

EU PRE-ACCESSION POLITICAL REQUIREMENTS FOR WESTERN BALKANS: Unravelling the Application and Compliance Record of the ICTY Conditionality¹

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Abstract

The European Union's association offer to Western Balkans included, among other pre-accession political requirements, full cooperation with the International Criminal Tribunal for the former Yugoslavia. This requirement was envisaged as one of the crucial elements of the EU conditionality mechanism towards Western Balkans, and has heavily dominated the EU's external relations agenda with the Western Balkans states. This essay analyses structural preconditions in selected countries of the Western Balkans (Bosnia and Herzegovina, Croatia and Serbia), and assesses impact of the ICTY conditionality on the dynamics of pre-accession Europeanization of the three states. With basis in both rationalist and sociological/constructivist meta-theories, discussion tracks down essential international and domestic factors, which if favourable facilitated the EU's policy of ICTY conditionality. Primary aim of the essay is to arrive to a descriptive and causal conclusions and get better understanding why both the application of, and compliance with, the ICTY conditionality was in the end rather trou-

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blesome and inconsistent process. Main argument is that in the case of each country observed, serious impediments undermining the ICTY conditionality's effectiveness can be encountered within the every factor assessed, which can be used to explain disruptive application and compliance record of the ICTY conditionality.

Key words: European Union, Western Balkans, pre-accession political conditionality, ICTY, international and domestic facilitating factors

1. Introduction

Enlargement is often regarded as the European Union's ("EU") most successful foreign policy tool. In its relations with the Western Balkans countries, the EU sought to use the existing leverages in order to maximize the impact of its pre-accession conditionality, and as a contribution to the ongoing process of democratic transition in the region. The EU is arguably the single most important international actor in this conflict-torn region, and thereby in a unique position of promoting ethnic reconciliation, democratization and economic revitalization (Mäki 2013: 53). Due to its inability to prevent violent conflicts during the 1990s, the EU has sometimes been referred to as having a "special responsibility" towards this region in facilitating post-war recovery and state-building. Thus, the EU has indeed acknowledged the prospect of membership for all Western Balkans states, but has opted for an individual approach to the enlargement and compliance assessment. As a result, one of the countries from the region (Croatia) had already acceded to the EU in July 2013.

Building up on the experiences of previous enlargement rounds, pre-accession requirements for the subsequent enlargements became in general more elaborate, encompassing, numerous and stricter (i. e. harder-to-achieve), while in the enlargement strategy "several new leverage tools were included" (Slootmaeckers & Touquet 2013: 17). Therefore, the EU association and accession offer to Western Balkans was made conditional on the set of political requirements derived from the Copenhagen criteria, plus the additional specific criteria linked to the Stabilization and Association Process ("SAP") launched in 1999, which included (among other requirements) full cooperation with the International Criminal Tribunal for the former Yugoslavia ("ICTY") – an *ad hoc* international criminal tribunal situated in Hague. This requirement was envisaged as one of the crucial elements of the EU conditionality mech-

anism towards Western Balkans, and has almost exclusively dominated the EU's external relations agenda with the Western Balkans states.

EU policy towards Western Balkans is predicated on the need to bring the "delegitimation of extreme nationalist ideologies", and facilitate reconciliation as a pre-condition for EU accession (de Vasconcelos 2009: 5). The ICTY conditionality thus stood out as a unique and unprecedented EU pre-accession mechanism since it was limited to the Western Balkans area, and presented the first instance in which the EU conditionality had been applied in the post-conflict region.

As a departure from the initial identity- and culturally-neutral technical criteria for EU accession established by the European Council's meetings in Copenhagen and Madrid, the ICTY conditionality is one of the newly-devised "culturalised" criteria (Milenković & Milenković 2013: 190), i. e. it appeared *prima facie* as "culturally" determined as it challenged, *inter alia*, issues like ethno-national identities and legacies of civil conflicts in the Western Balkans. Such requirements pose significant challenge to political institutions in not yet consolidated democracies, leading to a situation described by Milenković & Milenković (2013) as a "democratic deadlock": consolidated democracy is necessary in order to achieve political stability for implementation of the basic EU accession requirements, while the instability itself is a result of the additional criteria (i. e. ICTY conditionality) and reactions to it.

Finally, after having functioned for more than two decades, the ICTY is in the "completion strategy" phase. For that, and given that the ICTY conditionality is no longer an issue in EU accession dynamics since all of the war crimes suspects have been extradited to The Hague, yet the Tribunal's controversial jurisprudence is still highly disputed across the region and in certain instances used to radicalize nationalist rhetoric, a reflection on its specific use within the EU pre-accession conditionality at this point appears relevant.

From a more general and theoretical perspective, discussing the closely related topic of the EU conditionality tackling national identity issues Freyburg and Richter argue that:

"conditionality as an incentive-based instrument is only considerably effective under *certain preconditions* suitable for catalysing substantial change in countries characterized by legacies of ethnic conflict" (2010: 14, *italics added*).

