



**RESEARCH PAPER
No. 116**

**DECEMBER
2007**

**STATE COMPLIANCE WITH INTERNATIONAL CRIMINAL TRIBUNAL FOR THE
FORMER YUGOSLAVIA ARTICLE 29 (d) and (e) OBLIGATIONS:
A COMPARATIVE EXPLORATION OF CROATIA AND SERBIA**

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Note: An earlier version of this paper was presented at the CISS Millennium Conference in
Buçaco, Portugal, 14-16 June, 2007

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Introduction

This paper will examine state compliance with international criminal tribunal arrest and surrender orders through a comparative exploration of Croatian and Serbian interaction with the International Criminal Tribunal for the Former Yugoslavia (ICTY). Rather than simply identifying acts of compliance or non-compliance¹ this paper will attempt to discern the motivations behind state action. While compliance literature in both International Relations and International Law literature tends to identify three models for compliance: coercion, self-interest or normative persuasion,² it will be demonstrated that the act of *compliance* with Article 29(d) and (e) obligations, ICTY arrest and surrender orders, can be broadly explained by rationalist approaches to IR, which focus on the former two motivations for compliance as state compliance has largely been the outcome of external coercion. In fact, former Croatian foreign minister Mate Granić noted a *coercive model* for compliance had been established by 1997 (2005), while the Federal Republic of Yugoslavia's (*Savezna republika Jugoslavije*, SRJ) most spectacular display of compliance, the transfer of Slobodan Milošević to ICTY custody came within hours of a US imposed deadline which would have seen the SRJ denied access to funds from international financial lending institutions (Bass, 2002: 321-322; Borden, 2001). However, despite this correlation between compliance and coercion, the act of *non-compliance* proves much more difficult to explain as illustrated by the linkage of European Union accession and cooperation with the ICTY producing divergent outcomes in Croatia and Serbia.

Before we turn to the question of explaining state behavior, Croatian state cooperation with the Tribunal will first be assessed. Here, it will be demonstrated that early cooperation was the outcome of a *coercive model* of compliance, which involved the threat of sanctioning non-compliance through either the freezing of bilateral relationships or threats to deny Zagreb access to international financial assistance, while compliance post-2003 was the result of the linkage of European Union accession to the arrest and surrender of ICTY fugitive Ante Gotovina to Tribunal custody. Second, Serbia's troubled relationship with the Tribunal will be explored. Unlike Croatia, throughout Belgrade's decade long interaction with the ICTY, Serbia failed to receive a positive assessment of cooperation from the Tribunal until June 2007. While coercion proved effective in bringing about sporadic compliance with arrest and surrender orders, the linkage of European Union accession to cooperation with the Tribunal proved less effective in bringing about an end to Serbian non-compliance with arrest and surrender orders.³

Croatia and the ICTY – A Coercive Model of Compliance

It was in Croatia a coercive model for cooperation first emerged as the *modus operandi* for state compliance with ICTY arrest and surrender orders. While Croatia initially supported calls for the creation of an *ad hoc* international criminal tribunal, the initiation of investigations against Bosnian Croats by the ICTY during the mid-1990s and the subsequent indictment of Tihomir

¹ The ICTY's record in securing custody of accused persons is impressive. At the time of writing, of the 161 individuals indicted by the Tribunal only four remain at large.

² For a discussion on coercion, self-interest and legitimacy as three models of compliance see (Hurd, 1999: 379-408). Furthermore, Kratochwil identifies three theories of compliance based on similar models: Hobbesian coercion, Hume's utilitarian model, and Durkheim's norms-based model (Kratochwil, 1984: 685-708).

³ At the time of writing it appears a shift in Belgrade's policy toward the ICTY is the result of an effort to delay a final status solution for Kosovo which would result in supervised independence for the province (Vasović, 2007).

Blaškić along with ten other Bosnian Croats in 1995 led to a rapid deterioration in the relationship between Zagreb and the new court in The Hague. In the absence of cooperation from Belgrade, non-cooperation with the Tribunal on the part of Zagreb threatened to prevent the Tribunal from carrying out its mandate of bringing to trial individuals suspected of violations of International Humanitarian Law on the territory of the former Yugoslavia as indictments issued by the Tribunal failed to translate into war crimes trials in The Hague.

