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Master's Thesis

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# The EU accession and Transitional Criminal Justice in Serbia and Croatia

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I have written the Master's thesis independently.

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## Abstract

The international mechanisms to pursue the legal accountability of the past atrocities evolved from the Nuremberg and Tokyo trials to the permanent International Criminal Court (ICC). As a result of such development, the post-Cold War international tribunals appear to hold particular characteristics; they impose a legal obligation for states under their jurisdiction to cooperate and they are dependant on such state cooperation to fulfil its legal mandate. To secure such cooperation, third party coercion appears to be effective as a determining factor of the state's behaviour in the face of legal obligation. In this scope, former Yugoslavian states offer a significant example. In 1993, the United Nations (UN) established the International Criminal Tribunal for former Yugoslavia (ICTY) as an international court to prosecute those who were most responsible for the massive human rights violations committed during the bloody Balkan Wars in the 1990s. In the due course of its operation, the political pressure from third party actors, most notably the EU, played a vital role to yield a significant outcome of the tribunal's mandate.

This study is to address such impact of the EU accession conditionality on the politics of Transitional Criminal Justice in post-conflict Croatia and Serbia. For this purpose, the author conducted the comparative analysis of those two cases with a scope of the Most Similar System Design (MSSD). She combined several qualitative methods, such as content analysis, secondary analysis and interviews with experts, to trace the evidence showing the changes that occurred before and after the EU's imposing its political pressure. The outcome of this study showed that the EU accession conditionality could facilitate positive and stable development in the overall cooperation with the tribunal, while such external pressure had a counterproductive effect at the level of domestic war crime prosecution. Therefore, the findings of this study contain a warning that partial involvement of a third party in the area of Transitional Justice could result in an undesirable outcome.

(English, 56 pages)

**Keywords:** Transitional Justice, Criminal Justice; International Criminal Justice; ICTY; former Yugoslavia; the European Union; enlargement; conditionality; state compliance

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## **List of Abbreviations**

BiH- Bosnia and Herzegovina  
CEECs- Central and Eastern European Countries  
DOS- Democratic Opposition of Serbia  
EU- European Union  
FRY- Federal Republic of Yugoslavia  
HDZ-Croatian Democratic Union (Hrvatska Demokratska Zajednica)  
HSLs- Croatian Social Liberal Party (Hrvatska Socijalno Liberalna Stranka)  
ICC- International Criminal Court  
ICJ- International Court of Justice  
ICTJ- International Centre for Transitional Justice  
ICTR- International Criminal Tribunal for Rwanda  
ICTY- International Criminal Tribunal for former Yugoslavia  
IL- International Law  
IR- International Relations  
ITA- Interim Agreement on Trade and trade-related issues  
KLA-Kosovo Liberation Army  
MSSD- Most Similar System Design  
NATO- North Atlantic Treaty Organization  
OSCE-Organization for Security and Co-operation in Europe  
SAA- Stability and Association Agreement  
SAP- Stability and Association Process  
SDP- Social Democratic Party  
SFRY- Socialist Federal Republic of Yugoslavia  
UK- United Kingdom  
UN- United Nations  
US- United States  
WWI- World War One  
WW II- World War Two

## Introduction

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*“This [is] the day when we open a new chapter in the thick book of our history.” (BBC, 2013)*

With such a passionate remark from President Josipovic, Croatia became the twenty-eighth member of the European Union (EU) on July 1, 2013. It was truly a historical moment, when Croatia finally reached its EU membership after 12 years of negotiations and almost two decades after the Yugoslav succession Wars. This was followed by the initiation of Serbian accession talks in January 2014. The return of the post-conflict Western Balkan region to Europe became more visible than ever before.

Significantly, such procedures of European integration of those states had an extensive impact on how they dealt with the mass human rights abuses committed during the Balkan Wars in the 1990s. Such measures to approach ones' own past atrocities are referred as 'Transitional Justice'. More specifically, according to the International Center for Transitional Justice (ICTJ), Transitional Justice is defined as “a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses” (ICTJ, n.d). Regarding the measures taken with such purpose, one can generate an open-end list, including criminal prosecutions, reparations, institutional reforms and truth commissions (ICTJ, n.d). Among them, this study will cast its focus on the element of Criminal Justice, involving the investigation and prosecution of international crimes, such as genocide, crimes against humanity and war crimes.

Indeed, as Teitel (2000) rightly claimed, punishment dominates public's perception of Transitional Justice in general. Especially, Criminal Justice surely dominates the methods that deal with the past legacy in the post-conflict Western Balkans (Spoerri, 2011, p. 1827). In fact, the case study of Transitional Criminal Justice in the former Yugoslav states is of great significance due to its particular circumstances. In the beginning of 1990s, bloodshed and atrocities committed during the Balkan Wars stunned the international community. As a result, the United Nations (UN) established an ad-hoc international court, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague, the Netherlands. The main objectives of the ICTY was to prosecute those individuals who were most responsible for the atrocities, such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the Statute of the Tribunal. Significantly, the ICTY was the first war crime courts created by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo trials (ICTY. n.d.a).

Notably, the ICTY holds a peculiar characteristic in its system compared to its predecessors. Unlike the Nuremberg and Tokyo trials, the ICTY could not rely on an

occupying military force to carry out its orders. Since judicial proceedings of Nuremberg and Tokyo trials were carried out only after the total military defeat of Germany and Japan, they did not need the cooperation from adversarial states to secure accused persons in their custody and to assist prosecutors' investigations and collection of evidence. On the other hand, in the case of the ICTY, such cooperation from the states was necessary to fulfil its judicial mandate (Lamont, 2010b, p. 5). Despite the initial rejection of national authorities of former Yugoslav states to provide a good cooperation with the tribunal, the ICTY managed to prosecute over 160 persons, including the last President of the former Yugoslavia Slobodan Milosevic (ICTY, n.d.a). Such a significant establishment was largely owing to the political pressure from the external actors. Indeed, governments in Western Europe and North America placed cooperation with the ICTY in the forefront of their foreign policies vis-à-vis Western Balkan states. Notably, the United States (US) and the EU employed the policies of conditionality by making the continuation of the EU accession talks and the US foreign aid contingent on the former Yugoslav states' *full* cooperation with the ICTY (Spoerri, p. 1827). This is where the factor of the EU aspiration comes in the debate of Transitional Criminal Justice in the former Yugoslav states. Remarkably, the EU played a significant role to encourage states in the Western Balkan region to cooperate with the tribunal. As Carla Del Ponte, the former chief ICTY Prosecutor, said; "90% of all indictees brought to justice [before the ICTY] are a direct result of conditionality applied by the EU" (quoted in; Gledhill, 2012, p.132).

Nevertheless, some authors have attempted to analyse the politics that arose around the International Criminal Justice in the former Yugoslav states. Recent literature and policy makers largely agreed that material incentives offered from external actors could not be ignored when explaining the shift from defiance to acquiescence within the political decision of Western Balkan States to comply with orders from the tribunal (Lamont, 2010a, p.1686).<sup>1</sup> However, the attempt to scrutinise the impact of such external pressure on the development of the broader domestic politics of Transitional Criminal Justice has been limited. This could be due to the fact that a large part of recent scholarship examining third party coercion to facilitate state cooperation with the ICTY mainly focuses on the non-judicial facet of Transitional Criminal Justice, such as social and normative shifts, as an outcome of the political pressure from the external actors.<sup>2</sup> In addition, the dominant role of the ICTY played in Transitional Criminal Justice in the region and the strong impact of third party coercion in boosting the state cooperation with the tribunal blind the possible effects that third party coercion could exert in other area of the politics of Transitional Criminal Justice, such as domestic war crime prosecutions.

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<sup>1</sup> See also; Goldsmith and Posner (2005); Peskin, 2008; Subotic, 2009; Lamont 2010a; Spoerri, 2011

<sup>2</sup> Such as; Peskin, 2008; Lamont 2010a; Subotic, 2009; Spoerri, 2011



Therefore, this study is to contribute to the existing literature by examining the causal relationship between the political conditionality imposed by third party states and the development in domestic policies with regard to Transitional Criminal Justice in post-conflict Balkans. Among the external pressures to facilitate the state cooperation with the tribunal, this study will exclusively focus on the EU accession conditionality. This is due to the significant role that the EU conditionality played in the issue at stake as it was explained. Moreover, the implication of this study holds significance as Transitional Justice is now regarded as a one of the most fundamental and essential methods of peace building and post-conflict reconstruction. In addition, the recent development in the human rights advocacy made the issue of Transitional Justice and human rights abuses not only domestic but also international issues. Considering the fact that the Balkan Wars were one of the most brutal civil wars that occurred in the direct neighbourhood of Europe, it is important to examine what kind of impact the EU as a peace keeper and conflict mediator exerted on the local reality of Transitional Criminal Justice of former Yugoslav states through its enlargement policy. In addition, such focus could also add time-sensitivity to this study, due to the recent development in the European integration of the region as mentioned before.

In terms of its research structure, this study will employ the Most Similar System Design (MSSD) by comparing two similar cases, namely Croatia and Serbia, to identify the nature of the impact that the EU accession conditionality projected in those states' politics of Transitional Criminal Justice. Both Croatia and Serbia took part in the Yugoslav succession Wars until 1995 and subsequently participated in the same scheme of the EU enlargement policy. In addition, their political development after the Wars also followed a similar pattern; the wartime authoritarians in both states were toppled in 2000 and there was a right-shift in the political scene of both countries in 2003. However, it turned out that those two states reacted to the political pressure from the EU in a different manner (Subotic, 2011). Therefore, comparing those two cases will be helpful to identify the features of the impact that the EU accession conditionality had in the domestic politics of Transitional Criminal Justice in those states. For this purpose, the author conducted the combination of qualitative methods, namely content analysis of the EU Progress Reports, secondary data analysis of annual reports of ICTY and Human Rights Watch, secondary literature review and twelve expert interviews. Regarding the interviews, five interviews were conducted in Croatia and seven in Serbia, in the combined format of structured and semi-structured interviews. To draw the conclusion of the study, evidence that identified the impact that the EU political pressure exerted on Croatia and Serbia was synthesized and systematically reviewed with a scope of comparative analysis.

The result of this study indeed implies that the EU accession conditionality had a positive and strong impact on the overall 'cooperation with the ICTY'. Notably, it had an effect to facilitate a stable development of cooperation with the tribunal in both cases. However, there was a notable difference between those two cases in terms of the effectiveness of the EU political pressure. This could be explained by the

differences in the closeness to the eventual EU accession, the political motivations to comply with the ICTY orders as well as the existence of other actors that could strongly influence the policy outcome of a state. On the other hand, the EU accession process had rather counterproductive effects on domestic war crime prosecutions in both cases. It could be argued that such phenomenon were triggered by the lack of clear political pressure from the EU and the emergence of discrepancy between the domestic war crime prosecution and dealing with the past human rights abuses. Based on those findings, this study concludes third party coercion that focuses only the International Criminal Justice entails the risk of deteriorating the local pursuance of truth and justice. Such findings contain a warning that partial involvements of external actors in the area of Transitional Justice could result in an undesirable outcome by hampering the domestic attempts to seek the truth and justice.

This study is constituted of the following four chapters. Firstly, the basic concepts in the study area of Transitional Justice and Criminal Justice as well as theoretical approaches to the state compliance with external conditionality and rules will be briefly reviewed, together with the literature review of the recent scholarship in the relevant field. Secondly, the main research question and the methodology of the empirical study will be explained. Thirdly, the result of the empirical examination of the Croatian and Serbian cases will be presented, followed by a conclusion including the final comparison of those two cases to point out the impact that the EU accession conditionality projected on the politics of Transitional Criminal Justice of those states.

## 1. Basic concepts and Theoretical approaches

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In this chapter, the basic concepts and the theoretical approaches that are relevant for the scope of this study will be explained, together with the review of the related scholarship. The main objectives of this chapter is to introduce the debates in the growing literature of Transitional Justice and to familiarise readers with the particular relationship between state behaviors and third party coercion in the field of Transitional Criminal Justice. For these purposes, this chapter will proceed as follows. Firstly, the basic concepts concerning Transitional Justice and Transitional Criminal Justice would be reviewed. Secondly, the historical development of International Criminal Justice, from Nuremberg and Tokyo trials to the permanent International Criminal Court (ICC), will be explained. Thirdly, the particular features of the post-Cold War Criminal Justice mechanisms will be mentioned, together with a literature review in order to introduce the state-of-art in the relevant field. Lastly, the theoretical approaches to the state compliance with external rules and conditionality will be presented.

### 1.1 Transitional Justice and Criminal Justice

What is ‘Transitional Justice?’ - Such a simple question is indeed difficult to find an answer to. The wave of democratization in 1990s launched a new discourse concerning the question of how people deal with the past, especially atrocities and mass violations of human rights committed by the former regimes (Forsberg, 2003, p.65). Consequently, the term ‘Transitional Justice’, which describes a set of mechanisms to address such past violence, has gained popularity in scholarly and political communities (Olsen and Payne *et al*, 2010, p.9). Such a tendency established several different definitions of the term ‘Transitional Justice’. According to the International Center for Transitional Justice (ICTJ), Transitional Justice is defined as “a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses” (ICTJ, n.d). On the one other hand, Legal scholar Teitel (2003) defined the term as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrong-doings of repressive regimes” (p.69). Moreover, Olsen and Payne *et al* (2010) presented a more contemporary definition of Transitional Justice as: “the array of processes designed to address past human rights violations following periods of political turmoil, state repression, or armed conflict” (p.11). Although differences can be observed in the scope of those definitions, they overall point out a set of measures adopted to address the past human rights abuses as a consequence of the radical political flux.

Then, ‘how should a state address its own past abuses?’ Notably, such measures can take different forms. The ICTJ listed the major strategies to address past human rights abuses including criminal prosecutions, reparations, institutional reforms and truth

commissions, emphasizing that this is not a closed list (ICTJ, n.d.). Criminal Justice, which will be focused on this study, is one of such strategies. It involves the investigation and prosecution of international crimes, such as genocide, crimes against humanity and war crimes. As Huyse (1995) rightly claimed, such criminal prosecutions of perpetrators represent the most radical interpretation of historical acknowledgment as well as the legal accountability of past abuses (p.52). Moreover, historically speaking, such prosecutions of *ancien regimes* have been placed at the core of Transitional Justice, starting from the trials of Kings Charles I and Louis XVI in the English and French Revolutions (Teitel, 2000, p.27).

Nevertheless, as a method to address the past abuses, Criminal Justice has multiple objectives, such as the establishment of truth, future deterrence, punishment, reconciliation and enhancement of the rule of law (Thoms and Ron *et al*, 2010, p.333). Especially, criminal prosecutions of perpetrators of previous regimes could advance the cause of establishing or reconstructing a morally just order in the society. By doing so, Criminal Justice also strengthens the newly established democracy. Criminal prosecutions are important to uphold the supremacy of democratic values and norms and to enhance long-term consolidation of democracy in the post-transition society (Huyse, 1995, p.56-57). In addition, a trial of the previous regime could play a vital role in drawing the line between old and new government after the radical political change (Teitel, 2000, p.30). Therefore, it could be argued that Criminal Justice is an effective measure for states that emerge after the illiberal regime not only to address the past atrocities but also to move forward to their democratic future.

On the other hand, the critics of Criminal Justice argued that prosecution of perpetrators could jeopardise consolidation of the rule of law as well as democracy. For example, the post-transition elites would create special tribunals to prosecute past abuses due to political pressure, time constraints and unavailability of sufficient judicial personnel in the aftermath of radical political change. Then, it is possible that such special courts, where judges would play a prominent role, turn out to be instruments of partisan vengeance because non-professional judges are vulnerable to pressure from the executive, media and public opinion (Huyse, 1995, p.59). Critics also point out the risk of destabilising backlash that military leaders who feel insecure by projected prosecution might try to reverse a course of transition by a coup, a rebellion, or other means to weaken the authorities of the new government (Huyse, 1995, p.62-63). Criminal prosecution could also hinder the process of social reconciliation by, for instance, causing the social and political isolation of the group that supports the previous regime (Huyse, 1995, p.62-63). In this sense, prosecution seems to withhold a truly sensitive aspect, as it would help to draw a clear line between not only new and old governments but also 'good' and 'bad' sides with regard to, for instance, the past legacy of conflicts. In addition, the optimism among trial proponents concerning the potential for international deterrence does not reflect a broadly skeptical criminology scholarship (Thoms and Ron *et al*, 2010, p.334). Thus, contrary to the positive assessment of Transitional Criminal Justice, criminal

prosecutions could also destabilise the consolidation of rule of law and democratization of new liberal states.

Moreover, there is a risk that Criminal Justice could hamper the legal system of post-transition states by pushing them to breach the legal principles to prosecute wrongdoers of past atrocities. For example, criminal prosecution could jeopardise the principle of *nullum crimen sine lege, nulla poena sine lege*<sup>3</sup>. According to the principle, people can only be prosecuted for the criminal offence which was illegal at the time of commission. However, such prosecutions will be scarce and most perpetrators will escape from being punished if the courts applied the criminal law of the previous regime. Therefore, the retroactive nature of such criminal prosecutions triggered the conflict between the legal legacy of the past and the law and regulations of the new democracy (Huyse, 1995, p.59). In addition, the retrospective aspect of such prosecutions also causes an issue with the statute of limitations. In the case of Hungary, for example, it initially faced difficulties in prosecuting the atrocities that took place in the late 1940s and during 1950s as it has a 30-year statute of limitation and this resulted in Budapest's decision to lift the statute of limitation in November 1991 (Huyse, 1995, p.61, 69). Thus, criminal prosecution could result in the changes of the rules in the judicial system of post-transitional states and such action withhold the risk of jeopardising consolidation of the rule of law in the new liberal regime.