This essay will therefore analyze these preconditions in selected countries of the Western Balkans, in order to arrive to a descriptive and causal conclusions and get more general impression and better understanding why both the application, of and compliance with, the ICTY conditionality was in the end rather troublesome and inconsistent process. Analysis will thus be focused on a number of case studies and independent variables, latter derived from the Sedelmeier's conceptual framework on the impact of accession conditionality on the dynamics of pre-accession Europeanization (2005: 11-16), introduced in the following part of this paper. With basis in both rationalist and sociological/constructivist meta-theories, discussion in the present paper will follow essential international and domestic factors, which if favourable facilitated the EU's policy of ICTY conditionality. Main argument is that in the case of each county observed, serious impediments undermining the ICTY conditionality's effectiveness can be encountered within every factor assessed, which can be used to explain disruptive application and compliance record of the ICTY conditionality.

Countries included in the study are Bosnia and Herzegovina, Croatia and Serbia, given that the overwhelming majority of the ICTY caseload (almost 95%) concerns these particular states, and towards them the ICTY conditionality has been exercised in the most extensive manner by the EU.

2. Theoretical Framework: Independent Variables Explaining Application and Compliance Record of the ICTY Conditionality

According to Sedelmeier,

"the strategy of conditionality is far from uniform and homogenous, and the EU's application of conditionality varies across issue areas, target countries, and over time. The EU uses other strategies than conditionality to affect domestic change, such as persuasion and socialization of elites. A number of factors, not only at the domestic but also at the international level, affect the effectiveness of such strategies, and hence the EU's impact" (2005: 10).

Based on the two approaches within the framework of institutionalist theory – rationalism and constructivism – Sedelmeier suggests formulation of specific hypotheses to assess whether or not the EU will have an influence, both with regards to factors related to the EU's strategies and domestic factors (2005: 10). His analytical framework contrasts rationalist and sociological/constructivist causal models for the EU's domestic impact, and focuses on mediating factors at the international and domestic level, identified by and derived from the each of the two analytically distinctive approaches. Explanatory studies founded on such framework ask not only whether the EU has influence on the candidate countries, but also how and under what conditions the EU exercises such influence. The conditions and factors that determine the effectiveness of the EU's influence are the independent variables in this research area. Devised analytical framework provides a generalizable and suitably broad basis to study the explanatory power of international and domestic factors emphasized by the rationalist and constructivist approaches respectively.

Borrowing from the Sedelmeier's conceptual framework (2005: 13), for the purpose of this paper following main independent variables will be taken into account:

I. rational institutionalism approach:

- a) *international facilitating factors*: clarity of EU demands; credibility of conditionality (including consistency in application, and intra-EU consensus on rewarding compliance); power asymmetry, size and temporal proximity of rewards;
- b) *domestic facilitating factors*: domestic costs of adopting rules for governments (constellation of party system, ethnic policy preferences in parliament, veto players); societal mobilization and supportive formal institutions.

II. constructivist/sociological institutionalism approach:

- a) *international facilitating factors*: legitimacy of EU demands, and of the process through which the EU formulates demands and promotes rules;
- b) *domestic facilitating factors*: identification with the EU, and positive normative resonance of the EU requirements with domestic rules.

Rationalist institutionalism focuses on the EU's use of conditionality to influence candidate countries, and suggests that "adaptational pres-

sure from the EU changes the opportunity structure for utility-maximizing domestic actors" (Sedelmeier 2005: 10). This approach discards processes of socialization and persuasion as a mechanism for the EU's domestic impact (Sedelmeier 2005: 15). However, constructivism/sociological institutionalism holds that as a result of that very processes, elites in candidate countries become convinced that the EU's rules are legitimate and have an intrinsic value (*Ibid.*). Therefore, governments adopt the EU's rules regardless of the material incentives offered by the EU as an award for compliance. Rationalist approach also suggests that in order to have influence, the EU needs to have domestic allies in target countries, or at least the adjustment costs for target governments must not be prohibitively high (Sedelmeier 2005: 14). Constructivist institutionalism on the other hand emphasizes that the EU's impact does not (only) depend on the domestic material interest constellations (Sedelmeier 2005: 16). If a candidate country – elites and publics – positively identifies with the EU, the government is more likely to be open to persuasion and to consider the rules that the EU promotes as legitimate and appropriate (*Ibid.*). This approach identifies another crucial domestic factor: the extent to which there is a "cultural match" or "resonance" between EU demands and domestic rules and political discourses (*Ibid.*).

Following is the overview of selected independent variables, influencing effectiveness of the policy of ICTY conditionality (being a dependent variable this essay is intended to explain) in three countries of the Western Balkans. Given that some variables observed are closely intertwined, certain explanations offered will inevitably count for more than a single outcome. This essay will approach both theoretical perspectives with an assumption of their (at least partial) complementarity, thus covering explanations rendered on the basis of each of the theories.

