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AND JUSTICE FOR ALL:

DEVELOPING RULE OF LAW IN THE BALKANS

by

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AND JUSTICE FOR ALL: DEVELOPING RULE OF LAW IN THE BALKANS

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University of Nebraska, 2010

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The United Nations created the International Criminal Tribunal for the Former Yugoslavia to bring to justice those who had committed the worst crimes during the conflicts in the Balkans during the 1990s. From the outset, this institution was envisioned to temporarily process indicted war criminals. The domestic courts in Bosnia-Herzegovina, Croatia, and Serbia were seen as being corrupt and ill equipped to handle such cases; rule of law was absent or severely lacking in these countries. As the Tribunal winds down, however, both international and domestic actors have emphasized the need to strengthen their judicial systems that will create a culture of rule of law in the Balkans, and thus be able to not only handle war crimes cases but fairly adjudicate all cases that are brought before the courts. This research looks at how successful the European Union accession process has been in creating domestic judicial reforms that will strengthen local judiciaries. This research shows that EU accession has contributed to a modest amount of successful reforms in Bosnia and Serbia, while it has been less successful in Croatia. The reason, I argue, is the level of domestic support for EU accession. Bosnia and Serbia enjoy higher levels of support for EU accession, giving political leaders confidence that implementing judicial reforms required by the EU will not be costly to them. Croatian leaders, on the other hand, may be weary of implementing reforms that would not be favored by the public.

DEDICATION

For Mitch

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CHAPTER 1

Introduction

The wars in the Balkans during the 1990's brought some of the worst crimes against humanity to surface in Europe since World War II. The international community, after bearing witness to these crimes, could not stand idly by. As a result, in 1993 the International Criminal Tribunal for the Former Yugoslavia (ICTY) was created to prosecute those who had committed the worst atrocities. The United Nations emphasized the need to establish an international tribunal that would halt any further violations of international law in the Balkans (UN Security Council Resolution 808). Some argue that without an international tribunal, there would be no domestic trials held to address the crimes committed (Clark 2010, 88). An international tribunal would be better equipped to process such criminal cases as domestic courts are easily politicized and lack credibility. Additionally, the rule of law is weakened in post-conflict societies (Lowry and McMahon 2010, 99). However, the final chapter of the ICTY is still being written with the completion of the few remaining cases on the docket. The ICTY has developed a Completion Strategy that will facilitate its closure and pass the responsibility to try war crimes cases to domestic courts in the Balkans. At the time of this writing, the ICTY's assessment projects the remaining ten trials to be completed by the end of 2012, with appeals extending through mid-2014 (United Nations 2010). The international community is moving forward with the Completion Strategy, presumably, because the domestic judicial systems in the Balkans have made enough progress to fairly try and

adjudicate these cases. Reform efforts not only impact domestic trials for indicted war criminals, but also impact broader aspects of the judicial system if not the democratization process itself. This study looks at whether and to what degree the international community affects judicial reform in the Balkans.

If the ICTY, the international community, and domestic leaders in the region have agreed to the Completion Strategy, this suggests there is a level of confidence in the judicial systems in the Balkans. We should see, over time, positive changes in the judiciary and the development of rule of law in the region that was lacking in the immediate post-conflict period. This study broadly looks at how the international community has helped, or hindered, or hardly made a difference on the development of rule of law in the Balkans. While the international community uses a number of different methods to encourage the development of rule of law in the region, I will focus on one particular method: EU accession. Although there are many other potential influences on judicial reform, this research attempts, to the degree possible, isolate EU involvement as the independent variable of this research. I outline my argument for using EU accession in detail below. The dependent variable is the development of the judicial system in the three Balkans countries. Specifically, I look at reforms to the judicial system as they relate to the overall framework and structure of these institutions and their ability to operate independently from external pressures like political parties.

Financial assistance from the EU to the Balkans is staggering. Between the mid-1990s and today, the EU has spent nearly €7 billion in the Balkans.[1] The amount

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[1] From 2000-2006, aid to the Balkans was streamlined through the Community Assistance for Reconstruction, Development, and Stabilization (CARDS) program. Since 2007, the region has received assistance through the Instrument for Pre-accession

allocated to strengthen domestic institutions alone in Croatia, Bosnia, and Serbia from 2007-2013 is over 2.8 billion euro.[2] This, however, is only a smart part of the much larger assistance the region has received from the US, other countries in Europe and various other public and private sources. With this much being spent to enhance and strengthen institutions, is the international community getting its money's worth? I argue that while there has been some improvement to the domestic judicial systems, there is still much room for improvement. Additionally, the evidence seems to reveal that EU accession may not impact domestic judicial reform as much as some hope. In fact, I argue that the presence of an intervening variable, domestic support, is what ultimately drives judicial reform.

Before elaborating on this argument, it is important to recognize the role that rule of law plays in the Balkans. The former Yugoslavia began to dismantle when Slovenia declared its independence in June 1991, followed shortly by Croatia. Slovenia's independence was hardly challenged. After a ten-day war Slovenian forces were successful in removing the Yugoslav military presence. Croatia, however, faced a long and difficult war with the Republic of Serbia. From 1991-1995, Croatian forces and the Yugoslav National Army engaged in combat. When the war ended, Croatia emerged victorious over the Yugoslav National Army. Bosnia, too, faced a devastating war in its quest for independence from 1992-1995. The conflict in Bosnia did not come to an end until the international community stepped in and negotiated the General Framework

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Assistance (IPA). In the past, support from the EU has come in the form of macro-financial support and humanitarian aid. http://ec.europa.eu/enlargement/index_en.htm. Accessed 16 November 2010.

[2] These figures represent assistance from the European Commission's Instrument for Pre-accession Assistance (IPA). http://ec.europa.eu/enlargement/index_en.htm. Accessed 16 November 2010.

Agreement for Peace in Bosnia and Herzegovina (also known as the Dayton Agreement). Participating in the negotiations were Serbian President Slobodan Milošević, Croatian President Franjo Tuđman, and Bosnian President Alija Izetbegović. The conflicts in the Balkans produced new states that had to now quickly begin to grapple with the effects of war while trying to navigate their way toward democracy.

Effectively addressing war crimes in domestic institutions was not possible in the immediate aftermath of the conflicts. Rule of law was lacking in the former Yugoslavia and the judicial system was seen as corrupt and ineffective, and fears loomed that trials would be compromised by ethnic bias and political considerations (Kerr 2005, 323; Barria and Roper 2008). Domestic judicial systems are often not in a position to conduct war crimes prosecutions following periods of conflict due to a number of variables including the strength of military and police forces responsible for violations, lack of political will, and weak legal systems (Zoglin 2005; Alvarez 1999; Kritz 1996). Over time, however, rule of law must develop in order for an effective democracy to emerge. Rule of law not only enhances the quality, but also the sustainability of democracy (Chavez 2004, 2). For Linz and Stepan, democratic consolidation requires both an attitudinal and constitutional component; meaning faith in democracy as the best form of government and conflict resolution according to rule of law (Linz and Stepan 1996a, 16; Chavez 2004, 2-3). Others see rule of law as being the cornerstone of liberal democratic governments (Diamond 1999). In order for the states of the former Yugoslavia to develop into strong and lasting democracies, rule of law would have to take center stage. Changes to the judicial system would be one component of developing rule of law, and subsequently, creating strong democracies.

While non-governmental organizations have conducted countless assessments of the judicial systems in the region, there is a lack of scholarly attention being paid to make a comparative assessment.[3] Here, I attempt to narrow the gap between academics and practitioners by assessing the development of the rule of law in Croatia, Bosnia-Herzegovina (hereafter Bosnia), and Serbia. While practitioners often focus on single country assessment, this research looks at the region as a whole. The academic literature, too, seems to overlook critical assessments of the region's judiciary. Rather, the focus has been on an important and growing body of literature that looks at the effectiveness of various types of transitional justice mechanisms such as trials, truth commissions, amnesties, and lustration. Additionally, scholars have contributed greatly to the literature on the role that international actors play in judicial reform in post-conflict societies, the need to address accountability, and the process of domestic judicial reform. These issues, however, are often studied separately (Call 1997).

The purpose of this research is to not only bring together empirical evidence from the assessments of rule of law in the three cases of Croatia, Bosnia, and Serbia, but also to look at the theoretical propositions advanced by scholars that suggest ways the international community is able to leverage domestic reform. Methodologically, measuring the success of transitional justice mechanisms is a difficult and tricky process (Thomas, Ron and Paris 2008; Fletcher, Weinstein and Rowen 2009; Van Der Merwe, Baxter and Chapman 2009). To overcome some of the problems associated with

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[3] There are a number of NGOs operating in the region conducting assessments of the judicial system. For example, Human Rights Watch and the International Center for Transitional Justice publish periodic assessments of judicial reforms in the region. The American Bar Association's Rule of Law Initiative conducts assessments of the judiciary in the region, as well as assisting with legal education reform.

measurement, I selected cases that are geographically part of the same region, share a common political (and to a large extent, cultural) background, and all experienced the role of victim and perpetrator during the conflicts resulting from the breakup of Yugoslavia. I keep the focus of this study narrow, looking only at the judiciary, rather than other institutions such as the police or military. I also use the same indices across all cases to measure judicial independence, reducing the chances that data will not be comparable across cases.[4]

To make a definitive claim about what drives judicial reform in the former Yugoslavia, and consequently what ensures that rule of law will develop and be sustained in these societies is an insurmountable task. Instead, I first look at various claims offered to explain judicial reform. There is a growing literature that looks at what drives judicial reform, particularly in post-conflict societies. Scholars have approached judicial reform from three basic angles. The first looks at cultural and political legacies to explain institutional choice in emerging democracies. Another approach focuses on self-interested actions of politicians who bargain over the design of judicial institutions. Finally, some scholars emphasize the role of the international community in shaping judicial institutions. These three approaches try to answer the question of what factors influence judicial reform from different perspectives: historical, individual, and global.

Historical Approach to Judicial Reform

Looking at Eastern Europe, scholars emphasize the legacies of Communism in shaping the design of institutions in emerging democracies. These institutions are

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[4] I use the Freedom House index on Judicial Framework and Independence as well as its Democracy index for Croatia, Bosnia, and Serbia.

constrained by norms, attitudes, and structural conditions of the former regimes. For some, an important distinction must be made when examining Eastern Europe, as opposed to other states undergoing democratic transition. Linz and Stepan note that former authoritarian regimes, such as those in Southern Europe and Latin America, benefited from the adoption of principles of western law, a developed legal scholarship, and lower levels of politicization of the state apparatus (1996b, 333-335). This is not a universal view, however. Rebecca Chavez's survey of rule of law development in Latin America highlights ongoing issues with the judiciary.

> In most of Latin America, democratic transitions have occurred, yet the judicial branch remains unable to place real constraints on the executive branch. Leaders have not taken advantage of the democratic opportunity to change the incentive structures that have encouraged the subordination of the courts. A politically malleable judiciary is one of the most entrenched obstacles in the way of the rule of law in Latin America (Chavez 2004, 3).