From 1990 until 1999 Croatia was governed by the authoritarian Franjo Tuđman's Croatian Democratic Union (*Hrvatska demokratska zajednica*, HDZ). As Tuđman viewed the Tribunal with suspicion, there was a regime preference for non-cooperation with the court. With domestic political incentives favoring non-cooperation with the ICTY (Miošić-Lisjak, 2006: 104-105), a change in Croatian policy *vis à vis* the Tribunal was brought about through external coercion. Croatia proved especially vulnerable to coercion on the part of the United States as Zagreb was the recipient of significant US military and financial assistance (Galović, 2005: 13-17; Gutman and Barry, 2001: 30). Thus, when Croatia proved hesitant in ratifying legislation that would facilitate the fulfillment of Article 29 obligations, it was the coercive threat of denying Croatia continued access to US assistance that brought about ratification of the Constitutional Law on Cooperation with the ICTY. In fact, it was only after US Assistant Secretary of State for Human Rights, John Shattuck, informed the Croatian government full cooperation with the ICTY was not just a pre-condition for future military and political assistance but also for US support for Croatian talks with the IMF, World Bank and NATO's Partnership for Peace, the Constitutional Law on Cooperation with the ICTY was adopted by the Croatian parliament (Granić, 2005: 140).

While Shattuck's linkage of the ratification of the Constitutional Law on Cooperation with the ICTY and continued US assistance had the desired effect of Croatian ratification of the Constitutional Law on Cooperation with the ICTY, it would require further coercion to bring about the actual transfer of indicted Bosnian Croats to the Tribunal. The transfers of accused persons required additional pressure by the US in the form of a threat to 'block' US-Croatian relations in the event Dario Kordić was not transferred to the ICTY. Within weeks of the US informing the Croatian government of the costs of non-compliance Kordić was transferred to The Hague (Granić, 2005: 160). It was during Kordić's transfer to ICTY custody what Croatian foreign minister Mate Granić described as a 'coercive model' of cooperation with the ICTY developed as only external pressure was believed to be effective in bringing about Croatian state cooperation with the ICTY (2005: 160).

However, although the threat of freezing US-Croatian relations proved effective in bringing about state compliance with arrest and surrender orders, absent these explicit threats Croatian-ICTY cooperation quickly dissolved. The costs of compelling state cooperation through coercion required the US to raise the prospect of wider damage to US-Croatian bilateral relations in order to secure compliance following almost every ICTY indictment targeting Croats as Zagreb waited to gauge the costs of non-compliance before fulfilling Article 29 obligations.⁴ During the last two years of Tuđman's presidency the relationship between the Croatian state and the ICTY grew increasingly problematic as Croatian attitudes toward cooperation with the Tribunal appeared to harden and Zagreb denied the court's jurisdiction over war crimes cases deriving from the 1995 operations Flash and Storm (ICTY, 1999: 28). Moreover, Croatia proved reluctant to transfer Mladen Natelilić and Vinko Martinović to Tribunal custody following their indictments in 1998

⁴ An ICTY official in Zagreb noted how following each indictment the Croatian government first would initially fail to comply with ICTY arrest and surrender orders, then only after a period of time would indicted persons be surrendered to the Tribunal (Confidential Interview, 2006).

(ICTY, 1999: 27). Although Croatian non-compliance was reported to the United Nations Security Council, no punitive action was taken by Security Council member states.⁵

Regime Change and Parliamentary Non-Compliance

The electoral defeat of the governing HDZ in parliamentary elections held in January 2000 to a six party coalition, led by Ivica Račan's Social Democratic Party (*Socijaldemokratska partija Hrvatske*, SDP) combined with the defeat of the HDZ's presidential candidate in the first round of presidential elections also held in January 2000 created the perception of a decisive break with Croatia's nationalist authoritarian past (Akhavan, 2001; Hedl, 2000); however, a change in domestic regime type did not bring about a corresponding break with the past in the context state policy toward the Tribunal. As Boduszynski and Peskin pointed out, '*Tuđman would be more forthcoming in handing over indicted war crimes suspects than would his democratic successors who pledged increased cooperation*' (2003: 1124). This is not to say domestic regime type or domestic political incentives are entirely epiphenomenal to the understanding of state compliance, rather it will be demonstrated an elite-level consensus in favor of EU accession proved crucial to bringing about state compliance in post-Tuđman Croatia as it established a political context which amplified the effectiveness of EU conditionality.

Post-Tuđman non-cooperation with the ICTY was the result of an initial abandonment of the 'coercive model' following the election of a reformist government in January 2000. *In lieu* of linking cooperation with the ICTY to integration into Euro-Atlantic institutions, policymakers in Brussels and Washington initially abandoned the coercion in the hope that affirmation of Croatia as a regional 'democratic example' would have a transformative effect on the politics of the Western Balkans and were therefore unwilling to impose significant sanctions upon Croatia in the immediate aftermath of Tuđman's death (Massari, 2005: 268-269). Croatia was even extended an invitation to join NATO's Partnership for Peace and signed a Stability and Association Agreement (SAA) with the European Union without having first having achieved full cooperation with the ICTY (Massari, 2005: 268).