a. Clarity of EU demands

The EU accession is a political project and conditions for each particular situation can change or at least modify. Accordingly, compliance benchmarks may change for political reasons, and this makes the measurement of an "objective" compliance status a cumbersome venture (Križić 2012: 64). On the contrary, clarity of the EU's demands is considered as an important factor increasing the likelihood of effectiveness of condi-

tionality. Clarity means that the candidates know what they need to do if they decide to comply with the EU's conditions (Sedelmeier 2005: 12). Conditionality rules are, however, often too loose and result in difficulties when the candidates try to analyze the EU accession conditionality and what they are required to do. Conditionality is also subjected to political decisions made by the EU as a political actor that has sometimes prioritized other goals. Uncertainty might stem from evolving rules in the EU (e. g. unprecedented requirement of the ICTY cooperation), or from the absence of a single EU model in many policy areas (here again: transitional justice). Uncertainty also may arise from internal conflict among the Member States about the application of conditionality (*Ibid.*). Each Member State has its own agenda, priorities and judgment on the degree of compliance with the EU conditionality. This makes political conditionality less effective than more neutral and technical conditions spelled out in the SAA and accession process, which refer more directly to clear elements of the *acquis* (Batt & Obradović-Wochnik 2009: 12). All this is closely related to inconsistencies of the EU in setting and insisting upon political conditions.

ICTY conditionality emerged as an additional criterion customized specifically for the Western Balkans, and as such tended not to be so technical in its nature. Bieber notes two principal problems with this type of conditionality: the EU lacks rules in the sphere; consequently, the EU cannot be clear in terms of the conditions, severely impairing the effectiveness of conditionality (2008:7). Moreover, ICTY conditionality was new policy instrument partly reflecting the EU's pursuit of increasingly prominent foreign policy objectives over the past decade: transitional and post-conflict justice. Rangelov explains how this form of policy instrument embodied two distinct logics and approaches: democratization and stabilization (2011: 2). The democratization approach prioritizes justice as part of the ethical commitments of EU foreign policy to promote democracy, human rights and the rule of law, while the stabilization approach puts a premium on ending violent conflict and maintaining public order and political stability (*Ibid.*). EU pre-accession conditionality in the Western Balkans provided ample illustration of these developments: it was shown that these two approaches at the EU level were often competing and conflicting, despite the fact that they were intended to coexist in practice. Prominent example of the democratization approach was

the suspension of accession talks with Croatia, and in contrast, of the stabilization in the EU relations with Serbia, which often prioritized stability considerations over justice goals. Therefore, increasingly worried by the prospect of growing support for anti-Western right-wing radical nationalist forces, and strengthened by widespread bitterness at the loss of Kosovo and poor economic situation, the EU started offering Serbia various concessions notwithstanding lack of progress in cooperation with the ICTY (Hartmann 2009: 74). The Union therefore, majority of whose Member States backed Kosovo's independence, gave away most of its leverage and remained with even fewer policy tools with which to influence Serbia. Thus, prioritizing stabilization of democratic government in Serbia, and softening ICTY conditionality for political reasons, EU seriously impaired credibility of conditionality, undermined its effectiveness, and "sent out an image that its position is relative and that compromises can be made" (Dobbels 2009: 15).

As a result, perceived tensions between these two approaches have "framed the discussion of policy options at the EU level and sparked disagreement among Member States" (*Ibid.*). Ultimately, the goal of stabilizing the region outweighed the main purpose of the ICTY, namely providing justice, and political agenda became dominant while the Tribunal became a political instrument (Hoepel 2011: 55). EU Member States thus utilized the ICTY conditionality mostly as a policy tool for political purposes rather than to press for justice, causing both the Tribunal and the EU to lose their credibility.

b. Credibility of conditionality

Intra-EU conflict about the application of conditionality relates to another key factor that affects the EU's impact: the credibility of EU conditionality (Sedelmeier 2005: 12). Credibility has two sides: the candidates must be certain that they will receive the promised rewards after meeting the EU's demands, and furthermore that they will only receive the reward if they indeed fully meet the requirements (*Ibid.*). Thus, credibility depends on "a consistent, merit-based application of conditionality by the EU" (*Ibid.*). It suffers if political conflicts inside the EU make candidates doubt that the EU will deliver the promised rewards, and moreover if candidates suspect that political favouritism or some ulterior

or motives led the EU to reward other candidates who did not meet (all) the requirements (fully) (*Ibid.*).

A key factor that determined the effectiveness of conditionality is a credible accession perspective: membership is the most sizeable reward and incentive that the EU can offer, but to be effective, it needs to be credible (Sedelmeier 2005: 31). In case of the countries which have only in principle a membership perspective, either the opposition inside the EU to enlargement more generally, or towards particular countries more specifically, have greatly reduced its credibility (*Ibid.*). The problem of credibility is particularly salient in the potential candidates in the Western Balkans, where the membership prospect is more distant than for the previous candidates, due to the complex political situation (post-conflict societies, contested statehood) and lack of economic reforms.