Her assessment highlights not only the problems seen in Latin America, but also in post-Communist countries. In former Communist countries throughout Eastern Europe, the judiciary was historically tied to the state. Judges and judicial rulings were closely linked with the Communist Party and its orientations. Much the way Chavez describes Latin America, Eastern European judiciaries were entrenched in a culture where the boundaries between law and politics hardly existed. This legacy makes it difficult to create a new legal culture that emphasizes the independence of the judiciary (Reitz 1997; Heydebrand 1995). Even if reforms are adopted, the legacies of the past make it difficult to ensure these reforms are implemented and adhered to. What this approach lacks is a way to account for incentives to reform. Its possible that the incentive to reform the judiciary (or

consequences for not reforming) are great enough to ensure measures are taken to create robust institutions.

An Individual Approach to Judicial Reform

The second approach scholars have taken to explain judicial reform is one that focuses on individuals, specifically political actors, and his or her ability to weigh the costs and benefits of reform. State institutions can bring benefits to some while leaving others without. Political actors have an incentive, then, to create or reform existing institutions that are most beneficial to them (Moe 1990). Pedro Magalhaes (1999) applies this approach to institutional change in the judiciary. This approach, he notes, requires four assumptions about political actors. First, political actors will rationally pursue their individual self-interest and maximize their political power as well as their hold on the state apparatus. Second, preferences related to obtaining political power are preferable to institutional rules. Concerning the judiciary, where actors have the ability to shape institutional rules, they will choose policies that maximize the congruence of the judiciary with the party in power. Third, the extent to which parties can reform institutions that are most beneficial to them depends on their bargaining power in the decision-making arena. Fourth, the preferences of parties over judicial institutions are shaped by a degree of uncertainty about future electoral results (Magalhaes 1999, 47). While Magalhaes does not explicitly state it, there is a clear link between this approach and the historical approach, particularly in the context of post-Communist East Europe.

During the transitional phase, leaders within the Communist party still have the power to influence institutional reform. Magalhaes notes that Communist party members

are able to bargain for judicial reforms (or lack of reforms) by guaranteeing electoral competition and participation. While individuals and their preferences are clearly at play in this approach, so too are the historical legacies of the former regime. The deeply entrenched notion that executive and judiciary are closely linked is still present. This approach, like the historical approach, also lacks an explanation for how external actors can influence reform. Again, there is no account for how incentives from the international community help shape institutional reform. Those who use this approach may argue that external incentives have little influence because what is at stake is political power, or the prospect of future political power. In this case, one could argue that incentives from the international community have little influence on institutional reform. However, another body of literature looks at not just incentives for reform, but how the international community places constraints on the state either through direct involvement with the state, or through coercive measures.

An International Approach to Judicial Reform

The case of Bosnia is clearly one where it is affected fundamentally by the international community's involvement (Barria and Roper 2008). Gerald Knaus and Felix Martin (2003) make a striking comparison between the international involvement in Bosnia and imperialism. It is not that international actors are providing guidance for the Bosnian state, but rather they are overseeing every aspect of the state's decision-making process.

> Bosnia is a country where expatriates make major decisions, where key appointments must receive foreign approval, and where key reforms are enacted at the decree of international organizations. The nature of Bosnia's judicial system, the structure and number of governmental

> ministries…are subject to the regulatory powers of the OHR and a few other international agencies. They control the commanding heights of what amounts to a system of "indirect rule." (Knaus and Martin 2003, 62)

Knaus and Martin succinctly outline the international community's influence and power over Bosnia's judicial reform (2002, 64-65). While judicial reform was seen as a critical need for the state, there was little consensus on how the reform process should proceed. The Office of the High Representative (OHR) initially sought to reform the judiciary through a process of complaint/review where members of the judiciary who had complaints brought against them would be investigated and removed if it was seen as necessary. However this process did not yield expected results. In 2002, the OHR used its considerable power to force the resignation of all judges and prosecutors. Those who wanted to remain would have to reapply for their position. This heavy-handed approach to judicial reform, Knaus and Martin ironically point out, was all done for the purpose of strengthening rule of law.

This sweeping overhaul aside, the international community has also guided Bosnia's judicial reforms in other ways. Michael Doyle and Nicholas Sambanis (2000) identify 'multidimensional peacekeeping' as one of the types of operations carried out by international peacebuilders. This type of peacekeeping involves institutional transformations, which would include reforms to the judicial system. This type of operation, unlike that in the above example is more consent based. There is thus a dialogue between international and domestic actors. The result of the dialogue can take many shapes. In the particular case of trying war crimes cases, the domestic courts simply were not equipped to handle the caseload, nor was there the level of domestic expertise required to prosecute and preside over these cases. In this instance,

international judges and prosecutors became a necessary component to hold trials within Bosnia. The purpose of the international presence was not to create a 'domestic ICTY', but rather to help build capacity within Bosnia's judicial system, thus creating an environment where rule of law could develop. Here, if consent of the people is truly present, we should see little resistance to international involvement and greater progress in the development of rule of law.

Others see the benefit of using a 'toolbox approach' to moving Bosnia (and other post-conflict states) forward. This approach brings together a range of key actors who work closely together in order to achieve specific goals (McMahon 2004/2005, 588). Actors in this scenario have expertise in specific areas, but work together on mutually identified goals. However, McMahon points to a critical resource in the toolbox:

> Because indigenous ownership is a primary goal of nation building, the international community's plan must incorporate domestic actors and must fine-tune elements of the plan to the particularities of the country. An important resource in any future toolbox would be local stakeholders: all those critical to the long-term success of the nation-building project must be involved in designing its building blocks (McMahon 2004/2005, 588-589).

Essential to both a multidimensional or toolbox approach is the buy-in from domestic actors. A joint study released in 2000 by the University of California, Berkeley's Human Rights Center, International Human Rights Law Clinic, and the University of Sarajevo's Centre for Human Rights underscores this point. Their interviews with thirty-two Bosnian judges and prosecutors (representing Bosniak, Croat, and Serb ethnicities) revealed unease on the domestic side regarding the international community's involvement.

> Participants supported efforts of the international community to strengthen the independence of judges and prosecutors. However, legal professionals criticized international organizations operating in BiH, commenting that international representatives frequently were unfamiliar with the Bosnian legal system and acted arbitrarily to impose external rule on the country and its legal institutions (Fletcher and Weinstein 2000, 104).

While domestic actors support the intent of the international community, their actions within the domestic institutions remains an area of contention. The presence of the international community 'on the ground' can at times be a helpful partner in the reform process, and at other times constrain the actions of local leaders. Other times, the international community resorts to coercive measures to influence reform.

In the discussion of transitional justice, Serbia is often portrayed as the country in the region consistently pushing back on western notions of reform (Murrell 1996; Carothers 1998). It is the thorn in the international community's side. While Croatia and Bosnia are certainly not immune from criticisms, Serbia is often pegged as lacking the political will to make domestic reforms because of its reluctance at examining its past (Ellis 2004; Zoglin 2005; Peskin 2008). Additionally, the international community often resorts to threats before any cooperation is seen from Serbia, especially when the state is asked to comply with the requests of the ICTY (McMahon and Forsythe 2008). Resistance (or resentment) toward the ICTY may follow from the Serbian perception that the Tribunal is biased against ethnic Serbs, though empirical evidence argues that it is not (Meernik 2003). What is important to note for this research is that the EU has made cooperation with the ICTY a paramount issue. For the Balkans, it is not a question of whether they will or will not cooperate with the ICTY, but when. In order for Croatia, Bosnia, and Serbia to move forward with the EU accession process, they must show cooperation with the ICTY. One cannot overlook the role of the international community

in shaping institutions in East Europe, particularly where states have joined or have submitted their application to join the European Union. The use of conditionality can motivate states to reform institutions.

The Lure of the European Union

Not long ago, the topic of EU accession in the Western Balkans remained an underdeveloped area of the academic literature (Anastasakis and Bechev 2003). However, with the expansion of the EU throughout Central and Eastern Europe in the last decade, a number of scholars have contributed to the study of EU influence on candidate states. In a 2007 article, Tim Haughton concisely brings together the literature on the EU's influence on candidate states; how and when does the EU influence change in candidate states. Haughton notes that much of the research focuses on domestic change in candidate states being a result of the 'Europeanization' process (Grabbe 2001; Hughes, Sasse, and Gordon 2004; Schimmelfennig and Sedelmeier 2005). Europeanization is a term that can take different meanings, however, referring to the internalization of European values at the domestic level, or the process of domestic policy areas becoming increasingly subject to European policy-making (Haughton 2007; Olsen 2002). Haughton and others employ the term 'EU-ization' to explain change in candidate countries driven by the demands of EU membership (Haughton 2007; Malova and Haughton 2002; Wallace 2000). Employing 'EU-ization' is more useful in describing the process that goes on at the domestic level. That is, changes that occur domestically are a result of EU conditionality on candidate countries.

Scholars recognize that the impact of the EU varies over time, often because of the incentives offered (Schimmelfennig and Sedelmeier 2005; Vachudova 2005; Kelley 2006). Not only does the EU's impact vary over time, but across policy issues. Regarding economic policy, the EU seems to show its power to transform policy in candidate countries, while issue areas such as minority protection highlight the EU's limited power to influence policy (Haughton 2007). Regardless of issue area, however, the EU seems to have the most impact in the early stages of the accession process. Using the 2004 enlargement of the EU as a case, Haughton shows that the EU is able to have the greatest impact on domestic policy changes during the phase when it is decided whether or not to pursue accession negotiations (2007, 235).

Croatia, Bosnia, and Serbia stand to benefit from making reforms to their judiciaries in order to meet the standards of and become members of the EU. Of the three cases, Croatia is closest to meeting the requirements for accession. While the benefits of inclusion are great (Baldwin, Francois and Portes 1997, 169), so too are the costs of exclusion (Vachudova 2002). Milada Vachudova points out the economic costs of exclusion, noting that considerable flows of money, expertise, and foreign direct investment will be directed toward EU members rather than those that do not join (2002, 8). In order to gain access to the elite group of member states, Croatia (and other candidate states) must make institutional changes that conform to EU standards.

In addition to economic gains, there are political benefits that must be considered as well. Having access to the EU market is one thing, but having the ability to sit at the table to discuss and negotiate policies regarding trade is quite another. Belonging to the EU allows weaker states, like Croatia, Bosnia, and Serbia, to participate in these types of

discussions because of a set of rules that are applied to all member states (Hoffmann and Keohane 1993). Access to the western markets and the ability to negotiate policies, however, would be irrelevant if the political parties in power did not hold liberal ideals and espouse the tenants of democracy.

Vachudova (2002) uses the term 'active leverage' to understand how the EU was instrumental in bringing to power more liberal governments in East Europe, especially during the latter half of the 1990's. Others also note the EU's use of conditionality to change the behavior former communist states in East Europe (Baldwin 1999; Schmitter and Brouwer 1999). The lure of the EU is great enough that citizens are willing to look past the nationalist rhetoric and find favor with more moderate parties. With a more moderate government in place, institutional reforms can begin. This would include necessary reforms to the judicial system.