Challenging International Law – The Bobetko Crisis

Ambiguous signals transmitted from the EU and US regarding the costs of non-compliance with ICTY arrest and surrender orders were followed by an almost complete breakdown in relations between Croatia and the Tribunal as Croatia rejected the legitimacy of the 2002 Bobetko indictment, which Račan's government described as '*... legally and politically unacceptable to the Republic of Croatia...*' (OSCE, 2002a). Račan's rejection of the Bobetko indictment on the grounds that domestic courts deemed the indictment to be 'illegal' (OSCE, 2002a; Prosecutor v. Janko Bobetko, 2002) was perceived by the Tribunal as an attempt to alter the relationship between states and the ICTY established in the Tribunal Statute. In fact, the Office of the Prosecutor (OTP) noted compliance with Article 29 obligations was not 'an optional regime' for states, and furthermore, if the states of the former Yugoslavia were to be the arbiters of the legality of indictments certified by the ICTY, the Tribunal could no longer effectively compel arrests (Prosecutor v. Janko Bobetko, 2002). Thus, in a strongly worded dismissal of Croatia's appeal of the Bobetko indictment, the ICTY Appeals Chamber clarified the relationship between states and the Tribunal:

⁵ It is worth noting that in the pro-government daily *Vjesnik*, the United States was described as behaving like an 'ally' and was attributed with credit for helping Croatia avoid sanction by the UNSC (*Vjesnik*, 1999: 1).

Croatia's role in complying with [an arrest] request or order is the purely ministerial one of executing the warrants and carrying out such arrest and detention as ordered by the Tribunal. A State which is ordered to arrest or detain an individual pursuant to Article 29(d) has no standing to challenge the merits of that order (Prosecutor v. Janko Bobetko, 2002).

Given Croatia's refusal to surrender Bobetko to the Tribunal the president of the ICTY, Antonio Cassese, reported Croatian non-compliance to the UNSC in October 2002; however, as Cassese chose to *report* Croatia as not being in compliance its obligations under international law, rather than officially *refer* Croatia to the Council, no punitive action was considered (OSCE, 2002b). Following Cassese's report to the UNSC a compromise was negotiated between the Tribunal and Croatia which permitted Tribunal doctors to examine Bobetko's health in a Zagreb hospital. Although the OTP initially noted Bobetko's appearances on Croatian television suggested the accused was in a suitable condition for transfer to The Hague; the OTP later accepted that ICTY doctors could travel to Zagreb in order to determine whether the defendant was too ill to appear before the Tribunal (RFE/RL, 2003). As Tribunal doctors confirmed Bobetko's health had in fact deteriorated, the ICTY agreed not to pursue Bobetko's arrest unless there was a significant improvement in the accused's health (Hartmann, 2003). Then, following Bobetko's death in April 2003, the ICTY withdrew its indictment.

The return of the HDZ to government, following parliamentary elections in November 2003, marked the beginning of a gradual process of reconciliation between the Croatian state and the ICTY. The HDZ's post-Tudman party leader, Ivo Sanader, favored the rapid pursuit of EU and NATO membership (HDZ, 2002) and saw compliance with UNSC resolutions, which mandated Croatian cooperation with the ICTY, as a means by which Croatia could accelerate membership negotiations with Euro-Atlantic institutions. Thus, despite Sanader's robust rhetorical support for individuals indicted by the ICTY (2001: 121), the linkage of cooperation with the ICTY to the beginning of EU membership negotiations proved decisive in bringing about state compliance. Although the new HDZ government signaled an increased willingness to cooperate with the ICTY in November 2003, it was not until March 2005 that attempts to locate Gotovina acquired the urgency necessary to affect an arrest. March 2005 was significant because it was at this time formal EU membership negotiations were scheduled to commence; however, these negotiations were delayed indefinitely until Croatia was certified as being in full cooperation with the ICTY (RFE/RL, 2005). Then, in October 2005, Croatia was declared to be in full cooperation with the Tribunal (ICTY, 2005) after tracing ICTY fugitive Ante Gotovina to Spain where Gotovina would later be apprehended by Spanish police. As Gotovina was the final Croatian fugitive indicted by the Tribunal for violations of IHL, Croatia fulfilled its outstanding obligations toward the Tribunal with regard to the arrest and transfer of indicted persons.⁶