As it was oftentimes emphasized, the EU conditionality is saturated with inconsistency in its implementation. There have been numerous cases demonstrating the inconsistency with which the EU applied conditionality and its "backsliding from sanctions when particular selfish economic and security interests were considered to be paramount to normative political conditionality" (Perković 2013: 6). In the case of ICTY conditionality, this was repeatedly confirmed too. After continued resistance by the Western Balkans states to cooperate with the ICTY, and with the EU making dilemmatic political decisions, the pressure for compliance with ICTY conditionality became watered-down. For instance, key condition of full cooperation with the ICTY was inconsistently applied in relation to Serbia because EU often shifted the focus of its conditionality policy to the unresolved issue of Kosovo, in light of its anticipated declaration of independence. Even when Serbian authorities were obviously failing to cooperate with the ICTY, the EU responded with a compromising and softened requirements. Similarly, in Croatian case the meaning of "full cooperation" changed from "fully cooperating" to actually "finding general Gotovina", and in the eyes of domestic and international public the EU was acting inconsistently and losing credibility (Perković 2013: 8). And in the case of Bosnia, ICTY conditionality was compromised due to other more pressing reform areas related to the EU pre-accession policy, e. g. the police reform was a major obstacle for concluding the SAA, although the ICTY cooperation was incomplete and presented an unfulfilled requirement too, but was somewhat

side-tracked and emphasized less frequently. This inconsistency caused a certain backlash, given that it left too much space for political maneuvering and aggressive nationalistic rhetoric. Faced with artificial political crises emerging partly as a reaction to its conditionality, the EU resorted to tactics of remission and mitigation ultimately resulting in EU conditionality being weakened and undermined (Memišević 209: 64).

Inconsistent application was stimulated by the inter-institutional dynamics and clashes. In general, while the Parliament and some Member States argue for a tougher approach on conditionality, others in the Council advocate a more lenient stance (Dobbels 2009: 13). In the foreign policy domain, the latent institutional conflict between the Council and the Commission has surfaced very acutely in the context of the EU's Western Balkans policy where the "lack of coherence in policy coordination and implementation has created serious risks for the EU's external performance as a driver of domestic change" (Noutcheva 2006: 26). Additionally, EU institutions have different approaches towards the concept of transitional justice: the Council has considered transitional justice as a short-term post-conflict issue, while the Commission has tended to understand it as a long-term reconciliation issue (Unger 2010: 10). All this has intensified the inter-institutional rivalry and harmed the EU's pre-accession policy in Western Balkans. As a result, the problem of institutional fragmentation and poor coordination among different EU and other external actors caused inconsistent use of ICTY conditionality, thus inhibiting EU's transformative power in Western Balkans and damaging its international credibility as a "normative power" (Börzel 2011: 6).

Furthermore, inconsistent application of the ICTY conditionality was closely related to the weakness of the EU Member States in struggling to act and speak "with one voice". Member States were divided in two groups. One advocated a strict policy of conditionality in order to avoid repeating the "mistakes" of the previous round of enlargement (Bulgaria and Romania in 2007). Other held that the EU's policy of conditionality would be more effective if it involved giving significant intermediate rewards to applicants in order to show the credibility of association process, but also out of fear that aggressive and hostile EU position would not enhance compliance but rather foster the nationalistic rhetoric and risk destabilizing the entire region, or that e. g. Serbia would lapse into the Russian sphere of influence if "the EU pursued a

policy of strict conditionality against the backdrop of negotiations on Kosovo" (Dobbels 2009: 15).

Also important is that the inconsistent application of the ICTY conditionality was moreover strengthened by discrepancies stemming from the overlapping mandates with other international actors. For instance, including Bosnia in the NATO's Partnership for Peace ("PfP") program in late 2006, when the cooperation with ICTY was unsatisfactory, arguably weakened EU's leverage. Similarly, after the USA had softened its stance on ICTY cooperation by granting its certification on financial aid and assistance for Serbia, and also endorsed its prospect of joining PfP program, pressure mounted on the EU to soften its policy of conditionality as well (Dobbels 2009: 14).

c. Power asymmetry, size and temporal proximity of rewards

Salient characteristic for all three Western Balkans countries is that they faced heavy power asymmetry (even in comparison to previous EU enlargements), and they had relatively little to say in the process of the development of the ICTY conditionality (Mäki 2013: 57). Furthermore, the ultimate reward of EU membership is indeed a sizeable benefit for candidates, but sometimes the payment of the reward is distant (Sedelmeier 2005: 14). Western Balkans countries (at least initially with regards to Bosnia and Serbia) were faced with an uncertainty concerning eventual membership. Approximately until 2005, the EU did not tie cooperation with the ICTY to any specific reward in relation to Serbia and Bosnia, and only the renewed attention for potential candidates after the "big bang" enlargement of 2004 brought about change in this matter.

Furthermore, Bosnia and Serbia have been subjected to conditions by other international organizations and transnational actors, such as of the NATO, Council of Europe, the US diplomatic and financial resources, all conditioned upon cooperation with the ICTY (Bieber 2008: 7). The EU thus shared tasks with other actors in order to promote and maximize compliance with the ICTY conditionality, resulting in what was referred to as "parallel" or "cross-conditionality", describing the interplay of EU's leverage and multiple external factors on domestic politics. This plethora of conditions interlinked, yet distinct and evolving, reduced the incentives for compliance, and furthermore offered limited rewards (*Ibid.*). As the new and different conditions building upon the

ICTY conditionality emerged (e. g. police reform in Bosnia), a sense of an "open-ended process" arose which caused inconsistent compliance with the original requirement (*Ibid.*).

