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Practice of "Positive Complementarity" of the International Criminal Tribunals and Building the Domestic Rule of Law: Roles of Capacity-building and Outreach by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Post-conflict Serbia

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Abstract

This paper sheds light on the significance of the ICTY's practice under the idea of "positive complementarity" observed in the ICTY. The idea of "positive complementarity" is defined as positive attitudes and practice of the international criminal tribunals for catalyzing domestic criminal processes to fill the "impunity gap." However, the discussion has been ongoing due to the lack of unified understanding on the meaning of "positive complementarity" and remaining tension observed between international and domestic courts.

In order to understand how domestic and international criminal tribunals work together under the idea of "positive complementarity," this paper discusses how the idea of "positive complementarity" developed in the ICTY. Although the term "positive complementarity" itself was defined by ICC, this paper points out that the roots of the idea of "positive complementarity" can be found in the process of overcoming the failures of ICTY and the International Criminal Tribunal for Rwanda (ICTR) since around the late 1990s. As a specific practice of ICTY based on the idea of "positive complementarity," this paper argues that ICTY developed outreach and capacity-building functions.

This paper then analyzes the significance of the practice of "positive complementarity" by ICTY on rebuilding the rule of law in post-conflict Serbia. Although the tension between ICTY and Serbia has been longstanding, ICTY has been implementing both activities of outreach and capacity-building by cooperating with local experts for building the rule of law in Serbia by enhancing two sides of the rule of law in the domestic context.

1. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY) closed its doors at the end of December 2017. In its 24 years, the ICTY in the former Yugoslavia brought prosecutions against 161 individuals and contributed to developing the realm of international criminal law.[1] Analysis on the impact of the ICTY has been needed to consider the significance of its legacy and future practice of other international criminal tribunals.

This paper sheds light on the significance of the ICTY's practice under the idea of "positive complementarity"

observed in the ICTY. The idea of "positive complementarity" is defined as positive attitudes and practice of the international criminal tribunals for catalyzing domestic criminal processes to fill the "impunity gap."[2] The idea of "positive complementarity" spread amongst scholars and practitioners in the field of international criminal justice since the Office of the Prosecutor (OTP) of ICC introduced the details of the concept in 2010 (ICC, 2010, paras. 16–17). The concept of "positive complementarity" contributed to providing the basis of the discussion about the stands of the international criminal tribunals for working with domestic courts in their jurisdictions in the contemporary context. However, the discussion has been ongoing due to the lack of unified understanding on the meaning of "positive complementarity" and remaining tension observed between international and domestic courts.

In order to understand how domestic and international criminal tribunals work together under the idea of "positive complementarity," this paper discusses how the idea of "positive complementarity" developed in the ICTY. Although the term "positive complementarity" itself was defined by ICC, its historical roots can be found in the past efforts by international society to pursue justice against war criminals by embracing the idea of "complementarity" to positively catalyze domestic criminal justice processes. This paper points out that the roots of the idea of "positive complementarity" can be found in the process of overcoming the failures of ICTY and the International Criminal Tribunal for Rwanda (ICTR) since around the late 1990s. As a specific practice of ICTY based on the idea of "positive complementarity," this paper argues that ICTY developed outreach and capacity-building functions.

This paper then analyzes the significance of the practice of "positive complementarity" by ICTY on rebuilding the rule of law in post-conflict Serbia. Although the tension between ICTY and Serbia has been longstanding, ICTY has been implementing both activities of outreach and capacity-building by cooperating with local experts. This paper focuses on the process of outreach and capacity-building implemented since the late 1990s after ICTY revised its working policy from one of "primacy" over the domestic criminal processes to a more positive understanding on complementarity to overcome past failures to cooperate with domestic courts.

This paper specifically analyzes the significance of ICTY's outreach and capacity-building activities for rebuilding the domestic rule of law of post-conflict Serbia. International society has been stressing that addressing past injustice by the international criminal tribunals can contribute to building the domestic rule of law.[3] The concept of the rule of law can be defined as an idea for rejecting the "rule of man" and pursuing compliance with the fundamental norms respected by society as a governing principle. This paper considers how the practice of "positive complementarity" of the international criminal tribunals can contribute to building two different sides to the idea of the rule of law. The one side, the "broad sense" of the rule of law, means fundamental values such as human rights or equity before the law in the state. Another side, the "narrow sense" of the rule of law, means positive laws contain procedural rules and legal institutions that sustain functions of the laws in societies. Although the former provides the goals of law, the latter provides means to achieve the goals.

This paper analyzes the effects of the practice of "positive complementarity" under the framework that outreach activities of the international criminal tribunals contribute to building the "broad sense" of the rule of law. On the other hand, capacity-building contributes to building the "narrow sense" of the rule of law. Both outreach and capacity-building faced difficulties derived from a negative attitude toward ICTY that developed in the early stage of its activities. This paper discusses how both types of "positive complementarity" activities observed in the practice of ICTY contributed to building the rule of law in Serbia by enhancing two sides of the rule of law in the domestic context that entailed mixed positive and negative attitudes and practice toward ICTY.

2. Development of the Idea of "Positive Complementarity"

2.1. Idea of "Complementarity" of ICC

The idea of "positive complementarity" was first defined by the OTP of ICC in 2010. However, that was a product of the revising process of the policies of the international criminal tribunals since the late 1990s. The idea of "complementarity" came to be widely known among scholars and practitioners since the Rome Statute of the International Criminal Court (hereinafter Rome Statute) explicitly defined it in 1998. Article 1 of the Rome Statute stipulates that ICC "shall be complementary to national criminal jurisdiction."[4]

Article 17 of the Rome Statute concretized this term "complementarity" through the so-called "admissibility test." Under the "admissibility test" of the ICC, any cases are inadmissible where (1) the state authority has already been investigating, (2) the state authority has decided not to prosecute, (3) the case has already been tried before the national court, and (4) the case does not have sufficient gravity to be dealt with by the ICC.[5] The exceptions to these are cases in which the ICC determines the state authority to be unable or unwilling to deal with the cases in its criminal processes.[6]

One aspect of the concept of "complementarity," in this sense, is the rule of division of labor between the ICC and national courts. As of 2003, the informal ICC expert group explicitly divided the concept of "complementarity" into two aspects: *partnership* and *vigilance*. The former meant cooperative action taken by the ICC for promoting a national criminal justice process against war criminals. On the other hand, vigilance meant action taken by ICC for delivering justice against war criminals instead of the national legal institutions in case that they are unable or unwilling to initiate national criminal processes.[7] The latter aspect of vigilance was crystalized as an ICC practice for exercising its admissibility test stipulated in Article 17. The former partnership aspect, although it needed time to be elaborated, became "positive complementarity" later.