While Tudman-era compliance was dictated by external coercion, the effectiveness of the subsequent linkage of state cooperation with the ICTY to EU accession was amplified by domestic political structures favoring Croatian EU membership. The linkage of EU accession to cooperation with the ICTY proved decisive in bringing about Croatian compliance with Article 29 obligations particularly because there existed a clear elite consensus in favor of Croatian accession to the Union. Unlike in Serbia, which will be dealt with below, in Croatia a broad cross party consensus in support of EU membership which included former president Tudman's HDZ and the more nationalist Croatian Party of Rights facilitated state cooperation with the ICTY (see

⁶ Following Gotovina's transfer to the ICTY, three Croatian journalists were indicted on contempt of court charges for revealing the identities of secret witnesses, the three accused all either turned themselves in to the custody of the Tribunal or were arrested and surrendered by Croatian authorities.

Appendix). Thus, Sanader's 'Action Plan' for cooperation with the ICTY met with little opposition amongst elites, despite public hostility toward the Tribunal's indictment of Ante Gotovina.⁷

Serbia⁸ and the ICTY – Examining Non-Compliance

Although the ICTY's establishment was initially greeted with a considerable degree of hostility in Belgrade, it was in the aftermath of NATO military intervention in Bosnia that the Tribunal was increasingly characterized as a manifestation of a systemic anti-Serb bias within the foreign policies of western states toward the former Yugoslavia (Saxon, 2005: 566). The perception of the Tribunal as 'anti-Serb' was reinforced during the 1999 NATO bombing campaign which coincided with the indictment of Slobodan Milošević. After the collapse of the Milošević regime in October 2000 a significant degree of coercion brought about a gradual shift in policy toward to Tribunal as Belgrade sought to normalize relations with the United States and initiate a process of EU accession. However, the assassination of Serbian prime minister Zoran Đinđić in March 2003 brought about an end to this brief rapprochement.⁹ Despite a number of voluntary surrenders during between December 2004 and April 2005, Belgrade's perception and policy toward the ICTY could, in 2007, be described as ambivalent at best. In fact, when the International Court of Justice (ICJ) found Serbia '*failed in its duty to co-operate fully with the ICTY*' also noting, '*[t]his failure constitutes a violation by [Serbia] of its duties as part of the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention*' (International Court of Justice, 2007: 161), Belgrade took almost no notice and as of March 2007 Serbian cooperation with the ICTY was described as 'non-existent' (Kavran, 2007). Rather than the prospect of EU accession, or shaming at the ICJ, bringing about state compliance, it was only in May 2007 as the Kosovo final status was brought before the United Nations Security Council that Belgrade began to take concrete steps to affect the arrest of the remaining accused.

The Federal Republic of Yugoslavia (SRJ) and the ICTY

The SRJ opposed the very establishment of the ICTY in 1993 on the grounds the Tribunal Statute violated SRJ state sovereignty (Kerr, 2004: 37). Although as a signatory to the Dayton accords Milošević later accepted the SRJ's legal obligation to support the work of the Tribunal and comply with UNSC Resolution 827, the SRJ failed to comply with ICTY arrest and surrender orders throughout the 1990s. In fact, not a single ICTY annual report which addressed the question of state cooperation found Belgrade's cooperation with the Tribunal to be satisfactory. The Tribunal to a large extent was unable to challenge Serbian non-compliance as in the words of

⁷ For public opinion regarding the Gotovina indictment see polling data collected by the Puls Agency (2005).

⁸ When exploring Belgrade's interaction with the ICTY, it must be noted that Serbia, a former Yugoslav republic, did not acquire an international legal identity as an independent state until 2006. Serbia transitioned from being a constituent republic within the Socialist Federal Republic of Yugoslavia (SFRJ) to a constituent republic within the Federal Republic of Yugoslavia (SRJ) and then to a constituent republic within the State Union of Serbia and Montenegro (SiCG) before becoming an independent state in May 2006. Yet, despite Serbia's status as a constituent republic within the SRJ and later the SiCG, the focus of this study will be on Serbia itself. This is because the Republic of Serbia dominated the SRJ, in which Montenegro functioned as a client state until Montenegrin president Milo Đukanović broke with the Milošević regime in 1997 after which time Montenegro functioned as a *de facto* independent state.

