

\textsuperscript{536} ibid. par. 214
\textsuperscript{537} ibid. par. 215
\textsuperscript{538} ibid. par. 216
\textsuperscript{539} ICTY Outreach Activities – 1999 (http://www.icty.org/sid/10110).
\textsuperscript{540} ICTY Outreach Activities – 2009 (http://www.icty.org/sid/10110).
\textsuperscript{541} ICTY Reports and Publications. Completion Strategy (http://www.icty.org/tabs/14/2 ).
\textsuperscript{542} ICTY Outreach Activities Archive (http://www.icty.org/sid/8938).
The aims and specific activities of the ICTY Outreach Program have the potential to induce a pro-ICTY identity change with Serbian actors, which could improve Serbia’s compliance record. However, as was already described, during the years the Outreach program was active, no positive change in Serbian preferences on the ICTY took place. One can even discern a decrease in Serbian support for compliance with ICTY obligations. Several reasons for this lack of effectiveness can be identified.

First, the Outreach program was only established during the sixth year of the Tribunal’s functioning. As described in section 2 of this chapter, the Serbian public had adopted a negative perception of the ICTY by that time. Additionally, as the Tribunal’s mission contradicts core elements of Serbian collective identity, being its discourse of nationalism and victimhood, strong resistance to acculturation or internalisation, due to prior ingrained beliefs in terms of Hypothesis I2 and A3, is likely.

Second, although the Outreach Program has organised numerous events for ex-Yugoslav audiences, the magnitude of its activities has, all in all, been modest. The main reason is the lack of funding. The Program has never been funded by the regular budget of the Tribunal, but by a special UN trust fund, supported by voluntary contributions from UN member states and the European Union budget. The limited budget means that there are only a small number of Outreach officers: a regional outreach office typically is staffed by only two outreach officers. As a result, the amount of activities carried out and people reached by these activities, although impressive in view of the available resources, has been insufficient to present a serious alternative to the widespread negative views on the ICTY in Serbian society.

4.3. Negative interaction with policy of international conditionality

The previous and the current chapter have already presented factors that have impeded Serbian actors to internalise or acculturate to ICTY regime content, such as the strong nationalism and denial in Serbian society, the ambivalent stance of Serbian politicians

towards the ICTY, the NATO bombing campaign and the lack of a proper investigation into this campaign. The last negative factor impeding the identity change mechanisms concerns the prosecutorial strategy of the ICTY, and especially of Prosecutor Del Ponte.

First, Del Ponte developed a strategy immune to the political effects on Serbian society. The most important example of this fact is the indictment of the four top generals – Pavković, Lukić, Lazarević and Đorđević – in October 2003. The indictment was met with outrage from all political parties, undermined the ICTY’s fragile support, and is considered to have had a negative impact on pro-western parties in the December 2003 Parliamentary elections. As described above, the 2003 elections were followed by a period of standstill in the Serbian cooperation with the ICTY.

Second, Prosecutor Del Ponte was a strong advocate of coercing Serbia into cooperation with the ICTY. During her tenure she held a highly visible and straightforward profile, and she often criticised Serbia for not complying with its obligations in media and in her reports to the United Nations. As a result, the ICTY itself became openly associated with the policy of international conditionality. Additionally, the ICTY and other international actors did not invest sufficient energy in informing Serbian society, promoting truth-seeking and national reconciliation. Such was certainly the case with the underfunded Outreach Program. As for the EU, its ‘arrest and extradite’-oriented conditionality policy was not supplemented with a broad political dialogue, intended to transfer the ICTY regime values to Serbian actors. Observers have argued that this coercion-oriented approach has weakened the ICTY regime’s persuasive power, as Serbian society has progressively attached the Tribunal to conditionality and the threat of international isolation, instead of linking the ICTY to principles of justice and reconciliation. It is impossible to directly measure the actual strength of this effect. However, the validity of this claim is likely, in view of the continued