Countries wanting to belong to the EU must make internal changes to their institutions if they want to find a place in Brussels. For East European countries, the potential economic benefits are often strong enough to bring governments to power that are more amenable to reforming domestic institutions, such as the judicial system. For the Balkan countries, the promise of the EU may help us understand the development of rule of law. Following Haughton (2007), however, we should see the greatest changes occurring in the early years of the accession process. Because the door to EU negotiations was opened to Croatia first, we should see greater improvements to their judiciary, especially early on. Thus, I hypothesize:

During the period leading up to EU negotiations, candidate and potential candidate countries in the Balkans will make significant improvements to their judicial systems.

Using data from Freedom House and progress reports from the European Commission, I examine the progress made toward developing a strong, efficient, and independent judiciary as each country moves through the accession process. In addition, I will use public opinion survey data from Gallup's Balkan Monitor survey to show how support for the EU is linked with judicial reform.

Outline

In Chapter 2, I operationalize rule of law and provide a justification for why I use the judicial system in the three countries as an institution to be examined. This section will survey the literature on rule of law and give an overview of the ways in which scholars define this concept. Chapter 3 provides details on the structure of the ICTY. An understanding of the complex structure of the Tribunal is important as it was created in part because the domestic judicial structure could not handle the types of cases that would be tried in court. Additionally, since the European Commission has made cooperation with the ICTY a priority on the accession agenda, it is necessary to understand the relationship between the ICTY and domestic actors.[5] In Chapter 4, I analyze data regarding the progress of judicial reform. This section brings together empirical evidence

[5] In 1999 the EU established the Security and Association Process (SAP) for South-Eastern Europe. In 2000, the European Council stated all SAP countries are considered potential candidates, and stressed the importance of complying with international obligations such as cooperation with the ICTY at the Zagreb Summit. http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/zagreb_summit_en.htm. Accessed 30 November 2010.

that compares how the judiciary has developed in all three countries. I use the Freedom House indices as a proxy to measure judicial reforms. I then examine progress reports from the European Commission. These reports highlight where progress is being made, and identify areas within the judiciary that need improvement. Chapter 5 concludes with some observations on the development of rule of law in the Balkans and suggestions for future research.

CHAPTER 2

Defining and Measuring Rule of Law

The concept of rule of law has been around for centuries, but has recently come to the forefront of discussions among the international community (Carothers 1998; Call 2007). Since the fall of Communism, rule of law has taken its place along side other terms such as peacekeeping and conflict prevention (Hurwitz 2008, 22). Not only do international actors want to ensure that post-conflict societies remain peaceful, but also prevent violent conflict from breaking out in fragile regions. Rule of law is essential for both of these goals. The UN has devoted an entire sector to the rule of law initiative. In a March 2010 note, the Secretary-General summarizes the United Nation's position regarding rule of law:

> For the United Nations, transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law (United Nations 2010).

The goal of transitional justice includes the development of a strong and sustainable culture of rule of law. How do we know when we have achieved this goal? A definition of rule of law is necessary in order to measure its progress in post-conflict societies.

"Rule of law" it seems, is not a fixed term. There are a number of competing definitions used to describe what it means, which contributes to the vagueness of the term (Ellis 2004; Hutchinson and Monahan 1987). However, there is some consensus on the definition that there are two distinct types of rule of law. There is a "maximalist" and a "minimalist" concept of rule of law (Mani 2008; Call 2007; Mani 2002).

Charles Call notes that both scholars and practitioners tend to embrace a minimalist definition of rule of law (2007, 6). This narrow definition focuses on legal rules for social, political, and commercial interaction. Rule of law is present in a society where laws are public knowledge, are clear in their meaning, and apply equally to all persons (Carothers 1998). This definition has particular appeal to scholars and practitioners who want to measure rule of law because of its relatively narrow understanding. What it excludes, which is particularly important in transitional justice, is the content of the law itself.

The alternative to the minimalist definition is the maximalist view of rule of law. This view incorporates the content and intent of the law. As Call accurately notes, under a minimalist definition "apartheid South Africa and slave-holding U.S. states of the nineteenth century might all be characterized as enjoying the 'rule of law'" (2007, 7). However, under a maximalist definition, rule of law goes beyond just ensuring that the laws on the books are applied as they are written. This definition adopts a "rights"-based approach to rule of law (Dworkin 1987). Not only is it about the structure of the legal system, but the substance of the laws that come from it (Mani 2008, 24).

Others would argue that any definition of rule of law is not complete without the necessary component of an independent judiciary (Diamond and Morlino 2004; O'Donnell 2004). A judiciary that is independent from the influence of government elites is necessary for laws to be applied equally and to ensure minority groups are not unfairly treated before the law and courts. The presence of an independent judiciary is especially important in the context of transitional justice. As countries move toward democracy, an independent judiciary will ensure that no one, including state leaders, is

above the law and that cases are treated alike regardless of class, gender, ethnicity, or other attributes of individuals brought before the courts (O'Donnell 2004, 37-38; Linz and Stepan 1996). For the purposes of this research, the presence of an independent judiciary is essential for measuring the progress of rule of law.

In all three countries, judicial reforms included some aspect of ensuring an independent judiciary, regardless of the impetus to reform. Therefore it is necessary to have a comprehensive definition of judicial independence. Shapiro (1986) provides a broad definition of judicial independence as a form of conflict resolution by a neutral third party. Where two parties are in dispute, the judiciary is expected to be a neutral party with no interest in the outcome of the case (Fiss 1993). Operating under these definitions, judges should be able to adjudicate without showing bias toward either party in the case. Thus all citizens are equal before the law, and are afforded the same opportunities before the court (Larkins 1996; King 1984).

In former Communist countries, there is concern over the independence of judges, prosecutors, and other actors within the judicial framework. There is a large volume of literature that looks at the development of an independent judiciary in post-Communist Europe (Howard 2001; Ramseyer 1994; Utter and Lundsgaard 1994). For some, the former regime type plays an important role in developing rule of law, and consequently an independent judiciary (Reitz 1997; Linz and Stepan 1996; Heydebrand 1995). This is particularly important when making distinctions between authoritarian and totalitarian regimes. Still others look at institutional design as a way to explain variances between countries when comparing their judicial systems (Magalhaes 1999). These institutions are created by political actors who operate in ways that will maximize their power under

conditions of electoral uncertainty (Grzymala-Busse 2003; Frye 1997; Geddes 1997). In order to maintain a democratic framework, the judiciary must remain independent from other branches of the government.

The operational definition of rule of law that I use comes from the United Nations (2004). Rule of law "refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards" (United Nations 2004). This definition is useful because it not only includes elements of the minimalist and maximalist definitions, but also the element of independence within the judiciary. Other elements included in this definition - accountability, laws that are made public, equal enforcement of the law, and laws that are consistent with international human rights standards - are critical for measuring the development of rule of law. However, measuring all elements of this definition separately is beyond the scope of this research. Instead, using Freedom House's index, I measure progress of the overall framework of the judicial institution. The focus here is on institutional changes in the Balkans that lead to the development of rule of law. The international community's focus on institutional change allows us to look at the relationship between international push to reform and domestic implementation. While looking at the judiciary alone will not tell the whole story of the development of rule of law in the Balkans, it will provide important insight into how well the demands of the international community are implemented in the domestic arena.

The proxy that I use to evaluate rule of law comes from Freedom House, which provides an index on Judicial Framework and Independence for a number of countries in Central Europe and Eurasia (Freedom House 2010). This index will be used to measure the progress of creating a stronger more independent judiciary in Croatia, Bosnia and Serbia. Freedom House's assessment of the judiciary focuses on a number of elements included in the definition of rule of law including constitutional reform, human rights protections, criminal code reform, judicial independence, ethnic minority rights, guarantees of equality before the law, treatment of suspects and prisoners, and compliance with judicial decisions (Freedom House 2010). In addition to the score given for Judicial Framework and Independence, Freedom House also reports on the changes made over the course of the assessment. I use ten years of data from the index, looking at scores and reports from 2001-2010. While the index score allows us to see the trend in judicial development over time, the corresponding reports give a qualitative assessment of developments within the judicial system.

An international catalyst, such as EU accession, is one approach to examine institutional reform. In the Balkans, at least, is seems that this approach by itself may not drive the reforms the international community hopes for. Another way is to look at what is happening on the ground, to look at the attitudes of citizens toward the EU as it pushes for reforms to the domestic justice system. An integral part of creating a robust and sustainable culture of rule of law is to have a citizenry that trusts those institutes responsible for maintaining rule of law (Rose, Mishler and Haerpfer 1998). I look at public opinion polls that survey citizens on a number of different issues, including

attitudes toward EU accession as well as their perceptions of the domestic judiciary, that will be used to measure the success of rule of law development.

To put it concisely, the dependent variable in this study is the independence of the judiciary. I use the Freedom House scores on judicial framework and independence as a way to measure this variable. The independent variables are international support for judicial reforms (through funding and NGO involvement) as well as local attitudes toward those institutions responsible for reforming the justice system. Broadly speaking, this research asks how successful have international actors been in developing rule of law in the Balkans. While this research alone cannot definitively answer this question, it will provide insight into the ways in which international actors have tried to improve rule of law and the public's attitude toward reform to gauge a sense of what the future may hold for these countries as they continue through the transition process.

I now turn briefly to examine the ICTY, its impact on the Balkans, and how the EU uses accession as a tool to facilitate cooperation between domestic institutions and the Tribunal.

CHAPTER 3

The ICTY and the EU

The road from The Hague to judicial institutions in Croatia, Bosnia, and Serbia is a long one. It is marked by numerous detours and roadblocks, which have pushed the ICTY's closure deadline further and further out. But we are now seeing substantial progress, as the ICTY is no longer opening new cases, it is referring more cases to domestic courts, and providing support in the local setting. This section will briefly review the history of the ICTY and the process of moving from international to domestic trials. The motivation to reform the domestic judiciary, however, may not come from the imminent closure of the ICTY. It is important to recognize that the EU, as part of its dialogue with Balkan states, emphasizes cooperation with the ICTY as a key factor in moving toward EU membership.[6]

As the conflict in the Balkans showed no signs slowing, the United Nations Security Council adopted Resolution 827 on May 25, 1993 (United Nations 1993). Acting under Chapter VII of the Charter of the United Nations, the Security Council adopted this resolution to establish an international tribunal to address the crimes committed in the Balkans. Chapter VII of the Charter addresses action with respect to "threats to the peace, breaches of peace, and acts of aggression".[7] The Security Council

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[6] The June 2003 meeting of the European Commission (Thessaloniki Summit) addressed the importance of cooperation between Balkan states and the ICTY, noting that "full cooperation with the ICTY, in particular with regard to the transfer to The Hague of all indictees and full access to documents and witnesses, is vital for further movement towards the EU"; http://ec.europa.eu/enlargement/press_corner/key-documents/sap_en.htm. Accessed 30 November 2010.

