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About the Author

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Abstract

Over the past two decades conditionality has moved to the heart of the European Union's (EU) foreign policy and is one of the key instruments of the enlargement policy. This paper looks into one specific aspect of the EU's conditionality vis-à-vis the Republic of Serbia, namely the demand for cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY). This paper aims to assess the extent to which the EU's policy of 'ICTY conditionality' has been effective. By using the 'external incentives model' as the main theoretical framework, and supplementing it with insights of scholars who have studied past enlargements, I will identify and evaluate the main factors determining the success of this specific case of conditionality. I will demonstrate that, at times, the EU has been effective in employing 'ICTY conditionality', but that this has not been consistently so. I argue that on the EU's side, the uncertainty concerning eventual membership and the lack of consistency in applying conditionality are the main factors undermining the policy's effectiveness. On the Serbian side, the great political costs entailed by cooperation, and the lack of political will to reform the structures of certain veto players are hindrances for a policy of full cooperation with the Tribunal. This paper shows that conditionality is indeed a two-way process and that effectiveness is as much determined by the setter of the condition as by the target state. Moreover, by viewing this case as part of the broader policy of conditionality the EU has set out for aspiring members, the analysis will pinpoint some of the changing dynamics in the enlargement policy and contribute to the existing literature in this field.

1. Introduction: Setting Conditions for Cooperation

Over the past two decades conditionality has moved to the heart of the European Union's foreign policy and has become the cardinal principle of the enlargement process.¹ The use of conditionality in the relations with the Central and Eastern European countries (CEECs) which joined the EU in 2004 has been heralded as a great success and a demonstration of the EU's transformative power.² By setting out the 'Copenhagen criteria' as conditions for accession in 1993 and assisting the aspiring members to reach these conditions by concluding Europe Agreements, the Union has actively pursued economic and democratic reforms and stimulated lasting change in the CEECs.³ However, the cases of Bulgaria and Romania have tempered the euphoria of the effectiveness of enlargement conditionality. As one diplomat argued, "there is now a general feeling among most EU member states that they [Bulgaria and Romania] joined too soon and that conditionality should have been applied more strictly".⁴ By consequence, the EU's approach to enlargement and conditionality is somewhat different with regard to the countries of the Western Balkans. Most authors agree that the underlying dynamics of enlargement have changed: the EU member states have been more cautious and reluctant in putting forward a membership perspective, and more conditions have been set out.⁵ In addition, the political situation in the Western Balkans is deemed more complex, reforms seem to go slower and the road towards future membership is still long for most of these countries.

This paper aims to assess the effectiveness of one specific component of the Union's current policy of conditionality, namely the obligation of full cooperation with the

¹ C. Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality', *European Foreign Affairs Review*, vol. 9, no. 2, 2004, p. 220.

² H. Grabbe, *The EU's Transformative Power: Europeanization through Conditionality in Central and Eastern Europe*, Basingstoke, Palgrave Macmillan, 2005, pp. 15-16.

³ K.E. Smith, 'The Evolution and Application of EU Membership Conditionality', in M. Cremona (ed.), *The Enlargement of the European Union*, Oxford, Oxford University Press, 2003, pp. 121-122; European Council, *Conclusions of the Presidency*, 180/1/93, Copenhagen, 21-22 June 1993, pp. 12-13. These criteria include guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; being a functioning market economy; and accepting the Community *acquis*.

⁴ Interview with diplomat A, Brussels, 10 February 2009.

⁵ R.A. Epstein & U. Sedelmeier, 'Beyond Conditionality: International Institutions in Post-communist Europe after Enlargement', *Journal of European Public Policy*, vol. 15, no. 6, 2008, p. 799; D. Phinnemore, 'Beyond 25 – the Changing Face of EU Enlargement: Commitment, Conditionality and the Constitutional Treaty', *Journal of Southern Europe and the Balkans*, vol. 8, no. 1, 2006, p. 17; G. Pridham, 'Change and Continuity in the European Union's Political Conditionality: Aims, Approach, and Priorities', *Democratization*, vol. 14, no. 3, 2007, p. 454.