547 DOBBELS, supra note 429, p. 23.
unpopularity of the Tribunal, its perceived bias and association with NATO.

4.4. Conclusion

4.4.1. General summary

The ICTY’s dynamic identity-based strategies, in particular the broadcasting of the Milošević trial and the development of an Outreach Program, have not been successful in achieving a fundamental pro-ICTY identity change with Serbian actors. First, the analysis of Serbian domestic preferences in subsection 2 of this chapter has shown continuous hostility towards the Tribunal by an important part of Serbian society, and wide divisions among Serbian politicians. Consequently, there is considerable resistance to internalisation of and acculturation to ICTY regime content. Second, this subsection has uncovered substantial flaws in the ICTY strategies. The Milošević trial could not bring the anticipated catharsis in Serbian society and the Outreach Program’s activities, although having their merits, are too little too late to bring a decisive change in Serbian preferences. Moreover, the ICTY’s persuasive power is potentially undermined by its own prosecution strategy.

While the ICTY may not have brought a fundamental transformation in Serbian identities, Serbian observers have credited the Tribunal’s persuasion efforts with some success. According to them, the ICTY has contributed to shrinking the public space for denying war crimes, bringing Serbia a step closer to a genuine catharsis. 549

4.4.2. Applying the hypotheses

- Hypothesis I4: Internalisation-based compliance is more likely if the socialising agency/individual does not lecture or demand but, instead, acts out principles of serious deliberative argument.

The aim of the ICTY Outreach Program is to inform the Serbian public of its activities, in order to tackle negative perceptions of the ICTY. By its nature, it does not demand

549 ORENTLICHER, supra note 306, p. 19.
something from its target audience. However, the image of the ICTY in Serbia is not shaped by the Outreach Program, but by the activities of the ICTY Prosecutor. It has been the core element of the Prosecutor’s strategy to continuously demand the improvement of compliance, in view of Serbia’s clear and non-negotiable obligations to comply with ICTY requests. Consequently, the relation between Serbia and the ICTY has for the most part not been one of deliberative argument, but of one-way demands.

- **Hypothesis I3: Internalisation-based compliance is more likely if the socialising agency/individual is an authoritative member of the Serbian in-group to which the target belongs or wants to belong.**

As was mentioned before, the ICTY can benefit from the support of several actors in Serbian society, such as politicians Boris Tadić and Rasim Ljajić, and local NGOs. They can be considered as authoritative members of the Serbian in-group, making internalisation more likely. However, the ICTY failed to fully apply the strategy of enabling authoritative members of the Serbian in-group, since it has refused to integrate Serbian nationals (or nationals from the region in general) in its own services.\(^{550}\) The incorporation of Serbian nationals, for instance in the Office of the Prosecutor or as a judge, could have decreased the remote image of the ICTY in Serbia, and could have given the Tribunal a more impartial profile.

- **Hypothesis I5: Internalisation-based compliance is more likely the more the interaction between ICTY-regime actors and Serbian actors occurs in less politicized and more insulated, in-camera settings.**

Outreach Program activities such as visits to the Tribunal and workshops provide less politicised, in-camera settings for dialogue between the ICTY and Serbian actors, which makes internalisation of ICTY regime content more likely. However, the most important communication stream between the ICTY and Serbian actors is the dialogue on compliance with ICTY obligations. This dialogue is politically very sensitive and highly visible due to the open communication policy of the ICTY Prosecutor and Serbian politicians. Consequently, this dialogue is unlikely to contribute to the internalisation of ICTY regime content.

\(^{550}\) SPOERRI-JOKSIĆ, FREYBERG-INAN, supra note 545, p. 31.
- Hypothesis I6: Internalisation-based compliance is more likely the more frequently ICTY-regime actors and Serbian actors interact.

Hypothesis A2: Acculturation-based compliance is more likely the more Serbian actors are in contact with the international community and ICTY officials.