## 1.2 Development of International Criminal Justice

Regarding possible limitations of criminal prosecutions discussed above, the international legal scheme could offer solutions for some of them. For example, international law holds a degree of continuity (Teitel, 2000, p.32) and the international crimes, such as the crime of genocide, crime against humanity, war crimes, the crime of aggression, are not subject of any statute of limitations as laid down in Article 29 of the Rome Statute. As a result, schemes to pursue legal accountability of mass human rights abuses at the international stage have been developed over the years. Although the origin of modern International Criminal Justice can be traced back to until the end of WWI, the real turning point came after WWII, when the Allied Power convened the Nuremberg and Tokyo trials after the military defeats of Germany and Japan. Especially, since then, the understanding of successor justice has been dominated by the legacy of Nuremberg (Teitel, 2000, p.31). Moreover, although contemporary critics regard the Nuremberg and Tokyo tribunals as 'victor's justice', they have been constantly praised for triggering an initiation of international movements for human rights advocacy (Minow, 2003, p.89).

What was so special about the Nuremberg trial? To answer this question, one should look back to the international society's treatment of Germany after WWI. For

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<sup>3</sup> This legal principle means "no conduct may be held punishable unless it is precisely described in a penal law, and no penal sanction may be imposed except in pursuance of a law that describes it prior to the commission of the offence" (Huyse, 1995, p.59).

example, the post-WWI transitional justice opted for national trials as the means to establish transitional punitive justice, which clearly failed to prevent occurrence of future havoc. In addition, the international community imposed a collective sanction against Germany, which eventually generated the sense of economic frustration and outrage that fueled Germany's role in the subsequent World War (Teitel, 2003, p. 72-73). As a response to the obvious failure of the post-WWI model of Transitional Criminal Justice, the Nuremberg tribunal enforced innovative methods to address the legal responsibility of mass bloodshed committed by *Nationalsozialismus* during the WW II. First of all, in the Nuremberg trials, the international criminal accountability was pursued instead of convening national prosecutions. Therefore, the accountability remained in the hands of the Allied power and the jurisdiction was not national but international. Secondly, the main aim of Nuremberg trial was setting down individual responsibility and, therefore, its focus was on individual judgments and responsibilities, not on collective guilt. From a legal perspective, it was a truly innovative shift since the Nuremberg legacy extended the applicability of international criminal law beyond the state to the individual. Thirdly, the changes in the law of war and its principles of criminal responsibility enabled the international legal regime to hold German higher echelons accountable for the offenses of aggression and persecutory policy. (Teitel, 2000 p 31, 34; 2003, p.73) Notably, those Nuremberg approaches have formed the basic approaches in (International) Criminal Justice until today.

The aftermath of WWII was truly the culmination of international justice. By the 1950s, for example, the newly established UN pledged to codify the principles of the Nuremberg and Tokyo trials (Minow, 2003, p.89). Moreover, there was significant development in international law, where the notions of international accountability for wartime atrocities were implanted in international conventions, such as the Genocide Convention in 1948. In addition, the legal approach of the post-WWII trials, such as the commitment to individual right, has also influenced domestic and comparative law, as it could be observed in the escalation of related constitutionalism. Moreover, the exportation of forms of Transitional Justice happened through legal transplants of treaties, conventions and constitutionalism in the post-war phase (Teitel, 2003, p.74). As a consequence of such heated-up developments in the International Criminal Justice, international leaders drafted a proposal to establish a permanent ICC. However, the Cold War factor subsequently hampered the plan. Especially, the US resisted the establishment of the permanent court, as the observers elsewhere were claiming allegations of war crimes committed in Vietnam (Minow, 2003, p.89).

Nevertheless, the legacy of Nuremberg and Tokyo led to the creation of two ad hoc war tribunals, namely the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In the summer of 1992, the government of Bosnia and Herzegovina (BiH) asked the UN to intervene by claiming that Bosnian Serbs captured Bosnian Muslims to treat them in violation of the principles embedded in international law. After careful examination and analysis

of data, the UN Security Council concluded that massive and systematic violations of human rights prevailed in BiH and harassment of Bosnian Muslims, including torture and violence, by Bosnian Serbs were commonly observed. Moreover, there were also demands from people around the world to do something to halt the violence and prosecute perpetrators those who were responsible for torture and bloodshed (Ball, 1999, p.139-140). On the other hand, however, the international community proved to be unable and unwilling to operate costly military intervention in the former Yugoslavia. As a consequence, the UN Security Council established the ICTY in 1993, by relying on a generous interpretation of its mandate to respond to threats to international peace and security. In the subsequent year, the UN created the second ad hoc tribunal, the ICTR, as a response to the mass slaughter of 800,000 Rwandan people, mainly Tutsis (Minow, 2003, p.89, 92).

The creation of those ad hoc tribunals as a response to genocide and 'ethnic cleansing' eventually provoked the revival of the long-gone plan to establish a permanent ICC. In 1994, the UN General Assembly decided to work along such a plan and 120 of the world's states, notably excluding the US, voted to create such a court four years later (Minow, 2003, p.95). Subsequently, the court entered into force in July 2002. The ICC is situated in The Hague and has jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression (Schabas, 2011, p.16). Nonetheless, the significance of the establishment of the ICC lays in its implication to the future development of International Transitional Justice. As Teitel (2003) rightly claimed, the establishment of the ICC symbolised the normalisation of Transitional Criminal Justice as a response to the future human rights abuses. She argued that the establishment of the permanent ICC fundamentally altered the nature of transitional jurisprudence that was historically viewed as a legal phenomenon accompanied with an extraordinary condition (p.90).

### **1.3 State compliance and International Criminal Justice**

Such modification of the Nuremberg legacy to the contemporary Transitional Criminal Justice measures was associated with the emergence of the new dimension within the scheme of prosecutions of international crimes. It is important to emphasize that the post-WWII tribunals convened in the unusual situation, namely the total defeat of Germany and Japan, and, therefore, their mechanisms did not rely on or necessitate state cooperation of those states. On the contrary, the post-Cold War tribunals essentially depended on the cooperation of states that fell under their jurisdiction to fulfill their mandate. What is more, the post- Cold War tribunals impose legal obligations on either the members of the UN or the signatory states of ICC Statute of Rome, to cooperate with them (Lamont, 2010b). In the case of the ICTY, Article 29 of its Statute obliges member states of the UN to comply with a number of pre-trial requests ranging from assistance with the tribunal's investigations to the facilitation of arrest and transfer of the accused.

The negligence of such a difference between the post- WW II trials and the post- Cold War international tribunals cause the relative absence of literature on state compliance with orders from international tribunals, despite the notable growth in the studies of international tribunals following the establishment of the ICTY, the ICTR and the ICC (Lamont, 2010b). For instance, Lamont (2010b) examined the domestic and international politics of compliance with ICTY orders in cases of five former Yugoslav states through the scope of rationalist and constructivist approaches. Notably, his work explained the different patterns of state compliance especially in Serbia and Croatia with their rhetoric approaches toward the tribunal. Then, he claimed that the rationalist focus on merely material coercion could capture only a part of a whole picture of compliance.

Importantly, Lamont (2010b) also noted third party coercion as a significant factor to alter the states' behavior to or not to comply with orders from the ICTY. Due to the lack of enforcement ability of the ICTY and such action of the UN Security Council, the tribunal approached external actors to coerce compliance from Croatia and Serbia through the application of sanctions and incentives (Lamont, 2010b, p.171-172; Peskin, 2008). Moreover, Florence Hartmann, the former ICTY spokesperson, admitted that the tribunal was largely dependent on and vulnerable to the assistance from the 'great powers' to secure arrests of fugitives (Lamont, 2010b, p. 173). This study is to examine the impact of such external coercion to encourage state cooperation with the ICTY among former Yugoslav states.

There have been some scholarly works which examined the influence of such political pressure from the external actors to cooperate with the tribunal. For instance, Goldsmith and Posner (2005) examined the state compliance with ICTY orders from the realist scope to conclude that the ICTY's modest success was the result of NATO's or primarily American military, diplomatic and financial might. (p.16) Other scholars, such as Peskin(2008), also emphasize the dominant effectiveness of such external pressure that "without international pressure and the promise of economic and political incentives, there would be little change in Belgrade's willingness or capacity to cooperate with ICTY"(p.90).

On the other hand, other literature that examines third party coercion to encourage state cooperation with the tribunal mainly focuses on the non-judicial facet of Transitional Criminal Justice, such as norm shifts or social change. For instance, Peskin (2008) observed the methodological trap of interpreting state compliance as a signal of norm entrenchment or diffusion (p.9; Lamont, 2010a). In the same vein, Subotic (2009) identified the phenomenon called 'hijacked justice' within the state compliance with the ICTY in the face of external pressure. The concept of 'hijacked justice' refers the paradoxical situation in state's misuse of Transitional Justice norms to achieve goals which is different from the ones targeted by the international justice institutions, resulting in a huge discrepancy between the domestic policy outcome and International Transitional Justice expectations (p.6). Spoerri (2011) also made a



similar claim that: “while policies of conditionality may help achieve accountability by enabling arrests and extraditions to take place, they may also inadvertently protract the normative shifts required to see truth and reconciliation achieved”(p.1847). Moreover, through the examination of Croatian compliance with ICTY orders after 2003, Lamont (2010a) identified a ‘strategic cooperation’ that allows actors to formally comply with the rules of regime and, simultaneously, to pursue legalistic strategies of defiance within a rule-defined framework.

Notably, all literature mentioned above regarded that the political pressure from the external actors, such as the US or the EU, was found to be greatly effective to alter the states’ behavior with regard to the cooperation with the ICTY. However, the attempt to determine the causal relationship between them, such as to what extent or in what way the external pressure could facilitate the positive development in the cooperation with the ICTY is limited. This is mainly due to the situation that large part of attention of the existing literature has been directed towards the non-judicial aspect of Transitional Criminal Justice as an outcome of the external pressure and, therefore, its impact on enhancing international prosecutions is largely taken for granted. In addition, most of the above mentioned literature did not include the scope of the domestic war crime prosecutions in their analysis, although the EU does include the area of domestic war crime prosecutions in its assessment of the readiness of the former Yugoslav states for their eventual EU accession.

What is more, there have been some scholarly works that focused on the EU accession conditionality and state cooperation with the ICTY. For example, Peskin and Boduszynski (2011) assessed the EU policies of conditionality with regard to the cooperation with the ICTY. As a result, they claimed that the EU’s political pressure was too lenient and kept a space for renegotiation in light of political circumstances. Consequently, the EU failed to be a consistent ‘surrogate enforcer’ on behalf of the tribunal. Moreover, Rangelov(2006) pointed out the imperfection of the EU approach vis-à-vis the issue of Transitional Justice in the region that the exclusion of the domestic truth-telling process and war crime prosecutions from the EU conditionality deteriorate the EU’s potential to encourage governments as well as societies of the region to acknowledge and address the past atrocities. This study is in line with the latter scholarly work, although this research employed different approaches to examine the issue at stake.

#### **1.4 Theoretical approaches**

Lastly, the theoretical approaches to comprehend the state compliance with the external rules and conditionality will be presented. In here, the definition of conditionality proposed by Anastasakis (2008) will be applied:

*[Conditionality is a strategy] “with both a substantive and an operational dimension, referring, on the one hand, to the message and the designated*

*political criteria, and, on the other, to the way the instrument is operated through deadlines, thresholds and practice of pressure from abroad”(p.367).*

Moreover, as he rightly claimed, “both dimensions are particularly important and can affect the outcome of political transformation in a given situation” (Anastasakis, 2008, p.367). As a particular characteristic of the EU accession conditionality, it is also noteworthy that there was no clear indication of threshold, such as what a country need to do in order to move forward its path toward the eventual the EU accession.

In this section, the state compliance with the external conditionality will be firstly addressed with theories of International Relations (IR), namely (neo) rationalism, constructivism and liberalism. Such an attempt was made based on the work of Lamont (2010b), which approached the enforcement of the international legal obligation to secure state cooperation with the ICTY from the scope of IR theories. Since such a legal obligation could be also regarded as an imposed external rules in the case of Balkan states, the author extended the theoretical consideration of Lamont (2010b) to the broader aspect of state compliance with the external rules and conditionality. Secondly, the dichotomous approaches established by March and Olsen, namely ‘logic of consequences’ and ‘logic of appropriateness’, to explain the state compliance will be also reviewed by mainly referring the Europeanization literature. Thirdly, those two theoretical approaches will be systemically combined to present the theoretical standing point as well as assumptions of this study.

### *Theories of International Relations*

As Lamont (2010b) claimed, realists explain enforcement of external rules as being largely dependent on temporarily enforcement measures taken by powerful states vis-à-vis weaker ones and, therefore, compliance and non-compliance with the rules are guided by the relative power distribution (p.10). Additionally, they also regard that international body itself would exert no political pressure in a world where the asymmetrical power distribution is observed. This is due to the assumption that powerful states, which govern the international society, will not accept a regime that significantly deteriorates their ability to respond to perceived security threats and, as a result, both structure of such institutions and application of their jurisdiction will reflect the interests and relative power relations of the states involved (Rudolph, 2001, p.68). Morgenthau described such realists’ point of view concerning international legal system as, “ it makes easy for the strong to both violate the law and to enforce it, and consequently puts the rights of the weak jeopardy” (quoted in; Lamont, 2010b, p.10). Neorealist share a similar view with realists regarding the enforcement of external rules and the state compliance. For instance, Waltz (1979) claimed that the distribution of material capacities within the international society, not international law, were factors that shape international order and power, which are the governing principles in the international system (p.97-99). Additionally, as with the realists, other neorealist scholars also insist that the international institutions, such as the

ICTY, would have a marginal impact on the state's behavior at its best, as they strongly reflect the preference of the powerful states (Lamont, 2010b, p.11).

Therefore, (neo) realists' approaches to the politics emerged around the post-Cold War mechanisms of International Transitional Justice are based on the recognition of *realpolitik* and asymmetrical relations among states involved. Indeed, compliance on the part of weaker states would represent the successful projection of coercion, while non-compliance would symbolise a failure or inability of powerful states to project their power (Lamont, 2010b, p, 11, 18). In the context of this study, realists regard the state compliance with the ICTY as a successful offshoot of the EU accession conditionality and non-compliance as the EU's inability to impose sufficient pressure on former Yugoslav states. It would be also expected that the ICTY as an international institution itself does not have any impact on the change of state behavior and relied on the political pressure imposed by the powerful actor, namely the EU.

On the other hand, constructivists raise questions in the realists' understanding of state compliance dominated by the notion of power politics. They claimed that a state interest is neither static or dominated by the material factor. Instead, constructivists claim that ideas and norms would exert an extensive impact on the outcome either via path dependence or international socialisation (Rudolph, 2001, p. 658). In the similar vein, liberalists identify the regime type as a catalyst of the formation of a states' behavior in the face of the external rules. Although they offer little insight into the state compliance *per se*, the liberal account of international criminal justice insists that democratic states are more likely to support the establishment of the permanent ICC. This claim is based on the expectation that legalism emerged exclusively in liberal states. (Lamont, 2010b, p.13) Having mentioned that, this could be used to argue that the liberalist assumes that the regime type that could reflect the political identity of the state would have an extensive impact on the state behavior in the face of the external rules and conditionality. Therefore, on the contrary to the realist account, both constructivism and liberalism find the determining factor of states' behavior in the internal elements of states, such as norm and identity.

### *Two logics of state compliance*

Such dichotomous argumentations in the IR theories that to seek the explanation of the state compliance either in external factors or internal ones can be also observed in the well-cited two logics of state compliance established by March and Olsen (1998).

On the one hand, rational institutionalism employs a minimalist view of the institution's role. In its theory, states act as rational actors who try to maximize their self-interests while holding fixed sets of preferences, and the institutions define the rules of the game (Tunkrova, 2010, p.4). Therefore, it embraces the 'logic of consequence', defined as "political order as arising from negotiation among rational

actors pursuing personal preferences or interests in circumstances in which there may be gains to coordinate action”(March and Olsen, 1998, p.949), and emphasizes the importance of the ‘carrot’ and ‘stick’ approach to stimulate state compliance (Tunkrova, 2010, p.4). In the case of the EU enlargement policy, the basic impetus of the EU conditionality is the logic of cost-benefit analysis where domestic change is a reaction to the material and social incentives offered by the EU (Noutcheva, 2012, p18).

Indeed, many scholarly works examining the EU enlargement to the Central and Eastern European Countries (CEECs) found that such rational motives facilitated the state compliance with the EU accession conditionality. For instance, Kelly (2004) concluded that the socialisation-based effort to influence the domestic policies of the candidate states alone tend to be less effective and the incentive-based methods, such as membership conditionality, are the primary motivation to influence their behavior by being much less sensitive to domestic oppositions. By the same token, the contributor of the edited volume by Schimmelfening and Sedelmeier (2005) concluded that, with extensive examinations of the variety of issue areas across the CEECs, a large part of the patterns of state compliance with the EU’s political criteria and the *acquis communautaire* can be explained by the external incentive model, which is based on rationalist bargaining. Importantly, in their previous work, Schimmelfening and Sedelmeier also emphasized the importance of ‘credibility of conditionality’ as a significant factor to explain the EU’s external influence to the CEECs’ domestic governance along with the domestic cost of rule adoption (Schimmelfenning and Sedelmeier, 2004). According to them, ‘credibility of conditionality’ means ‘the credibility of the EU’s threat to withhold rewards in case of non-compliance and, conversely, its promise to deliver the reward in case of rule adoption.’ (Schimmelfenning and Sedelmeier, 2004, p. 665) Moreover, they also claimed that the presence of the cross-conditionality is also an important factor, as the EU conditionality would be less effective when the candidate states have another option offering comparable benefits with lower adjustment costs (Schimmelfenning and Sedelmeier, 2004, p. 666). Those elements were of significance in this study to explain the different effectiveness of the EU pressure in Croatian and Serbian cases, as it will be demonstrated in Chapter 3.

On the contrary, social constructivism regards the values, norms and rules as important elements to explain political processes and events as they affect identities, behavior and interests of political actors. Thus, this approach withholds the ‘logic of appropriateness’, by choosing the most legitimate or ‘appropriate’ action from the range of available choices they have (Tunkrova, 2010, p.4). As for the mechanism to influence the domestic policy of candidate states, the EU employs socialisation and social learning: through the interaction with EU institutions and representatives, political actors of target states internalise new norms and develop new identities. In this regard, compared to the conditionality, it can be said that socialisation is a softer mechanism to stimulate change because the transformation of the actors’ interests and identities occurs gradually in due course of learning and lesson-drawing as a result of

personal exchanges and greater exposure to the European manner of governance (Noutcheva, 2012, p.18).