[7] For a text of the UN Charter see: http://www.un.org/en/documents/charter/index.shtml.

saw the situation in the Balkans (especially Bosnia) as a possible threat to the peace and stability of the international community. Language in the resolution expressed the urgency of the international community to 'do something'.

> […] this situation continues to constitute a threat to international peace and security, [the Security Council is] determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, [and] convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of the persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace…(United Nations 1993).

This was the first phase of what would become the International Criminal Tribunal for the Former Yugoslavia. It is important to note that the Security Council envisioned the tribunal to act as a mechanism that would contribute to the restoration and maintenance of peace in the former Yugoslavia.

It seems that from the outset, this line would spark a debate among scholars regarding the utility of international criminal trials as a form of transitional justice. Payam Akhavan is one of the leading supporters of international trials. His view is that the ICTY has been essential to the restoration of peace and reconciliation in the former Yugoslavia (Akhavan 1998, p. 739; 2001, p. 7). Without international tribunals we could expect the number of war crimes to continue to rise (Goldstone 1996). Some also see this as an opportunity to advance global democratic norms as it lends well to the concept of liberal legalism (Bass 2000, p. 20). Liberal states have well-established judicial systems and follow due process, whereas illiberal states do not. In the case of the former Yugoslavia, the separate states (at the time) had practitioners and NGOs noted that the

judicial systems were corrupt and unfit to properly address war crimes (Human Rights Watch 2004).

There are, however, those who question the utility of international tribunals, especially regarding the claim that they facilitate peace and reconciliation. Linking the work of international tribunals to peace and reconciliation can be a tricky exercise. Patrice McMahon and David Forsythe's (2008) research on the impact of the ICTY on Serbia shows there is little empirical evidence to directly link the Tribunal to peace and reconciliation (p. 414). Instead, they find support for the argument that other stronger international actors such as the EU, US, and NATO have "adopted the ICTY's mission and made their relationships with Serbia conditional upon Belgrade's cooperation with the ICTY" (p. 433). Thus, it may not be the international tribunal that is the mechanism for change, but a larger set of actors working in concert that facilitate positive changes. Clearly, the decision of the Security Council to suggest that the establishment of an international tribunal would promote peace in the region has offered scholars a chance to examine the link between justice and reconciliation (Meernik 2005; Fletcher and Weinstein 2002).

The ICTY is composed of three organs: the Chambers, the Office of the Prosecutor, and the Registry. The judges, along with legal support teams make up the Chambers. There are three Trial Chambers and one Appeals Chamber. At each trial, three judges will sit on the bench and oversee the proceedings. Their main function is to determine the guilt or innocence of the accused, pass sentences on those found guilty, and make sure the trials are fair and conducted in a manner consistent with the Rules of Procedure and Evidence. The Rules of Procedure and Evidence are the general guidelines for the

operation of the trials and cover such processes as pre-trial proceedings (submission of indictments, orders and warrants, preliminary proceedings, disclosure of evidence, depositions and motions), proceedings before the Trial Chambers (case presentation, judgment and sentencing), and post-trial proceedings (appeals, pardons or commutations of sentence).

The Office of the Prosecutor (OTP) is responsible for investigating and prosecuting individuals responsible for violations of international humanitarian law in the territory of the former Yugoslavia since 1991. Article 6 of the Statute states the Tribunal has jurisdiction over individual persons, and therefore the OTP cannot pursue organizations, political parties, or administrative entities. This does not however, relieve high-ranking officials of criminal responsibility. In fact, a run-down of indicted persons is evidence that the OTP would prosecute heads of state, government officials, military officers and generals. Article 7 of the Statute allows the OTP to prosecute these individuals if there was knowledge or reason to believe there was knowledge that they were aware of their subordinates' actions.

Articles 2-5 pertain to the subject matter jurisdiction of the ICTY. These articles refer to the types of crimes the OTP pursues. Specifically the ICTY is mandated to prosecute grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. The criminal acts covered include use of poisonous weapons, wanton destruction of cities, towns or villages, plunder of private property, genocide (acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group), murder, enslavement, deportation, torture, rape.

Territorially, the ICTY has jurisdiction over the land, airspace and territorial waters of the former Socialist Federal Republic of Yugoslavia. The Statute provides for a temporal jurisdiction of any crimes (as referred to in Articles 2-5) beginning on 1 January 1991. These are outlined in Article 8 of the Statute. Though the temporal jurisdiction only gives a beginning point of reference, the ICTY was never designed to be a permanent institution, nor was it envisioned to prosecute crimes that may occur in the future. The UN Security Council set targets for the completion of all ICTY activity (UN Security Council Resolution 1503 and 1534 2003, 2004).

The Registry is unlike the other two organs of the ICTY, and is tasked with a number of responsibilities. While trials are in session, members of the Registry are responsible for keeping official records and administer exhibits and filings submitted by both the prosecution and defense teams. Members of the Registry also work with witnesses to bring them to testify at the ICTY and are charged with providing protection and psychological support when needed. This organ is also responsible for overseeing the detention unit where the accused are house prior to and during the trial phase. One important function of the Registry is its 'diplomatic' function. The Registry is responsible for maintaining positive relationships between the ICTY and the international community, and particularly with the countries of the former Yugoslavia. In an attempt to communicate the work of the ICTY to citizens in those countries, the Registry established the Outreach Program.

The Outreach Program is designed to be a link between the ICTY and the countries of the former Yugoslavia. The Outreach Program actively seeks to promote the work of the ICTY and convey the importance of trials as a means to hold those accountable that

violate international humanitarian law and the impact it has on bringing justice to victims. The work of the Outreach Program falls in line with the message conveyed by the Security Council in 1993. They work with local organizations, NGOs, youth and women's groups to try to engage the population that should feel the most impact from the trials. As part of the Completion Strategies, the Outreach Program also works with local judiciaries in the prosecution of domestic war crimes trials. Through training and education programs, they work with regional legal professionals to provide them with the expertise needed to conduct fair trials in the domestic courts.[8]

The framework may be in place to facilitate cooperation between the ICTY and domestic actors and institutions; however, the ICTY lacks any real power to compel states to cooperate and instead must rely on other institutions to facilitate cooperation (McMahon and Forsythe 2008). Coupled with the lacking the power to compel, the ICTY also suffers from "legal and procedural shortcomings, including incompetent investigations, [and] poor prioritizing of cases" (Simpson 2005, 1275). The ICTY's legal and procedural shortcomings are largely due to the fact that it operates with a mix of adversarial common law system and inquisitorial civil law legal system, yet leans heavily toward adversarial common law which is unfamiliar to legal professionals in the Balkans (Clark 2010, 92; Tolbert 2002, 7). As for prioritizing cases, the ICTY was established to prosecute military and political leaders who authorized or initiated war crimes. However, the Tribunal's first indictments were the result of immediate practical considerations for funding (Clark 2010, 87). The ICTY had no budget when it was created and the need to

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[8] The International Criminal Tribunal maintains an official website which outlines the structure and function of the organs of the Tribunal. Information from the above section can be found at: http://www.icty.org/sections/AbouttheICTY. (last accessed 6 January 2010)

secure funding was essential for its operation. Therefore the OTP indicted lower level individuals first because it was "under tremendous pressure to obtain crucial funding from the United Nations" (Goldstone 2002, 281). These issues, along with geographic and linguistic distance from the Balkans, make cooperation with the ICTY difficult even under the best conditions. However, the ICTY also has to combat persistent negative perceptions of its work. A recent poll asking citizens in the region what best describes the proceedings of the ICTY reflects the negative attitude. Roughly fifty six percent of Bosnians and fifty five percent of Croatians believe the proceedings are ceremonial and that verdicts are known before the process is complete. In Serbia, figure reaches a staggering seventy nine percent.[9] It is no surprise, then, that the ICTY relies on other international institutions to facilitate cooperation.

The EU is able to use the accession process as a tool to get Croatia, Bosnia, and Serbia to cooperate with the ICTY. Through the accession process, the EU has the opportunity to insert certain conditions for candidate countries. In the case of Croatia, Bosnia, and Serbia, cooperation with the ICTY was implied early in the process, but not explicitly stated. In June 2000, the European Council declares all countries in the Western Balkans are potential candidates for EU membership.[10] The status of potential candidate paved the way for the EU to require cooperation between these states and the ICTY. In November 2000, representatives from the EU and the Balkans met for the Zagreb Summit, cooperation with the ICTY was emphasized as being an important factor

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[9] Survey data from Balkan Monitor, http://www.balkan-monitor.eu/index.php/dashboard. Accessed 30 November 2010.
[10] See: Santa Maria de Feira European Council meeting, 19 and 20 June 2000. http://ec.europa.eu/enlargement/press_corner/key-documents/sap_en.htm. Accessed 30 November 2010.

in creating a lasting peace in the region.[11] At this time, however, the EU merely implied the necessity to cooperate. It was not made an explicit condition for membership.

In 2003, however, the European Council's Thessaloniki Summit notes with stronger language the need for cooperation between the Balkans and the ICTY. Here, the Council "urges all concerned countries and parties to cooperate fully" with the ICTY as it is "vital for further movement towards the EU" (European Council 2003, 12). In March 2004, the Council identifies cooperation with the ICTY specifically as a criterion for membership. The Council's report states: "The same basic entry requirements apply to the countries of the Western Balkans as to other countries that aspire to join the Union", but in addition, specific criteria need to be met including "full cooperation with the ICTY".[12] The EU has now set, as part of the conditionality for membership, the requirement for cooperation with the ICTY. For Croatia, Bosnia, and Serbia to become EU member states they must show compliance and cooperation with the ICTY.

It will take a great deal of time and expertise to ensure the ICTY, international community, and domestic actors work together to make the Completion Strategies and judicial reforms a success. I now turn to an assessment of reform efforts in Croatia, Bosnia, and Serbia. I look at the progress of reforms to their judicial systems in relationship to their status as EU candidate countries. If, as some argue, EU accession has an impact on the development of domestic institutions, we should see varying levels

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[11] See: Zagreb Summit, 24 November 2000, Final Declaration. http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/zagreb_summit_en.htm. Accessed 30 November 2010.

[12] See: Stabilisation and Association Process for South Eastern Europe, Third Annual Report, 30 March 2004. http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=504DC0202. Accessed 30 November 2010.

of progress in each country as they are at different stages within the accession process.

CHAPTER 4

Rule of Law in the Balkans: Bosnia, Croatia, and Serbia

In the previous chapter, I showed that the structure of the ICTY is complex, and that by itself is unable to facilitate cooperation with domestic actors. It will take great effort to ensure war crimes trials are fairly adjudicated by the courts in Croatia, Bosnia, and Serbia. The rule of law is a necessary component for that to happen. I now turn to evaluating the development of rule of law in the Balkans. Using EU accession as an independent variable, I will look at how that has influenced reforms to the judicial systems in each country.