2.2. Development of the Idea of "Positive Complementarity"

Although the idea of "positive complementarity" became widely known through the definition of ICC, ICC did not create the idea of it out of nothing. There had been discussions about having a more positive understanding on the concept of "complementarity" in international society since the late 1990s. The beginning of discussions about broadening the concept of "complementarity" can be found in the process to overcome the failures of ICTY and ICTR. Both ICTY and ICTR were established by Security Council Resolutions in the 1990s as kinds of first-generation international criminal tribunals after the Nuremberg and Tokyo Trials.[8] Their foundational basis in Security Council Resolutions provided them with strong jurisdiction over national criminal courts. For instance, the report of the Secretary General in 1993 explicitly stated that the concurrent jurisdiction of the international tribunal and national courts "should be subject to the primacy of the International tribunal."[9] The appeals chamber decision of the *Tadić* case in 1995 also confirmed this "primacy" of the international criminal tribunals over national courts by rationalizing that crimes dealt with by the international criminal tribunals had a universal character recognized by international law.[10]

Both tribunals were expected to play crucial roles in delivering justice against war criminals who had committed serious human rights abuses in conflicts. However, this "primacy" approach for understanding the jurisdictions of the international criminal tribunals caused ICTY and ICTR to become ineffective by leading opposition of the states under their jurisdictions. In the case of ICTY, for instance, there were problems in gathering evidence of war crimes

or interviewing witnesses due to the lack of cooperation from national authorities (Brammertz and Hughes, p. 188). The insufficient cooperation in the process of extradition took much time, and it led to criticism against the time-consuming activities of ICTY (Hazan, 2004, p. 69). The distance between both tribunals from the states under their jurisdiction also hindered effective collaboration with local actors.

In the late 1990s, both ICTY and ICTR revised their policies of "primacy" for pursuing a more collaborative relationship with the states under their jurisdictions to find the exit strategy. The annual reports of ICTY in 1999, for instance, explicitly stated that there was a gap between tribunals and local citizens (UN, 1999, paras. 146–153). Both international criminal tribunals, in order to overcome their failures under the "primacy" approach, developed new functions not limited to prosecution of war crimes mandated by their foundational bases. As measured to address the problems, both tribunals gradually developed capacity-building functions of local authorities and outreach activities in local languages (UN, 2004, paras. 314–326; UN, 2005, paras. 63–68). The current activities of the United Nations International Residual Mechanisms for Criminal Tribunals (MICT) took over these functions of ICTY and ICTR on a continuing basis to assist national jurisdictions.[11]

Since the 2000s, establishing "hybrid courts," which had features based on the collaboration between international and national actors, has been mainstreaming in international society.[12] Some of the "hybrid courts" had outreach or capacity-building functions for effectively supporting national legal activities from scratch.[13] This mainstreaming of the "hybrid courts" can be considered an indication of the trends for pursuing a collaborative relationship between international criminal tribunals and domestic courts. The report of the UN Secretary General in 2004, for instance, explicitly referred to the ineffectiveness of past practice of ICTY and ICTR in terms of their cost, physical locations, and lengthy legal processes.[14] The report emphasized the collaborative relationship between international criminal tribunals and local legal institutions as follows.

> National location also enhances the national capacity-building contribution of the ad hoc tribunals, allowing them to bequeath their physical infrastructure (including buildings, equipment and furniture) to national justice systems, and to build the skills of national justice personnel. In the nationally located tribunals, international personnel work side by side with their national counterparts and on-the-job training can be provided to national lawyers, officials and staff. Such benefits, where combined with specially tailored measures for keeping the public informed and effective techniques for capacity-building, can help ensure a lasting legacy in the countries concerned.[15]

The idea of positive complementarity, thus, was constituted as a result of the discussion about a cooperative nexus between national and international justice for filling the "impunity gap." In accordance with the proposals, the need for discussion about "positive complementarity" was first referred to in the resolution of the 8th plenary meeting of the ICC on November 26, 2009.[16] Denmark, as one of the proposed countries, stated as follows:

> The Court itself is the court of last resort. In this regard an issue of particular interest to Denmark is positive complementarity – understood as support for national jurisdictions to enable them to better deal with their obligations in cooperation with the Court. Denmark has a long history of supporting the development of rule of law institutions through technical assistance. Thus, we see the issue of positive complementary [*sic*] not only as flowing from the activities of the Court, but as part of a broader and sustained effort of promoting justice and good governance for the benefit of all.[17]

This indicated a change of perception by international society on the nature of international criminal tribunals from merely justice institutions into supporting institutions to sustain development of the rule of law of the societies under their jurisdictions. The term "positive complementarity," then, was eventually defined by the OTP of ICC in 2010 as a more positive attitude and practice on the idea of "complementarity" for catalyzing domestic criminal processes.

3. Analytical Framework: Two Sides of the Rule of Law

3.1. Difference of the Perspective on the Effects of Transitional Justice

In the realm of transitional justice, however, previous research did not necessarily empirically measure the effects of the activities of international criminal tribunals as a transitional justice mechanism on domestic societies. This was largely because much previous research, particularly that which argued the significance of justice in building the rule of law, tended to regard criminal justice mechanisms as institutions to symbolize transition from past regimes to a more democratic regime. For instance, Neil J. Kritz, one of the notable scholars in the early era of the development of transitional justice, stated that addressing the issue of justice is the "first test" for building the rule of law and distinguishing the new democratic regime from the old one (Kritz, 1995, p. xxi). Ruti G. Teitel also theorized the role of transitional justice mechanisms including criminal tribunals for expressing the "narrative" of transition from a past authoritarian regime to a new democratic one (Teitel, p. 220).[18] From these kinds of normative perspectives, activities of justice institutions designed for working in the period of social transition can play an important role in (re)building the rule of law as long as such activities express the need for new norms to be respected under the new regime.