*Linking theoretical approaches and the scope of the study*

**Table 1: Theoretical approaches to the state cooperation**

	Decision-making Process	Compliance Method	Explanations for Non-Compliance	IR Theories and Approaches
Logic of Consequences	Rational cost-benefit analysis	Coercion, inducements, use of force	Failure or inability of powerful states to project coercion, benefits of non-compliance > compliance costs	Realism, neorealism
Logic of Appropriateness	Ideational, norm following	Persuasion, Shaming	Competing norms, lack of norm internalization	Cognitive-sociological approaches, liberalism

(Source: Lamont (2010b), p.18 (modifications were made by the author))

The above-mentioned two theoretical approaches, namely the IR theories and the two logics of state compliance, could be systematically linked with each other as it is presented in Table 1. As it was demonstrated above, the main theoretical considerations could be categorised as the approaches that finds a trigger of state compliance in the external factors, such as the political pressure from strong states and cost-benefit calculation of domestic actors as a reaction, or the one that seeks such a cause within the internal factors, such as changes in identity and norms.

This study opts the external incentive model associated with the realist and rational institutionalist approaches as its theoretical framework. This is due to the fact that this study assumes the EU's usage of 'carrot' and 'stick' to enforce its conditionality and the rational cost-benefit calculations of domestic actors as a reaction are the main causes of changes in state decisions concerning Transitional Criminal Justice issues. Moreover, it is also noteworthy that the EU does not have any clear indication of 'an European manner' in the area of Transitional Justice suggesting how the 'European states' should deal with their past atrocities compared to other aspects, such as

political and economical criterion within the 1993 Copenhagen Criteria.<sup>4</sup> Therefore, it is unlikely that the EU accession process could transform the internal factors of the domestic actors, such as norms and identity, to influence the handlings of Transitional Criminal Justice issues of former Yugoslav states.

Having said that, the following theoretical expectations could be drawn based on the application of the external incentive model to the issue at state. Firstly, it is expected that the EU is the main actor to pressure states to facilitate *full* cooperation with the ICTY, rather than the tribunal itself. Secondly, this study also assumes that the asymmetric relations between the EU as a stronger actor and the former Yugoslav states as weaker ones. Lastly, the main cause for the compliance and non-compliance of states will be sought in the external factors, namely the exertion of the EU accession conditionality and cost-benefit calculations of domestic actors as a reaction, rather than internal factors, such as changes in norms and identity in the due course of the EU accession process.

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<sup>4</sup> Copenhagen criteria (the accession criteria) in 1993 lays out the essential conditions that all candidate states must fulfil before their accession as follows:

- Political criteria: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- Economic criteria: a functioning market economy and the capacity to cope with competition and market forces;
- Administrative and institutional capacity to effectively implement the *acquis* and ability to take on the obligations of membership. (Source: European Commission Enlargement (2012))

## **2. Research Question and Methodology**

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In this chapter, the main research question as well as the research structure of the empirical study will be explained. Firstly, the main research question and the explanation of the case selection will be explained, followed by the conceptualisation as well as operationalisation of the main question. Subsequently, the methods employed in the empirical examination will be thoroughly explained.

### **2.1 Research Question and Case Selection**

As it was mentioned in the previous section, the existing literature in the relevant field largely agreed that the external pressure, such as the EU accession conditionality, on the post-conflict Balkans enhanced the establishment of legal accountability in the war crimes committed during the Balkan Wars in 1990s through cooperation with the ICTY. In other words, the amount of suspects faced trials at the international court increased significantly owing to the political pressure from the external actors. Despite the significant role played by the EU to enhance state cooperation among Western Balkan states, however, systematic attempts to establish a basic causal relationship between the EU accession conditionality and the broader domestic attempt to establish legal accountability in war crimes as a reaction has been understudied. In other words, there are two questions largely remained unanswered:

- 1) ‘To what extent and in what way the EU accession conditionality enhanced the state cooperation with the ICTY?’
- 2) ‘Did the EU accession conditionality yielded any impact on the other area of Transitional Criminal Justice in those states, such as domestic war crime prosecutions?’

This study is aiming at answering those questions by examining a causal relationship between the external pressure to enhance state cooperation and the development of domestic politics of Transitional Criminal Justice as a response. By summarizing those two questions, this research is aiming at answering the following research question.

What kind of impact did the EU accession conditionality have in Transitional Criminal Justice in post-conflict Croatia and Serbia?

As it will be explained further below, it important to note that this study widens the implication of Transitional Criminal Justice from the cooperation with the ICTY to entire picture of Transitional Criminal Justice in the concerning region by including the domestic war crime prosecutions, which was also a part of the EU conditionality

package.<sup>5</sup> Such examination is significant to examine what kind of impact the EU as an external actor could exert on the Transitional Criminal Justice of a state not only at international but also domestic level.

To assess the impact of the EU accession conditionality, the comparative analysis of Croatian and Serbian cases will be conducted in this research. Such case selection was based on the unique similarity as well as difference that those states represent in their development after the Balkan Wars in the 1990s. Both Croatia and Serbia were engaged in the Yugoslav succession Wars until 1995, when the Dayton agreement brought the Bosnian Wars to its end. Subsequently, both of the states were included in the same scheme of the EU enlargement process, namely the Stabilisation and Association Process (SAP), since 1999. Moreover, both of those two states toppled the wartime authoritarians coincidentally in 2000 to establish their real relations with the EU as well as the ICTY. On the other hand, however, those two states followed significantly different paths towards their eventual EU accession, as it would be presented in the following chapter. In addition, the reactions from domestic political elites of those states against the political pressure from the EU as well as the patterns of compliance were also different (Subotic, 2011). Therefore, the research design of this study is the Most Similar Systems Design (MSSD), as it is to determine the impact of the EU political pressure vis-à-vis two similar cases by examining the causal relationship resulted in different outcomes.

Although another state in this region, namely BiH, might offer an interesting insight into this study, the author omitted such a case from the comparative analysis. This is due to the fact that the BiH's state building after the Balkan Wars is at a notably different stage compared to the cases of Croatia and Serbia. Indeed, BiH's governmental structure as a 'sovereign state' is underdeveloped, which could confirm a protectorate status of the state.<sup>6</sup> Such difference is truly fatal and misleading since this study focuses on the decision-making of governments in the area of Transitional Criminal Justice, as it will be explained below. Thus, the author excluded the case of BiH, despite its heavy involvement in the Balkan Wars as well as its European aspiration.

## **2.2 Conceptualisation and Operationalisation**

In this section, the main research question will undergo the process of conceptualisation and operationalisation. Based on the comparative analysis of the Croatian and Serbian cases, this study will attempt to draw a lesson of the current EU

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<sup>5</sup> Within the assessment of Croatia and Serbia in the Progress Report issued by the EU commission, the overall cooperation with the ICTY were included in the section 'regional issue and international obligation' and domestic war crime prosecution was mentioned in the sub-section 'judiciary system' within the 'democracy and the rule of law'. Both were included in the political criteria.

<sup>6</sup> For the detailed description about the state structure of BiH, see Noutcheva (2012), p.55-68



approach to the Transitional Criminal Justice of the region by extending the implication of the main findings of this study.

### *Conceptualisation*

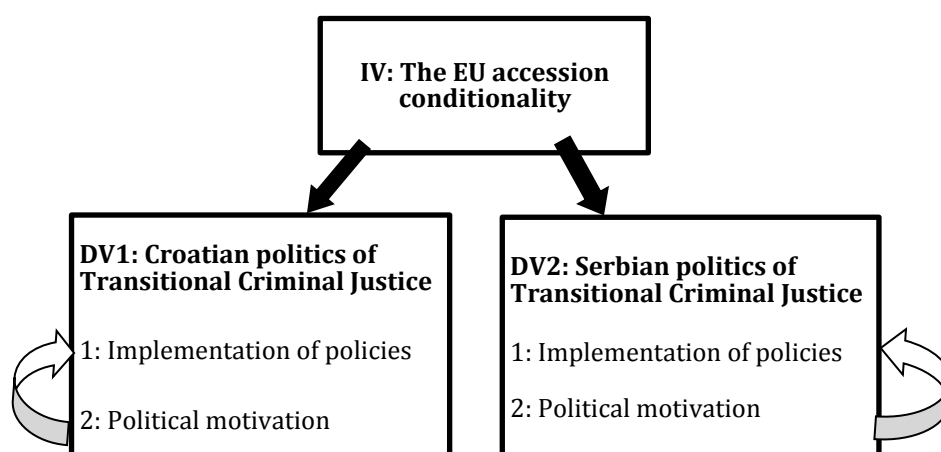
First of all, the EU accession conditionality would be identified with the EU's usage of 'carrot' and 'stick' vis-à-vis Croatia and Serbia, in accordance with the positive or negative development in their handlings of Transitional Criminal Justice issues. For instance, if the EU rewarded those states by enabling them to move forward their paths to the EU accession after their marking positive development in their politics of Transitional Criminal Justice or it employed political sanctions by delaying their EU accession negotiations due to insufficient measures taken by those states to deal with such issues, it would be assumed that the EU imposed political pressure against them. With regard to that, the term 'impact' is defined as the change that occurred before and after such political pressure being imposed.

Regarding the Transitional Criminal Justice, the domestic politics of Transitional Criminal Justice will be exclusively focused in this study. In other words, the political decision to implement certain policies with regard to the Transitional Criminal Justice, such as whether to or not to comply with orders from the tribunal as well as to prosecute war criminals in the domestic courts, will be examined in here. To address the criticism of the external incentive model by Lamont (2010b) that exclusion of ideational elements will show only the partial picture of state compliance, this study will also include the ideational segment of the policy implementation, namely political motivations. This could be defined as the rationale behind of the political decisions with regard to the implementation of Transitional Criminal Justice policies, such as the reason why those states' governments decide to comply with the tribunal orders or to improve the situation in the domestic war crime prosecutions. In this study, it was assumed that such political motivations would be also influenced in the due course of the EU accession process. Therefore, this study will examine the implementation of the policies with regard to the Transitional Criminal Justice as well as the motivations of political elites to determine such implementation, as the outcome of the application of the external pressure from the EU in the scheme of its enlargement policy. In addition, the conflict mentioned in the research question means the Yugoslav succession wars from 1991, which the ICTY has jurisdiction over (ICTY, n.d.a). Therefore, atrocities committed before 1991 were omitted from the focus of this study.

### *Operationalisation*

Therefore, this study is to examine the changes that occur within the causal relationships that are indicated with arrows in the Table 2.

**Table 2. Visualisation of the research question**



As it was explained, this study added the ideational segment of the policy implementations in the scheme of the empirical research. It is logical to assume that the political motivation and its changes could also have an impact on the implementation of Transitional Criminal Justice policies by local governments. Thus, this study will try to identify not only a pattern of changes in the political motivations of the domestic elites, but also the impact of such changes in the actual implementation of Transitional Criminal Justice policy.

Moreover, this study categorises the Transitional Criminal Justice measures employed by post-war Croatia and Serbia into the following three analytical categories: 1) extradition of fugitives to The Hague, 2) cooperation with ICTY investigation and 3) domestic war crime prosecution. Although more specific definition of those three analytical categories will be given in the following chapter, such categorisation is greatly significant since the EU did not apply its political pressure to all of those aspects equally, as it would be demonstrated in the outcome of empirical study.

Thus, this study will trace the impact of the EU political pressure by taking the following procedure. First of all, as an independent variable, the nature of the EU accession conditionality vis-à-vis Croatia and Serbia will be scrutinized in accordance with the three analytical categories of Transitional Criminal Justice measures. Then, the major changes that occurred in the implementation of the Transitional Criminal Justice policies as well as its political motivation will be connected with the EU's usage of 'carrot' and 'stick'. Subsequently, it will be also attempted to connect the attitudinal elements and the actual implementation of policies to explain the pattern of the development in those state's politics of Transitional Criminal Justice. As a conclusion, those changes will be reviewed with a scope of comparative analysis to identify the implication of the EU leverage over the Transitional Criminal Justice issues in the concerned region.

## 2.3 Methods

For such purpose, the author applied the following methods in the empirical examination. Overall, the qualitative method was opted, as quantitative data could be somewhat misleading in this study. In the case of extradition of ICTY indictees, for instance, Serbs occupied a much larger part of the wanted list of the ICTY compared to Croats. (Ford, 2013, p.50) Therefore, numerical examination would make it difficult to capture the real impact of the EU political pressure on the enhancement of Transitional Criminal Justice policies, due to such differences in the amount of issues that Croatia and Serbia had to deal with in the post conflict environment.

For the independent variable of the study, a content analysis of the Progress Reports issued by the European Commission<sup>7</sup> was conducted. During the analysis, the frequency of the word ‘ICTY’ and the space given to the assessments of ‘regional issue and international obligation’ and ‘domestic war crime prosecution’ were measured in each report and the results were compared over the years. This was to identify the change in the importance given to the each analytical categories of Transitional Criminal Justice within the EU Progress Reports, which directly communicated to the authorities of Serbia and Croatia as assessments of their readiness for the eventual EU accession. As necessary, the relevant secondary data analysis, such as reports from other agencies<sup>8</sup>, website<sup>9</sup> and secondary literature, was conducted to set the narrative of those two states’ procedures of the European integration. Moreover, the inclusion of other datasets is also to balance out the political nature of the Progress Reports. Eventually, the all evidence that shows the characteristics of political pressure from the EU as well as its change will be synthesized and systemically reviewed to identify the nature of such EU pressure.

For the dependent variables, the secondary data analysis of annual reports from the UN<sup>10</sup> and Human Rights Watch<sup>11,12</sup>, relevant media reports by BBC, the Economist, Reuters and New York Times was conducted to synthesise the evidence of changes in accordance with the political pressure from the EU. Such a diversification of datasets is also to equal out the political nature of the ICTY annual reports. The main criteria in the selection of sources were the topic covered by them and whether author or institutions that hold ownership constantly followed the topic within the time frame of the study or not. Regarding the secondary literature, the method of citation tracking was also conducted within the literature of the field of study.

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<sup>7</sup> Croatia 2005-2011, Serbia 2005-2013

<sup>8</sup> Mainly the UN (ICTY annual report) and Human Rights Watch

<sup>9</sup> Mainly ‘the European Commission EU enlargement Serbia/Croatia’

<sup>10</sup> ICTY’s annual reports to the UN Security Council

<sup>11</sup> After Croatia’s accession to the EU, one reports issued by the Croatian non-governmental organizations were referred.

<sup>12</sup> UN (ICTY annual report) 2000-2013, Human Rights Watch 2001-2014

Regarding the examination of political motivation of domestic actors, expert interviews were conducted in both countries to compensate for the author's inability to comprehend the local languages of Serbia and Croatia. The criteria to select interviewees were the expertise of the experts and the impartiality of their opinions. First of all, the persons who were actively involved in policy implementation in the area of Transitional Criminal Justice were selected as interviewees. The author conducted interviews with not only persons who were directly involved in the policy implementation (war crime prosecutors) but also ones from organizations that observed the policy implementations (NGO, journalist and scholars). Secondly, the impartiality of the answers was also scrutinized by referring the secondary data and relevant reports.<sup>13</sup> As a result, only part of the interview data was used for the empirical study. The interviews were conducted in a face-to-face style and in both structured and semi-structured formats. Duration of interviews ranged from 30 to 60 minutes and five were conducted in Croatia and seven in Serbia during January and February 2014. The list of interviewees will be presented before the reference list of this study and their brief biography will be shown in Appendix 1. In addition, Appendix 2 will show the list of questions the author asked to all interviewees. It is important to note that, although the author presented the closed questions to each of interviewees, the interviews were conducted in a similar manner with the semi-structured format and, thus, all interviewees had a leeway to answer each question on the list<sup>14</sup>. Regarding the open-end questions, the author asked more specific questions in accordance with the expertise of each interviewee, as it would be shown in the following chapter as necessary. In addition, the secondary data analysis of the relevant reports, literature as well as media reports were also conducted to scrutinize the impartiality of the answers and to compensate the data from the interviews.

To sum up, Table 3 below summarises the datasets that were used for the empirical research. Subsequently, the overall outcome of the empirical analyses will be examined with a scope of comparative analysis. Then, the answer of the main research question based on the evidence gained through the empirical study will be presented as the outcome. The methods employed and presentation of the result of

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<sup>13</sup>Although some answers from the interviewees significantly lacks impartiality, those remarks clearly show the sensitivity of the Transitional Criminal Justice issues and offer significant insights about the domestic narratives of Transitional Justice and Europeanization. Such a tendency is more visible in the case of Serbia. For instance, Strabac from the NGO 'Veritas' in Belgrade, which represents the Serbs who were forcefully deported from the Croatian territory during the war, expressed strong doubt against the EU enlargement policy that lacks the follow-up monitoring system after the EU accession of states. As she claimed, Croatian authorities started to release Croatian wrongdoers once they achieved the status of a EU member state. (The author could not find any concrete evidence to prove this argumentation.) Also, some interviewees in Serbia claimed the commonly shared view of the ICTY as an anti-Serb institution and its operation has enforced the common image of 'Serbia as a bad guy in the conflict' in the western world. It could be argued that such criticism was especially strong at the time of the field research, in the aftermath of the release of Ante Gotovina in 2012. Those examples show that the past is not over yet in Serbia.

<sup>14</sup>For example, although the author listed the time frames in the questions in accordance with the timing when main political pressure imposed by the EU, the interviewees were asked to mention any changes occurred within the time frames if there any.

empirical study, which will be mentioned in the storytelling style within the narrative that reflects the historical development of the involvement of international actors in the region after the Balkan Wars and the politics of Transitional Criminal Justice in each country, is mostly in line with the existing literature concerning state compliance and the third party coercion in Transitional Criminal Justice, notably Peskin (2008) and Subotic (2009).