ICTY conditionality clearly proved the most effective once it was unambiguously tied to immediate rewards (e. g. start of negotiations on the SAA in 2005 for Croatia, or the entry into force of the SAA in 2008 for Serbia), and once it had become clear that the SAA was indeed the first step towards future accession to the Union (Dobbels 2009: 10). However, even after these intermediate rewards and with the prospect of the SAA, compliance has not always been consistent, proving the hypothesis that when the promise of membership is distant, i. e. membership is not the immediate reward, compliance will hardly be stimulated (*Ibid.*). This can be observed also from the point of changed enlargement dynamics in general and the Union's capacity to deliver the eventual reward of membership. Complex political environment in the Western Balkans, coupled with a lack of reforms and legacies of inter-ethnic violence, and multiplied by the tough lessons learned from the previous rounds of enlargement, made both EU institutions and Member States "more cautious and reluctant in putting forward a clear membership perspective" (Dobbels 2009: 4). Deeply entrenched feeling of "enlargement fatigue", concerns over the "absorption capacity" of the EU, and remnants of the severe economic crisis from the previous decade, effected what is now a much stricter policy of conditionality, in which "even technical steps in the accession process previously considered to be mere formality, are increasingly being linked to certain conditions and more difficult to accomplish" (Dobbels 2009: 28). This undoubtedly had an impact on the effectiveness of the ICTY conditionality, as this requirement was considered as an essential part of the process leading to the EU membership.

d. Domestic costs of adopting rules for governments, societal mobilization and supportive formal institutions

In the polity dimension, key facilitating factor is the presence of a liberal democratic government, or a liberal party constellation, in which the major political parties agree on liberal reforms and integration into Western international organizations (Sedelmeier 2005: 14). In such context, adaptation costs of complying with the EU's demands for governments are not prohibitively high. On the contrary, domestic costs with

regards to the EU's demands increase in the case of dominance in parliament of nationalists over liberal ethnic policy preferences (Sedelmeier 2005: 15). Governments' adjustment costs and political constraints are also related to various instances of historical legacies, which considerably affect different aspects of democratization (*Ibid.*). For example, in the policy dimension a low number of veto players is a key facilitating factor.

Domestic politics hold the key to compliance with identity- and sovereignty-sensitive conditions (Noutcheva 2006: 2). In Western Balkans countries, the domestic costs of complying with EU conditionality are often very high, as some of the requirements tackle sensitive questions of statehood and national identity. The specific nature of the EU's political conditions also makes it easier for nationalist politicians for which they create adjustment costs to challenge their legitimacy (Sedelmeier 2005: 31). Hence, ICTY conditionality managed to stir up nationalism and undermine the popularity of moderate forces in domestic politics (in Croatia marginally, in Bosnia and especially Serbia significantly). Large part of the job was carried by the powerful politically-influenced right-wing nationalist media, which contributed to creation of an atmosphere of promoting nationalism, rejecting cooperation with ICTY and anathematizing everyone who endorsed facing the war legacies and advocated reforms, thus effectively undermining any basis for cooperation with the Tribunal (Dobbels 2009: 18). Under such circumstances, the political costs of advocating cooperation with the ICTY were very high, and it became increasingly difficult to establish a pro ICTY-regime, since nationalist parties gained more popularity and were often needed (particularly in Serbia) to form a majority (*Ibid.*).

ICTY conditionality in these countries was accompanied by a negative influence of formal domestic factors, in a setting described as "diffused power" (Serbia) or "hybrid politics" (Bosnia). Political costs entailed by cooperation were particularly high since it dealt with the issue of national identity, coupled with negative domestic public opinion, which resulted in reluctant adaptations of the political elites due to the re-election concerns or fears of political instability. There was also lack of political will to reform the structures of main influential veto players – army, security services, etc., some of which were directly or indirectly involved in committing war crimes (Dobbels 2009: 25). In Serbia moreover, national identity was particularly fragile at the moment when

ICTY conditionality was applied the most aggressively, in the light of anticipated prospect of Montenegrin and Kosovo secession, which also raised the chances of further nationalist reactions and hence added political turbulence for the government (Rajković 2008: 59).

The capacity of compliance with conditionality is influenced by the number of veto players in the institutional structure of the target state. In Serbian case, the ousting of Milošević was not followed by the necessary changes in state structures, power was decentralized across various parts of the government and its security services, and it was arguably the main obstructing force for cooperation with ICTY conditionality (Dobels 2009: 17). This made pro-European leaders who did wish to cooperate with the ICTY unable to openly condemn war criminals or engage in tough political action to reform these institutions. Finally, as a result of the ICTY conditionality, instead of EU integration enjoying social consensus in Serbia, it reopened identity issues, divided the society and boosted discourses on sovereignty, victimization of nation, "double standards of international community" and injustice perpetrated to Serbia by international community's one-sided handling of war crimes (Milenković & Milenković 2013: 199). Even in instances of compliance with the ICTY conditionality dominant justifications remained strictly instrumental and not as a value in itself: cooperation with The Hague was presented as "an unfortunate and resented imposition" that must be complied with for other reasons, namely to satisfy the EU but also to boost Serbia's international credibility when it came to contesting Kosovo's independence in terms of international law (Batt & Obradović-Wochnik 2009: 11).