From a more empirical perspective, some previous research pointed out the lack of a strong causal relationship between addressing past human rights abuses and building the rule of law (Call, 2007, pp. 397–399). Padráig McAuliffe criticized scholars and practitioners in the field of transitional justice for tending to consider that addressing past human rights abuses automatically contributes to rebuilding the rule of law (McAuliffe, 2013, pp. 51–54). He specifically criticized various international criminal tribunals from ICTY to ICC for contributing insufficiently to building the domestic rule of law (McAuliffe, 2013, pp. 185–219). From this type of empirical perspective, transitional justice institutions cannot be regarded as an important factor for (re)building the domestic rule of law as long as they do not deliver any specific benefits for domestic legal rules or institutions that sustain the functions of law in society.

3.2. Two Sides of the Rule of Law and Long-term Goal of Transitional Justice

Theoretically speaking, this difference in the evaluations about the role of transitional justice mechanisms derives from the different perspectives for understanding the concept of the rule of law. There have been a variety of discussions on the definition of the rule of law, notably about distinguishing between the "broad" and "narrow sense" of the rule of law.[19] The former, "broad sense" of the rule of law means fundamental values such as human rights or equity before the law in the state. The latter, "narrow sense" of the rule of law means positive laws contain procedural rules and legal institutions that sustain the functions of laws in society.

From the normative standpoints that emphasize the symbolic effects of transitional justice, the effects of transitional justice activities on the domestic rule of law can be measured by how they express value codes that should be respected as rules under the new regime formed through the process of transition.[20] This perspective tends to stress the particularity of the transitional societies that face dilemma of the rule which has both

“backward”-looking for considering continuity from past regimes and “forward”-looking for considering new values as “goals” of the society that ought to be pursued under the new regime (Teitel, p. 219). Therefore, even if transitional justice often takes imperfect measures against past human rights abuses during the period of transition and itself is not “ideal justice,” it makes critical contributions to (re)building the rule of law by expressing “goals” that transitional societies ultimately achieve in the passage of time (Teitel, p. 228).

On the other hand, from the empirical standpoints that emphasize the specific benefits delivered by the transitional justice institutions, the effects of transitional justice on the domestic rule of law can be measured by how it delivers benefits for enhancing positive laws or how legal institutions sustain functions of the rules in the domestic contexts. Within this perspective, mere symbolic effects of transitional justice are not enough for (re)building the domestic rule of law. The empirical standpoints emphasize a “fact-based” assessment of how transitional justice has an impact on “means” of the domestic rule of law such as domestic legal institutions that sustain foundation of the rule of law (McAuliffe, pp. 288–289)

At first glance, these different perspectives are irreconcilable for discussing the effects of transitional justice activities. However, theoretically, both different aspects of the rule of law are mutually reinforcing and are needed for building the rule of law to set the long-term framework of the discussion. In case the “broad sense” of the rule of law is ignored, it causes lacking of the “goal” of law respected by the government or its legal institutions. As a result, the new regime will face difficulties in expressing the normative shift from that of the past regime that did not take enough measures to prevent human rights abuses. On the other hand, in case the “narrow sense” of the rule of law is ignored, states will lack specific legal “means” to achieve the “goals” of law by complying with its fundamental value code. Such situation causes citizens to distrust the function of the domestic rule of law. This is why, as Figure 1 shows, under the long-term framework for discussing the effect of transitional justice, both perspectives are needed for filling different aspects of the rule of law.