Croatia is currently the only candidate country of the three. However, Bosnia and Serbia are potential candidates. Serbia's application for EU membership was recently referred to the European Commission for an opinion on the status of progress in the country. This is a crucial step in the accession process, as Serbia must show compliance and cooperation with the ICTY. The Stabilisation and Association Agreement (SAA) between EU members and Serbia explicitly states that "respect for principles of international law, including full cooperation with the [ICTY], and the rule of law…shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement" (Stabilisation and Association Agreement 2008). Compliance with the conditions outlined in the SAA is required to start accession negotiations.

As Haughton (2007) notes, the period just prior to EU negotiations sees the greatest changes in candidate or potential candidate countries. At the same time, he is

cautious about stating just how much impact the EU will have in the Western Balkans. Aware of its influence early in the accession process, the EU "took a tough line on Croatia in 2005, demanding full cooperation with the International War Crimes Tribunal in The Hague before accession negotiations could begin" (Haughton 2007, 243-244). The result, he notes, was an increased number of indicted war criminals from the Balkans going to The Hague. The EU's stance with Croatia, it seems, also had a similar influence on other states in the region with aspirations of EU membership.

With this 'deliverable' met, accession negotiations for Croatia officially began in October 2005[13]. However, Haughton asks just how much power the EU has to influence changes in Croatia now that negotiations have begun. If the EU's greatest influence comes before official negotiations, what kind of progress will we see in the years to follow? Also, what impacts do we seen in the region? Below I compare the progress of the judicial institutions in Croatia, Bosnia, and Serbia. I use the Freedom House index on Judicial Framework and Independence as a proxy to measure the progress in each country from 2001-2010. If the EU's stance toward Croatia had a regional impact, we should see some indication of progress in Bosnia and Serbia. Though Haughton uses the number of indicted war criminals sent to The Hague as a measure of progress, we can look deeper into the domestic institutions. Local judicial officials are often an integral part of ensuring indicted war criminals are brought before the ICTY.

Figure 1.1 represents Croatia's score on Judicial Framework and Independence since 2001. The ratings are based on a scale of 1 to 7, with 1 representing the highest and 7 the lowest level of democratic progress. Interestingly, Croatia's highest rating

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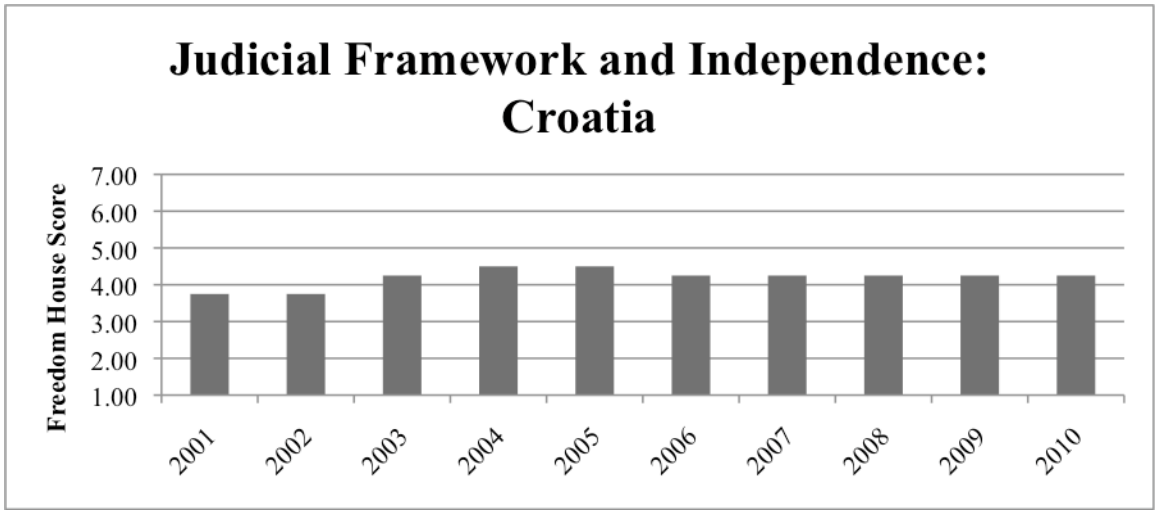
[13] Source: *European Commission*, http://ec.europa.eu/enlargement/candidate-countries/croatia/relation/index_en.htm. Accessed 21 November 2010.

(lowest score on the index) comes in 2001 and 2002. In these years, Croatia received a 3.75 score on the 7 point index. In 2003 the score jumped up by .50. In 2004 we also see an increase of .25, to reach a high of 4.50. When accession negotiations began in 2005, the score remained the same as the previous year. Since 2006, the score has remained at 4.25, just a quarter of a point better than it was at its highest. Where we would expect a decrease in score (increased rating) in 2004/2005, the years leading up to accession negotiations, we see the opposite.

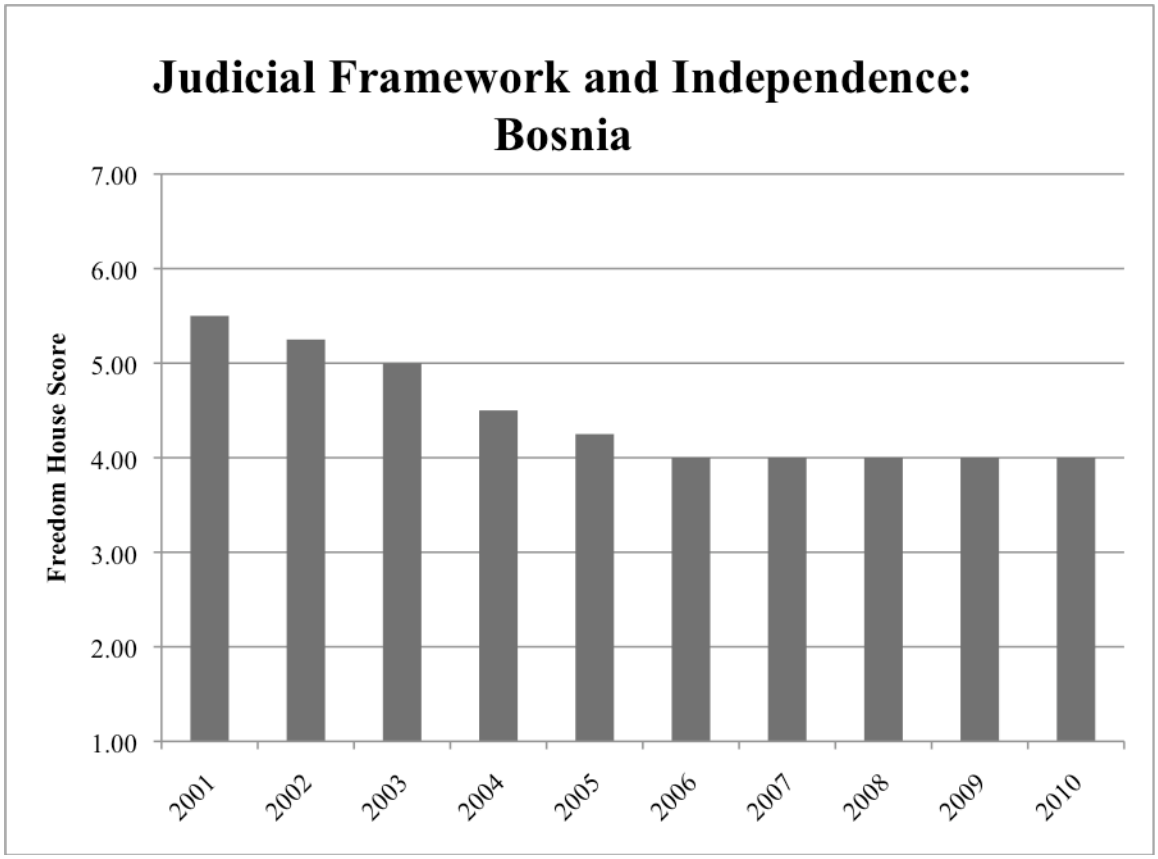
Figure 1.1



Source: Freedom House, *Nations in Transit 2010: Democratization from Central Europe to Eurasia*. Rowman & Littlefield Publishers, Inc.

Bosnia's progress in this area tells a somewhat different story. In Figure 1.2, we see steady improvement from 2001-2006. The score drops from a high of 5.50 in 2001 to a low of 4.00 in 2006. The greatest change occurs between 2003 and 2004 when the score drops by .50. Since 2006, the score has remained constant at 4.00.

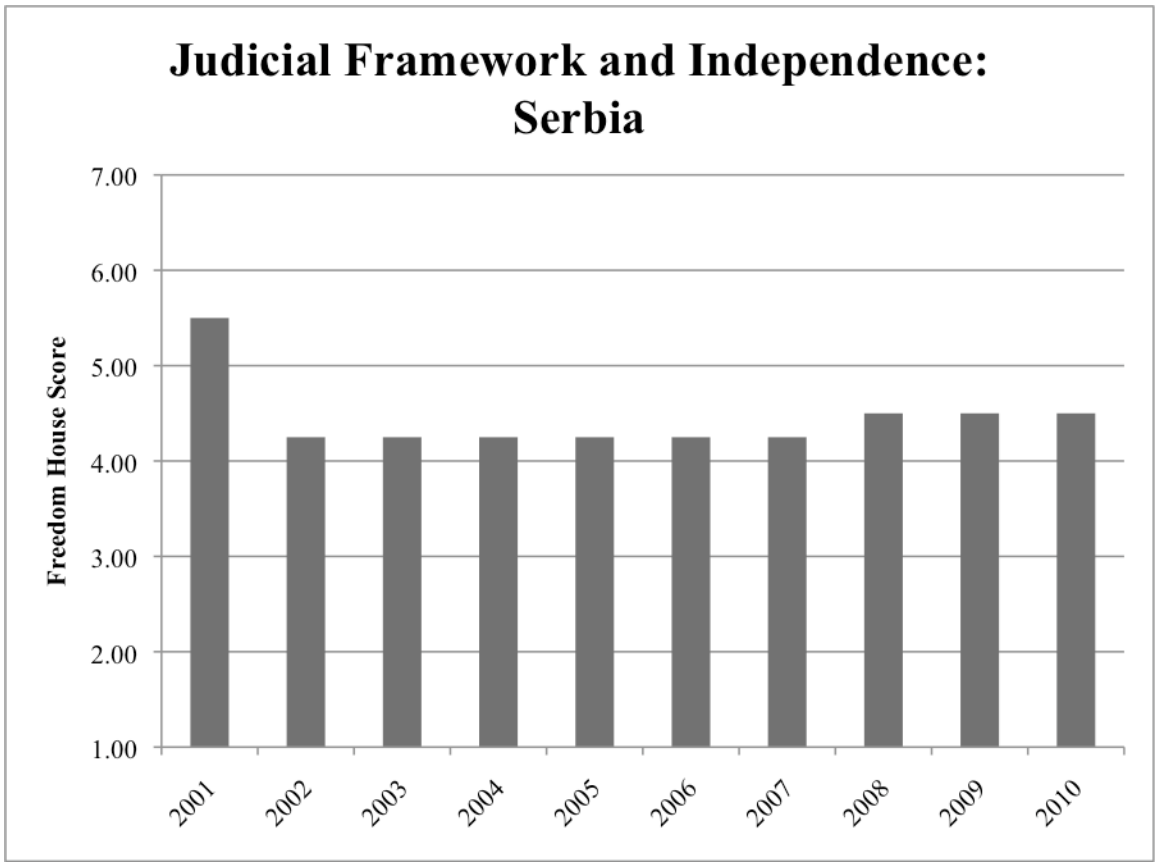
Figure 1.2



Source: Freedom House, *Nations in Transit 2010: Democratization from Central Europe to Eurasia*. Rowman & Littlefield Publishers, Inc.