Specific situation existed in an arguably semi-sovereign country like Bosnia, where the ICTY conditionality incurred higher compliance costs as it "intervened in the sovereignty suggesting a redefinition of internal statehood structures" (Noutcheva 2006: 2). Limited cooperation with the ICTY came only from one of the two entities (Republika Srpska), whose authorities had not turned over a single ICTY indictee (Memišević 2009: 57), which contributed to holding back the entire country from the progress in the EU accession process. The other entity (Federation of Bosnia and Herzegovina) had always complied promptly with ICTY requests, appearing to be the exception in the region in showing genuine will to cooperate with The Hague (Hartmann 2009: 77). Genuine commitment and positive compliance record of this majority-Bosniak entity can be explained by the fact that their own com-

munity suffered the greatest number of casualties during the war in Bosnia, as well as by motivation to bring justice for their own victims and at the same time to see their former enemies who had attempted to dismantle Bosnia sentenced at the international level (*Ibid.*). Another specificity with regards to domestic institutional capacities in Bosnia was role of the High Representative of the International Community, who often used the ICTY issue as a justification for removing obstructionist officials, freezing assets, and even re-shaping Bosnian state institutions, especially in the defence and security sectors (*Ibid.*), which is another peculiar example of interplay of the EU and another international actors in pursuing ICTY conditionality.

As for the element of supportive institutions influencing the compliance with ICTY conditionality, there was in general serious reluctance on the part of Western Balkans governments to commit themselves to creating the formal conditions necessary for war crimes accountability. For instance, the police assistance to ICTY requests remained half-hearted at best, in part because police officers were often themselves implicated in the commission of war crimes (Hartmann 2009: 78). In Croatia particularly difficult was establishing civil-democratic control and oversight of the security sector, heavily stuffed with the legacy of former communist regime and linked with organized crime dating back to the war period. Therefore initially, while the investigation on the whereabouts of general Gotovina was *de facto* the most important issue for Croatian government, the Ministry of Defence was at the same time still paying his pension contributions (Watkins 2005: 3). Similarly to societal reactions in Serbia, ICTY conditionality in Croatia influenced political discourses and public opinion by challenging national identity which was partially built on the patriotic war and national heroes from the 1990s (Perković 2013: 2). This issue was arguably the strongest one polarizing post-authoritarian Croatian political scene (Jović 2009: 1). EU's insistence on this requirement and subsequent postponement of negotiations following the failure to extradite national war hero caused public frustration, which in turn eroded the support for EU integration whilst Euroscepticism and nationalism were on the rise (Perković 2013: 17). What followed was the ever lowest level of public support for EU membership in Croatia which did not recover substantially since 2005, and as a consequence the motivation to join the Union remained mostly with the domestic political elites (*Ibid.*).

e. Legitimacy of EU demands, and of the process through which the EU formulates demands and promotes rules

A number of factors increase the likelihood for effective persuasion and socialization: at the international level, some of the most important are the legitimacy of the substantive rules that the EU promotes, as well as the legitimacy of the process through which the EU promotes such rules (Sedelmeier 2005: 15). If a candidate country considers that the process through which EU conditions are formulated as legitimate, it is more likely to adopt these rules (*Ibid.*). Facilitating factors thus include the participation of the target countries in setting conditions and the making of rules, which is always problematic in the case of candidate countries, especially when coupled with heavy power asymmetry as aforementioned. Furthermore, substantive rules are more likely to be perceived as legitimate if they are codified internationally or in the EU's own *acquis*. The conditions for candidates must be normatively consistent and backed up by a strong international consensus on the technical and political appropriateness of policy prescriptions (*Ibid.*).

There are couple of elements aggravating the legitimacy and compliance record of the ICTY conditionality. The ICTY's jurisprudence was in general met with high mistrust and doubts over its legitimacy in all Western Balkans countries. Since the majority of those indicted were Serbs, it initially came under fire for being used as a political instrument with an anti-Serb bias; when it started indicting Croats, it came to be seen as having a bias against Croats as well (Sadkovich 2011: 155). Bosniaks who were seen by some as the only real victims of the 1990s wars were outraged when some of their leaders have been indicted too, and after certain perpetrators of war crimes against their ethnic group have not been sentenced to longer terms in prison. Given the ICTY's failure to communicate its indictments and verdicts accurately, public opinion both in the region and internationally tended to interpret particular verdicts as exonerating or victimizing the entire nation, thus undermining the Tribunal's legitimacy (Orzechowska 2013: 137). Moreover, "unexpected redefinitions and reinterpretations of the international law" have created a huge space for "subjective assessment and flexible facts management", hence coming under the great suspicion of the public and legal professionals, and weakening the legitimacy of the ICTY rulings too (*Ibid.*).

f. Identification with the EU, and positive normative resonance with domestic rules

EU's impact on democracy and human rights is generally considered to be rather limited, but positive (Sedelmeier 2005: 19). If the EU was not sufficiently sensitive to the implications of its interventions in domestic politics for national sovereignty, it undermined liberal-democratic politicians and NGOs, since their authoritarian and nationalist rivals could present them as "agents of foreign powers" (*Ibid.*). Political actors may face the difficult situation in which the "end goal", i. e. EU membership is societally approved, whereas some of the criteria for membership are disapproved, e. g. ICTY conditionality (Freyburg & Richter 2010: 14).