**Table 3: Datasets**

<b>1. The EU accession conditionality (IV)</b>	The Progress Reports (the European Commission): Croatia: 2005-2011, Serbia: 2005-2013 UN (2000-2013)/ Human Rights Watch (2001-2014) reports, secondary literature, website
<b>2. Implementation of policies (DV)</b>	The annual reports: UN: 2000-2013/ Human Rights Watch 2001-2014 Secondary literature, media reports, website <sup>15</sup>
<b>3. Political motivation (DV)</b>	Eleven expert interviews: Five in Croatia, Seven in Serbia UN (2000-2013)/ Human Rights Watch (2001-2014) reports, secondary literature, media reports

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<sup>15</sup> For the latest development in the domestic politics of Transitional Criminal Justice after the issuance of the above-listed reports, the author also refers to the answers from the expert interviews as necessary.



Hague, its analyses end in the year when those two states finished extraditing all of the suspects to the tribunal, 2005 in the Croatian case and 2011 in the Serbian case. For the cooperation with tribunal's investigators and domestic war crime prosecutions, their analyses continue up to January 2014, as those are still on-going process for both Croatia and Serbia. In the case of Croatia, it was assumed that all political pressure stemming from the EU accession conditionality vanished once it joined the EU in July 2013.<sup>16</sup>

Following the 1995 Dayton Peace Accord that brought the ruthless war in BiH to its end, Serbia and Croatia started to move forward somewhat different roads of democratisation as well as Europeanisation. The newly independent Croatia faced hardship in its economic and political transition and, consequently, the party of wartime leader Franjo Tudjman lost its popularity (Goldstein, 1999, p.257-263). Regarding the positive development, Croatia became the fortieth member of the Council of Europe in April 1996, which was indeed the first and significant step toward the EU accession. In September of the same year, the agreement between Croatia and the Federal Republic of Yugoslavia (FRY, consisted of Serbia and Montenegro) was signed to normalise their relations, which practically concluded the undeclared five-year war between them (Goldstein, 1999, p.257-263). Following the death of Tudjman in 1999 and the general elections in 2000, Croatian international reputation significantly improved. Moreover, as a result of the election, Tudjman's political party, the Croatian Democratic Union (HDZ), suffered major losses at the polls. Stjepan Mesic, the last president of the Socialist Federal Republic of Yugoslavia (SFRY) and the HDZ defector, won the presidency and the parliament was placed under control of the left-leaning six-party coalition led by the Social Democratic Party (SDP) and Croatian Social Liberal Party (HSLs) and Ivica Racan from SDP became a new Prime Minister (Subotic, 2009, p.86-87).

On the other hand, Serbia was driven into another brutal war in Kosovo until 1999. This is a continuous attempt of the Milosevic-dominated and Serb-oriented FRY to retain as much Serb-inhabited territory as possible (Hupchick, 2002, p.440). Following the collapse of the peace talk between FRY and Kosovo Liberation Army

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<sup>16</sup> Regarding the interview questions shown in Appendix 1, the author also suggested the time frames in accordance with the main rewards and sanctions imposed by the EU or key achievement with regard to the ICTY requests. It is important to note that, although the political shift in 2003 turned out to be a significant event in both cases, Croatian time frame did not point out such change *per se*. This is because the Croatian election occurred in November 2003, which is only almost half of a year before the EU rewarded Zagreb with the candidacy status. Subsequently, the main sanction was imposed again and the Croatia was rewarded within a year. Thus, the author decided to marginalize the 2003 election with obtaining the candidacy status to avoid making the time frames too short. In Serbian case, the extradition of main fugitives (such as Karadzic and Mladic) was mainly focused since connection between the Serbian establishment and the following EU reward were not as clear as Croatian case. In addition, the usage of sanction in 2006 was not focused, as it was clear from existing literature (such as Peskin, 2008; Subotic, 2009) that such act was compromised subsequently. Additionally, it is important to emphasize that the author also asked interviewees to identify changes within the time frames if there were any.

(KLA) facilitated by the US, NATO launched air bombardments in March 1999 and Belgrade declared a State of War. After seventy-three days of bombardment, Milosevic eventually accepted the joint Russo-Western Peace Plan in June 1999. After the war, enormous economic, political and social issues overwhelmed Serbian government as well as its people. The air bombing in Belgrade also caused a psychological shock and it was perceived as a direct attack against Serbian nation. As a result, the paranoid idea of the whole world's plotting to destroy Serbian people was created and hatred against NATO and the West emerged.<sup>17</sup> Nevertheless, the opposition in Serbia began to advocate itself once the State of War was lifted. In post-conflict Serbia, due to the economic decline, people were convinced that the state would hit rock bottom unless Milosevic was toppled and, as a result, they demanded for his resignation (Pavlowitch, 2002, p.215-226). As a consequence, Milosevic was ousted by a popular revolt in October 2000. The electoral victory of the Democratic Opposition of Serbia (DOS), which was the anti-Milosevic coalition constituted with eighteen parties, brought new political leaders, Vojislav Kostunica as a President and Zoran Djindjic as a Prime Minister (Subotic, 2009, p.40).

In the following sections, the paths that both Croatia and Serbia followed after 2000 will be reviewed with a scope of the EU accession conditionality in the area of Transitional Criminal Justice and the domestic reaction against it.

### **3.1 The EU accession conditionality with regard to Transitional Criminal Justice**

#### *Paths to the EU membership*

Both Croatia and Serbia started to establish a real relationship with the EU from 2000, following the ousting of their wartime leaders. In June 2000, the Faira European Council concluded that all countries in the scheme of the SAP were potential candidates for the EU membership. As a response, Croatia moved quickly and the European Commission and the Croatian government officially initiated negotiations on the SAA already in November 2000. The SAA is a special type of agreement that is to give a signatory country the status of an associated member as well as a potential candidate for a full-fledged EU membership (Cehulic-Vukadinovic, 2013, p. 53). Therefore, the signing SAA is the significant and concrete first step towards the EU accession for Western Balkan states. Subsequently, Croatia signed its SAA in October 2001 and submitted the application for the EU membership in February 2003. In the following year, Croatia received a status of the EU candidate state. On the contrary, Serbian progress toward the EU accession was not initiated immediately after the ousting of Milosevic. Indeed, the international community welcomed such a democratic turn in Serbia with great enthusiasm as well as instant rewards (Subotic, 2009, p.41). However, the EU accession process itself did not start until June 2003,

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<sup>17</sup> Such mentality is still strongly persistent in Serbian society and it had a substantial impact on the Europeanization of Serbia, together with Belgrade's historical and cultural relationship with Europe as well as understanding of 'Europe' as a political actor. (See: Subotic (2011))



when Serbia was reconfirmed as a potential candidate state of the EU during the Thessaloniki European Council. Just before the council, Serbia also made a significant step toward its European ambition; it became the forty-fifth member of the Council of Europe in April 2003. In October 2004, the European Council conclusions opened up a process of the SAA with Serbia and its negotiation was launched a year later.

In March 2005, the EU called off the accession negotiations with Croatia because of its insufficient cooperation with the ICTY, pointing at the failure of arresting Ante Gotovina, the last Croatian fugitive indicted by the tribunal (Peskin, 2008, p.145). Eventually, the EU resumed the negotiation with Croatia in October 2005 and the arrest of Gotovina followed it two months later. Subsequently, the EU tried to use the same tactics against Serbia. In March 2006, Olli Rehn, the European Commissioner for Enlargement at that time, declared that the detention of Ratko Mladic, the former leader of the Bosnian Serbs military forces and responsible for the Srebrenica massacre in 1995, was non-negotiable pre-condition for the further EU integration of Serbia. As a response for this, Prime Minister Kostunica promised that Belgrade would facilitate the transfer of Mladic within the following months, though such a promise was never fulfilled (Stahl, 2013, p.456). As a consequence, the SAA negotiation was called off in May 2006. However such a strong gesture from the EU resulted only in a political compromise in the face of the plea made by some of the EU member states. In June 2007, the SAA negotiation was resumed and the commission announced the finalisation of the agreement five months later, although the *full* cooperation with the ICTY as an initial requirement had not been achieved (Stahl, 2013, p.457).

Yet the Dutch government strongly refused to sign the Serbian SAA without the apprehension and transfer of Mladic, mainly due to its own historical issues related to the Srebrenica genocide. Eventually, in order to offer something to Serbia, the EU established an 'Interim Agreement on Trade and trade-related issues' (ITA) and also brought up the prospect of visa-free access to the Schengen area for Serbian nationals. (Stahl, 2013, p. 457) With Mladic still remaining at large, the SAA and the ITA are signed in Luxemburg in April 2008. After the arrest and transfer of Radovan Karadzic in July 2008, the EU lifted a visa requirement for Serbian people traveling into the Schengen zone.

Meanwhile, Croatia moved forward on its way to the EU accession quickly. In June 2006, the first chapter of *acquis communautaire* was opened and all of 35 negotiation chapters were successfully closed in June 2011. Croatia has signed the Treaty of Accession to European Union in December 2011 and subsequently all EU member states have ratified the Croatian Treaty of Accession. In 2012, 66% of Croatian voters showed their wishes to join the EU in the referendum and finally Croatia became the twenty-eighth member of the EU on July 1, 2013. On the other hand, the European Council confirmed Serbia as a candidate country in March 2012 and the SAA entered

into force in September 2013. In January 2014, the first EU-Serbia intergovernmental Conference was held and the accession negotiation of Serbia was finally launched.

As it could be seen from above, Croatia and Serbia followed significantly different roads towards their eventual EU accession. Croatia preceded the EU accession procedure relatively quickly; alas Serbia has always lagged behind. In case of the initiation of the accession negotiation, for example, Serbia followed Croatia almost a decade later. Such differences seemed to have an impact in the effectiveness of the EU accession conditionality in those states, as it would be demonstrated later.

### *Extraditing fugitives to The Hague*

Both Croatian and Serbian cases clearly exemplified that the EU put the most direct political pressure on this aspect. Indeed, the transfer of ICTY indicted was the main and most likely only benchmark for the EU to judge the fulfillment of the conditionality concerning the overall ‘cooperation with the ICTY’.

In the Croatian case, for example, Zagreb was rewarded with significant steps toward its EU accession in accordance with the arrests and transfers of the ICTY fugitives. In 2001, the arrest warrant for Mirko Norac, who was involved in the defence of the strategic town of Gospic in the Krajina region in October 1991, was issued resulting in his subsequent surrender to the Croatian authorities (Peskin, 2008, p124-127). This was rewarded with initiating the SAA in October of the same year. In 2004, the ICTY indicted two Croatian generals, Ivan Cermak and Mladen Markac, who immediately surrendered to the tribunal. Moreover, the government extradited six Bosnian Croat military and political leaders to The Hague on April 5, 2004 (Subotic, 2009, p98). Such significant development was followed by the reward of awarding the candidate status to Croatia in June 2004. On the other hand, as it was mentioned above, the only political sanctions clearly used against the lack of cooperation with the ICTY was triggered by the failure and insufficient efforts made by Croatian authorities to arrest and transfer General Ante Gotovina. (Peskin, 2008, p.142-146)

This is also clear from the change in the importance given to ‘the cooperation with the ICTY’ within the Progress Reports of Croatia before and after the transfer of Gotovina. For example, in the report of 2005, the term ‘ICTY’ was mentioned for 46 times in total and almost four pages were assigned for the assessment of cooperation with ICTY and other related issues, such as regional cooperation. (European Commission, 2005) In 2006, however, the ICTY was mentioned only 7 times and the number of pages assigned for the cooperation with the ICTY and related issues reduced their amount for almost half. (European Commission, 2006) Therefore, the EU significantly lost its interest in Croatia’s establishment of legal accountability in war crimes as well as overall ‘cooperation with the ICTY’ after its having sent all fugitives to The Hague.

A similar pattern was also observed in the Serbian case, although the strength of the EU political pressure seems to be somewhat less strong compared to the one on Croatia. In short, the EU used more ‘carrots’ to motivate Serbian government to facilitate extradition of suspects and it failed to punish its insufficient effort to handover Mladic with a same kind of political sanction that encouraged Croatia to transfer Gotovina.

In fact, during the early 2000s, the main actor who pushed the reluctant Serbian government to transfer fugitives, including Slobodan Milosevic, was the US and its aid conditionality. (Peskin, 2008, p.61-78) It was indeed after 2003 when the EU started to put pressure on the Serbian government to transfer indictees in a scheme of its enlargement policy. For example, after the assassination of Prime Minister Dindic in March 2003, Serbian government increased its cooperation by extraditing four ICTY suspects. Moreover, the Serbian government amended controversial aspects of the domestic cooperation law that had previously used to hinder the extradition of suspects to The Hague (Peskin, 2008, p. 81). Subsequently, in June 2003, the EU rewarded Belgrade by sending positive signal concerning the perspective of Serbian EU accession to make a real turning point in its relationship with Belgrade (Stahl, 2013, p.455). Towards the end of 2004 and in early 2005, Prime Minister Kostunica facilitated the ‘voluntarily’ surrenders and the flow of Serb indictees departing to The Hague increased unprecedentedly (Peskin, p.84). Such improvement was also welcomed and rewarded by the EU with initiating the SAA negotiation in 2005. In 2008, after the long-awaited arrest of Karadzic, the EU also rewarded the Serbian government by lifting visa requirements for Serbians traveling into the Schengen area in 2009. When Mladic and Hadzic were finally transferred to The Hague in 2011, the EU offered the biggest ‘carrot’ Belgrade ever had, namely a status of a candidate state, in the following year.

On the other hand, the EU did try to use a ‘stick’ method against Serbian failure to arrest remaining fugitives, especially Mladic, by calling off the SAA negotiation in 2006 (Stahl, 2013, p.456). However, this resulted in an obvious political compromise: the EU resumed the negotiation in the subsequent year without having Mladic in the ICTY custody (Peskin, 2008, p.89). Such compromise was made in regard with a tough political situation in Serbia. The EU and the West became increasingly anxious about the prospect of political instability in Serbia and reemergence of nationalists in the 2007 election. In addition, the West also sought to ensure that Serbia would not move away from Europe to move toward pro-Moscow direction (Peskin, 2008, p.86, 88).

Nevertheless, it was also obvious that the EU radically lost its interest in overall ‘cooperation with the ICTY’ once Serbia finished to send all fugitives to The Hague from its annual reports. For instance, the ICTY was mentioned ten times in the 2010 reports but only five times in the one of 2013. (European Commission, 2010b, 2013b) Kostic and Veljovic revealed that, although their non-governmental organization sent

recommendations to the EU to include certain aspects regarding Transitional Criminal Justice issues, those points were not even mentioned in the latest annual reports. (personal communication, February 6) Therefore, as with the Croatian case, extraditing fugitives could be the main and most likely only benchmark for the EU to assess Serbian cooperation with the ICTY and the EU lost its interest in Serbian handlings of the Transitional Criminal Justice issues once it finished sending all indictees to The Hague.

Therefore, it is clear that the EU attached the most visible and strong conditionality to the extraditing indictees to the tribunal in both cases of Croatia and Serbia, although there was a difference in the strength of such political pressure. This could be due to the different motivations toward the EU accession of those two countries. On the one hand, EU accession was Croatia's main foreign policy goal as Croatian government insisted that joining the EU was its vital foreign policy goal ever since it gained recognition as an independent and sovereign state. (Cehulic-Vukadinovic, 2013, p.51) On the other hand, the EU aspiration has never been clear and vital foreign policy goal in Serbia. In fact, during the interview surveys, several interviewees noted that they were not entirely sure whether Serbian government is truly aiming at joining the EU or not. (Gruhonjic, personal communication, January 30, 2014; Kostic and Veljovic, personal communication, February 7, 2014) Moreover, such a difference could be also stemmed from the strong influence of the other external actor, namely Russia, observed in Serbia. (Peskin, 2008, p.86, 88) As Schimmelfenning and Sedelmeier (2004) claimed, such a situation where 'cross-conditionality' is observed could weaken the effectiveness of the EU accession conditionality (p.666) as it was mentioned in the first chapter.

### *Cooperation with ICTY investigation*

As both Croatian and Serbian cases demonstrate, cooperation with tribunal investigators was placed under less strong political pressure from the EU compared to the extradition of ICTY indictees. In Croatian case, for instance, the EU indeed rewarded Croatia in 2004 by offering the status of candidate state after its significant improvement in providing documents to the ICTY investigators from August 2003 through the end of the year (Peskin, 2008, p. 136). In October 2005, the EU also rewarded Croatian authorities' effort to track down the location of Gotovina, which resulted in the arrest of the last Croatian fugitives at large (European Commission, 2005).

However, the EU did not pose any clear sanction against negative development in the cooperation with ICTY investigators. For example, the Croatian authority and the Tribunal's Office of the Prosecutors crumbled into open conflict in 2008, as there was a problem for ICTY investigators to access certain documents necessary for the Gotovina and Prlic case (Lamont, 2010a, p1700). Although the European Commission has noted about this issue in its Progress Reports until the latest issue

(European Commission, 2008a, 2009a, 2010a, 2011), this problem failed to trigger any usage of the 'stick' against Croatia in regard to its EU accession process. Moreover, this issue of missing documents did not cause any increase in the importance given to the cooperation with the ICTY in the EU's assessment of Croatian accession process. From 2008 to 2011, there was no significant change in the frequency of the appearance of the ICTY as well as the length of the assessment regarding the cooperation with the ICTY and related issues in Croatian Progress Reports (European Commission, 2008a, 2009a, 2010a, 2011). Thus, the EU did not attach any strong conditionality to the aspect of cooperation with investigators from The Hague.

In the Serbian case, the EU also rewarded the good cooperation provided from the Serbian authorities to the ICTY investigators. In 2003, the Serbian government increased handover of documents and granted waiver for government and military officials to testify at The Hague (Peskin, 2008, p.81). Such positive development was followed by the EU's reward, the confirmation that Serbia is a potential EU member state during the Thessaloniki European Council summit. In 2007, the EU's resuming the SAA negotiation with Belgrade occurred after the arrests of two ICTY fugitives, Zdeavko Tlimir and Vlastimir Djordjevic. In those two arrests, the Serbian collaboration with Bosnian authorities as well as the EU peacekeepers in Bosnia played a significant role. Moreover, the Serbian government provided long-requested files to the tribunal in the year. Subsequently, during her visit to Belgrade in June 2007, Del Ponte positively assessed such improvements in Serbian cooperation with the tribunal investigation (Human Rights Watch, 2008). Therefore, it could be argued that such a significant development were rewarded by unfreezing the SAA negotiation, although it is more possible to assume that the EU's decision to compromise was merely based on its political calculation as it was discussed before (Peskin, 2008, p86-89).