When we look at Serbia's progress, we get still a different picture. Serbia's greatest progress came between 2001 and 2002 when the score dropped 1.25 points, from 5.50 to 4.25. The score remained constant through 2007, then in 2008 it jumped slightly to 4.50 and has remained there through 2010.

Figure 1.3

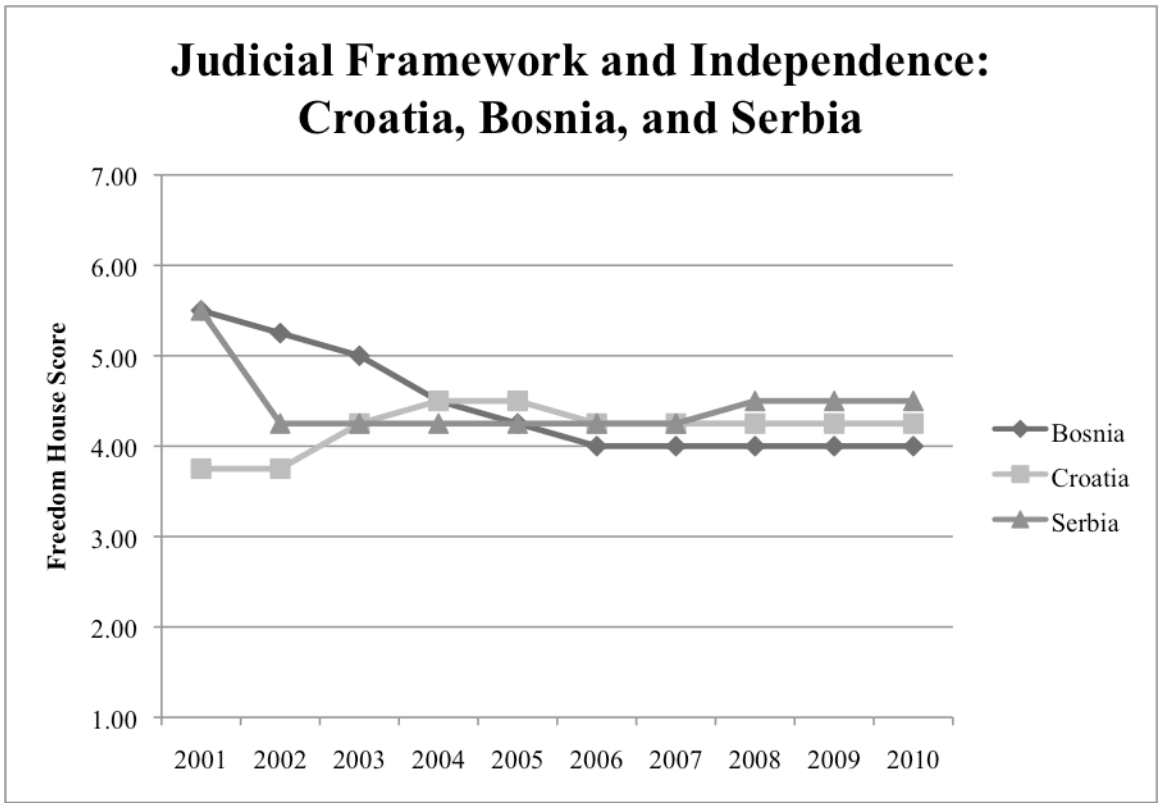


Source: Freedom House, *Nations in Transit 2010: Democratization from Central Europe to Eurasia*. Rowman & Littlefield Publishers, Inc.

A comparison (Figure 1.4) shows the progression of each country over the last decade. The picture that begins to emerge is something of a puzzle. In the years leading up to accession negotiations, Croatia's score shows backward progress. However, in Bosnia and Serbia, the opposite is true. The scores in these two countries get better leading up to Croatia's negotiations. While Haughton's claim that the EU is able to have the greatest impact on domestic policies and institutions does not seem to hold for Croatia, his prediction that the negotiations may also impact the region does seem to have

some support. Interestingly, it is Bosnia that may reflect Haughton's claim best. Croatia's scores show a reversal of progress, while Serbia makes substantial progress between 2001 and 2002, then levels off for the next five years.

Figure 1.4



Source: Freedom House, *Nations in Transit 2010: Democratization from Central Europe to Eurasia*. Rowman & Littlefield Publishers, Inc.

To summarize, since 2001 Croatia has seen an overall decline in its progress score by -0.50, Bosnia score has progressed +1.50, and Serbia's score has improved +1.00. Freedom House also uses an overall Democracy Score to assess countries in transition.

This score categorizes countries into five regime types. Table 1 gives an overview of the characteristics of the judiciary for each regime type.

Table 1

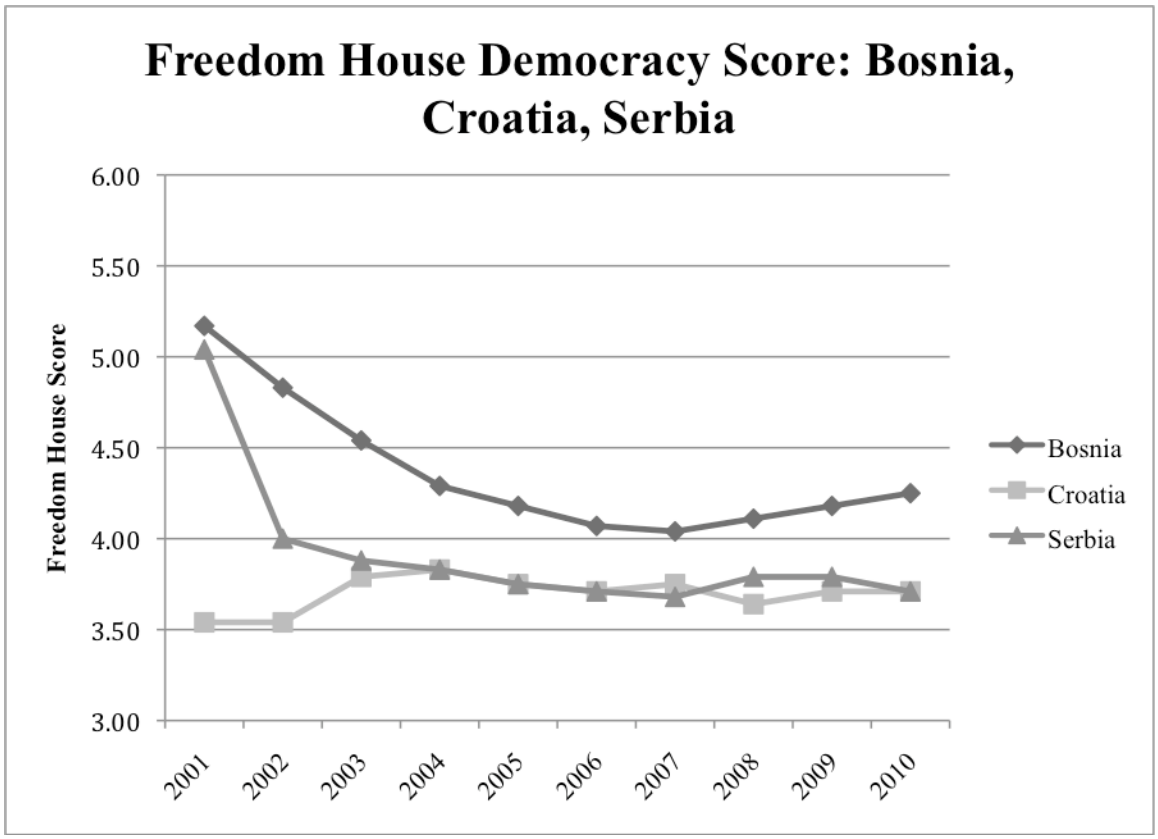
Democracy Score	Regime Type	Characteristics of the Judiciary
1.00-1.99	Consolidated Democracy	independent, impartial, timely; able to defend fundamental political, civil, and human rights; equality before the law; judicial decisions are enforced
2.00-2.99*	Consolidated Democracy	independent, impartial, able to defend fundamental political, civil, and human rights; equality before the law; judicial decisions are enforced; timeliness remains an area of concern
3.00-3.99	Semi-Consolidated Democracies	framework for an independent judiciary is in place; judicial independence and the protection of basic rights, especially those of ethnic and religious minorities, are weak; judicial processes are slow, inconsistent, and open to abuse
4.00-4.99	Transitional or Hybrid Regime	judiciary struggles to maintain independence from government; respect for basic political, civil, and human rights is selective; equality before the law is not guaranteed; judiciary is slow and abuses occur; use of torture in prisons may be a problem
5.00-5.99	Semi-Consolidated Authoritarian Regime	judiciary is restrained in its ability to act independently of the executive; equality before the law is not guaranteed; judiciary is frequently co-opted as a tool to silence opposition figures and has limited ability to protect basic rights and liberties of citizens
6.00-7.00	Consolidated Authoritarian Regime	rule of law is subordinate to the regime; violations of basic political, civil, and human rights are widespread; courts are used to harass members of the opposition

*Countries receiving a Democracy Score of 2.00-2.99 differ from those receiving a 1.00-1.99 Score because of challenges largely associated with corruption.

Source: Freedom House, *Nations in Transit 2010: Democratization from Central Europe to Eurasia*. Rowman & Littlefield Publishers, Inc.

We can look at the overall Democracy Score as an indication of the progress made with respect to the judiciary. Figure 1.5 compares the Democracy Score for each country.

Figure 1.5



Source: Freedom House, *Nations in Transit 2010: Democratization from Central Europe to Eurasia*. Rowman & Littlefield Publishers, Inc.

With respect to the overall Democracy Score, Serbia certainly shows the greatest improvement, moving from a semi-consolidated authoritarian regime to a semi-consolidated democracy. From the typology in Table 1, we see that Serbia now has the framework for an independent judiciary is in place, whereas in 2001 that was not the case. The judiciary was closely linked with the executive and had little independence. Bosnia, too, has made improvements but the independence of the judiciary remains a problem. Croatia's Democracy Score has remained relatively consistent, remaining within the semi-consolidated democracy range. While it is a positive sign that Croatia

remains within this range, it is puzzling to see the sizeable improvements in Serbia and Bosnia over time and yet Croatia varies little. In fact, both the index on Judicial Framework and Independence and Democracy show some backsliding in Croatia in the years leading up to EU accession negotiations. From these data it seems that the hypothesis does not hold. Where we would expect to see improvements in Croatia's judicial system prior to negotiations in 2005 we see the opposite. While the changes are not dramatic, they do move in an unexpected direction. However, Serbia and Bosnia may represent a regional effect. Improvements in their scores on both indices came prior to 2005. Without investigating further, these indications reveal that the prospect of EU accession has had little impact on Croatia, yet may help explain improvements in Serbia and Bosnia.