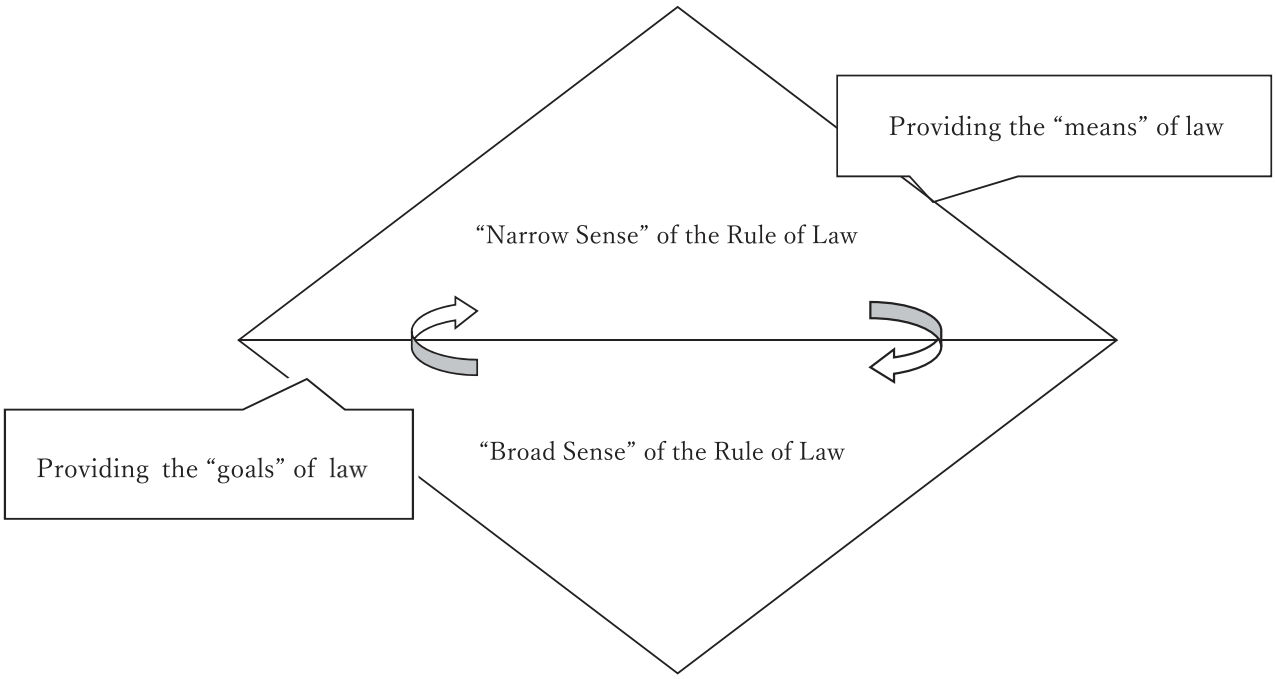

Figure 1. Model of the Amicable Relationship of the two sides of the Rule of Law

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This kind of long-term framework of discussion about the issue of transitional justice can be regarded as one of the recent trends in the field of transitional justice. For instance, since the late 2000s, there have been active discussions on the relationship between transitional justice and long-term development assistance (Greiff and Duthie, 2009, pp. 17–25). Development of the discussion about the relationship between transitional justice and post-conflict peacebuilding also indicates the tendency of the broadened context of the issue of transitional justice.[21] This is largely because of the expansion of the field of transitional justice and visible overlap between transitional justice and other fields in discussing long-term development of the society on the ground, although much previous research that dealt with the relationship between transitional justice and building the rule of law tended to stress the peculiar feature of transitional justice: the "transition" phase cannot be actually separated from both the "before" and the "after" of the transition of society. As long as the "transition" phase in which transitional justice is implemented theoretically can be embedded in the process of spatiotemporal transition of the society, policies of transitional justice inevitably need to consider the nexus with other fields such as peacebuilding or development assistance that pursue the long-term development of society.

3.3. Practice of "Positive Complementarity" of ICTY under the Two Sides of the Rule-of-Law Model

As this paper mentioned, ICTY has developed its outreach and capacity-building functions since the late 1990s for implementing policies of "positive complementarity" to catalyze domestic criminal processes of the former Yugoslavia. Under the rule-of-law model in this paper, theoretically speaking, outreach can be considered as a policy that pursues the "broad sense" of the rule of law. Although there is no unified definition of the term "outreach" of the international criminal tribunals, it can be defined as consisting of activities for disseminating information about their role and functions in their jurisdictions for deepening people's understanding on the significance of the activities of the international criminal tribunal. Every judgment of the international criminal tribunals is open to the public, and everyone can seem to access it. However, in general, people living in transitional societies have difficulty understanding such information itself due to the physical or linguistic barriers and lack of access to the war crimes tribunals. Furthermore, the significance of the activities of the court themselves are not easily understood without interpreting and explaining because of the complex political situation, and understanding it requires specialized knowledge about international criminal justice. Thus, it is necessary for outreach to play a role as a catalyst to connect between international criminal tribunals and the people living in the transitional societies.

Under the rule-of-law model of this paper, outreach can play a role of provider of the "goals" of law, which were lacking or lost as a result of conflict. Despite conducting a broader discussion not limited to the activities of international criminal tribunals, Stromseth, Wippman, and Brooks discussed the "demonstration effects" of accountability proceedings of transitional justice mechanisms that demonstrate norms of impunity in public (Stromseth, Wippman, and Brooks, 2006, pp. 258–260). They argued that "accountability proceedings must demonstrate the value and importance of accountability and fair justice to local leaders and ordinary citizens" (Stromseth, Wippman, and Brooks, 2006, p. 260). From the perspective of this paper, outreach as a practice of "positive complementarity" is an activity that can contribute to conveying opportunities for the people to learn about norms constructed under the new regime. Many outreach activities of international criminal tribunals, in fact, not only entail public relations activities like radio broadcasting or press conferences, but public research conferences or seminars, documentation of records and disseminating them in a local language, and study tours or programs.

On the other hand, capacity-building, another component of the practice of "positive complementarity" of the

international criminal tribunals, plays a role in building the "narrow sense" of the rule of law that provides the "means" of law to achieve the "goal" of law in society. Stromseth, Wippman, and Brooks argued that accountability mechanisms have "capacity-building" effects that increase the skills of national legal professionals or education of domestic actors including civil society groups (Stromseth, Wippman, and Brooks, 2006, pp. 258–260), although, as this paper argued, international criminal tribunals were not mainly designed for implementing capacity-building activities such as training national judges in their jurisdictions. However, the capacity-building function has become common among the international criminal tribunals since the late 1990s in accordance with the increased number of hybrid courts. The capacity-building activities of international criminal tribunals generally entail training of national legal experts, sharing information between international criminal tribunals and national experts, and supporting national institution building.

This paper specifically analyzes the significance of the practice of "positive complementarity" of ICTY in the transitional context of Serbia in accordance with this analytical framework. On the aspect of the "broad sense" of the rule of law, this paper analyzes how outreach activities of ICTY contributed to providing opportunities for setting norms and for the local people of Serbia to understand the significance of justice activities of the court. On the other hand, on the aspect of the "narrow sense" of the rule of law, this paper analyzes how capacity-building activities of ICTY contributed to building capacities of national legal experts and institutions in Serbia. In particular, this paper analyzes the significance of both fields of activities targeting long-term effects on building the rule of law in Serbia.