There appears to be a lot of interaction between the ICTY-regime actors (the ICTY itself, the EU, the US) and Serbian actors. First, the ICTY and Serbian society communicate through mass media. Second, there are regular contacts between ICTY-regime actor officials and political leaders (such as the regular visits by the Prosecutor to Belgrade or the contacts between Serbia and EU politicians). Third, the ICTY cooperates with Serbian operational services such as the war crimes prosecutor and war crimes investigators via the Outreach Program or in operations to arrest Ratko Mladic.551

As such, there seems to be a sufficient degree of interaction to facilitate internalisation and acculturation processes. However, for these processes to actually take place, other supporting factors, already described, need to be present.

5. Capacity building

Following the Yugoslav wars, the international community has been engaged in enhancing the capacity of the national jurisdictions in the Balkan region to handle war crimes cases.552 The ICTY has been a crucial actor in this exercise. Pursuant its Completion Strategy, the Tribunal issued its last indictments in 2004, 553 and referred several cases to local jurisdictions.554 Since then, capacity building of judicial institutions has been a core target of the Outreach Program, to make them able to fairly adjudicate war crimes cases.555 The types

of activities organised in this framework include *inter alia* (1) training of the local judiciary and prosecutors, including specific training on controversial subjects as command responsibility for war crimes, (2) technological support and training, and (3) working visits by legal professionals to the ICTY in The Hague.

The capacity building efforts of ICTY regime actors do not seem to directly target Serbia’s capacity to comply with ICTY requests, such as the arrest of indictees or transfer of documents. Serbia already had security services capable – if willing – of executing arrest operations, such as the Milošević arrest. Other requests such as the procurement of documents or access to witnesses, do not involve difficult technical issues. Consequently, the overriding issue hindering compliance does not seem a lack of capacity but a lack of will.

While the mechanism of Hypothesis Ca1 (Serbian compliance will improve if the capacity of its relevant governmental services is enhanced) did not appear to operate with respect to Serbia’s compliance capacity, an indirect positive spill over to Serbian compliance is possible. As was described above, actors benefiting from capacity building efforts in the Outreach program, such as the Serbian war crimes prosecutor office, are more likely to internalise or acculturate to ICTY regime content. They can become allies for the ICTY in the struggle to capture the remaining war crime fugitives.

### 6. Chapter summary

In this chapter, an overview was presented of the relation between the ICTY and Serbia. In general, the following assessment can be made. First, Serbian compliance with its ICTY obligations has been problematic, with a specific reluctance to arrest and extradite war crimes indictees. However, Serbia’s compliance record has improved over the years to almost full compliance. Currently, the most important impediment for the ICTY to certify full compliance...
compliance is Serbia’s inability to arrest Ratko Mladić. Second, Serbia’s flawed compliance record has been the result of strong resistance among Serbian actors against the ICTY. The ICTY is perceived as biased against Serbs, only a slim majority of Serbs support compliance with ICTY obligations – mostly motivated on instrumental grounds – and the nationalist forces resisting all cooperation with the Tribunal are still strong. Consequently, strategies applied by the ICTY to enhance Serbian compliance will operate in a difficult context. The principal ICTY strategy was the use of international conditionality of the US and the EU, which is held to be responsible for numerous transfers of indictees to the Tribunal. Additionally, the Tribunal tried to improve Serbian perceptions of the ICTY using for instance the Outreach Program and the broadcast of the Milošević trial. However, continuing negative perceptions of the Tribunal in Serbia indicate the ineffectiveness of this strategy, which can be attributed *inter alia* to the low budget for this program and the overt linkage of the Tribunal to the policy of international conditionality. Finally, capacity building of domestic legal institutions is likely to have influenced these institutions into more pro-ICTY preferences.

In the following chapter, the results of this chapter and the previous one will be used to formulate recommendations for future international regimes governing atrocities.
CHAPTER 5: RECOMMENDATIONS

1. Introduction

The previous chapters have analysed the performance of the ICTY with respect to Serbia. Several shortcomings have been identified. Based on the conclusions of the previous chapters, this chapter formulates several general recommendations for the international management of future war atrocities crises. Where applicable, references will be made to the hypotheses of the theoretical framework.