⁹ While there never was full cooperation with the Tribunal preceding Zoran Đinđić assassination, it is widely acknowledged that Đinđić was preparing to transfer wanted individuals to the ICTY at the time of his assassination.

the ICTY, ‘[f]or a considerable period of time, the international community failed to respond adequately to the challenges to its authority by the Federal Republic of Yugoslavia’ (1999: 26). Faced with a non-cooperative state, the Tribunal turned to the UNSC. The ICTY’s referral of Belgrade to the UNSC and the adoption of Resolution 1207, which demanded SRJ cooperation with the Tribunal, failed to bring about state compliance; however, it must be noted this deterioration in cooperation coincided with an escalation of violence in Kosovo which ultimately led to the use of force against the SRJ on the part of the NATO alliance through Operation Allied Force.

The escalation of violence in Kosovo and the subsequent indictment of Milošević brought an abrupt end to Tribunal access to the SRJ. The denial of visas to ICTY OTP investigators in 1998 illustrated the extent to which the Belgrade government no longer felt bound by any obligation to cooperate with the Tribunal (ICTY 1999: 26). Despite an intensive campaign by the OTP to highlight SRJ non-compliance, the ICTY reported:

None of these demands brought any concrete improvement in the attitude or behaviour of the Federal Republic of Yugoslavia and none was supported by effective action to compel such change until the situation in Kosovo had deteriorated dramatically (1999: 27).

The period immediately preceding and after Operation Allied Force brought about a non-recognition of Tribunal competencies, leaving the Tribunal to wait until a change in regime in Belgrade before a realistic attempt at securing the arrest and surrender of fugitives believed to be on the territory of the SRJ could be initiated. As it was during Operation Allied Force Slobodan Milošević was himself indicted along with senior regime associates, ICTY indictments were increasingly perceived as representing a direct threat to regime survival and were met with an intensification of media campaigns against the Tribunal which attempted to link the work of the ICTY to an assumedly US-led ‘anti-Serb’ campaign.¹⁰ Given the centralization of SRJ foreign policymaking processes around Milošević and his close associates (Vekarić, 1999), the SRJ robustly challenged the Tribunal until new elites assumed power in October 2000. Statements by US policymakers in 1999 perhaps reinforced this perception as ICTY indictments were publicly seized upon by US officials as legitimizing the NATO bombing campaign. Take for example the following statement by US Secretary of State Madeleine Albright:

We believe that the indictment actually shows the validity of our campaign...We had said all along that the behavior of the Serb authorities and Milosevic himself in Kosovo was unacceptable in terms of how we deal with situations like that at the end of the twentieth century (National Public Radio, 1999).

As Operation Allied Force was followed by almost complete isolation within Europe and a United States’ commitment to a policy of regime change in Belgrade, the SRJ increasingly turned to Russia and China for financial and diplomatic assistance. With regard to Russia, the SRJ even proposed Yugoslavia’s accession to a new state that was to be formed through a merger of Belarus and Russia, which would have in effect ended the SRJ’s existence as a sovereign state (Lazić, 1999).¹¹

¹⁰ The ICTY’s 2000 Annual Report noted an incident whereby the SRJ Foreign Ministry declared that the Prosecutor of the Tribunal was a ‘NATO’ official denying the ICTY Prosecutor access to the SRJ (ICTY, 2000: 26). With regard to the media, it should be noted that many journalists who participated in media campaigns against the ICTY during the 1990s remained active after the fall of Milošević (Nosov, 2007).

¹¹ It is difficult to assess the extent to which Milošević was willing to pursue integration into a state union with Belarus and Russia; however, the Russian Duma did pass a non-binding Resolution endorsing the

Post-Milošević Serbia and the ICTY

After the collapse of the Milošević regime in October 2000, the European Union reaffirmed the long term prospect of EU membership for the SRJ;¹² however, unlike in Croatia where there existed an elite level consensus in favor of integration into the EU and NATO, Serbia's political elite remained divided along the lines of two competing visions of Serbia's place in Europe.¹³ In fact, even after the collapse of the Milošević regime in 2000, and Serbia's emergence as an independent state in 2006, many Serbian elites continued to view international institutions with suspicion and presented building closer ties with Russia as an alternative to integration into the European Union. Vojislav Šešelj, the head of the Serbian Radical Party,¹⁴ which as of parliamentary elections in January 2007 remained Serbia's largest parliamentary political party, perceived Serbia as representing Russian interests in southeastern Europe. Take for example Šešelj's description of Serbia's relationship with the Russian Federation, '*Serbia tirelessly defends the fatherland. And Russia sleeps. We also defend Russia and at the same time try to awaken her*' (Šešelj, 2006). The SRS de facto party leader in Belgrade Tomislav Nikolić was more explicit in statements made following his election as parliamentary speaker in May 2007, '*Russia will find a way to bring together nations that will stand up against the hegemony of America and of the European Union,*' and then went on to state, '*I hope that a majority in Serbia will strive for membership in such an organization, not in the European Union*' (International Herald Tribune, 2007).¹⁵ The SRS party program supports Nikolić's alternative foreign policy orientation which envisages Serbia building closer ties with Russia, China, Japan, India along with 'Arab states' and the 'states of South America' (Serbian Radical Party, 2001).