4. Practice of "Positive Complementarity" of ICTY in Serbia

4.1. Context of Justice in Transition of Serbia

The practice of "positive complementarity" of ICTY in Serbia needed to start being implemented from the negative perspective that was cultivated under the regime of Slobodan Miloševic, former president of Serbia. Since the beginning of the ICTY in 1993, ICTY faced insufficient cooperation from Serbia for many years. In 1999, for instance, ICTY reported lack of national cooperation by Serbia in arresting indictees including Ratko Mladic, who was eventually arrested as a war criminal for committing war crimes and crimes against humanity in 2008.[22] There had been only nine war criminal proceedings in the domestic trials in Serbia until 2003 (Majić and Ignjatović, 2012, p. 1). In this sense, the agreement of cooperation for ICTY stipulated in the Dayton Peace Agreement had been breached in Serbia.[23]

Although these opposing attitudes observed among high-level Serbian officials have been mitigated to some extent since the end of the Miloševic regime, the negative attitudes toward the works of ICTY have generally been long-lasting.[24] The remaining negativity among ordinary citizens toward the works of ICTY was reported in several previous research studies. For instance, Bachmann and Fatic analyzed the difference among polls conducted from 2002 to 2011, and they depicted the negative attitudes of Serbians (Bachmann and Fatic, 2015, pp. 100–105). They also concluded that one of the critical causes of such negative attitudes was that people observed that the court activities of ICTY were biased particularly against Bosnian Serbs (Bachmann and Fatic, 2015, p. 266). Actually, as Figure 2 shows, Serbians made up 58% (94 persons) of 161 ICTY indictees at the time the ICTY completed its work on December 31, 2017.[25] This tendency that the ICTY showed in its prosecutional activities laid the foundation of the long-term negative attitudes of Serbian citizens toward ICTY for criticizing their biased practice.[26]

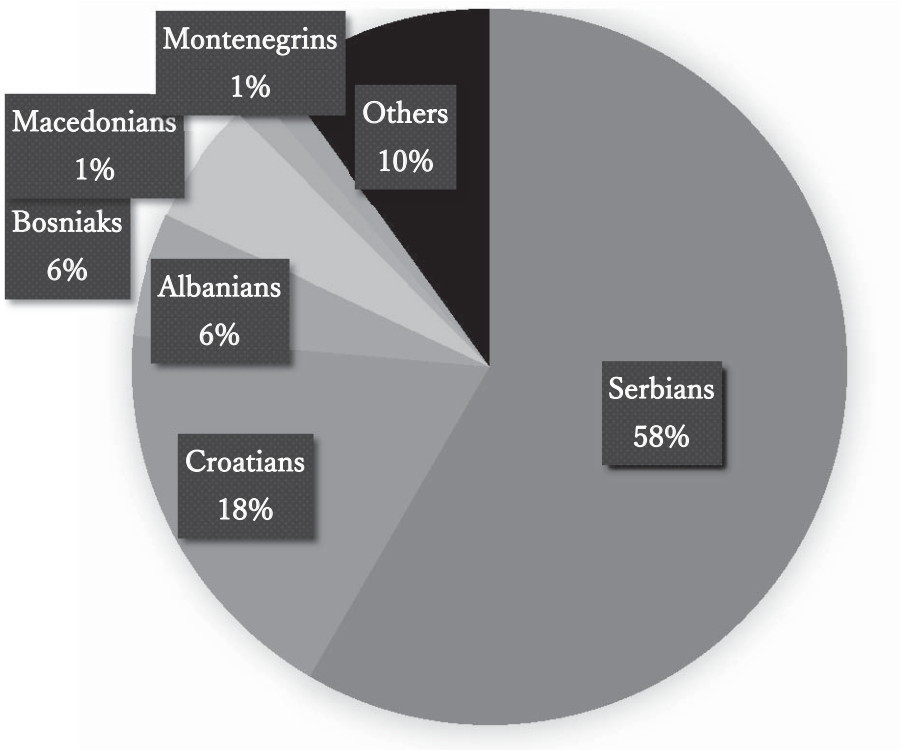

Figure 2. Ratio of ethnicity of the indictees of ICTY

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This negative attitude toward ICTY, however, has not necessarily caused the lack of cooperation in pursuing justice and development of the rule of law in Serbia. Rather, the current context of transition in Serbia has been characterized by both positive and negative attitudes toward pursuing transitional justice due to the long-term policy of the state. One of the explicit factors for constructing the context of transitional justice in Serbia derived from the fact that Serbia had pursued a long-term policy of trying to join the EU since it was the State Union of Serbia and Montenegro. Since 1999, addressing past human rights abuses has been one of the benchmarks for whether Serbia is to become a kind of "legitimate member" of the European club.[27] However, in the domestic context, the government of Serbia had been publicly taking a stance for legitimizing itself during the conflict that sometimes entailed denial of the responsibility of war crimes or massacre in Srebrenica.[28] This reluctance was one of the causes that delayed Serbia joining the EU.

Although Serbia's negative attitudes toward ICTY had remained under the Koštunica regime until 2008, they gradually changed with the new regime of Mirko Cvetković, which favored joining the EU. The gradual change of the Serbian attitude was indicated by the incidents in which war criminals who were regarded as "heroes" were arrested and publicly prosecuted before the ICTY. One of the notable examples was the arrest of Karadžić on July 21, 2008. Obradovic-Wochnik's analysis was that the arrest created the story about Karadžić during his life as a fugitive and "collapsed" the myth of him as a war hero (Obradovic-Wochnik, 2009, pp. 45–47). This step became a sign that Serbia was fulfilling the condition of full cooperation with the ICTY stipulated by the decision of the European Council (EC) on the partnership with Serbia on February 18, 2008. Another case that served as a sign that Serbia was fulfilling the condition was the arrest of Ratko Mladić, former commander-general of the Yugoslav People's Army, on May 26, 2011. That incident occurred two years after Serbia's application for EU membership on December 19, 2009.

As a specific measure that needed to be taken by Serbia, the EU decision of 2008 required Serbia to "create an IT network for prosecutors at all levels, ensure enforcement of court decisions and further strengthen the capacity to try war crimes domestically in full compliance with international obligations to the ICTY."[29] After Serbia's application in 2009, the EU publicly called on Serbia to implement policies based on the recommendation of the ICTY and to make continued efforts to arrest the two remaining nominal fugitives, Ratko Mladić and Goran Hadžić, as one of the critical benchmarks for accepting an application from Serbia.[30] Serbia successfully arrested these fugitives by the middle of 2011. Then, on October 12, 2011, the EC confirmed that "Serbia has reached a fully satisfactory level in its cooperation with ICTY and has taken an increasingly active role in fostering reconciliation in the region."[31] Finally, the EU gave Serbia the status of "candidate country" on March 1, 2012.[32] In the following ongoing discussion for the accession process of Serbia, there has been continuous pressure from the EC and responsive action by Serbia so far.[33] The remaining negative perception toward the ICTY and positive practice caused by the EU accession process set the transition context of Serbia.