In its 2004 Opinion[14], the European Commission reviewed Croatia's standing with respect to EU membership criteria. This document outlined Croatia's potential for meeting criteria for EU membership and was a necessary step in the accession process. A favorable opinion from the Commission signaled Croatia's readiness to begin negotiations. Periodic reports are made by the Commission to monitor the progress of Croatia throughout the negotiation process. The 2005 progress report is telling:

> The role and structure of the Croatian judicial system…have not changed since the Commissions Opinion…Improving the functioning of the judiciary remains a major challenge for Croatia. Problems highlighted in the Opinion such as the inefficiency of courts, the excessive length of court proceedings, weaknesses in the selection and training of judges and difficulties with the enforcement of judgments remain…A coherent long-

[14] The European Commission's Opinion on Croatia's Application for Membership of the European Union was issued on 20 April 2004. The European Commission made a recommendation to move forward with accession negotiations. http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=504DC0257. Accessed 23 November 2010.

> term strategy to tackle systemic problems is crucial if the goal of an independent, reliable, transparent and efficient judicial system is to be achieved (European Commission 2005, 14-15).

This first report since the Opinion indicates no progress in Croatia's judiciary. Though it was issued only 14 months after the Opinion, the hypothesis suggests we should still see progress, as this is the time frame before negotiations began. Instead we see no progress, and little indication that attempts to reform have been initiated. The largest challenges include a substantial backlog of cases and excessive length of court proceedings. The report did note that the judiciary is both formally independent and appears to act independently. However, with respect to domestic war crimes, questions of ethnic bias remain. Serbs far outweigh the number brought to trial on charges of war crimes.

The European Commission Progress Report in 2009 echoed similar concerns for Croatia. A backlog of cases remained an area of criticism, as did the perception of ethnic bias in domestic war crimes trials. Additionally, the report found there was a strong tendency for judges to be politically influenced and that "overall reform of the system has not progressed to the point where it can positively influence the fight against corruption that permeates the governance system" (Freedom House 2010, 173; European Commission 2009a). Rather than progress, it appears that the Croatian judicial system in fact has seen some backsliding since 2005. Where judicial independence was not a question before, it has now become a concern.

Since the start of EU accession negotiations, Croatia has seen little progress in their judicial system. Concerns over the ability of the judiciary to function efficiently remain, as do concerns about its independence. What of Serbia and Bosnia? While they have not entered formal negotiations, they are considered potential candidates. In Bosnia

we see some of the same problems evident in Croatia's judiciary. The problem of a backlog of cases and timeliness of trials is an issue in Bosnia. Questions remain about the independence of the judiciary as well. Where Bosnia does show positive progress is in the area of trying domestic war crimes cases (European Commission 2009b). However, this bright spot is not without a caveat. There are a substantial number of international judges and prosecutors working on war crimes cases in Bosnia. The efficiency of the court cannot be wholly attributed to domestic efforts. In fact, the effort to extend the mandate of foreign judges and prosecutors did not pass the legislative process. Rather, the High Representative, using executive authority, had to extend the mandate. Opposition mainly from authorities in Republika Srpska (RS) was the key roadblock in extending the mandate through the domestic process. As discussions of EU accession continue, domestic disputes between the Federation and RS may continue to hamper progress. This is particularly important as international actors move out of their roles in Bosnia and domestic actors replace them.

Finally, Serbia's reform efforts remain to be examined. The 2009 European Commission's Progress Report highlights a number of reforms to Serbia's judicial system. What is most striking are Serbia's efforts to enhance the independence of the judiciary. In 2009 the High Judicial Council and the State Prosecutorial Council were established. The High Judicial Council consists of the President of the Supreme Court of Cassation, the Minister of Justice, the President of the Parliamentary Committee for Judicial Affairs, and eight other members (six of whom are judges). The Commission notes the fact that judges will hold a majority of seats on the Council and should ensure they are represented more fairly. It will also help to reduce political influence in the

judiciary. Additionally, the autonomy of the prosecution service was enhanced when the new State Prosecutorial Council extended the mandate that makes the position of deputy prosecutor a permanent post (European Commission 2009c). While these are major improvements designed to strengthen the independence of the judiciary, their implementation is cause for some concern. As the Commission notes, where future judges sitting on the High Judicial Council will go through an election process to become eligible members, the first round of judges appointed to the new Council were nominated by its previous members. This leaves room for political influence in the first round of the new Council. Serbia's judiciary also suffers from the same problems that persist in Croatia and Bosnia. There is a significant backlog of cases and there is a need to develop efficiency in the court system. However, the Commission's conclusions regarding Serbia take a much different tone than those for Croatia and Bosnia:

> Serbia is moderately advanced in the area of reform of the judiciary. There has been progress in the form of adoption of new legislative framework and steps to implement it. However, the ongoing reform and its partly hasty implementation pose big risks for the independence, accountability and efficiency of the judiciary (European Commission 2009c, 12).

For Serbia at least, it seems that there is less resistance to reform. Whether this stems from the prospect of EU membership or not is unclear. The EU accession process does place conditions on states to make institutional reforms and that may be part of the reason we see evidence in Serbia of such changes to the judiciary. However, if the promise of EU membership is working in Serbia, it is a having minimal effect in Croatia and Bosnia. Clearly there is more to the story.

As noted above, not only domestic participation but also domestic support is essential for long-term success of reform projects (Doyle and Sambanis 2000; McMahon

2004/2005). Perhaps the lack of progress in Croatia, and conversely the progress made in Bosnia and Serbia, can be explained due to domestic support for the EU. The Gallup Balkan Monitor poll conducts surveys on a wide range of issues throughout the Balkans. One area of focus concerns the EU; particularly whether or not citizens feel joining the EU would be a good or bad thing. Below I will use survey data gathered from the Balkan Monitor to assess domestic support for EU membership.

Figures 2.1-2.3 show the level of support for EU membership in Croatia, Bosnia, and Serbia.[15] There is a clear difference in the level of support between Croatia and the other two countries. From 2006-2010, Croatians who believe EU membership would be a good thing has decreased 10 percentage points, while the percentage of those who see membership as a bad thing has slightly increased. In Bosnia, with the exception of 2008, the percentage of respondents who see membership as a good thing has remained high and relatively consistent. Of the three, Bosnia also has the lowest percentage of respondents who view membership as a bad thing. The positive perception of EU membership in Serbia, like Croatia, is declining. While those who view EU membership as a good thing has declined by 16 percentage points since 2006, it still remains higher much than in Croatia.

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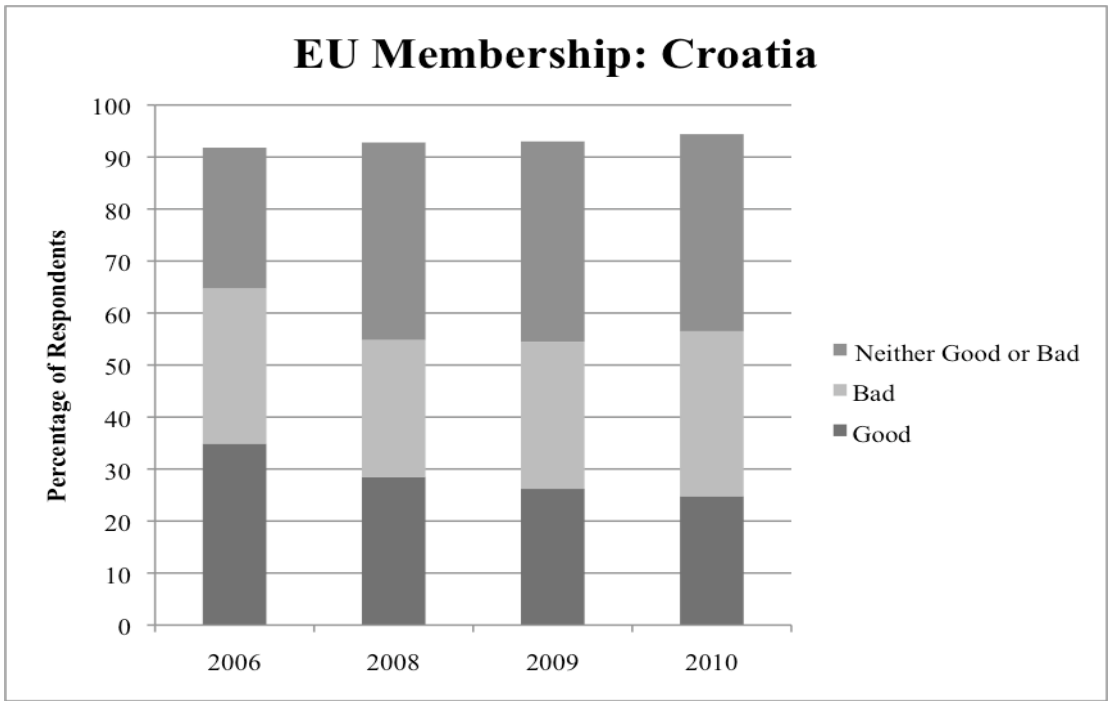
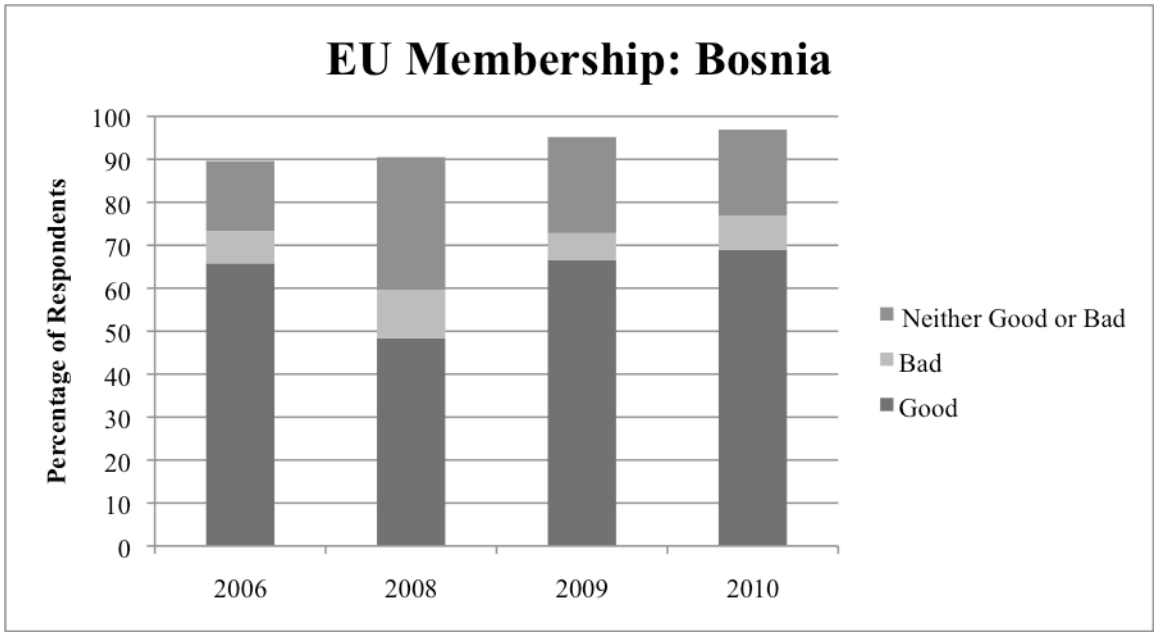
[15] The Gallup Balkan Monitor provides data on the question: "Generally speaking, do you think that [country]s membership of the EU would be a good thing, bad thing, or neither good or bad?" Data is available on this question for years 2006, 2008, 2009, and 2010. http://www.balkan-monitor.eu/index.php/dashboard. Accessed 23 November 2010.