International Criminal Tribunal for the former Yugoslavia in the case of Serbia. The reason for this particular case study is that it looks into a new form of conditionality which is being applied with regard to one of the most complex potential candidate members. Indeed, due to its turbulent past, the issue of Kosovo, its strong nationalism and utterly divided political landscape, Serbia is one of the toughest 'potential candidates' the EU has to deal with. The cooperation with the Tribunal in The Hague, and in particular the extradition of suspected war criminals, is one of the most controversial and politically sensitive topics in Serbian politics. Since the Court's establishment in 1993, cooperation has been put on the Serbian agenda by the West and demands in this respect have intensified since the Kosovo war of 1999. Currently, it is the only condition left for ratification of the Stabilisation and Association Agreement between Serbia and the EU and arguably one of the few remaining obstacles on Serbia's path to become an actual candidate.

The effectiveness of 'ICTY conditionality' is a topic which has not yet received much academic attention; nevertheless it is highly relevant for three reasons: First of all, this case study will build on the existing literature on enlargement and give a more precise idea of the new dynamics in this field. Secondly, the findings of this paper will qualify scholars' statements that conditionality has become more elaborate and stringent for aspiring members as compared to the conditions the CEECs had to fulfil. Thirdly, an assessment of the effectiveness of 'ICTY conditionality' will tell us something more about the transformative power of the EU with regard to a new group of target states. As explained above, Serbia is a tough partner for the EU, but if the Union's conditionality of cooperation with the ICTY is successful, it will once again have pushed the boundaries of its ability to influence reforms and stimulate change in potential member states.

Anastasakis and Bechev define conditionality as a one-way process, whereby the EU sets out conditions which have to be accepted and fulfilled unconditionally by the target states.⁶ Meeting the conditions usually means the country in question can integrate more with the EU. The prospect of moving closer to Europe or eventual accession to the Union should serve as an external incentive for internal reforms. A theoretical framework based on the 'external incentives model' as defined by Schimmelfennig and Sedelmeier will provide the necessary hypotheses to produce a

⁶ O. Anastasakis & D. Bechev, 'EU Conditionality in South East Europe: Bringing Commitment to the Process', *South East European Studies Programme*, April 2003, retrieved 24 March 2009, <http://www.cespi.it/STOCCHIERO/dossierBalceni/conditionality.PDF>, p. 13.

comprehensive understanding of the application of 'ICTY conditionality'.⁷ In order to measure the effectiveness of the conditionality, I will be looking at the degree to which the objectives set out by the EU are achieved. However, assessing the effectiveness of conditionality is a complex issue as the targeted performance against which the actual performance is to be measured is often unclear. The problems surrounding the concept of effectiveness in this particular case are treated more elaborately in the thesis on which this paper is based.⁸

The paper is divided into two parts: In the first part I will look at 'ICTY conditionality' from an EU perspective. Here, I will analyse the evolution of 'ICTY conditionality' in the EU's relations with Serbia and address the deficiencies in the application of it. I argue that the lack of a clear prospect of accession and the inconsistency in applying the condition are the main shortcomings in this policy. The second part of the case study will focus on 'ICTY conditionality' from the Serbian point of view. Although cooperation with the ICTY has been demanded by the EU since the establishment of the Tribunal, I will only analyse the period since 5 October 2000. This date marked the end of the Milošević era, the beginning of the democratic transition in Serbia and the end of a decade of wars in the region. It is also the starting point of intensified advocacy of the West and the EU in particular to bolster democracy and stimulate political and economic reforms in Serbia. The ousting of Milošević and his 1999 ICTY indictment also marked the beginning of more pressure on the Serbian authorities to cooperate fully with the Tribunal in The Hague.⁹ I will demonstrate that 'ICTY conditionality' is not strictly a one way process, but to a large extent its effectiveness is influenced by those in power in the target state.

The sources used to analyse this case study range from official reports and documents of the EU, international organisations and the Serbian government, to briefings of international and Serbian non-governmental organisations (NGOs). The Commission's progress reports on Serbia and the yearly addresses of the ICTY's Chief Prosecutor before the UN Security Council will serve as the basis for assessing Serbia's cooperation with the Tribunal. Reference to reports from institutions such as the International Crisis Group and human rights NGOs will facilitate a more nuanced

⁷ F. Schimmelfennig & U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', *Journal of European Public Policy*, vol. 11, no. 4, 2004 pp. 661-679.