Furthermore, before EU accession could be pursued in earnest the question of state survival of the SRJ had to be answered.¹⁶ In fact, for Belgrade, cooperation with the ICTY was just one of a myriad of issues which complicated the EU accession process.¹⁷ By 2000, the SRJ was on the brink of collapse as Montenegro continued to drift toward independence. Although a 2002 EU sponsored agreement maintained a loose union between Montenegro and Serbia in the State Union of Serbia and Montenegro, in May 2006 Montenegro held a successful referendum on independence leaving Serbia to emerge as an independent state. A second challenge to state survival came from Kosovo, which as of 1999 was placed under international civilian and military administration sanctioned by UNSC Resolution 1244. Despite remaining legally within

proposed merger of the SRJ with the Russian Federation and Belarus (Radio Free Europe, 1999). However, Vekarić argues the proposal of a Russia, Belarus, SRJ union was primarily meant for a domestic audience rather than an actual foreign policy (1999).

¹² At the Feira June 2000 European Council all Western Balkans states were described as 'potential candidates' for EU membership. Moreover, in the immediate aftermath of the collapse of the Milošević regime, the Council extended an invitation to the SRJ to begin the Stability and Association process.

¹³ Javier Solana prefers to refer to this as a division between 'pro-European' and 'anti-European' parties although a more appropriate distinction could be established between parties which see Serbia as 'European' and those which emphasize a 'Slavic' as opposed to a 'European' identity support the establishment of closer ties with Moscow.

¹⁴ After Šešelj's surrender to the custody of the ICTY, Šešelj's position as party leader became largely symbolic and Tomislav Nikolić, the party's vice president, assumed the position of interim party leader.

¹⁵ Nikolić was to be removed as parliamentary speaker within days of his appointment.

¹⁶ Although Montenegro and Serbia agreed to remain together in the State Union of Serbia and Montenegro, Podgorica reserved the right to hold a referendum on independence. Thus, the State Union of Serbia and Montenegro disintegrated in May 2006 after Montenegro voted to become an independent state.

¹⁷ Serbian agreement to a final status solution for Kosovo has proved a more salient issue in EU/Serbian relations than cooperation with the ICTY.

Serbia, a final status process was initiated for Kosovo that may result in the recognition of Kosovo as an independent state.¹⁸

Although the absence of consensus for EU accession in Belgrade explains the inability of EU conditionality to bring about Serbian compliance with Article 29 obligations in the years following the collapse of the Milošević regime, the removal of the ‘outer wall’ of sanctions¹⁹ meant that the SRJ’s new post-Milošević elites could seek financial assistance from international lending institutions making Belgrade more vulnerable to methods of coercion previously used in Croatia. While post-Milošević elites sought the SRJ’s integration into international institutions and the normalization of relations between the SRJ and the US, this did not translate into a new spirit of cooperation with the Tribunal as Belgrade’s non-recognition of Tribunal competencies appeared to harden in the immediate aftermath of regime change. The dimming prospects for change in SRJ policy *vis à vis* The Hague were highlighted in March 2001 during testimony before the US Senate Subcommittee on European Affairs, in which Morton Abramowitz of the Century Foundation summarized Serbian non-cooperation with the Tribunal:

Belgrade has yet to detain and transfer a single indictee to the Hague Tribunal. It has plagued the work of the Tribunal’s Belgrade office with bureaucratic obstacles. And President Koštunica’s hostile public statements have left no doubt about his attitude toward cooperation with the Tribunal in general, and the effort to have Milošević face charges in the Hague in particular. Earlier this week, one indictee did go [T]he Hague—a Bosnian Serb of dual nationality—and Mr. Koštunica’s government was eager to emphasize that his surrender was “voluntary” and entailed no change in policy. I think we should take them at their word (2001: 13).

Although Milošević was surrendered to the ICTY within weeks of Abramowitz’s testimony in reaction to an explicit threat by the United States to deny Serbia access to financial assistance, overall cooperation between the Tribunal and the SRJ was deemed to be identical to pre-1998 levels (Bang-Jensen, 2001: 23).