Prior to presenting the recommendations, it is important to recall that even an improved strategy is only a partial determinant of the relationship between an international post-atrocities instrument, such as the ICTY, and its target state. Indeed, in the case of the ICTY and Serbia, the characteristics of Serbian society – strong nationalism and lagging reforms – have greatly determined the relationship with the ICTY and the effectiveness of ICTY strategies to improve compliance. True, in time these strategies have an influence on the target state. However, it makes a huge difference for the success of an international post-atrocities instrument if a target state is initially more or less open to its activities.

2. Recommendations

The ability of international tribunals, like the ICTY, to prosecute and convict war criminals is heavily dependent on cooperation by the states involved in the atrocities. Requests for cooperation are likely to meet hostility and refusal, caused by denial or ignorance of war atrocities in the particular states, or by political elites and institutions implied in the past war crimes. Such has been the case with Serbia and the ICTY.

The international community can try to coerce the recalcitrant state into compliance with international justice institutions, using a policy of conditionality. This strategy has produced considerable results in the case of Serbia and the ICTY. However, such strategy has a significant political cost. First, the international community must be willing to apply coercion. Second, as conditionality does not focus on changing the preferences in the target
state, persistent hostility towards international justice institutions is likely. Moreover, the use of coercion can reinforce the negative feelings in the target state.

Therefore, international action addressing war atrocities crises must take into account the broader societal context of war crimes prosecution. A holistic approach is warranted: war crimes prosecution must be complemented with truth-seeking and coping with the past, reconciliation and democratic institution building. These complementary activities are directed at changing preferences in the target state. Moreover, they can be better modelled on the hypotheses of the theoretical model than the justice-related activities. For instance, a truth-seeking activity, such as a seminar, provides an insulated, non-politicised environment wherein target actors are not subjected to direct requests or political costs, but are invited to participate in an argument-based discussion (Hypotheses I4 and I5). As such, the preferences of local actors towards international justice institutions can be more effectively influenced through mechanisms of internalisation and acculturation.

Admittedly, numerous international actors have been involved in broader transitional justice projects for Serbia. However, the principal instrument applied by the international community to manage Balkan war atrocities has been the ICTY, and the principal benchmark for success has been the degree of compliance with the ICTY obligations.

Based on this general premise, I propose the following institutional guidelines for future international policies directed at addressing war atrocities, compatible with the International Criminal Court or other specific international tribunals.

**International strategy**

International interventions are typically ad hoc and related to the political circumstances of that moment. Ad hoc policies produce inconsistencies between different cases of war atrocities crises, and with respect to the same case between different international actors and different moments in time. Consequently, international actions risk losing credibility. In order to address this ad hoc character, the international community should work out a coherent strategy to tackle war atrocities crises. Ideally, this is a UN Security Council Resolution describing a general plan of action for facing such crises. When a war atrocities crisis arises, the Council can base its specific action on this document. The potential power of
a general strategy to tackle war atrocities crisis is, first, that it is formulated outside the context of a specific crisis. Consequently, the direct political costs for Council members are low and the future political costs are difficult to foresee. Second, the existence of this document generates extra pressure on the Security Council to act, and to do this in the coherent manner prescribed by the document. If the adoption of a general strategy is impossible in the framework of the Security Council is, then in other (regional) international organisations or in a coalition of willing states.

The general strategy describes the post-atrocities instruments applied by the international community, inspired on the holistic approach as mentioned above.

**Conditionality**

In pursuing its strategy, the international community can still apply conditionality policies. However, there are two important differences with the case of Serbia and the ICTY. First, conditionality policies must be better balanced with a significant outreach effort from the start, in view of the holistic approach to the crisis. This will give mechanisms of internalisation and acculturation more possibilities to operate. Second, the holistic approach must be brought into the conditionality policy itself: states must not only be conditioned to comply with the orders of international justice institutions such as the ICTY or the ICC. The successful implementation of programs such as truth-seeking, reconciliation and democratisation must be imported into the set of applied conditions.