4.2. Outreach and "Broad Sense" of the Rule of Law in Serbia

Although outreach programs of the ICTY in Serbia faced many difficulties as a first in the history of the international criminal tribunal, they played a role in providing the opportunities for understanding the significance of justice for the people in the domestic context.

In addition to the pre-condition of outreach activities created as a result of prosecutional activities of ICTY, shortage of resources was another type of constraint on outreach activities in Serbia. Orentlicher analyzed that the outreach program in Serbia was really understaffed and concerned about the insufficient budgetary resources for effective cooperation with the Serbian national media (Orentlicher, 2008, p. 67). Ivan Jovanović, local transitional justice and rule-of-law consultant of Serbia, pointed out that ICTY's outreach efforts in Serbia seemed to be "occasionally" from the perspective of ordinary people.[34] In order to overcome this shortage, ICTY needed to be supported by other international and national institutions including the OSCE, UNDP, and national civil society organizations like the Humanitarian Law Center for implementing outreach programs.[35]

Even in this difficult situation for ICTY outreach activities, there have been some good indications about building the "broad sense" of the rule of law provided by outreach in Serbia. One of the successful activities was youth-outreach programs co-organized by international and national actors. The outreach programs targeting youth were among the principal areas of activities since the ICTY started its outreach activities in its jurisdiction in 1999. In the final report on outreach activities of ICTY published in 2016, it was reported that ICTY staff gave lectures and presentations to 930 university and high-school students in Serbia as of December 2015.[36] The youth-outreach programs entailed lectures on the mandate or achievements of ICTY and discussions with staff members of ICTY.[37]

Another positive indication is found in the collaboration between ICTY and national NGOs for memorializing archives of the records of justice. Since 2005, the project of archiving ICTY proceedings in the local language has been implemented with the Humanitarian Law Center, the local Serbian NGO. According to the ICTY report, it had created copies of AV recordings for more than 9,300 days of trial sessions and 115,000 documents including witness statements, of which 95 percent consisted of ICTY archives.[38]

From the perspective of building the "broad sense" of the rule of law, these activities have significance for constructing the long-term social context for targeting future generations and their ways to disseminate it in the domestic context. As this paper mentioned above, the "broad sense" of the rule of law pursues constructing "goals" of law in transitional societies. The future-oriented nature of outreach activities is vital for building the "broad sense" of

the rule of law. In case the effects of outreach are merely evaluated as effects on present society, Serbia inevitably faces negative responses due to the remaining negative attitudes against ICTY.[39] However, it constructed a path for setting norms that was not respected before Serbia's transition.[40]

4.3. Capacity-building and "Narrow Sense" of the Rule of Law in Serbia

ICTY's capacity-building activities contributed to building capacities of both staff and institutions. The development of the "narrow sense" of the rule of law reflects the feature of Serbia's transition that entailed a mixed attitude toward ICTY.

The war crimes-related institutions are providing some explicit indications of the effects of ICTY's capacity-building activities on enhancing the capacity of national institutions in Serbia. Serbia established two national judicial mechanisms, the Office of the War Crimes Prosecutor of Serbia and the War Crimes Department, on July 1, 2003, in accordance with the Law on Organization and Competence of Government Authorities in War Crimes Proceedings.[41] For Serbia, dealing with war crimes in a domestic context was really an unexplored field of activity, and it needed to develop national systems based on the accumulated know-how of ICTY.[42] Since the initial stage of activities of national war crimes prosecution in Serbia, ICTY-provided training opportunities entailed lectures on international humanitarian law, visit of judges to ICTY, and holding roundtable sessions.[43] However, there has been some criticism that high-ranking politicians have not been prosecuted due to the lack of sufficient capacity or political will.[44] In this sense, the outcomes of ICTY's capacity-building activities have also been affected by the mixed nature of Serbia's transitional context.

The continuity in the cooperative relationship between ICTY and Serbia entailed training opportunities; however, it indicated the nominal contribution of ICTY to building the capacity of Serbian legal experts. For instance, from September 2010 to October 2011, ICTY co-implemented the "War Crime Justice" project, which entailed providing training opportunities for the national legal experts of the former Yugoslavia and developing an effective co-working system with national legal institutions. In the "Action Plan for Chapter 23" published by Serbia as a strategic plan for proceeding with the EU accession process in April 2016, Serbia reported that 435 persons were processed through national war crimes mechanisms.[45] This kind of continuous training had been reported in the recent progress reports submitted by MICT.[46]

From the perspective of the "narrow sense" of the rule of law, this indicates that Serbia had made long-term efforts to build national legal institutions for addressing war crimes issues. As the national report of Serbia stated, the effort in the "narrow sense" of the rule of law also has a long-term framework embedded in the continuous cooperative relationship with MICT and the EC.

5. Conclusion

This paper analyzed the role of ICTY in implementing its activities under the idea of "positive complementarity" in Serbia. It depicted ICTY's contributions through outreach and capacity-building for both sides of the idea of the rule of law. Although outreach faced many difficulties due to the transitional context of Serbia, it contributed to supporting norms-setting as a legal "goal" required for building the "broad sense" of the rule of law through both targeting future generations and past archives in Serbia. On the "narrow sense" of the rule of law defined as "means" of law to achieve the "goal," this paper described the efforts ICTY made to support enhancing the capacity of national legal institutions and experts in Serbia.