The Transfer of Slobodan Milošević

As stated above, the initial position of the SRJ’s first post-Milošević president, Vojislav Koštunica, regarding the ICTY was continued denial of Tribunal jurisdiction (Abramowitz, 2001: 13). Yet, despite public opposition to cooperation with the Tribunal it was during early 2001 the most spectacular transfer of an SRJ accused to the ICTY occurred, that of Slobodan Milošević. Milošević’s transfer to the ICTY, while having occurred in the context of a domestic political conflict between the Yugoslav president, Vojislav Koštunica, and the Serbian prime minister, Zoran Đinđić, was the direct result of coercive pressure applied by the United States, which threatened to use its votes in the IMF to block Belgrade’s access to international financial assistance and boycott a donors conference in Brussels during the crucial period in the immediate

¹⁸ At the time of writing final status discussions remain in progress.

¹⁹ Following the lifting of UN sanctions against the SRJ in 1996, an outer wall of sanctions remained which barred the SRJ from normalizing relations with the US and EU member states until four conditions were met: a) full implementation of Dayton, i.e. cooperation with the ICTY, b) a settlement of disputes with neighboring states regarded SFRJ succession, c) a settlement of the Kosovo conflict in a manner respectful of international human rights norms, and d) democratization (Vekarić, 1999). Given the Milošević government’s failure to resolve the above issues the outer wall of sanctions remained in place until after the collapse of the Milošević regime in October 2000.

aftermath of the collapse of the Milošević regime.²⁰ Unlike with regard to Croatia, the SRJ was the subject of US legislation that required an annual certification by the US State Department of Serbian compliance with Article 29 obligations. This certification process, which relied on disincentivizing non-compliance through the immediate application of financial sanction, when implemented proved far more consequential in bringing about the arrest and surrender of individuals indicted for war crimes than the more long-term incentives subsequently offered by the European Union such as the linkage of Stability and Association Agreement negotiations to cooperation with the ICTY. This was because rather than providing for a long-term incentive for cooperation, the US was willing to impose significant costs upon the SRJ non-compliance as failure to secure US certification as being in cooperation with the Tribunal meant not only would Serbia jeopardize access to direct assistance from the US, but the US would use its votes in the IMF and World Bank to block financial assistance to Serbia from international lending institutions.

A Return to Non-Compliance

After Milošević's transfer to the ICTY, Serbia once again failed to comply with Article 29(d) and (e) obligations and overall cooperation with the Tribunal once again deteriorated as the United States proved less willing to coerce Belgrade into surrendering the remaining ICTY indictees on the territory of the SRJ. While the linkage of EU accession to compliance with Article 29 obligations did not bring about actual arrests, by 2005 the Serbian government began to increasingly perceive the presence of ICTY fugitives on its territory as a liability and actively encouraged persons indicted for war crimes on the territory of Serbia to 'voluntarily surrender' themselves to the Tribunal. However, Alexandra Milenov of the ICTY field office in Belgrade noted that these surrenders were always characterized as 'patriotic' acts and no mention was ever made of the contents of the ICTY indictments against persons accused of war crimes (Milenov, 2007). Moreover, in instances where voluntary surrenders were not forthcoming such as with regard to Ratko Mladić, the Serbian government failed to take action to bring about an arrest.

In the case of Ratko Mladić, the Serbian government has continued to deny that it is in non-compliance with Article 29(d) and (e) obligations through claims it is unable to locate the accused. The nuance in Serbian government descriptions of a non-compliance event suggests that there is a desire to avoid being seen as not complying with international legal obligations which was absent during the 1990s.²¹ The European Union initially adopted a policy that linked the start of Stability and Association Agreement talks with Belgrade to the handing over of the remaining ICTY fugitives on Serbian territory including Ratko Mladić (Thessaloniki Agenda, 2003). Yet, the incentive of SAA and EU candidacy proved insufficient to bring about Serbian compliance. Recall that in the case of Milošević compliance only occurred after the cost of non-compliance, denial of access to financial assistance, was clearly transmitted to Belgrade; however, in the case of Mladić the only cost associated with non-compliance was a delayed initiation of SAA talks. Given the prospect of further EU enlargement in the medium to short-term was in question following the rejection of the EU's Constitutional Treaty in referendums in France and The Netherlands, the incentive of SAA proved unable to bring Serbia into cooperation with the Tribunal. Furthermore, a significant bloc of EU member states, led by Italy and Austria opposed the linkage of cooperation with the ICTY to the commencement of SAA negotiations

²⁰ Đinđić was quoted as noting, 'we can neither afford to loose the necessary economic aid by refusing to cooperate with The Hague nor can we avoid Milošević's extradition if we want to end the isolation' (Serbia-Info, 2001). For more on Milošević's transfer to ICTY custody see (Bass, 2002: 321-322).