**Coordination of conditionality**

The international community’s conditionality policy should be coordinated as much as possible to assure its consistency. First, a basic framework can be agreed on in the general strategy. Second, when a specific crisis arises, international actors should make a specific agreement on their conditionality policy in that case. Third, international actors should frequently reassess their policy in concert, through a specific institution such as the UN Security Council or a semi-structured coordination body as the Quartet for the Middle East or the Contact Group for ex-Yugoslavia, with international actors willing to apply a conditionality policy. As such, the international conditionality policy becomes more structured. Of course, differences between international actors will still exist if they have
different ideas on how to handle the situation. However, differences due to a lack of coordination will be sparser and there will be more pressure to come to a coordinated approach.

**The High Representative for Transitional Justice**

International post-atrocities instruments require a form of political representation towards the target states and the international community itself, to promote the goals of these instruments and secure cooperation with them. In the case of the ICTY and Serbia, the Prosecutor has primarily executed this function. However, as was described above, this gave the Prosecutor a very politicised profile. Prosecutor Del Ponte, especially, was closely associated with the international conditionality policy. Consequently, the impartial image of the Tribunal was damaged. Moreover, a Prosecutor has an inherent legalist view on the crisis: he or she must ensure the arrest and prosecution of war criminals. Broader goals, such as truth-seeking, reconciliation, and democratisation, risk to be neglected.

The situation can be remedied by introducing the function of ‘High Representative for Transition Justice’ (HR). This official would be appointed by the UN Security Council, or in case of disagreement in the Council, by another institution, or ad hoc by a coalition of willing international actors. The HR is responsible for the political representation of the international post-atrocities instruments with the international community and the target states and the coordination between these instruments. For instance, the HR should be the official advising the international community on the overall performance of a target state, such as Serbia, with respect to international conditions. He or she can take into account the experiences of all instruments applied in the crisis. In the contacts with the target states, the HR will not only focus on specific justice-related actions such as extraditions. As he or she represents all instruments applied, the HR will resort to a more balanced strategy, which gives more attention to the underlying norms of the international community’s actions and avoids the risk of destabilising the target state too much. As such, the holistic vision on the management of war atrocities crises can be translated to an operational level.

It is important that introducing an HR does not become a method to reduce the influence of international post-atrocities instruments. In order to avoid this situation, the HR’s
independence from the international community must be assured. This can be realised using several mechanisms:

- The function of HR is reserved for former politicians or government officials of the highest level and esteem, such as Colin Powell, Louise Arbour, Javier Solana and Martti Ahtisaari. An assessment of prior involvement with the target states is of course necessary.
- The HR is appointed for a fixed period that is sufficiently long, for instance four years.
- The independence of the HR is formally recognised by the body mandating the HR, comparable to the relation between the ICTY Prosecutor and the UN Security Council.

It is indeed true that by appointing a strong and influential person as HR and by giving this official formal independence, the international community has only limited power and risks losing control over the process. However, this mode of operation is favourable for two reasons. First, in order to achieve sufficient effectiveness and stability, a policy should not be dependent on the political developments of the day. Second, this proposal is a clear improvement over the situation of the ICTY, as an overly assertive Prosecutor risks undermining the goals of the international post-atrocities instruments. There is less chance that the HR, with a broader mission and perspective, will risk this situation from occurring.

The Prosecutor

It is fundamental that the Prosecutor of the ICC or a special international tribunal, operating in a war atrocities crisis, retains its full independence. Coordination by the HR of all applied post-atrocities instruments does not imply oversight over the Prosecutorial strategy or the decisions of judges. The most important change in comparison to the case of Serbia and the ICTY is the depolitisation of the Prosecutor. He or she may not be associated with the broader political question of conditionality, as to retain as much as possible an impartial image (Hypothesis Q2).

Translation of this principle into a legal relationship may be very difficult. However, what is most of all necessary is that in practice the international community promotes the role of the HR and gives prominence to his or her reports when assessing its policy on a war atrocities crisis.
Increasing local participation

Nationals from the target states should be incorporated into all international post-atrocities instruments. The presence of these officials –authoritative members of the Serbian in-group– would give a more impartial and closer profile to these instruments than is the case with the ICTY and Serbia (Hypothesis I3). As such, the chances of target state actors internalising or acculturating to the norms transmitted through the post-atrocities instruments would be higher.
CHAPTER 6: CONCLUSION

In this dissertation, the relationship between Serbia and the ICTY has been analysed. As Serbia’s compliance record with its ICTY obligations is flawed, this case promises to provide important recommendations for the future use of international post-atrocities instruments.