Of course, this paper does not claim that the policy of ICTY in pursuing “positive complementarity” played a role in drastically changing the context of transition in Serbia itself.[47] This means that policies of transitional justice including activities of the international criminal tribunals inevitably face difficulties derived from unique features of the contexts of transitions on a case-by-case basis. In the case of Serbia, it had a nature for taking both a negative stance against ICTY and some positive attitudes and practice continually observed for achieving the goal of justice and building the rule of law in the political context of the accession of Serbia to the EU. It caused some mixed results including both positive and negative indications of the activities of ICTY.[48]

As the remaining negative attitudes toward the general perception of Serbia against ICTY showed, the case of Serbia also indicated the need for a long-term framework to both implement and evaluate policies of transitional justice to build the two sides of the rule of law. In the transitional context of Serbia, as mentioned above, conditions in Serbia’s accession process to the EU have played a kind of monitoring mechanism role for evaluating the transitional justice process so far. However, Relja Radosavljević, legal analyst of the Humanitarian Law Center, stated that “we have seen a certain fatigue, or a certain slowing down even on the side of the EU for enlarging the EU and it accelerated the accession process of Serbia.... the scrutiny is not as strong as it was.”[49] Thus, further examination will be needed for analyzing how Serbia utilizes the legacy of achievement of justice of ICTY even after the end of its EU accession process to evaluate the long-term effect of transitional justice in building the rule of law in Serbia.

Notes

[1] The breakdown of the data is as follows: 90 sentenced, 19 acquitted, 13 referred to national jurisdiction; 37 had their indictments withdrawn or are deceased, and two retrials are to be conducted by MICT. See ICTY (2017).

[2] In this sense, this paper does not consider "positive complementarity" as just the legal standard of admissibility test or division of labor between international and domestic courts. Instead, this paper considers that it entails activities of the international criminal tribunals not limited to prosecutions to support domestic criminal processes.

[3] Rebuilding of the rule of law has been regarded as a core objective of the international criminal tribunals. See UN (2014).

[4] Article 1 of the Rome Statute

[5] Article 17(1) of the Rome Statute

[6] Article 17(2), (3) of the Rome Statute

[7] ICC (2003), para. 3.

[8] ICTY was established by Security Council Resolution 827 in 1993. ICTR was established by Security Council Resolution 955 in 1994.

[9] UN (1993), para. 65.

[10] Prosecutor v. Tadić, 1995. para. 59.

[11] Recent reports submitted by MICT explicitly referred to its activities on outreach and capacity-building. See UN (2017), paras. 38, 45–50.

[12] Except for the Special Tribunal for Lebanon established for dealing with crimes committed as a part of terrorism in 2009 and Extraordinary African Chambers first established by the regional organization of Africa, all hybrid courts established since the 2000s located their tribunals in the states under their jurisdictions.

[13] For instance, the first annual report of the Special Court for Sierra Leone (SCSL) referred to its outreach activities for disseminating information about court activities and capacity-building of national legal experts. See SCSL (2003), pp. 22, 26.

[14] UN (2004b), paras. 42–45.

[15] Ibid.

[16] ICC (2009), para. 6.

[17] Statement Delivered by H.E. Ambassador Kirsten Biering, Ambassador of Denmark for Eights Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, November 19, 2009, p. 4.

[18] Teitel argued for this normative perspective of the role of transitional justice by emphasizing the difference between "ordinary justice" in the society that has already established the culture of the rule of law and "transitional justice" in the transitional societies that have not sufficiently incorporated the culture of the rule of law.

[19] These two different aspects of the rule of law have been given various names, such as "thick" and "thin," "maximalist" and "minimalist," or "formal" and "substantive." However, these classifications have a similar tendency to divide laws into naturalistic value codes respected by the states and positivistic rules or institutions functioning in the states. As an example of the previous research, see Strometh (2006), pp. 68–80.

[20] In this sense, the discussion by Teitel does not make a clear distinction between politics and law (justice) in a transitional context. Instead, she emphasized the normative function of the political decisions of a new regime on justice matters in transitional societies.

[21] For instance, see Lamborne (2009).

[22] UN (1997), para. 45.

[23] Article X of Annex IA of the Dayton Peace Agreement stipulated that "the parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorized by the United Nations Security Council, including the International Tribunal for the Former Yugoslavia."

[24] Even in recent years, ordinary citizens of Serbia generally have negative attitudes toward ICTY. Interview with Serbian legal experts on November 15, 2017, in Belgrade.

[25] Even if this was the natural result because Bosnian Serbs broadly engaged in various conflicts in the Former Yugoslavia, a negative perception of ICTY's justice has remained in Serbia.

[26] Ivan Jovanović, a local transitional justice and rule-of-law consultant in Serbia, stated that many Serbians consider ICTY to be

biased against all of Serbia and feel a sense of injustice even today. Interview in Belgrade on November 17, 2017.

[27] Serbia needed to face human rights issues in the context of development and "membership" of the EU as a policy of national transition. As of 1999, Serbia had already become a member of the Stability Pact for South-eastern Europe, which entailed a working table designed for discussing the issue of democratization and human rights. The copy of the Pact can be accessed through the website of the University Toronto library. http://www.g8.utoronto.ca/summit/1999koln/pact.htm (last accessed on June 19, 2018)

[28] Sometimes discussion about past human rights abuses increased the risk of internal dispute or attacks from groups opposed to ICTY in Serbia. For instance, Obradovic-Wochnik reported public complaints even from politicians against the commemoration of Srebrenica organized by the local NGO Youth Initiative for Human Rights in 2005. See Obradovic-Wochnik (2009), pp. 29–47.

[29] Annex 2 of the Decision.

[30] EC (2010), p. 9.

[31] EC (2011) p.11.

[32] EC (2012)

[33] Even in the present context after the closure of ICTY, the EU has been continuously putting pressure on Serbia to deal with remaining war crimes cases and transitional justice matters through building national capacities. Serbia has been continually implementing its policies on dealing with war crimes in accordance with its strategic report. On the latest reports from both sides, see EC (2018); Republic of Serbia (2016b)

[34] Interview in Belgrade on November 17, 2017.

[35] Ibid.

[36] ICTY (2016), p. 88.

[37] ICTY itself evaluated that more than 70% of the participants in the youth outreach responded to a positive answer for the programs. ICTY (2016), p. 11.

[38] Ibid., p. 27.