Figure 2.1



Source: The Gallup Balkan Monitor. http://www.balkan-monitor.eu/index.php/dashboard.

Figure 2.2



Source: The Gallup Balkan Monitor. http://www.balkan-monitor.eu/index.php/dashboard.

Figure 2.3

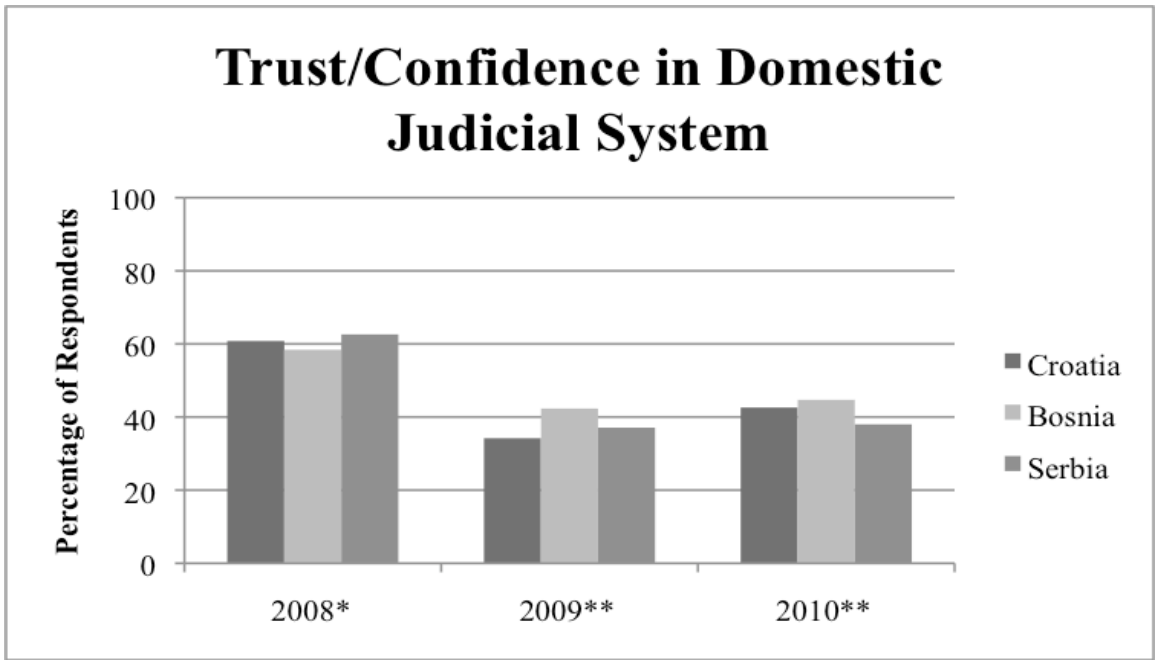
Source: The Gallup Balkan Monitor. http://www.balkan-monitor.eu/index.php/dashboard.

The higher levels of support for EU membership in Bosnia and Serbia may help explain why we see greater progress to judicial reforms in those countries, and less in Croatia. Popular support for the EU encourages policy makers to move forward with reform measures that fulfill EU conditions for membership. Some make the case that institutional design is shaped by leaders operating in an environment of political uncertainty (Grzymala-Busse 2003; Magalhaes 1999; Frye 1997; Geddes 1997). Where there is healthy competition in the political arena, leaders (and potential leaders) will favor policies that are supported by the electorate. If there is strong support for the EU among citizens, leaders will respond by enacting policies that move the country toward EU membership. However, if citizens show little support for the EU, leaders may put

reform recommendations on the back burner. While we cannot state definitively that domestic support for the EU drives reforms, this evidence seems to suggest that where domestic support for the EU is present, we see greater progress in judicial reform.

One final piece to look at is the perception of domestic judicial institutions. I have shown that support for the EU in Bosnia and Serbia is much higher than in Croatia. However, do domestic judicial institutions garner the same kinds of support? Interestingly, support for the domestic judicial system has declined recently across all countries. Below, Figure 3.1 shows the percentage of respondents who answered "a lot" or "some" to the question of whether they had trust/confidence in the domestic courts/judicial system.

Figure 3.1



Source: The Gallup Balkan Monitor. http://www.balkan-monitor.eu/index.php/dashboard.
*In 2008 respondents were asked how much trust they had in the domestic courts.
**In 2009/2010 respondents were asked how much confidence they had in the domestic judicial system.

It should be noted that the wording of the question changed from 2008 to 2009, which may account, in part, for the dramatic drop in positive attitudes towards these institutions. What is interesting is that all three countries hold similar attitudes towards domestic judicial institutions. Where support for EU accession is much different in Croatia than in Bosnia and Serbia, here there is some consistency. What does this mean for the fate of rule of law in the Balkans? Do reforms even matter if there is little trust in judicial institutions? This is a question that requires a more in depth analysis than can be provided here. However, another poll suggests that rule of law is important, and that citizens associate EU accession with its development. In 2010, the Balkan Monitor asked whether respondents thought rule of law would be strengthened as a result of EU accession sixty-six percent of Croatians, seventy-eight percent of Bosnians, and fifty-five percent of Serbians said yes.[16] This evidence suggests that rule of law is linked with EU accession in the minds of the region's citizens. If the EU accession process helps to bring about judicial reforms, there is hope that a stronger culture of rule of law will develop.

[16] Survey data from Balkan Monitor, http://www.balkan-monitor.eu/index.php/dashboard. Accessed 30 November 2010.

CHAPTER 5

Conclusion

The transition process in the Balkans brings with it a number of challenges. Not the least is the challenge to reform judicial institutions in a region trying to build rule of law where politicized courts and corrupt judges were once commonplace. Here I try to shed some light on the motivations for successful implementation of judicial reforms designed to enhance rule of law. Scholars had previously looked toward the EU accession process as a motivation for domestic institutional change in other Central and Eastern European states (Haughton 2007). This research shows that prior to the period when official negotiations for membership begin, states tend to make substantial changes to domestic institutions. Prospective member states must meet certain conditions before the negotiation process begins. Additionally, there is some evidence that there is a regional effect when negotiations begin in one country. However, there is little empirical work showing the impact of EU accession on domestic institutions in the Balkans.

The research here looks at the role of EU accession on the development of judicial institutions, which in turn will help develop rule of law in the Balkans. I measure the impact of the EU at the institutional level, looking at the judiciary. First I use data from Freedom House assessments of the judiciaries in Croatia, Bosnia, and Serbia to examine the impact of the EU on domestic reforms. These data are not only convenient because it available for years leading up to and following official negotiations in Croatia (currently the only state in the negotiation process), but also because it is consistent in what it measures across all states. Therefore, we should expect little bias from one country to the

next. What these data reveal is surprising, considering the previous literature on the EU's impact on domestic institutions. Where we would expect Croatia to show the most progress as it moves toward EU accession, there is evidence to the contrary.

However, in Bosnia and Serbia there is evidence in the data showing positive changes to their judicial systems. It is unclear if this is due to the drive toward EU membership or other factors. The European Commission's assessment of reforms only highlights those areas where progress was made, or where there is still work to be done. This is a limitation of this study. To determine whether or not it was the prospect of EU membership that truly initiated reforms, an examination of official statements by relevant actors would be helpful. Future research could look at statements made by political leaders and members of the judiciary. If these actors reference reform efforts as part of the larger goal of EU membership we would be able to clarify the connection between the two.

In the absence of this information, we may still be able to draw some connection between EU accession and judicial reforms. Looking at public opinion surveys, we see higher levels of support for EU membership in the two countries where there is evidence of reform progress. Bosnia and Serbia both show higher levels of support for EU membership. In Croatia, support for membership is quite low. This may not be surprising (given the evidence of reform progress), but it is telling. Where there are higher levels of domestic support for membership, we see more progress. Political leaders may be inclined to make institutional changes required for EU accession knowing the public supports the move toward membership. Again, this study falls short of making that connection explicit. Here it would also be helpful to look at statements made by

political leaders or to look at party platforms. References linking institutional reforms to future aspirations of EU membership would support the connection I suggest here.

There are certainly other ways we could examine the development of rule of law in the Balkans. Membership to the European Union is not the only motivation to reform domestic institutions that impact rule of law. International aid has been flowing to this region for nearly two decades with the expectation that it will have a positive impact on rule of law. The OECD, for example, has dispersed more than $381 million to Croatia, Bosnia, and Serbia since 2002 to fund legal and judicial development projects.[17] It is not only the EU that has a stake in developing rule of law in the region.

Looking at the other side of the question, rule of law does not only develop through the judiciary. Playing a critical role are governments, military, and police. Constitutional reforms that enhance accountability and transparency are important for strengthening rule of law, emphasizing equality before the law rather than impunity for elites. Military and police institutions are critical for maintaining peace in post-conflict areas. Reforms to these institutions that emphasize protection of all citizens are necessary to develop a culture of rule of law.

While this study focuses narrowly on how the EU impacts judicial systems in Croatia, Bosnia, and Serbia, it does begin to inform us how rule of law develops in post-conflict societies. Its applicability reaches beyond states with aspirations of EU membership. The concept of incentives and conditionality from the international

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[17] Since 2002, the breakdown of OECD support for legal and judicial development: Croatia - $19.36 million, Bosnia - $134.29 million, Serbia - $228.02 million. www.stats.oecd.qwids. Query: Recipient(s) - Bosnia-Herzegovina, Croatia, Serbia; Flow(s) - ODA; Flow Type(s) - Disbursement; Type of Aid - All Types; Sector(s) - Legal and Judicial Development; Amount - Current Prices (USD millions). Accessed 7 November 2010.

community can be applied to other countries. With the US involvement in Iraq and Afghanistan, we may be able to apply some lessons learned from the Balkans. While providing incentives for and conditions on domestic reforms, the efforts of the international community may have little impact, unless they are accompanied by domestic support for the international actors and institutions making the requests for change.

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