In Croatia, the EU's insistence on the ICTY conditionality at certain point played into the hands of the Eurosceptics and set back government efforts to promote the EU as the best possible option, but this backlash was minor in a real effect since the Croatian public largely agreed on idea that "Croatia belongs to a Western European community of nations" (Watkins 2005: 3). Different situation is in Serbia, where the electorate is still more evenly split on this issue: be it from the public lack of confidence for a states that contributed to the NATO military intervention in Serbia, or alleged undesirability of the whole process of EU integration due to the recent serious economic turmoil, or historical connections with Russia, etc. Thus, EU's condition of full cooperation with the ICTY in Serbia had serious detrimental effect on democratic reforms, and the negative perception of the ICTY bolstered anti-reform forces at the expense of the liberal-democratic movement (Sedelmeier 2005: 19).

In the Western Balkans, mechanisms of transitional justice (laws on war crimes, investigations, tribunals and commissions) were never fully developed, nor had a real political support (Obradović–Wochnik 2009: 31). Laying the foundations for strong justice system would have ensured better support for ICTY cooperation, giving more legitimacy to the ICTY in the public sphere (*Ibid.*). Narrowly interpreting the Copenhagen political criteria in the SAP, and focusing exclusively on full cooperation with the ICTY while ignoring domestic mechanisms of transitional justice, the EU has missed an important opportunity to encourage the region's governments and societies to acknowledge and deal with mass atrocities committed during the conflicts (Rangelov 2006:

375). Ignoring domestic transitional justice processes has allowed the persistence of ethno-nationalist ideologies and denial of responsibility for war crimes, thus "obstructing both the process of rebuilding the rule of law and international justice's goal of facilitating lasting peace and reconciliation in the Western Balkans" (*Ibid.*). Instead, as in the Serbian case after the death of PM Đinđić, different governments made some poor attempts to deal with the war crimes issue, with every attempt being severely undermined or criticized by "large and vocal nationalist parties" such as the Serbian Radical Party (Obradović-Wochnik 2009: 31). Their military officers indicted by the ICTY for alleged war crimes were even voluntarily and ceremoniously transferred to The Hague as national heroes (Rajković 2008: 57). In Croatia as well as in Bosnia, the great number of the ICTY indictees was perceived by a large part of the society and political elite in their homeland as heroes and defenders, while the public awareness of the war crimes committed by members of their ethnicity during the war remained very weak (Orzechowska 2013: 135). Such negative public opinion functioned as a brake for cooperation and eroded the efficiency of the ICTY conditionality.

Compliance with the ICTY conditionality was moreover not established as rooted in a value-related basis (Orzechowska 2013: 137). Consequently, the capturing and extraditions have been frequently treated in the region as payoffs or payments for rewards/carrots, not an element of a consistent process of reconciliation and dealing with the past (*Ibid.*). Coupled with a weak legitimacy of the Tribunal, it resulted in declining trust among the Western Balkans societies towards the ICTY and lower public support for the cooperation, which negatively influenced the public support for the EU integration too. Also, the political and societal reactions in the region following the crucial trials and verdicts in The Hague followed "the everlasting narrative of the war" (*Ibid.*). Finally, these extremely emotional and everything-but-substantial reactions further divided the public opinion, as well as deteriorated the inter-ethnic and regional relations, thus aggravating ICTY conditionality and conflict transformation processes.

3. Concluding Remarks

This essay is an attempt to provide generalized summary of the history of ICTY conditionality, exploring it through the lenses of Sedelmeier's conceptual framework and selected independent variables. Following is an overview of the main findings on preconditions affecting ICTY conditionality, observed on the basis of selected cases and independent variables.

Both theoretical approaches separately manage to present factors which ultimately impaired effectiveness of the EU policy of ICTY conditionality in Western Balkans. Put together, given that certain variables observed are interrelated, they provide for a clearer picture explaining troublesome and inconsistent both compliance and application record of the ICTY conditionality.

Rationalist institutionalism offers more examples showing how the limited effectiveness of the ICTY conditionality could be encountered in the serious cost-incentive gap, given the considerable mismatch between the high domestic compliance costs and unsupportive factors in polity domain on the one hand (even in the case of Croatia), and the weak clarity, credibility and rewards of EU conditionality policy on the other. EU Member States were furthermore often divided on the question of standard of application of ICTY conditionality, and this lack of consensus caused the loss of credibility of EU conditionality. Credibility was arguably affected as well by the tension between the EU conditionality which is derived from the political processes of pre-accession negotiations, and the institution (ICTY) granted with tasks of reporting on compliance which in order to be effective needs to maintain independence from any political pressure. Departure from consistent application and clear interpretation of requirements eventually weakened the overall EU leverage in relation with Western Balkans. In the end, rationalist approach conveniently suggests explanation on the basis of cost-benefit calculation for the EU opting to compromise on the ICTY conditionality, and taking more lenient stance in light of the poor record of economic and political reforms in the Western Balkans.