On the other hand, the comparison of the degree of the EU pressure imposed on the cooperation with ICTY investigation with the one on the extradition of fugitives to the tribunal is less clear in the Serbian case, as Serbian cooperation with ICTY investigators has not deteriorated as visibly as the case in Croatia. However, as it was mentioned, it is clear that the EU radically lost its interest in Serbian 'cooperation with the ICTY' in its annual reports once Serbia finished sending all of the fugitives to The Hague.

Summing up, in both cases the EU political pressure imposed in this aspect of cooperation with the ICTY was less direct compared to the one on the previously discussed one. Indeed, the EU rewarded both Croatia and Serbia when they made significant improvements in their cooperation with ICTY investigation. However, it did not pose any political sanctions against the insufficient cooperation and clearly lost its interest in the overall 'cooperation with the ICTY' after all ICTY fugitives were successfully transferred to The Hague from both states.

### *Domestic war crime prosecutions*

On the other hand, the EU did not attach any conditionality in the aspect of domestic war crime prosecutions in both Croatian and Serbian cases. Indeed, the EU did employ neither rewards nor sanctions in accordance with the positive or negative development in domestic war crime prosecutions. Such indifference was even clearer in the Croatian case, as the EU failed to mention about shortcomings in Croatian domestic war crime trials and the necessity of ensuring justice regardless of the ethnicity of victims and perpetrators in the European Partnership documents issued in September 2004. These documents are significant since they laid out details of short and medium term priorities for Croatia's preparation for its eventual EU accession (Human Rights Watch, 2004).

Nevertheless, the EU overlooked the serious issues that persisted in the domestic criminal trials in both cases. For instance, in its progress reports, the EU continuously noted the main problems in Croatian domestic war crime prosecutions, such as ethnic bias, insufficient witness protections and slow progress of reviewing the verdicts of *in absentia* trials. Significantly, those fundamental flaws continued to be referred in the assessment of the Croatian EU accession until the year before the end of Croatian accession negotiations (European Commission, 2005, 2006, 2007a, 2008a, 2009a, 2010a). However, the EU did not impose any political sanction against Croatia to encourage them to address those issues. Indeed, there was an occasion when the EU showed its serious concern over the politicisation of a domestic war crime case against a sitting member of the Croatian Parliament indicted in 2006. In 2008, the EU issued a stern letter to Zagreb listing complaints regarding the practice of domestic war crime prosecutions. In the letter, the EU warned that such conduct could hinder the process of judicial and legal reforms that is necessary for the EU integration of Croatia. (Subotic, 2009, p.105) However, no major political sanctions followed after this incident, although the Croatian domestic war crime trials remained to be problematic.

The EU's approach was similar in Serbian case. The EU continuously mentioned some fundamental issues in domestic war crime trials in Serbia, such as the limited investigate capacity, slow progress of trials and insufficient witness protection. (European Commission, 2007b, 2008b, 2009b, 2010b, 2012, 2013) However, the EU also used no 'stick' to encourage the Serbian government to tackle with those issues. Thus, it is clear that the EU did not attach any conditionality in the development of domestic war crime prosecutions in both cases of Croatia and Serbia.

### *Summary*

As it was demonstrated above, the EU indeed put the different degree of pressure on the three aspects of Transitional Criminal Justice in both cases of Croatia and Serbia. The most strongest and visible pressure was imposed on the extradition of ICTY

fugitives and such pressure was less direct and weaker with regard to the cooperation with ICTY investigators. As for the domestic war crime prosecution, the EU did not attach any conditionality to encourage those two countries to improve their situation of domestic war crime trials. Therefore, the following scrutiny of the domestic reaction vis-à-vis the EU pressure of the each of the analytical categories in Croatia and Serbia would allow us to thoroughly examine the impact that such political pressure projected on the establishment of legal accountability in those states.

### **3.2 Croatian politics of Transitional Criminal Justice**

#### *Extradition of fugitives to The Hague*

During the time of Tudjman, no attempt was made to facilitate the transfer of fugitives to The Hague. Consequently, in August 25 1999, the President of ICTY noted that Croatia had failed to comply with its obligation pursuant to Article 29 of the Statute of Tribunal (United Nations, Security Council General Assembly, 2000). On the other hand, Croatia adopted a constitutional law to cooperate with the ICTY in April 1996, as Tudjman came to realize that such a law might serve his interests by enabling Croatia to establish its international reputation as a law-abiding state. (Peskin, 2008, p111) Clearly, those moves were inconsistent and showed that there was a significant discrepancy between words and deeds of Croatian policies concerning the overall ‘cooperation with the ICTY’. Nevertheless, the emergence of the new center-left government in 2000 marked a significant turning point in the Croatian-ICTY relationship. The new government led by Prime Minister Racan succeeded to please the tribunal by making positive gestures in the field of human rights and transitional justice, especially in the realm of the cooperation with the ICTY (Subotic, 2009, p89).

Subsequently, the first serious crisis for the new government came in February 2001 when a domestic court acted on ICTY indictment issued for the arrest warrant of Norac, who was regarded as a war hero of the ‘Homeland War’ in the domestic society. As a reaction against his indictment, Croatian right-wing parties and veterans’ group quickly mobilized and organized street demonstrations throughout Croatia. The protestors criticised the new government’s policy of cooperation with the tribunal as shameless giving up to international pressure and the cooperation with the ICTY as further humiliation of Croatia by Serbs (Subotic, 2009, p.91). Eventually, the crisis was solved when Del Ponte agreed to defer the Norac case to the Croatian judiciary and following surrender of Norac to the Croatian authorities (Subotic, 2009, p.93). The EU rewarded such positive developments in Croatia-ICTY relations by signing the Croatian SAA to mark a significant step toward the Croatian EU accession.

However, during the reign of Racan, the Croatian cooperation in arranging the extradition of fugitives remained to be slow and selective. For instance, in July 2001, the ICTY prosecutor issued two controversial indictments against two high-ranking

Croatian generals, namely Rahmi Ademi and Ante Gotovina. These indictments resulted in a split of the two main parties in the government coalition, as four ministers resigned after the issuance of the indictment and Racan's decision to arrest those generals. On the other hand, Racan himself strongly defended the governmental position as Croatia had a legal obligation to cooperate with the tribunal and the country's progress toward the entry to the European institutions would have been hampered by a failure to hand over those generals (Peskin, 2008, p.128).

However, in reality, Racan did not act quickly to arrest them. He did not follow his pro-cooperation stance especially when it comes to the arrest of Gotovina. Indeed, he was scared of vocal criticism from nationalists against the government's policy regarding cooperation with the ICTY as it was seen during the Norac crisis. Eventually, the government delayed its decisive action to arrest Gotovina, believing that it would facilitate his escape (Peskin, 2008, p130). Therefore, although the Racan's government could mark significant and positive development in terms of cooperation with the ICTY, such cooperation was far from being *full*. Together with the fatal delay of Zagreb to act upon the indictment of Janko Bobetko and his eventual death due to the poor health condition, the ICTY noted that "cooperation on the part of the Croatian authorities had continued to improve, although sometimes it had been selective and slow [...]" (United Nations, Security Council General Assembly, 2003, p.53).

As a result of the election of the late November 2003, the Tudjman's HDZ led by Ivo Sanadar defeated Racan to mark the return of the center-right government. On the contrary to the anticipation of the ICTY, Sanadar made rapid progress in extraditing fugitives to The Hague. In February 2004, ICTY indicted two Croatian generals, Ivan Cermak and Mladan Markac, for crime against humanity during the Operation Storm, which resulted in the immediate surrender of both of them. Subsequently, six other ICTY fugitives were transferred to The Hague (Subotic, 2009, p.98). Moreover, Sanadar even successfully manage to arrange Norac's surrender, after the ICTY indicted him on other charges stemming from the wartime atrocities than the ones he had been accused by the Croatian domestic courts (Peskin, 2008, p.138). Thus, it could be legitimately concluded that Sanadar successfully established a more stable and decisive cooperation with the ICTY by facilitating a larger number of extraditions in a much speedier manner. Such significant achievements resulted in receiving a status of EU candidate state in June 2004.

However, the issue of Gotovina still remained unsolved, as the ICTY annual report in 2004 noted: "The only remaining issue is the Gotovina's case [...] the prosecutor is disappointed that it was not possible for Croatia to ensure the transfer of this accused since [...] 2001" (United Nations, Security Council General Assembly, 2004). In fact, the Gotovina case was truly difficult to handle even for Sanadar. He feared that the Gotovina's arrest would split his party and estrange key allies. As a consequence, Sanadar's government provided little cooperation to the tribunal's quest for Gotovina.



On the other hand, pressure from the European states continued to be high, as the United Kingdom (UK) and the Netherlands continued to insist that they would not support Zagreb's bid for the EU candidacy without the arrest of Gotovina. The eventual suspension of the EU negotiation talks in March 2005 was indeed a 'catastrophic blow' for Sanadar's government (Peskin, 2008, p.144, 147). Consequently, Croatian authorities significantly increased their efforts to facilitate a more effective investigation to track down Gotovina's whereabouts. Shortly after the EU's decision to block Croatian entry to the EU, Del Ponte softened her criticism against Croatian cooperation and sought to develop a working relationship with Croatian officials. On the evening of December 7, 2005, finally Gotovina was arrested in the Canary Island, largely owing to the effort made by the Croatian officials (Peskin, 2008, p.147). This is the critical moment when Croatia sent its last remaining fugitive to The Hague to establish the status of *full* cooperation with ICTY.

Therefore, as it can be seen above, EU conditionality was substantially effective in securing the cooperation with Zagreb to facilitate the extradition of ICTY suspects. By the same token, regarding political motivation, EU conditionality was dominating factor to push political elites to transfer the suspects to The Hague, as most of interviewees noted. As Cicak argued, Croatian political elites were never in favor of the ICTY and they accepted the cooperation with the Tribunal merely because of the pressure from the EU, which was the main actor to put pressure on Croatia to do so (personal communication, February 11, 2014). On the other hand, some interviewees regarded the motivation of state cooperation with the tribunal from different point of view. For example, Knezovic described that the political elites conceptualised extraditing fugitives to The Hague as a necessary action since the 1996 constitutional law of cooperation with the ICTY has to be respected and, therefore, the main motivation for such cooperation was the pressure from two direction: externally as well as internally to consolidate the rule of law (personal communication, February 13, 2014). What is more, Speher indicated that the main motivation to cooperate with the ICTY was not only the EU accession but also to join the world of democratic countries and to demonstrate a respect to the international legal system (personal communication, February 12, 2014).

Thus, it could be argued that Croatian political elites had a forward-looking motivation to facilitate transfers of the ICTY indictees. For them, extraditing fugitives was not about prosecuting their wartime abuses anymore, but it was the key to move forward for their future as a European and democratic country. It is also noteworthy that there have been no changes in such motivation of political elites, according to the answers from all of the interviewees. Thus, such observation can be drawn that Croatia had a clear mindset regarding objectives of its extraditing war crime suspects to The Hague, namely Europeanization as well as democratization of the country (Speher, personal communication, February 12, 2014) from the very beginning of its EU accession process.

Such a clear and forward-looking mindset indeed made Croatia extremely vulnerable to the EU political pressure compared to the Serbian case, as it will be demonstrated. In the Croatian case, the EU political pressure was substantially strong so that it could facilitate a stable cooperation even after the right-shift in its political scene in 2003 and, more notably, even the arrest and transfer of Ante Gotovina. However, it could be pointed out that the effectiveness of the EU accession conditionality was not sufficient enough until 2003, when Racan could only establish unstable and selective cooperation. Considering the fact that there was no change in the political motivations in Croatian government at that moment, it could be argued that the effectiveness of the EU leverage itself had changed before and after the political change in Croatia. This issue would be addressed later, as a result of the comparative analysis with the Serbian case.

### *Cooperation with ICTY investigation*

In the aspect of cooperation with ICTY investigation, a similar pattern of commitments as the extradition of fugitives has been observed. Though, as Subotic (2009) described, ‘one step forward, two step back’ pattern of cooperation is much clearer in this aspect of cooperation with the tribunal.

Before the 2000 election, there was almost no cooperation from Croatian government. In July 1999, as a consequence, the ICTY prosecutor condemned the fact that Croatian government refused to provide evidence and other information in request (United Nations, Security Council General Assembly, 2000). After the 2000 parliament election, positive improvement was also made in cooperation with ICTY investigators. For instance, within several months after the election, the new government signed an agreement with the UN for the establishment of a liaison office of the tribunal in Zagreb (United Nations, Security Council General Assembly, 2000). Moreover, the Office of Prosecutor of the tribunal was granted access to some archives holding collections of documents that were essential for ongoing trials and investigations. In addition, some of the most difficult and sensitive issues, such as high-level suspect interviews and exhumation of the politically sensitive mass grave, were successfully addressed. (United Nations, Security Council General Assembly, 2001) As a response, the EU rewarded such a positive improvements with concluding the SAA negotiation with Zagreb.

However, such improvements were not converted into smooth development in the cooperation with ICTY investigation. As with the extradition of indictees to The Hague, the improvement in the cooperation with the tribunal’s investigation also remained slow and selective. For example, there were some setbacks and delays in a number of the tribunal prosecutor’s requests for assistance during the second half of 2000 (United Nations, Security Council General Assembly, 2001). In the following year, the ICTY gave an evaluation to Croatia that although good cooperation was provided regarding two exhumation projects, problems in gaining access to specific

documents as well as witnesses still remained (United Nations, Security Council General Assembly, 2002).

In the summer of 2003, Del Ponte offered a deal to give a favorable assessment in the next annual report to the Security Council in return of government's clearing the setbacks of documents which had not provided to the tribunal yet. As a result, having the European aspirations on its mind, the government made significant progress on providing documents to the tribunal from the August 2003 until the end of the year (Peskin, 2008, p136). The ICTY noted such progress in its annual report that, for instance, its access to different archives and witnesses has been improved. However, problems still persisted regarding access to specific documents for the purpose of ongoing investigation (United Nations, Security Council General Assembly, 2003). After the HDZ's victory in the 2003 election, Sanadar also managed to establish a positive development in the cooperation with the ICTY investigation. For instance, the Croatian Department for the Cooperation with ICTY was moved from under direct control of government to the Justice Department. This structural reform was aiming at moving cooperation with the tribunal from the political to the purely legal sphere (Subotic, 2009, p.98). In addition, the government provided documentary evidence to The Hague (Subotic, 2009, p.98) and, as the ICTY praised in its report, the Croatian authorities, especially the Office of State Attorney, developed close cooperation with the ICTY prosecutor to locate Gotovina (United Nations, Security Council General Assembly, 2004).

However, the cooperation from Croatia to track down Gotovina's location remained insufficient until the critical moment of postponing the EU accession talks. The ICTY noted in its 2005 report that, although the cooperation in providing assistance, information, archival documents and witnesses remained satisfactory, no progress had been made with regard to the arrest of Gotovina since the tribunal Prosecutor gave a positive assessment to Zagreb at the request of the EU in April 2004 (United Nations, Security Council General Assembly, 2005). After the suspension of its EU accession talks, the Croatian government initiated a new action plan to resolve the outstanding issue of tracking down Gotovina's location. Subsequently, significant efforts were made to locate Gotovina's whereabouts by the Croatian authorities. For example, Croatian officials shared important information regarding Gotovina's location with Del Ponte in late September 2005 and this led to her giving positive assessment to Croatian cooperation (Peskin, 2008, p.146). The ICTY praised extensive efforts made by Croatian officials as "the arrest and transfer of accused Ante Gotovina can be credited to the efforts of the Government of Croatia" (United Nations, Security Council General Assembly, 2006). The EU subsequently rewarded Croatia by resuming its accession negotiation. The Gotovina case clearly exemplified that the EU pressure was the main and critical motivation for Zagreb to tackle with issues in its cooperation with the tribunal investigation.

Another issue had emerged since 2007. The Office of the Prosecutor requested Croatia to obtain access to the governmental archives and produce documents for the Prlic and Gotovina cases. Although some archival materials were provided, requests for key documents were not answered in a timely manner (United Nations, Security Council General Assembly, 2008). For Gotovina case, in June 2008, the Trial Chamber ordered Croatia to produce artillery documents relating to Operation Storm at the request of the Office of Prosecutor. However, Croatia insisted that it was unable to fulfill such a request, as the documents in question did not exist (Lamont, 2010a, p1700).

Although Croatian response to the majority of requests from the tribunal's Office of Prosecutor remained adequate and timely, the progress regarding the long-standing requests for the key military documents was slow and limited. Moreover, the Office of the Prosecutor raised its concern about the focus, manner and methodology of the investigation conducted to locate those missing documents (United Nations, Security Council General Assembly, 2009). In October 2009, the Croatian government initiated an inter-agency Task Force to tackle with such shortcomings of its investigation to track down the whereabouts of the requested documents. However, the investigation could not provide a full account of the location of the documents and, consequently, none of the documents in question were provided to the ICTY Prosecutor (United Nations, Security Council General Assembly, 2010). Additionally, the tribunal's Prosecutor asked Croatia to investigate a number of inconsistencies and questions with regard to the Task Force's findings, though it remained unsolved. Eventually, on April 15 2011, the Trial Chamber delivered its judgment in the Gotovina *et al.* case to find Gotovina and Markac guilty of crimes based on the evidence submitted to the trial (United Nations, Security Council General Assembly, 2011). The issue of missing documents also supports the argument that the political pressure from the EU was the main motivation for Croatian authorities to improve their cooperation with ICTY investigation. In the missing documents issue, the EU did not use any clear political sanction against Croatia and, therefore, the issue was never solved.<sup>18</sup>

Nevertheless, after 2011, Croatian cooperation with ICTY investigation has been satisfactory and no major issues emerged until 2014. Both ICTY annual reports in 2012 and 2013 noted that the Croatian cooperation remains as 'timely and adequate' (United Nations, Security Council General Assembly, 2012, 2013). It is important to mention that such a good cooperation was not deteriorated after the parliamentary election in 2011, which resulted in the return of the center-left

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<sup>18</sup> Although Colak argued that this issue could not be solved merely due to technical problems (personal communication, February 10, 2014), Zagreb indeed failed to address some issues that the ICTY Prosecutor pointed out, such as inconsistencies in the findings of the Task Force. Thus, it could be argued that the lack of the EU pressure resulted in the reluctant and insufficient attempts of the Croatian authorities to improve its cooperation with investigation of the tribunal.

opposition to power (Ilic and Radosavjevic, 2011). More importantly, such trend did not change even after the Croatian EU accession in 2013, which technically took off all the political pressure that stemmed from the EU enlargement policy. The fact that there have been no trials against Croatian nationals in The Hague after the release of Gotovina and Markac in 2012 could make it much easier for Croatian government to conduct such continuous efforts.