[39] Some kinds of "positive attitudes" can be found in recent top-down indications such as the apology of Tomislav Nikolić, former president of Serbia on April 26, 2013. However, negative attitudes toward ICTY have not yet "disappeared" completely, even today. On the apology of Tomislav Nikolic, see CNN (2013), "Serbia's president declines to define killing of 8,000 in Srebrenica as 'genocide'," April 26, 2013, Retrieved June 21, 2018, from https://edition.cnn.com/2013/04/25/world/europe/serbia-srebrenica-apology/index.html

[40] Although this paper is not written to analyze other transitional justice institutions, establishing a truth commission has been discussed on an ongoing basis in the five countries of the former Yugoslavia including Bosnia, Kosovo, Macedonia, Montenegro, and Serbia, as of 2018. In the future, the archives created through outreach activities of ICTY could be utilized for making narratives by finding the truth of past human rights abuses.

[41] Articles 4, 10 of the Law on Organization and Competence of Government Authorities in War Crimes Proceedings.

[42] Interview with staff member of the War Crimes Department in Belgrade on November 16, 2017.

[43] On the training provided in the initial stage of activities of war crimes institutions of Serbia, See the website of the ICTY. http://www.icty.org/en/outreach/activities-archive/2003 (last accessed on June 22, 2018)

[44] Interview with Relja Radosavljevic, legal analyst of the Humanitarian Law Center, in Belgrade on November 17, 2017.

[45] Republic of Serbia (2016a), p. 21.

[46] UN (2018), para. 65.

[47] Radosavljević stated that ICTY did not successfully change the general negative perception of Serbia toward ICTY itself. However, he also stressed that this kind of failure can be found not only in Serbia, but also in other transitional societies under the jurisdiction of the international criminal tribunals. Interview on November 17, 2017, in Belgrade.

[48] Although the analytical framework is different from this paper, Orentlicher (2018) also discussed the mixed outcomes of the activities of ICTY.

[49] Interview in Belgrade on November 17, 2017.

References

Bachmann, K. and Fatić, A. (2015), *The UN International Criminal Tribunals: Transition without Justice?* New York: Routledge.

Brammertz, S. and Hughes, C.K. (2015), "From Primacy to Complementarity: The International Criminal Tribunal for the Former Yugoslavia, 1993–2015," *FICHL Publication* Series, *23*. pp. 161–233.

Call, C. (2007), *Constructing Justice and Security after War*, Washington DC: United States Institute of Peace Press.

CNN (2013), "Serbia's president declines to define killing of 8,000 in Srebrenica as 'genocide'," April 26, 2013.

EC (2010), "Press Release on 3040th Council Meeting," 25 October 2010.

EC (2011), "Communication from the Commission to the European Parliament and the Council: Commission Opinion on Serbia's application for membership of the European Union".

EC (2012), "European Council Conclusions – 1/2 March 2012".

EC (2018), "Serbia 2018 Report".

Greiff, P. and Duthie, R. (2009), *Transitional Justice and Development: Making Connections*, New York: Social Science Research Council.

Hazan, P. (2004), Justice in a Time of War: The True Story behind the International Criminal Tribunal for the Former Yugoslavia, Texas: Texas A&M University Press.

ICC (2003), "Informal Expert Paper: The Principle of Complementarity in Practice".

ICC (2009), "Strengthening the International Criminal Court and the Assembly of States Parties," ICC-ASP/8/Res.3.

ICC (2010), "Prosecutional Strategy 2009–2012".

ICTY (2016), "Outreach: 15 years of Outreach at the ICTY".

ICTY (2017), "Key Figures of the Cases," Retrieved May 25, 2018, from http://www.icty.org/en/cases/key-figures-cases

Kritz, N. (1995), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, *1*, Washington DC: United States Institute Peace Press, 1995.

Lamborne, W. (2009), "Transitional Justice and Peacebuilding after Mass Violence," *International Journal of Transitional Justice*, *3*(1), pp. 28–48.

Majić, M. and Ignjatović, D. (2012), "Ten Lessons from Serbia's Experience in War Crimes Issues," *FICHL Policy Brief Series,9*.

McAuliffe, P. (2013), *Transitional Justice and Rule of Law Reconstruction*, New York: Routledge.

Obradovic-Wochnik, J. (2009), "Strategies of Denial: Resistance to ICTY cooperation in Serbia," in Batt, J. and Obradovic-Wochnik, J. (2009), *War Crimes, Conditionality and EU Integration in the Western Balkans* (pp. 29-47), Paris: Institute of Security Studies.

Orentlicher, D. (2008), "Shrinking the Space for Denial: The Impact of the ICTY in Serbia," New York: Open Society Justice Initiative.

Orentlicher, D. (2018), *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*, Oxford, UK: Oxford University Press.

Prosecutor v. Tadić. Case No. IT-94-1-AR 72. Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995)

Republic of Serbia (2016a), "Action Plan for Chapter 23".

Republic of Serbia (2016b), "National Strategy for the Prosecution of War Crimes".

SCSL (2003), "First Annual Report of the President of the Special Court for Sierra Leone (for the period Dec. 1–2, 2003).

Statement Delivered by H.E. Ambassador Kirsten Biering, Ambassador of Denmark for Eights Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, November 19, 2009.

Stromseth, J.E., Wippman, D. and Brooks, R. (2006), *Can Might Make Rights? Building the Rule of Law After Military Interventions*, Cambridge, UK: Cambridge University Press.

Teitel, R. (2000), *Transitional Justice*, Oxford, UK: Oxford University Press.

UN (1997), "Fourth Annual Report of 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, UN Document, A/52/375 S/1997/729.

UN (2004a), "Eleventh Annual Report of 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," UN Document. A/59/215 S/2004/627.

UN (2004b), “Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,” UN Document, S/2004/616.

UN (2005), “Tenth Annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994,” UN Document. A/60/229 S/2005/534.

UN (2014), “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies.”

UN (2017), “Fifth annual report of the International Residual Mechanism for Criminal Tribunals,” UN Document. A/72/261-S/2017/661

UN (2018), “Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2017 to 15 May 2018,” UN Document. S/2018/471.