Sociological institutionalism offers couple of interpretations of constellation of both international and domestic factors influencing ICTY conditionality, mainly revolving around salience of the issue (i. e. national identity) this type of conditionality was intrinsically linked to. The

EU did not succeed to clearly establish link between the policy of ICTY conditionality with underlying values of democracy and respect for the rule of law, which also caused negative domestic support for the EU requirement, even in Croatian case where identification with the EU was greater than in other two countries. Effectiveness of the ICTY conditionality was moreover impaired due to lack of legitimacy of the Tribunal and its controversial and politicized judgments. Finally, constructivism presents how the ICTY conditionality, being a "culturalised" requirement and more suitable to tackle with social learning mechanisms which take time to effectuate, lacked time and appropriate (internal and external) tools to succeed in a relatively short time span of its application.

The analysis of the factors affecting the EU policy of ICTY conditionality in Western Balkans had important repercussions on the overall accession process of the countries observed. The most favourable conditions were present in Croatia, which was the first country to join the EU in 2013. The ICTY conditionality, which provoked an unprecedented stall in the accession process due to Gotovina case, was the main factor explaining Croatia's postponed accession in comparison with two other countries (Bulgaria and Romania) with comparable political-economic reform accomplishments and other pre-accession requirements compliance record, yet which joined the EU already in 2007. Less favourable conditions, as present in Serbia and Bosnia, are in part explaining the slow progress of both countries towards the full EU membership. Serbian negotiations on the SAA were suspended until some of the most-wanted war crime suspects were handed over. Also, progress of Bosnia and conditions to be met before it could be recommended for concluding the SAA were tied with the requirement of full cooperation with the ICTY, particularly in the case of its entity of Republika Srpska (Rangelov 2006: 368). In addition, now when Croatia is an EU Member State, it came back to condition and exert pressure on Serbia and impose conditions threatening with vetoing its EU accession progress, all related to the Chapter 23 of the membership negotiations, which deals with, *inter alia*, Serbia's universal jurisdiction for prosecuting war crimes of the Balkan wars, but also cooperation with the ICTY with regards to the case of Serb radical nationalist Šešelj, who was released from The Hague's custody before the first instance judgment was issued, and continued to stir the nationalist tensions in his media statements and political appearances.

Apart from these generalized conclusions on the interplay of factors effecting the EU policy of ICTY conditionality in Western Balkans and the overall accession process of the three countries observed, further research needs to focus on assessing the importance of (un)favourable conditions in each country and juxtaposing these theoretical assumptions to empirical findings on the cooperation of selected countries with the ICTY and successfulness of the EU-imposed ICTY conditionality.

In the end, relevance of the present analysis and discussion is reflected in the importance of the modification of the EU's approach towards pre-accession conditionality dealing with transitional justice and reconciliation, in light of the future prospective enlargements to regions emerging from violent civil and ethnic wars, such as Ukraine or Armenia.

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**Pretpristupni politički uvjeti Europske unije
za zapadni Balkan:
analiza primjene i poštivanja uvjeta suradnje sa
Međunarodnim kaznenim sudom za bivšu Jugoslaviju**

Sažetak

Proces pristupanja država zapadnog Balkana Europskoj uniji je kao jedan od pretpristupnih političkih uvjeta uključivao i suradnju sa Međunarodnim kaznenim sudom za bivšu Jugoslaviju (Haaški tribunal). Ovaj uvjet je bio usvojen kao jedan od najvažnijih elemenata EU politike uvjetovanosti za zapadni Balkan, te je značajno dominirao vanjskopolitičkim programom EU u odnosima sa državama zapadnog Balkana. Ovaj rad analizira strukturalne preduvjete u pojedinim državama zapadnog Balkana (Bosna i Hercegovina, Hrvatska i Srbija), te razmatra učinak uvjeta suradnje sa Haaškim tribunalom na dinamiku pretpristupne europeizacije te tri države. Polazeći od osnovnih pretpostavki racionalističke i sociološke/konstruktivističke teorije, rad prati najvažnije međunarodne i domaće faktore koji su olakšavali ili otežavali ostvarenje EU političkog uvjeta suradnje sa Haaškim tribunalom. Glavni cilj rada je prikazati i opisati učinke primjene i poštivanja uvjeta suradnje sa Haaškim tribunalom, te objasniti zašto je u konačnici taj proces bio znatno otežan i nedosljedan. Glavni argument je da se u slučaju svake pojedine države u predmetnoj analizi mogu pronaći značajne strukturalne prepreke koje su ugrožavale učinkovitost suradnje sa Haaškim tribunalom, čime se objašnjava konačni neuspjeh politike primjene i poštivanja EU političkog uvjeta suradnje sa Haaškim tribunalom.

Ključne riječi: Europska unija, zapadni Balkan, pretpristupni politički uvjeti, Međunarodni kazneni sud za bivšu Jugoslaviju, međunarodni i domaći olakšavajući i otežavajući faktori