Regarding the political motivation, most of interviewees noted that domestic political elites complied with such conditionality because it was part of the requirements to join the EU. As Knezovic noted, the cooperation with ICTY investigation could be the aspect of the overall 'cooperation with the ICTY' that needs the most extensive pressure to achieve. Since allowing access to certain documents, such as opening archives, could significantly jeopardise the legitimacy and security of states, Croatia was more reluctant to cooperate in this aspect of its international obligation (Knezovic, personal communication, February 13, 2014). Moreover, there was a tendency among Croatian media to report the person who gave an access to the requested documents as a 'traitor' (Cicak, personal communication, February 11, 2014). On the other hand, not only the EU's but also other external actor's pressure was significant to encourage Zagreb to provide a good cooperation to the tribunal investigator (Speher, personal communication, February 12, 2014). Therefore, a strong external pressure from multiple actors enhanced such cooperation from Croatian authorities. In addition, as for the extraditing fugitives, establishment of the rule of law in regard with the 1996 cooperation law as well as judicial and moral obligations were also referred as political motivations to cooperate with investigations of the tribunal. In this aspect of the Transitional Criminal Justice, there has been also no major change in the political motivations over the years of the Croatian EU accession procedure.

Therefore, the rationale behind to assist the investigation of the ICTY is more closely related to the external pressure compared to the extradition of fugitives. This could explain the patterns of the development in the cooperation with the tribunal investigation. Indeed, the strong political pressure from the EU could push the Croatian authorities to locate the whereabouts of Gotovina, while the absence of such political sanction resulted in the issue of missing documents' remaining unsolved, as it was demonstrated. In other words, the unclear political pressure from the EU could only facilitate unstable development in this aspect of the cooperation with the tribunal compared to the extradition of fugitives. Together with the aspect of extradition of fugitives, unchanged political motivation could exemplify the Croatian constant vulnerability to third party coercion in the overall 'cooperation with the ICTY'.

#### *Domestic war crime prosecutions*

Since as early as 1991, Croatia has engaged in a large-scale war crime prosecutions in its domestic judiciary. However, The overall development of the domestic war crime prosecutions in Croatia was characterized with its selective improvement as well as a

huge gap between commitment and implementation. Surprisingly, some serious problems in domestic war crime prosecutions still remain even after the Croatia's EU accession (Documenta, 2013).

Nevertheless, it was indeed since the initiation of the tribunal's Completion Strategy when the importance of capacity building of local courts to prosecute war crimes caught substantial attention of international actors (Josipovic, 2006, p148). As a part of it, it was expected that a number of cases would be referred by the ICTY to domestic judiciaries in accordance with Rule 11 *bis* of ICTY's Rules of Procedure and Evidence (OSCE, 2004). Moreover, in October 2003, the Croatian Parliament passed the law to execute a structural reform of domestic war crime prosecutions by establishing four new chambers within County Courts in Zagreb, Osijek, Rijeka and Split, which would specifically deal with war crime cases (ICTY, n.d. b). In fact, some evidence shows that the creation of specialised war-crimes chambers has professionalised Croatian prosecution of war crimes (Subotic, 2009, p.103) and Colak recalled that such a reform helped her work by removing local prosecutions and easing the pressure on witnesses (personal communication, February 10, 2004).

However, even after the implementation of the reforms in the domestic judiciary system, Croatia failed to address the serious issues in its domestic war crime prosecution, such as ethnic bias as well as witness protection. For example, in 2003, more than 1500 Croatian Serbs were indicted often based on ill-founded charges, while only a handful of war crime against ethnic Serbs were prosecuted usually to result in acquittals or absurdly low sentences (Human Rights Watch, 2004). In the following year, although Croatia made a significant step toward its EU accession, it did little to improve the situation of its problematic domestic war crime prosecution. While Croatian court tried only two cases involving war crimes committed against ethnic Serbs, the trials against Serbs accused of war crimes continued throughout the country (Human Rights Watch, 2005). In fact, the indirect political pressure from the EU also worked in such situation as Croatian government dealt with several flaws, especially the issue of ethnic bias, in accordance with the EU's issuance of opinion regarding the Croatian candidacy (European Commission, 2005).

The issue of ethnic bias also persisted in 2005, although certain positive developments were made in the area of witness protection and inter-state cooperation with its neighboring states (Human Rights Watch, 2006). In 2006, Croatia marked some progress on its human rights issues, including domestic war crime prosecutions. For example, Croatian courts took up some significant cases involving war crimes against Serbs (Human Rights Watch, 2007). However, the issue of ethnic bias continuously prevailed, as the Organization for Security and Co-operation in Europe (OSCE) mission, which monitored war crime cases in Croatia, found examples of inconsistent approaches toward Croats and Serbs defendants concerning indictments, prosecution, conviction and sentencing (Human Rights Watch, 2007). The years 2007 and 2008 could mark only modest improvements. Especially, the issue of trials *in absentia*

caught the attention of the Human Rights Watch in those years; as such an issue could hinder fair and just prosecutions against non-Croat defendants, especially ethnic Serbs. For instance, at the end of October 2007, 19 out of 23 defendants on trials *in absentia* were held against ethnic Serbs (Human Rights Watch, 2008). Despite opposition from the State Attorney's Office, *in absentia* prosecutions against Serbs continued in the region of Vukovar, Sisak and Osijek in 2008 (Human Rights Watch, 2009).

On the other hand, development of the Glavas case demonstrated a heavy influence of the Croatian Parliament on domestic war crime prosecutions. Branimir Glavas, who was a wartime commander and a sitting member of the Croatian Parliament, was accused of torturing and killing Serb civilians in Osijek 1991, together with six other suspects in 2006. However, when he was indicted, the Parliament voted not to strip him of his parliamentary immunity. What is more, in September 2008, the judge gave up the case due to defense delay and ordered it to begin anew (Subotic, 2009, p. 105). In 2009, he fled to Bosnia on the day of his verdict with taking advantage of his Croatian-Bosnian double citizenship (Human Rights Watch, 2010). He was eventually arrested and sentenced by the court of BiH for eight years imprisonment (Human Rights Watch, 2011). As it was mentioned before, the EU indeed showed its concern over this issue by sending a letter to warn that such conduct could hamper the EU integration of Croatia (Subotic, 2009, p.105). However, the lack of clearer and stronger pressure from the EU resulted in almost no attempt to address such a problematic aspect of domestic war crimes prosecution.

In 2010, some improvements were made to address the issue of ethnic bias. For instance, the investigations into war crimes committed by members of Croatian Armed Force were notably increased. Additionally, during the first nine months of the year, only 11 out of 25 newly indicted individuals were ethnic Serbs. However, there was a visible discrepancy between 'words and deeds' of Croatian government and the issue of ethnic bias as well as trials *in absentia* remained as a major concerns (Human Rights Watch, 2011). After closing its membership negotiations in 2011, the improvement in the human rights related issues, including domestic war crime prosecutions, lagged behind. Notably, the number of *in absentia* trials increased, particularly when the defendants were ethnic Serbs. During the first eight months, 20 out of 33 ongoing war crime trials conducted *in absentia* at least partially. Moreover, 10 among 20 newly indicted individuals were indicted *in absentia* and most of them were Serbs (Human Rights Watch, 2012). In addition to the issue of trials *in absentia*, another controversial tendency in Croatian domestic crime trials remained even at the point of Croatia's closing EU accession negotiations; indictees continued to face war crime trials in regular district courts, instead of the four courts specially designated for prosecutions of war crime (Human Rights Watch, 2012). Although the reform in 2003 would have increased the professionalism of prosecutors, it clearly indicated that such improvement did have an insufficient impact on the actual war crime prosecutions in Croatia.

In 2012, Croatian authorities achieved significant improvements in the area of domestic war crime prosecutions. In late 2011 and early 2012, fifteen domestic war crime cases were transferred from local county courts to four special courts for war crime trials, with leaving only two cases in local courts. There was also remarkable change in the judicial practice of Croatian court, as it altered its exercise that considering participation in Croatian Armed Forces as a mitigating factor in sentencing war crimes (Human Rights Watch, 2013). Such a positive development could be due to the political shift in domestic politics as a result of the election held in December 2011.

However, some concerns remained unaddressed in 2013, as the European Commission called Zagreb to improve the efficiency in the judiciary and domestic war crime prosecutions (Human Rights Watch, 2014). Notably, the assessment from the local non-governmental organisations on that year mentioned some issues that have been on the table for more than a decade, such as ethnic bias against Serbs and trials *in absentia*. On the one hand, it also noted that the Croatian Judicial bodies became more capable of conducting war crime prosecutions in an impartial manner compared to the recent past by pointing out the continuous trend of suspension of proceedings against members of Serbian military units who had been indicted or sentenced *in absentia* (Documenta, 2013). However, although the majority of regularly held court hearings were against member of Croatian military units in 2013, the trials *in absentia* were conducted only against Serbs. In addition, the first-instance courts still tended to hinder the equality in front of law based on the ethnicity of defendants (Documenta, 2013).

Therefore, the improvement in Croatian domestic war crime prosecutions remained insufficient throughout years of its EU accession process. Even one could argue that the situation worsened once Croatia reached to the conclusion of its negotiation talks in 2011. On the other hand, interestingly, the Croatian government has been relatively supportive for its domestic courts to prosecute war crimes. For example, the Croatian government assigned a special budget for war crime prosecutions and put the most experienced prosecutors in the war crime division. In addition, there have been technical supports for the work of war crime prosecutors from the government, as they can ask Ministry of Justice for any help whenever they need some assistance from legislation, such as new laws. Indeed, during the interview, Colak revealed that she could always get what she needed from the ministry (D. Colak, personal communication, February 10, 2014). It is important to note that such tendency continues even after Croatia's joining the EU. Such stable political support is one of the clear differences from the case in Serbia, as it would be shown later.

Regarding the political motivation, the impact of the EU conditionality was also strong (Cicak, personal communication, February 11, 2014), although political elites associate domestic war crime prosecutions more closely to the consolidation of the rule of law as well as judicial and moral responsibility to establish legal accountability.



In Croatia, people gradually started to recognize the importance of the rule of law as verdicts from courts could send strong message that misbehavior was not tolerated even for wartime high-ranked political elites and this led to the fight against corruption as well as organized crime (Knezovic, personal communication, February 13, 2014), rather than regarding it as an attempt to face its past wartime atrocities. Indeed, interviewees mentioned that the general discourse over war crime within Croatian society is 'we forget about it' (Cicak, personal communication, February 11, 2014) and people are generally more reluctant to look back its own history (Knezovic, personal communication, February 13, 2014). There was also no change in the political motivations in this aspect of Transitional Criminal Justice.

In the field of domestic war crime prosecutions, the forward-looking motivations among political elites to establish the legal accountability of wartime abuses is also clear. As those answers and quotes from the interview surveys exemplify, war crime prosecutions at the local court became all about the holding trials, not facing the past atrocities. Indeed, such an attitude of political elites could explain the problematic development of Croatian domestic war crime trials, together with the absence of the clear political pressure from the EU. It could be argued that such a discrepancy between war crime prosecutions and the facing the legacy of past human rights abuses allowed Croatian authorities to tolerate the practices of its domestic judiciary which could be problematic for the historical implications, such as ethnic bias.

### *Summary*

The Croatian case clearly exemplifies that its pattern of development in the Transitional Criminal Justice policies is strongly influenced by the EU accession conditionality. The aspect of extradition of suspects to The Hague, on which the EU imposed the strongest pressure, shows mostly stable development. The EU could even push the Croatian government to facilitate the extradition of Gotovina, which was surely the most controversial indictment that Zagreb had to deal with. However, such strong impact of the EU political pressure became substantial only after 2003. Before that, the EU political pressure could merely establish a selective and unsteady cooperation with the tribunal. On the other hand, cooperation with the tribunal investigators resulted in more unstable development. For instance, the EU did not pressure Zagreb to handle the issue of missing documents and eventually it remained unsolved. Besides that issue, the Croatian government marked positive development in its cooperation with ICTY investigation up to 2014. Regarding domestic war crime prosecution, where the EU did not attach any conditionality, the overall development remained selective and insufficient.

It is also noteworthy that there was no major change in the political motivations in all of analytical categories of Transitional Criminal Justice. This could mean that the Croatian government had a clear and determined mindset that handling its Transitional Criminal Justice issues is the key to proceed its way of Europeanisation

and democratisation from the very beginning of its EU accession process. Although such attitude brought about mostly sustainable development in the cooperation with the ICTY especially after 2003, it showed counterproductive effects in the domestic war crime prosecutions by failing to address the fundamental issues throughout years of the EU accession procedure and it also floundered the situation immediately after the conclusion of negotiation talks in 2011.

### **3.3 Serbian politics of Transitional Criminal Justice**

#### *Extradition of fugitives to The Hague*

In the Serbian case, no attempt was also made by Belgrade to facilitate transfer of suspects before the Milosevic's ousting. As ICTY condemned in its annual report, the Serbian government refused to recognise the tribunal's jurisdiction with holding Milosevic, who was an ICTY indictee himself, in power (United Nations, Security Council General Assembly, 2000).

Immediately after the 2000 election, the arrest and transfer of suspects who were residing in the FRY started and even intensified after the handover of Milosevic in April 2001. (United Nations, Security Council General Assembly, 2001) However, such a strong gesture did not result in the establishment of stable development of Belgrade's cooperation in the aspect of Transitional Criminal justice at stake. Already in the next year's ICTY report, Serbia received a negative evaluation that its cooperation is "far from being full and proactive" (United Nations, Security Council General Assembly, 2002, p.39). In addition, Belgrade finally adopted the long-awaited law on the cooperation with the ICTY in April 2002, though it had one substantial fault in its Article 39, which prohibited the extradition of any suspects indicted after the law's coming into force (United Nations, Security Council General Assembly, 2002).

After the assassination of Prime Minister Dindic, who facilitated the handover of Milosevic, there were positive improvements such as several important accused were transferred to the tribunal and the controversial cooperation law was amended. However, nearly twenty indictees still remained at large and Serbian cooperation continued to be complex, selective and unstable (United Nations, Security Council General Assembly, 2003). From the beginning of 2004, Serbian cooperation was practically suspended. ICTY condemned Belgrade that a new prime minister Kostunica, who was a conservative and suspicious about international institutions and the idea of transitional justice (Subotic, 2009, p.45) had done nothing more than insisting that cooperation with the tribunal is an international obligation that should be a 'two-way street'<sup>19</sup> (United Nations, Security Council General Assembly, 2004). It is

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<sup>19</sup> As Kostunica argued, "the government is in favour of collaborating with the tribunal [...] but the government is in favour that the tribunal does something for Serbia too. Those who voluntarily

noteworthy that although the right-wing political figures emerged at almost the same time in Serbia and Croatia, only the latter could continuously provide a sustainable cooperation with the tribunal by facilitating transfer of fugitives.

Nevertheless, from late 2004, Serbian government suddenly started to provide a good cooperation to the tribunal; it facilitated fourteen outstanding and new indictees to The Hague. However, it was still reluctant to carry out the arrest warrants from the tribunal and, as a result, six out of ten remaining ICTY fugitives were believed to reside in Serbia (United Nations, Security Council General Assembly, 2005). Indeed, the political pressure from the US and the EU played a vital role to trigger such a positive change. For instance, the EU put political pressure on Serbia by indicating a possibility of SAA negotiations' initiation, which also played a vital role to increase Serbian cooperation (Peskin, 2008, p.84). However, the EU conditionality was not sufficient enough to facilitate a steady and positive cooperation from Belgrade. Subsequently, as the ICTY condemned, Serbia failed to facilitate an arrest of any single fugitive (United Nations, Security Council General Assembly, 2006) and Serbian cooperation continued to be poor until March 2007 (United Nations, Security Council General Assembly, 2007). Unlike in the Croatian case, Serbia did not react immediately to the EU's political sanctions against Serbia when it called off the SAA negotiations in May 2006. Although the EU's main condition on the resuming the SAA talks was the apprehension of Mladic (Peskin, 2008, p.86), it took another five years for Serbian authorities to arrest and transfer him to The Hague.

Visible improvement in the cooperation was again observed in May and June 2007, although no progress was made to apprehend Karadzic and Mladic (United Nations, Security Council General Assembly, 2007). In June and July 2008, the Serbian government finally transferred Zupljanin and Karadzic. The arrest of Karadzic was indeed brought about as a consequence of political shifts in Serbia as the new pro-European government led by Boris Tadic was formed in Belgrade several weeks before the apprehension of Karadzic (The Economist, 2008). As Gallach, a spokesperson of Javier Solana, the former EU's High Representative for Common Foreign and Security Policy, said; "If not for the current government in place, we wouldn't have Karadzic"(Castle and Erlanger, 2008). Subsequently, Serbian government finally apprehended and transferred Mladic and Hadzic, the two last remaining ICTY fugitives, in 2011. As it would be discussed below, a series of handovers of fugitives was clearly motivated by the EU aspiration of Belgrade.