The following Research Questions were formulated:
(1) How can the relation between the ICTY and Serbia be theorised?
(2) Which strategies did the ICTY apply in order to increase Serbian compliance with its obligations?
(3) Which improvements to compliance-inducing strategies for future international post-atrocities instruments can be identified based on the analysis of this case?

Pursuant to the first research question, a theoretical framework was constructed based on the research discipline International Law and International Relations, in Chapter 2. The aim of this framework was to conduct a structured analysis, grounded in empirical research on state behaviour. The framework presented several mechanisms to enhance Serbian compliance with its obligations. These are internalisation, acculturation, international conditionality, capacity building and rule quality. The framework contained hypotheses with predictions on the optimal effectiveness of these mechanisms.

The second research question was dealt with in Chapters 3 and 4. In Chapter 3, the main aspects of the ICTY regime have been described. Second, the ICTY regime was tested on its procedural qualities, using the rule quality hypotheses on adherence, coherence and determinacy. It was established that the ICTY regime contains considerable flaws with respect to the former two concepts. While an observer would probably not give a negative evaluation to the ICTY regime’s procedural quality as a whole, it is likely that Serbian actors, skeptical of ICTY regime content, will do so.

Chapter 4 first provided an overview of Serbia’s compliance record with the ICTY. Serbian compliance has been problematic, with a specific reluctance to arrest and extradite war crimes indictees to the Tribunal. However, Serbia’s compliance record has improved over the years to almost full compliance. This compliance record is determined by (1) the preferences of Serbian actors and (2) the strategies applied by the ICTY to enhance
compliance. As regards the preferences of Serbian actors, negative feelings towards the ICTY are still strong among politicians, the army and the security services, and the public opinion. However, during recent years pro-ICTY politicians led by President Boris Tadić have been in power. This has exercised a positive impact on Serbia’s compliance record. As regards the strategies applied by the ICTY to achieve better Serbian compliance, the Tribunal has predominantly relied on international conditionality policies of the US and the EU. As such, Serbia has been mostly coerced into complying with its ICTY obligations. Strategies aimed at triggering a change in the preferences of Serbian actors, through mechanisms of acculturation and internalisation, have been neglected. The broadcast of the Milošević trial did not provoke a general catharsis in Serbian society and the Outreach Program, designed to inform the ex-Yugoslav societies of the war crimes and the work of the Tribunal, came too late and was underfunded. Moreover, Prosecutor Del Ponte’s adversarial style and her close association with the conditionality policies of the EU and the US have probably damaged the Tribunal’s persuasive power on Serbian actors.

To sum up, while at this point in time Serbia is displaying increasing results in dealing with its wartime past, the ICTY could have played a more positive role in achieving this result. Pursuant research question 3, recommendations were formulated to enhance the positive role of future international post-atrocities instruments in Chapter 5.

**Evaluation of achieved results**

The use of a theoretical framework has been worthwhile. As predicted, it has structured the analysis into logical sub-categories. Additionally, its hypotheses functioned as specific benchmarks for the evaluation of the available data. One caveat must be noted, however. The systematic approach offered by the use of a theoretical framework led to the wish to construct a model as complete as possible. While this exercise in completeness has delivered a very robust framework, it imposed high demands on the subsequent analysis, since a wide range of themes needed to be researched. This dissertation has presented an overview of these themes. However, it is advisable that future research addresses specific themes of the analysis in more detail. For instance, more detailed research into the negative impact of international conditionality on the persuasive power of the ICTY, using interviews with Serbian actors, is warranted.
In het begin van de jaren 1990 werd de internationale gemeenschap geconfronteerd met de Joegoslavische onafhankelijkheidsoorlogen. Op zoek naar een strategie om het geweld te beëindigen, koos de VN Veiligheidsraad onder andere voor de oprichting van een tribunaal om de verdachten van oorlogs misdaden en misdaden van internationaal humanitair recht te berechten.