²¹ The ICTY notes Serbia is actually aware of Ratko Mladić's location and Mladić could be arrested and transferred to The Hague by Belgrade (Del Ponte, 2006).

and actively lobbied the European Council to decouple the resumption of Serbia's EU accession process from cooperation with the ICTY (Brunnstrom, 2007).²² Following January 2007 elections in Serbia, which saw the Serbian Radical Party gain the largest bloc of votes, an increasing number of EU member states saw the immediate re-launch of Serbia's EU accession process as a means of strengthening 'pro-European' political parties in Serbia ahead of Kosovo's recognition as an independent state (B92, 2007) and the linkage between the arrest of Ratko Mladić and the onset of SAA talks was abandoned (B92, 2007a).²³ In fact, compliance with arrest and surrender orders for the remaining fugitives appears to have been brought about through a desire on the part of Belgrade to delay a final status decision on Kosovo.²⁴ Following a visit by Carla Del Ponte to Belgrade in June 2007, the ICTY Chief Prosecutor even advanced the Serbian position on the Kosovo question before the UNSC by linking future compliance on the part of Belgrade with a delay in a final status decision on Kosovo (B92, 2007b).

Conclusions – The Justice Bargain

Croatia and Serbia provide for two important case studies in the growing body of compliance literature. An initial glance at Croatian-ICTY interactions gives the impression interpretations of state compliance with international arrest and surrender orders which focus on state coercion have largely been confirmed as in the 1990s there was a direct correlation between coercion and compliance with regard to Croatia. The success of a coercive model for compliance in Croatia provides explanations for state compliance which focus on coercion with substantial empirical support. Furthermore, it was the linkage of EU accession negotiations with ICTY cooperation that brought about the arrest of Ante Gotovina in 2005. Yet, when we turn to Serbia the coercive model is challenged as we are confronted by a state that has proven largely unreceptive to external coercion. Additionally, EU conditionality, which played such an instrumental role in bringing about Croatian cooperation with the ICTY, failed to bring about cooperation on the part of Belgrade and instead Serbian compliance only occurred in the context of a campaign to extract external concessions over Kosovo's final status. However, the ICTY's dependence upon external coercion to bring about state compliance in both Croatia and Serbia leaves a question mark surrounding the long-term viability of an international criminal justice regime.

²² There was an unsuccessful parallel lobbying effort which included many of these same states with regard to decoupling the start of Croatia's accession talks from cooperation with ICTY (Barnett, 2005).

²³ EU enlargement commissioner Olli Rehn stated cooperation with the ICTY is no longer a precondition for a resumption of SAA negotiations, but cooperation must be achieved before the conclusion of the process.

²⁴ Aleksandar Vasović quoted an anonymous government official as describing Mladić as '*an asset*' and stating, '*We can get him and hand him over easily but only when we get Kosovo-related assurances from major powers, specifying what Serbia and Kosovo Serbs will receive in return*' (Vasović, 2007).

Appendix: Parliamentary Political Parties, ICTY Cooperation and Support for EU Membership

Croatia: as of November 2003 parliamentary elections				Serbia: as of December 2003 parliamentary elections			
Party	Seats	Supports compliance with ICTY arrest and surrender orders	Supports EU accession	Party	Seats	Supports compliance with ICTY arrest and surrender orders	Supports EU accession
Croatian Democratic Union	66	Yes	Yes	Serbian Radical Party	82	No	No
Social Democratic Party*	43	Yes	Yes	Democratic Party of Serbia*	53	Yes/No	Yes
Croatian Peoples Party*	11	Yes	Yes	Democratic Party*	37	Yes	Yes
Croatian Peasants Party*	10	Yes	Yes	G17+*	34	Yes	Yes
Croatian Party of Rights*	8	Yes	Yes	Serbian Renewal Movement – New Serbia	22	No	Yes
Croatian Social Liberal Party	1	Yes	Yes	Socialist Party of Serbia	22	No	No
Democratic Center Party	1	Yes	Yes				
Croatian Pensioners Party	3	Yes	Yes				
Independent Democratic Serbian Party*	4	Yes	Yes				

*In coalitions with minor or regional parties

Data accumulated by the author from personal interviews, party programs and public statements of party officials. All errors are of course the author's own.

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