As for the political motivation, the overall transfers of fugitives to The Hague were mainly motivated by the external pressure from the EU and others in the 'international community', including the US, the UN and the ICTY. According to Stanojlovic, all of the political elites opposed the extradition of fugitives and, therefore, the aspiration to

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surrender should be allowed to return to their country and remain there until the trial begins"(Gow and Zverzhanovski, 2013, p.139).

join the EU as well as other external relations were key elements to facilitate the government's compliance (personal communication, February 6, 2014). Indeed, anti-Hague feelings strongly persist in the Serbian society and no politician expects to win elections by advocating the cooperation with the tribunal (Grotsky, 2010, p.143). It is also important to note that the Serbian cooperation was merely driven by the political rewards and sanctions from the external factors. Compared to the answers from the experts in Croatia, there were no opinion from Serbian experts pointing out the establishment of the rule of law by noting the cooperation law adopted in 2002.

On the other hand, it is noteworthy that there have been slight changes in domestic motivation concerning extraditing fugitives to The Hague over the years of EU accession process. Significantly, from the arrest of Karadzic to the moment when last fugitives of the ICTY transferred to The Hague, the EU factor became more important in the mind of political elites as a motivating factor to implement infamous extradition of Serbs to the tribunal, as many interviewees pointed out. Indeed, as Subotic described, "the Serbian government looked at [him] and saw the country's ticket to the European Union"(Subotic, 2009, p.1). Moreover, after the arrest of Mladic, President Tadic said his detention "opened the doors to European Union membership "(Lowen, 2011, May 26). Such a remark was followed by his statement on the arrest of Hadzic that; "I will look my European counterparts in the eye and see if they make good on what they have promised"(Lowen, 2011, July 22).

Such a change in political motivation indeed seemed to have an impact on the implementation of Transitional Criminal Justice policies. After the EU factor became more significant in the mind of political elites, the Serbian governments started to facilitate more stable cooperation compared to the previous years. Indeed, after such a moment, the EU political pressure finally succeeded to encourage Serbian government to arrest controversial figures such as Karadzic and Mladic, who were at large since 1995.

#### *Cooperation with ICTY investigation*

As with the extradition of fugitives, there were serious problems in Serbian cooperation with ICTY investigation before the ousting of Milosevic. The Embassy of the FRY in The Hague dismissed any contact with the ICTY and the authorities of Serbia and Montenegro refused to issue a visa for the Prosecutor of the tribunal (United Nations, Security Council General Assembly, 2000). After the 2000 election, the cooperation was significantly improved as the ICTY's Belgrade field office was able to reopen and tribunal investigators were finally granted visas to enter the FRY (United Nations, Security Council General Assembly, 2001). In the subsequent year, however, the ICTY already made a negative assessment for Serbian cooperation that many requests from ICTY investigators were pending regarding access to evidence and to important witnesses (United Nations, Security Council General Assembly,

2002). Therefore, the development in this aspect of cooperation with the tribunal was also unstable in the beginning of the real establishment of the Serbian-ICTY relations.

Such an unsteady trend in the development of the cooperation with the tribunal's investigators continued after the murder of Dindic in 2003. Although remarkable changes were made in the aftermath of his assassination, such as increase in handovers of documents and improvement of the situation in granting waivers to witnesses (Peskin, 2008, p.81), serious issues persist in production of documents and access to archives and witnesses (United Nations, Security Council General Assembly, 2003). Moreover, the high number of requests related to the most compelling and relevant evidence remained outstanding and the authorities still questioned or even limited the ICTY Prosecutor's right to have a full access to the evidence as necessary (United Nations, Security Council General Assembly, 2003).

A remarkable improvement was made in 2006, owing to the positive efforts of Rasim Ljajic, President of the National Council for Cooperation with Tribunal. For instance, in May 2006, staff of the tribunal's Office of Prosecutor finally granted access to the archives of Serbia and Montenegro (United Nations, Security Council General Assembly, 2006). Such efforts of Ljajic together with the prosecutor Vukcevic also continued in the following year, although the production of documents was often delayed (United Nations, Security Council General Assembly, 2007). It is important to note that the overall positive development of the cooperation with ICTY investigation during this period of time is clearly in contrast to the one of extraditing fugitives. Therefore, it could be assumed that such positive attitude toward cooperation with the tribunal was the result of individual efforts and was unlikely to be shared with political elites in Belgrade.

Subsequently, the cooperation with ICTY investigation continued to be adequate and follow a steady development. In 2008, for example, the ICTY praised Serbian cooperation to apprehend Zpljanin and Karadzic that an effort made by domestic actors, namely the National Security Council of Serbia, the Action Team in charge of locating ICTY indictees and the Office of War Crime Prosecutor, played a vital role in the arrests and such events demonstrated the improvement in cooperation from Belgrade (United Nations, Security Council General Assembly, 2008). In 2009, almost all of important requests for access to documents and archives that had remained outstanding were addressed (United Nations, Security Council General Assembly, 2009). On February 2010, Serbian authorities investigated the apartment of Mladic's wife to seize important items, including his handwritten wartime notebooks that contained highly valuable information and was submitted to the tribunal as evidence in a number of cases (United Nations, Security Council General Assembly, 2010). Moreover, after the Office of Prosecutor's encouragement to critically reassess the strategy employed to locate remaining fugitives, certain recommendations were implemented and it led to the arrests of Mladic and Hadzic (United Nations, Security Council General Assembly, 2011).

It is significant that Belgrade continued to provide good cooperation even after the 2012 elections. As a result of the elections, Tomislav Nikolic was elected as a president and Ivica Dacic from Milosevic's Socialist Party as a prime minister. As BBC (2012) described, the victory of nationalist Nikolic was indeed a 'political earthquake' for Serbia. After the 2012 elections, the ICTY Prosecutor expressed his concern regarding the new President's remark denying that genocide occurred in Srebrenica in July 1995 and emphasized that Serbian authorities needed to sustain a good working relationship with the tribunal under the newly elected president and government (United Nations, Security Council General Assembly, 2012). Despite such anticipation from the part of the ICTY, the Serbian government continued to offer sufficient cooperation to the tribunal investigator by processing the requests from the ICTY Prosecutor's office for assistance and adequately facilitating access to witnesses (United Nations, Security Council General Assembly, 2013). In addition, after the arrest of Mladic and Hadzic, the ICTY Prosecutor coaxed Serbia to provide information concerning how some fugitives could evade justice for such a long time in Serbia (United Nations, Security Council General Assembly, 2011). Although the information Serbian authorities initially provided in May 2012 could not satisfy the ICTY Prosecutor, Belgrade addressed such an issue rather quickly and the Serbian War Crime Prosecutor presented additional and more detailed information regarding its investigation of the fugitives' network in four month later. Consequently, the progress of the investigation has increased and managed to produce results in some areas (United Nations, Security Council General Assembly, 2013).

Regarding the political motivation of the cooperation with ICTY investigation, a similar pattern with the ones of extraditing fugitives was observed. As most of interviewees pointed out, the EU accession and the pressure from the 'international community' was the main motivation for Serbian governments to facilitate a good cooperation with ICTY investigators. Such a similar motivations to cooperate with ICTY investigators with the extradition of fugitives could explain the similar developments in state cooperation in those two aspects. In cooperation with the tribunal's investigation, the Serbian authorities also managed to facilitate a stable development once they get closer to its eventual EU accession. It is noteworthy that Serbia could carry on good cooperation with the tribunal even after the emergence of nationalist political leader after the election in 2012. Together with the aspect of the extradition of suspects to the ICTY, it could be argued that the EU political pressure had an effect to facilitate a stable and positive development in Serbian overall cooperation with the tribunal.

#### *Domestic war crime prosecutions*

On the other hand, the development in the domestic war crime prosecutions provides us somewhat a different picture from the overall 'cooperation with the ICTY'. Soon after the political shift occurred in 2000, leaders in military and police began a

number of low-level investigations and at least two courts started to look into war crime cases. However, it was impossible to conduct fair trials in the domestic courts in Serbia due to enormous public pressure, a lack of training for court professionals and poor technological capabilities in the courtroom (Grodsky, 2010, p.139). The major change came as an aftermath of the assassination of Dindic. In 2003, the War Crimes Chamber of the Belgrade District Court and the War Crimes Prosecutor's Office were established with the assistance and support of the international community (ICTY, n.d. b). Notably, political elites quickly proceeded with plans for an empowerment of the domestic war crime court, together with the one for organised crime, so that they could make the domestic prosecutions more accessible to international actors as an alternative of the more controversial extradition of suspects to The Hague (Grodsky, 2010, p.140).

It is important to note that Serbian domestic war crime prosecutions managed to establish a stable and positive development in the pursuance of legal accountability in war crimes committed during the Balkan Wars. In the early phase of the establishment of Serbian War Crime Chamber, major issues in the Serbian domestic prosecutions were: ethnic bias, lack of witness protection, inability to prosecute high-ranking suspects and slow progress. In 2003, Human Rights Watch mentioned that Serbian authorities were reluctant to bring those who were responsible for war crimes committed during the Kosovo War to justice. In addition, Serbia did not have a detailed witness protection law that would criminalise intimidation or threats to witnesses and other participants in trials (Human Rights Watch, 2004). In the following year, the issue of ethnic bias was quickly addressed, as the Belgrade District Court indicted Sasa Cvjetan in March 2004 for crimes committed against Albanian civilians in Kosovo in 1999 and sentenced him to twenty-years imprisonment (Human Rights Watch 2005). However, the overall proceedings of the War Crime Chamber was rather slow since it dealt with only one crime, which arose from the killing of 200 Croats near Vukovar, Croatia, by the end of 2005. Moreover, Serbian domestic court did not try any high-ranked soldiers or policemen at that time (Human Rights Watch, 2006).

Subsequently, the Serbian court continued to deal with only limited number of cases, although several important trials were ongoing in the War Crime Chamber. In April 2006, the so-called Suva Reka case was initiated as eight former policemen were convicted for the war crime of killing 46 Kosovar Albanians in March 1999. This case was of significance as it was the first trial in Serbia involving a defendant having held a senior position within the police at the time of the alleged offense. Moreover, although the witness protections remained as an obstacle in the establishment of legal accountability, some significant improvements were made. The witness protection law was finally adopted in September 2005 to partially address the issues at stake. In early 2006, the new Criminal Procedure Code came into force to deal with some of the remaining concerns in Serbian witness protection system. (Human Rights Watch, 2007)

In the following years, the Belgrade War Crime Chamber continued its effort to bring wartime abuses to justice. The situation of witness protection was improved by allowing witnesses to hand in evidence remotely or anonymously. In 2008, the War Crime Chamber carried on several trials including ones related to the war crime committed against Bosnian Muslims, Kosovar Albanians as well as the ones against former members of the paramilitary unit 'Scorpions'. In 2009, the War Crime Prosecutor issued new significant indictments including ones for 17 former members of the KLA accused of war crime against Serbs, Roma and Albanians in 1999 (Human Rights Watch, 2008, 2009, 2010).

However, from 2010, the Serbian War Crime Chamber started to conduct some controversial practice. In August 2010, the war crime prosecutor indicted a former member of the Croatian Army Force for crimes against Serbs, which was to be the first case when the ethnic Croats would face war crime trials in a Serbian court (Human Rights Watch, 2011). The local non-governmental organisation in Belgrade criticised this indictment that he should be prosecuted in Zagreb in accordance with the 2006 agreement of cooperation in the prosecution of war crimes between Serbia and Croatia. Consequently, he was sentenced to twelve-years imprisonment (Humanitarian Law Centre, 2011). In 2011, the criticism of the War Crime Chamber regarding the limited progress in domestic war criminal proceedings increased. Moreover, there were some suspicious moves that several indictments involving a high-ranking accused for war crime against Yugoslav People's Army were dropped due to the lack of evidence and the pressure from non-governmental organisations (Human Rights Watch, 2012). In the following years, the progress was made in the domestic war crime prosecutions though slowly (Human Rights Watch, 2013, 2014). Therefore, it could be pointed out that the domestic war crime prosecution represents the opposite tendency than the one of the overall 'cooperation with the ICTY'; its development somehow deteriorated after Serbia reached closer to its EU membership.

Regarding the political motivation, the external pressure, both from the EU and the 'international community', was a dominant motivation for Serbian politicians to facilitate domestic war crime prosecutions, according to the most of interviewees. Indeed, the Serbian political elites connected the third party coercion to the area of domestic war crimes prosecutions almost as strongly as they did for the overall 'cooperation with the ICTY'. Thus, the absence of clear political pressure from the EU was indeed fatal in the Serbian case. In addition, Serbian political elites also have particular reasons to enact prosecutions of war criminals at their local courts. For instance, as it was mentioned, the post-Milosevic political elites regarded domestic war crime prosecutions as a politically more harmless alternative to the unpopular cooperation with the ICTY (Grodsky, 2010, p.140). Moreover, the Serbian politicians felt enormous internal pressure to 'do something' on the domestic courts, as a consequence of their continuous argumentation that they could bring about justice in Serbia without having the ICTY (Kostic and Veljovic, personal communication,



February 7, 2014). Therefore, the main political motivations in Belgrade are the pressure from external actors as well as internal pressure, together with the particular political necessity.

However, it is important to note that the domestic war crime prosecution has never had adequate political supports in Serbia. For instance, the budget allocation for war crime prosecutions was absurdly small so that the related institutions live on the 'donation' from external actors, such as the EU, the OSCE and the US (Kostic and Veljovic, personal communication, February 7, 2014). Moreover, the support from political elites seems to be unstable and greatly influenced by the external pressure. In 2008, when the War Crime Chamber and the Office of the War Crime Prosecutor in Belgrade celebrated their fifth-year anniversaries, many important political figures, such as President and Minister of Justice, showed up to those institutions to congratulate them. However, for their tenth-year anniversaries in 2013, none of them showed up (Kostic and Veljovic, personal communication, February 7, 2014). It could be argued that the EU's skewed emphasis on the overall 'cooperation with the ICTY' could create the situation that Serbian elites started to regard domestic war crime prosecutions, which were simply an alternative of the infamous 'cooperation with the ICTY', as unnecessary once they finished sending all fugitives.

There has been no major change in the motivation and conceptualisation of the domestic war crime trials from 2003 until 2011. Indeed, some interviewees noted that there has been an emergence of the moral responsibility in the domestic war crime prosecution since 2011. Especially after the ICTY started to deliver suspicious judgments such as significantly different sentences for similar cases and acquittals, as Rabrenovic argued, the domestic war crime prosecutions started to gain trust that it could have done much more than what the ICTY did in the region (personal communication, February 4). However, judging from the inadequate and unstable supports political elites shown to the domestic war crime prosecutions as mentioned above, it is doubtful that such mentality is deeply shared among political elites in Belgrade.

### *Summary*

Overall, the EU political pressure also turned out to be effective in the Serbian case, although there was a notable difference in its effectiveness compared to the one in Croatia. Regarding the extradition of fugitives to The Hague, the political pressure from the EU seemed to have a positive impact on the Serbian development in the aspect. However, such impact failed to establish a stable development in the Serbian cooperation before 2008. Most notably, the political sanctions the EU employed in 2006 were not effective at all, as Serbia failed to apprehend Mladic, which was a pre-condition of its EU accession. After 2008, largely owing to the establishment of a new government, the Serbian cooperation significantly and steadily improved and finally Serbian authorities managed to hand over their last fugitive in 2011. Indeed, the

importance of the EU accession conditionality grew stronger after 2008 among political elites' mind. This could be due to the fact that the perspective of Serbian EU accession came much closer to Serbia (Kostic and Veljovic, personal communication, February 7, 2014). Such a phenomenon could be a clear example of the significance of 'credibility of conditionality', which was explained in Chapter 1.

The cooperation with ICTY investigation followed somewhat similar path with the one of extradition of fugitives. On the contrary to the extradition of indictees, Serbian cooperation with the tribunal's investigators did mark a stable and positive development as early as from 2006. However, such positive improvements largely owed to the efforts of individuals considering the fact that the other aspect of overall 'cooperation with the ICTY' remained insufficient and poor. Since 2008, Serbian cooperation in this aspect continued to be adequate and sufficient. Indeed, it is important to note that such cooperation remained good even after the electoral victory of the nationalistic President in 2012.

On the other hand, domestic war crimes prosecutions shows us different picture than the overall 'cooperation with the ICTY'. It established more stable and positive development in its exercise until 2010, although the political support for it remained low. In 2010 and 2011, however, such positive development somehow deteriorated, when Serbia reached closer to its eventual EU accession. Such tendency is clearly opposite from the one of other two analytical categories, as it was demonstrated. Therefore, it could be assumed that the EU accession procedure indeed had a counterproductive effect in Serbian domestic war crime prosecutions.

### **3.4 Comparative summary**

Table 5 summarizes the findings of the empirical study in the form of timelines. To visualize the outcome of the empirical examination, the author evaluated the development of the handlings of Transitional Criminal Justice in five levels, positive (+), moderately positive ( $\Delta$ ), same (=), moderately negative (-) and negative ( $\times$ ), in accordance with the three analytical categories and juxtaposed it with the main progress in the EU accession procedure of both states. Although the final comparison of the result of the two case studies will be thoroughly presented in the next section as a conclusion of this study, one can see the tendencies of developments in the each analytical category as well as the two different dimensions of Transitional Criminal Justice in Croatia and Serbia, namely the overall 'cooperation with the ICTY' and domestic war crime prosecutions, as a reaction against the EU accession conditionality from the following two tables.

**Table 5: Timelines***Croatia*

Interactive timeline	1.	2.	3.
2000/ Confirmation that the SAP states are “potential candidates”	+	+ → Δ	
2001/ The SAA signed	=	=	
2002/	-	=	
2003/ Application for the EU membership	+	+	=
2004/ Confirmed as a candidate country	×	=	=
2005/ The SAA entered into force → the accession negotiation postponed → negotiation resumed	× → +	× → +	Δ
2006/ First chapter of accession negotiations closed		=	Δ
2007/		×	=
2008/		=	=
2009/		=	=
2010/		=	Δ
2011/ Last chapter of accession negotiations closed → accession treaty signed		=	-
2012/ Referendum		+	+
2013/ Croatia joined the EU		=	-
2014/		=	=

*Serbia*

Interactive timeline	1.	2.	3.
2000/ Confirmation that the SAP states are “potential candidates”	+	+	
2001/	+	-	
2002/	-	=	
2003/ Confirmation that the SAP is an EU policy for the Western Balkan States	Δ	Δ	Δ
2004/	× → +	×	Δ
2005/ The SAA negotiation launched	×	=	Δ
2006/ The SAA negotiation called off	=	+	+
2007/ The SAA negotiation resumed → SAA initialed	= → Δ	=	=
2008/ SAA and ITA signed	+	+	+
2009/ Visa requirement lifted for Serbs travelling into the Schengen area → Application for the EU membership	=	+	+
2010/	=	+	-
2011/	+	+	-
2012/ Confirmation as a candidate country		=	Δ
2013/ SAA entered into force		=	Δ
2014/ Initiation of the negotiation talks		=	=

## Conclusion

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Based on the comparative analysis of the cases of Croatia and Serbia, the following points were identified as the impact that the EU accession conditionality yielded on the domestic politics of Transitional Justice. In here, the result of the final comparison of those two cases will be presented in two levels, the overall ‘cooperation with the ICTY’ and the domestic war crime prosecutions. This is followed by the brief concluding remarks to summarise the findings of this study as well as its limitations and future implications.