Het is waarschijnlijk dat gelijkaardige internationale instellingen, zoals het Internationaal Strafhof, ook in de toekomst zullen geconfronteerd worden met vijandigheid en tegenwerking door staten van wie de medewerking noodzakelijk is. Daarom is het relevant om de casus van Servië en het ex-Joegoslaviëtribunaal te analyseren, en aanbevelingen voor de toekomst te formuleren. Om deze analyse gestructureerd uit te voeren, werd gekozen om een theoretisch kader te ontwikkelen, op basis van theorieën uit de Internationale Betrekkingen en het Internationaal Recht. Dit kader bevat verschillende mechanismen die de naleving van internationaal recht bevorderen en formuleert hypothesen over de optimale inzet van deze mechanismen.

De analyse bestaat uit twee delen, ten eerste de juridische analyse van de procedurele kenmerken van het Tribunaal, en ten tweede de analyse van de relatie tussen Servië en het Tribunaal.

De juridische analyse maakt ten eerste duidelijk dat de juridische basis van het Tribunaal, een resolutie van de VN Veiligheidsraad, vernieuwend is in het internationaal recht, en dus controversieel is. Vervolgens wordt vastgesteld dat de onafhankelijkheid en de onpartijdigheid van het Tribunaal op een aantal vlakken in het gedrang is gekomen. Een belangrijk voorbeeld is de beslissing van Aanklaagster Carla Del Ponte om geen officieel
onderzoek te openen naar de NAVO bombardementen op Servische doelen van 1999. Hieruit wordt besloten dat de procedurele kenmerken van het Tribunaal geen positief effect hebben op de perceptie van Servische actoren op het Tribunaal. Hierdoor stimuleren zij de naleving door Servië van haar verplichtingen ten aanzien van het Tribunaal niet.


Na de bespreking van de Servische actoren worden de strategieën uiteengezet die het Tribunaal hanteerde om de samenwerking van Servië te verbeteren. De eerste strategie is een internationale conditionaliteitspolitiek. De Verenigde Staten stelde een deel van zijn financiële steun aan Servië afhankelijk van de goede samenwerking met het Tribunaal. De Europese Unie verbond de verdieping van haar relaties met Servië aan dezelfde voorwaarde. Aanklaagster Del Ponte maakte van internationale conditionaliteit het speerpunt om de medewerking van Servië te bekomen. Een tweede strategie is het beïnvloeden van de preferenties van Servische actoren via het Outreach-programma, dat zich richt op informeren, waarheidsvinding en verzoening. In theorie kan deze strategie voor een veel stabielere samenwerkingsband tussen Servië en het Tribunaal zorgen, aangezien de Servische actoren via het Outreach-programma gradueel de normen en doelstellingen van het Tribunaal overnemen. Echter, door onderfinanciering en de harde en gemediatiseerde houding van Aanklaagster Del Ponte, die vooral inzette op conditionaliteit, heeft deze strategie nog geen beslissende ommekeer in de Servische samenleving veroorzaakt. De laatste besproken strategie is het verbeteren van de capaciteit van Servië voor de uitvoering van haar verplichtingen ten aanzien van het Tribunaal. Vastgesteld is dat de internationale inspanningen om de capaciteit van Servische instellingen te verhogen niet rechtstreeks gelinkt zijn aan de verplichtingen ten aanzien van het tribunaal. Echter, een indirect positief effect op de preferenties van de betrokken Servische actoren is wel waarschijnlijk.
Tenslotte wordt vanuit deze analyse een set aanbevelingen geformuleerd, voor het design van toekomstig internationaal optreden in gelijkaardige conflicten. De klemtonen van deze aanbevelingen zijn (1) een grotere nadruk op informeren, verzoening en democratisering in de betrokken staten, (2) een betere coördinatie van internationale initiatieven, en (3) de depolitisering van de aanklager van de betrokken juridische instelling.
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