### **The overall ‘cooperation with the ICTY’**

As the empirical examination shows, the EU political pressure had a strong and positive impact in both cases, as it facilitated the arrests and transfer of the most controversial figures in 2005 for Croatia and in 2011 for Serbia. Moreover, it also had an effect to encourage those states’ stable cooperation with the tribunal, from 2003 in Croatian case and from 2008 in Serbian case. This could be due to the fact that the political pressure from the EU involves the long-term procedure, namely the EU accession process, compared with, for example, the aid conditionality of the US (Peskin, 2008).

On the other hand, the EU accession conditionality yielded different outcomes in both the Serbian and the Croatian cases. For example, when there was a right-shift in both states’ political scenes in 2003, only Croatia could carry on its good cooperation with the tribunal and Serbian cooperation floundered radically. Moreover, when the EU called off the Croatian accession negotiations, such political sanctions could achieve a remarkable result, namely the arrest of Gotovina. However, when the EU tried to apply the same strategy to Serbia to encourage it to arrest Mladic (Stahl, 2013, p.456-457), such political pressure from the EU resulted in nothing but the political compromise. Notably, such differences could be explained by the closeness of those states to their eventual EU accession. For instance, those years when the EU conditionality started to facilitate a stable development in those states’ extradition of suspects came after signing the SAA in both cases. Therefore, it could be argued that the closeness to the eventual EU accession of a state would have an influence on the effectiveness of the EU leverage on the overall cooperation with the tribunal. This could exemplify the significance of the ‘credibility of conditionality’ as a determining factor of the influence of the EU accession conditionality, as claimed by Schimmelfenning and Sedelmeier (2004) (See Chapter 1). On the other hand, it could be also argued that those states were strongly motivated by the perspective of the EU accession when it comes to cooperation with the tribunal.

In addition, such differences in the effectiveness of the political pressure from the EU could be also explained by the political motivations of the domestic elites to

implement Transitional Criminal Justice policies. Indeed, the Croatian government seemed to be more vulnerable to the EU accession conditionality possibly because it assigned the EU accession as the vital foreign policy goal ever since its independence (Cehulic-Vukadinovic, 2013, p.51). What is more, in the Croatian case, the political motivation in both aspects of the overall ‘cooperation with the ICTY’ remained unchanged. This could show that the Croatian government had a clear mindset that such cooperation is the key of its future Europeanisation and democratisation. Such vulnerability could be also seen in the issues of missing documents starting from 2007, which remained unsolved possibly due to the lack of strong political pressure from the EU. On the other hand, Serbian political elites did not have such clear mindset of its Europeanisation and the EU factor started to gain clear importance only after 2008. Those explanations of the effectiveness of the EU accession conditionality by pointing out the attitudinal aspects of the policy implementations indeed confirmed the criticism of the realist approach that exclusion of the ideational aspects could only grasp a partial picture of the state compliance, as Lamont (2010b) claimed. Moreover, the ‘cross-conditionality’ found in Serbian case referring to the strong influence from Russia could also explain the difference in such effectiveness.

### **Domestic war crime prosecutions**

On the other hand, it was observed that the EU accession conditionality had counterproductive effects in both states’ domestic war crime prosecutions. In the Croatian case, the merely insufficient improvement in the situation of domestic war crime trials were identified, leaving some fundamental shortcomings unaddressed throughout years of the EU accession procedure. When Croatia successfully concluded its negotiation talks, it was followed by the negative developments, such as the increase in the number of *in absentia* trials. Moreover, it is important to note that some of problematic practices in domestic war crime trials still remain after the Croatian accession to the EU.<sup>20</sup> In the Serbian case, a stable and positive development in its domestic war crime prosecutions somewhat floundered especially in 2010 and 2011. This shows the opposite picture from the one of the overall ‘cooperation with the tribunal’; once Serbia reached closer to its eventual EU accession, the positive development in the situation surrounding domestic war crime trials deteriorated. Indeed, it could be argued that the EU’s clear exclusion of domestic war crime prosecutions mainly caused such issues in both cases.

Moreover, regarding the political motivations, the discrepancy between domestic war crime prosecutions and the acknowledgement of the past legacy of atrocities was also

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<sup>20</sup> Although there was a significant improvement in 2011, it could be argued that it was an outcome of the political change after the elections. This is due to the fact that the other area in the politics Transitional Criminal Justice, namely the cooperation with ICTY investigators, also improved this year. Thus, the result of election could bring the positive development in the handlings of the overall Transitional Criminal Justice issues, although some issues remained unaddressed in the area of domestic war crime prosecution.

observed in both cases. In Croatia, domestic war crime prosecution was more closely associated with the consolidation of the rule of law, rather than prosecution of the past atrocities. In Serbia, domestic war crime prosecutions were all about reactions against political pressures from external actors and, thus, they prosecuted war criminals on the ground to please external actors for their eventual gain, such as the EU membership, not to redress its past mass atrocities. Such tendencies could also contribute to the counterproductive effects of the EU accession conditionality in the area of domestic war crime prosecutions. In the Croatian case, such forward-looking attitude toward the handlings of Transitional Criminal Justice, together with the lack of the EU pressure, could result in the tolerance of the issues that could be problematic for the historical implications of domestic war crime trials, such as ethnic bias. In the Serbian case, the lack of clear political pressure from the EU was truly fatal, as Serbian elites associated domestic war crime prosecutions with the political pressure from the international community, including the EU, as strong as in other aspects of the Transitional Criminal Justice. Moreover, the EU's clear emphasise on the extradition of fugitives makes it unnecessary for the political elites in Belgrade to support domestic war crime prosecutions as a more acceptable alternative of such extradition after Serbia facilitated handovers of all fugitives.

### **Concluding remarks**

To sum up the main findings, the EU accession conditionality had a positive and strong impact on the overall 'cooperation with the ICTY'. Notably, it had an effect to facilitate the stable cooperation with the tribunal in both cases. However, there was a significant difference between those two cases in terms of the effectiveness of the political pressure from the EU. This could be explained by the difference in the progress toward the eventual EU accession, the political motivation to comply with the ICTY orders as well as the existence of other actors that could influence the policy outcome of a state. On the other hand, the EU accession process had counterproductive effects on domestic war crime prosecutions in both cases. The possible explanations for such phenomenon were the lack of clear political pressure from the EU and the emergence of discrepancy between domestic war crime prosecutions and dealing with the past human rights abuses.

Based on those findings, the following conclusion could be drawn. The EU accession conditionality, which merely focused on the overall 'cooperation with the ICTY', deteriorate the Croatian and Serbian domestic attempts to prosecute war crimes as a measure to coming to term with their legacy of atrocities. The closer countries get to the eventual EU accession, more problems emerged or were simply overlooked in the domestic war crime prosecutions. This is because such EU political pressure converted implementations of Transitional Criminal Justice policy of those states into methods to proceed towards the democratic and European future or to satisfy the external actors for future gains. Therefore, it could be argued that third party coercion that focuses only the International Criminal Justice carries the risk to deteriorate the

local pursuance of truth and justice. Such a conclusion is in line with the existing literature that examined the issue at stake from different approaches, most notably the ‘hijacked justice’ identified by Subotic (2009) and Rangelov (2006).

In here, it is also important to emphasize that the EU itself creates such discrepancy between Transitional Criminal Justice and dealing with the past atrocities. Although the EU encourages Transitional Criminal Justice via its accession conditionality, it does not have any clear indication suggesting the ‘European manner’ in the area of Transitional Justice. Thus, the EU unconsciously separates those two issues in the scheme of its enlargement policy, although Criminal Justice is just one aspect of Transitional Justice. Therefore, the main finding of this study also withholds a warning that the partial involvement of third party in the area of Transitional Justice could result in an undesirable outcome: undermining the domestic attempts to coming to term with the past.

The author admits that this study holds certain limitations. The most notable one is the fact that this study exclusively focuses on the aspect of Transitional Criminal Justice among multi-dimensional EU accession procedures. This could cause the misinterpretation of the magnitude of the EU’s usage of ‘carrot’ and ‘stick’. Especially, exclusion of the Kosovo issue in the Serbian case might cause a considerable limitation of this study. In addition, the exclusion of other means to pursue truth and justice, such as a truth committee, admittedly narrowed the focus of this study.

The conclusion of this study indeed implies new dimensions within the area of Transitional Criminal Justice to be scrutinised in the future research. For instance, the relationship between International Criminal Justice and domestic war crime prosecutions need to be studied further. Based on the main findings of this study, would it be also possible to conclude that the schemes of International Criminal Justice itself have a negative impact on the promotion of the domestic quest for truth and justice? If so, what would be the future implication of the establishment of the permanent ICC in the domestic attempts to address the past abuses with legal means? Indeed, this study implied that the development of International Transitional Justice seems to create somewhat problematic situations in the domestic war crime prosecutions. Such a relationship between those two transitional jurisprudences should be examined further in the future research.

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## Brief biography of interviewees

### *Croatia*

- Ms. Davorka Colak,  
Senior Advisor at General State Attorney's Office of the Republic of Croatia
- Mr. Ivan Zvonimir Cicak  
President of the Croatian Helsinki Committee for Human Rights
- Doc. dr. sc. Hrvoje Spehar  
Assistant Professor at Faculty of Political Science, University of Zagreb
- Dr. Sandro Knezovic  
Researcher Associate in the Department for International Economic and Political Relations at the Institute for Development and International Relations in Zagreb.
- Mr. Igor Sokolar  
Lawyer, supervisor of the NGO 'Udruga Iustitia'

### *Serbia*

- Dr. Jovan Ciric  
Director of the Institute of Comparative Law
- Prof. Dinko Gruhonjic  
President of Independent Journalists Association of Vojvodina  
Professor at Faculty of Philosophy, Media Department of the University of Novi Sad  
Editor and journalist at Beta News Agency
- Mr. Svetislav Rabrenovic  
Assistant Prosecutor, Adviser to the Public Prosecutor, the War Crimes Prosecutor's Office
- Ms. Seska Stanojlovic  
A member of board of Helsinki Committee for Human Rights in Serbia
- Ms. Milica Kostic and Mr. Edmir Veljovic  
Members of the Humanitarian Law Centre
- Ms. Korana Strabac  
A member of the NGO 'Veritas'
- Dr. Branislav Ristivojevic  
Associate Professor at Faculty of Law, University of Novi Sad



## Lists of Questions

### Interview Questions (Croatia)

1. Please choose the most accurate sentence to describe the opinion of the government at the time regarding the transfer of war criminals to The Hague.

- A. It is necessary, as those fugitives should be prosecuted in the international tribunal.
- B. It is necessary, as it is part of the requirements to join the EU.
- C. It is necessary, as external actors other than EU put pressure to do so. (Please specify)
- D. It is unnecessary, as those fugitives should be prosecuted in the domestic court with same or stricter standards compared to the international one.
- E. It is unnecessary, as those fugitives should be prosecuted in the domestic court with less strict standards compared to the international one. (ex. Lighter sentences)
- F. It is unnecessary, as those fugitives are not guilty at all.
- G. None of them (please specify)

2000-2004 (acquiring the status of candidate state of the EU):

From 2004 until the suspension of the EU negotiation:

From the suspension of the EU negotiation until the transfer of the Ante Gotovina:

2. Please choose the most accurate sentence to describe the opinion of the government at the time regarding the cooperation with the investigation of ICTY. (ex. Providing access to documents, witnesses)

- A. It is necessary, as the international tribunal should prosecute those fugitives.
- B. It is necessary, as it is part of the requirements to join the EU.
- C. It is necessary, as external actors other than the EU put pressure to do so. (Please specify)
- D. It is unnecessary, as those fugitives should have rather been prosecuted in the domestic court with same or stricter standard compared to the international one.
- E. It is unnecessary, as those fugitives should have rather been prosecuted in the domestic court with less strict standard compared to the international one. (ex. Lighter sentences)
- F. It is unnecessary, as those fugitives are not guilty at all.
- G. None of them (please specify)

2000-2004 (acquiring the status of candidate state of the EU):

From 2004 until the suspension of the EU negotiation:

From the suspension of the EU negotiation until the transfer of the Ante Gotovina:

2006-2011 (until the signing of accession treaty of the EU):

2011-now (January 2014):

3. Please choose the most accurate sentence to describe the opinion of the government at the time regarding the domestic prosecution of the war criminals.

- A. It is necessary, as war criminals should be brought to justice.
- B. It is necessary to join the EU.
- C. It is necessary to satisfy a pressure from other external actor(s). (Please specify)
- D. It is not necessary to prosecute war criminals.
- E. None of them (please specify)

From 2003 until the suspension of the EU negotiation:

From the suspension of the EU negotiation until the transfer of the Ante Gotovina:

2006-2011 (until the signing of accession treaty of the EU):

2011-now (January 2014) ;

4. What do you think was the main motivation for the government at that time to transfer the war criminals to The Hague?

- A. Responsibility to fulfil the international obligation
- B. Accession to the EU
- C. Pressure from other external actors (please specify)
- D. No motivation
- E. None of them (please specify)

2000-2004 (acquiring the status of candidate state of the EU):

From 2004 until the suspension of the EU negotiation:

From the suspension of the EU negotiation until the transfer of the Ante Gotovina:

5. What do you think the main motivation for the government at that time to cooperate with the investigation of the ICTY?

- A. Responsibility to fulfil the international obligation
- B. Accession to the EU
- C. Pressure from other external actors (please specify)
- D. No motivation
- E. None of them (please specify)

From 2004 until the suspension of the EU negotiation:

From the suspension of the EU negotiation until the transfer of the Ante Gotovina:

2006-2011 (until the signing of accession treaty of the EU):

2011-now (January 2014) ;

6. What do you think the main motivation for the government at that time to prosecute war criminals at the domestic courts?

- A. Responsibility to fulfil the international obligation
- B. Accession to the EU
- C. Pressure from other external actors (please specify)
- D. No motivation
- E. None of them (please specify)

From 2003 until the suspension of the EU negotiation:  
From the suspension of the EU negotiation until the transfer of the Ante Gotovina:  
2006-2011 (until the signing of accession treaty of the EU):  
2011-now (January 2014);

Additionally, semi-structured questions were asked.

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### **Interview Questions (Serbia)**

1. Please choose the most accurate sentence to describe the opinion of the government at the time regarding the transfer of war criminals to The Hague.

- A. It is necessary, as those fugitives should be prosecuted in the international tribunal.
- B. It is necessary, as it is part of the requirements to join the EU.
- C. It is necessary, as external actors other than the EU put pressure to do so. (Please specify)
- D. It is unnecessary, as those fugitives should be prosecuted in the domestic court with same or stricter standard compare to the international one.
- E. It is unnecessary, as those fugitives should be prosecuted in the domestic court with less strict standard compared to the international one. (ex. Lighter sentences)
- F. It is unnecessary, as those fugitives are not guilty at all.
- G. None of them (please specify)

2000-2003(until the assassination of Đinđić):  
2003-2008 (until the transfer of Karadzic):  
2008-2011(until the transfer of Mladic and Hadzic):

2. Please choose the most accurate sentence to describe the opinion of the government at the time regarding the cooperation with the investigation of ICTY. (ex. Providing access to documents, witnesses)

- A. It is necessary, as the international tribunal should prosecute those fugitives.
- B. It is necessary, as it is part of the requirements to join the EU.
- C. It is necessary, as external actors other than the EU put pressure to do so. (Please specify)
- D. It is unnecessary, as those fugitives should have rather been prosecuted in the domestic court with same or stricter standard compare to the international one.
- E. It is unnecessary, as those fugitives should have rather been prosecuted in the domestic court with less strict standard compared to the international one. (ex. Lighter sentences)

- F. It is unnecessary, as those fugitives are not guilty at all.
- G. None of them (please specify)

2000-2003:  
2003-2008:  
2008-2011:  
2011- now (January 2014):

3. Please choose the most accurate sentence to describe the opinion of the government at the time regarding the domestic prosecution of the war criminals.

- A. It is necessary, as war criminals should be brought to justice.
- B. It is necessary to join the EU.
- C. It is necessary to satisfy a pressure from other external actor(s). (Please specify)
- D. It is not necessary to prosecute war criminals.
- E. None of them (please specify)

2003-2008:  
2008-2011:  
2011-now (January 2014):

4. What do you think the main motivation for the government at that time to transfer the war criminals to The Hague?

- A. Responsibility to fulfil the international obligation
- B. Accession to the EU
- C. Pressure from other external actors (please specify)
- D. None of them (please specify)

2000-2003:  
2003-2008:  
2008-2011:  
2011- now (January 2014):

5. What do you think the main motivation for the government at that time to cooperate with the investigation of the ICTY?

- A. Responsibility to fulfil the international obligation
- B. Accession to the EU
- C. Pressure from other external actors (please specify)
- D. None of them (please specify)

2000-2003:  
2004-2008:  
2008-2011:  
2011- now (January 2014):

6. What do you think the main motivation for the government at that time to prosecute war criminals at the domestic courts?

- A. Responsibility to fulfil the international obligation
- B. Accession to the EU
- C. Pressure from other external actors (please specify)
- D. None of them (please specify)

2004-2008:

2008-2011:

2011-now (January 2014):

Additionally, semi-structured questions were asked.

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