⁸ See M. Dobbels, *Serbia & the ICTY: an Analysis of EU Conditionality*, Master's thesis, Bruges, College of Europe, 2009, pp. 16-19.

⁹ V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge, Cambridge University Press, 2008, p. 61.

critique of the official reports and assess the effectiveness of conditionality. In order to have a broader view of the impact of 'ICTY conditionality' on Serbian society, opinion polls will be used to analyse evolutions in the public's attitude towards the Tribunal. For more recent developments in Serbia's cooperation with the ICTY, I have relied on press reports and in-depth interviews with officials from several EU member states, Serbian diplomats and representatives from civil society in Belgrade.

2. 'ICTY Conditionality' from the EU's Point of View

2.1 Which 'Carrot'?

According to the 'external incentives model', it can be hypothesized that *the effectiveness of 'ICTY conditionality' will increase with the size and temporal proximity of the promised rewards*.¹⁰ Frank Schimmelfennig adds that "nothing short of a credible conditional accession perspective has proven effective" and that "material incentives below the threshold of EU membership – such as financial aid or association agreements – are too weak".¹¹ Although calls for cooperation by the EU date back to the Tribunal's establishment in 1993, they were not tied to any concrete rewards until 2005. Moreover, it is interesting to see that the Union has been very reluctant to put forward a clear membership perspective in its relations with Serbia. A stance which – according to this perspective – could seriously hamper the effectiveness of conditionality.

2.1.1 The Ultimate Goal of EU Membership

In 1997 the EU launched the 'Regional Approach' with the aim of promoting regional cooperation, stability and economic recovery in the states of the former Yugoslavia.¹² In the conclusions of the General Affairs Council of 29 April 1997, cooperation with the Tribunal is mentioned as one of the conditions for obtaining 'contractual relations' with the Union.¹³ However, the member states did not mention what such 'contractual relations' entailed and clearly avoided putting forward a distinct membership perspective for the countries in the region.¹⁴ It was not until after the Kosovo war in 1999 that the Union defined this relationship. When the Stabilisation

¹⁰ Schimmelfennig & Sedelmeier, *op.cit.*, p. 666; F. Schimmelfennig, 'EU Political Accession Conditionality after the 2004 Enlargement: Consistency and Effectiveness', *Journal of European Public Policy*, vol. 15, no. 6, 2008, p. 920.

¹¹ Schimmelfennig, *op.cit.*, p. 920.

¹² Anastasakis & Bechev, *op.cit.*, p. 7.

¹³ General Affairs Council, *Conclusions on the Former Yugoslavia*, Brussels, 29 April 1997.

¹⁴ D. Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?', *European Foreign Affairs Review*, vol. 8, no. 1, 2003, p. 98.

and Association Process (SAP) was launched, the EU reiterated the conditions of April 1997 and tied them to the negotiation and conclusion of a Stabilisation and Association Agreement (SAA).¹⁵ The benefits of an SAA include “asymmetric trade liberalisation, economic and financial assistance [...], assistance for democratisation and civil society, [...] cooperation in justice and home affairs and the development of a political dialogue”.¹⁶ If the Commission judges that Serbia sufficiently fulfils the political and economic conditions set out by the Union, it will draft a formal proposal for negotiation directives. Consequently, on the Council’s approval, it will start negotiations with the Serbian government.¹⁷ The SAP marked the end of an era of sanctioning in the region and the beginning of the use of positive conditionality to promote stability by bringing the countries of the Western Balkans closer to the EU.¹⁸ But what is the reward tied to compliance with the conditions? Is it eventual membership or something less attractive?

The SAAs were presented by the Commission as the successors of the Europe Agreements, which were concluded with the Central and Eastern European countries. However, they are less ambitious in terms of the envisaged association. Once again the Commission clearly refrained from referring to a membership perspective and instead described the purpose of the SAAs as “drawing the region closer to the perspective of full integration into EU structures”.¹⁹ A year later, the European Council created a new status as it labelled the SAP countries ‘potential candidates’.²⁰ While this may seem a great step forward in granting states like Serbia a membership perspective, the commitment remains political and does not imply any legal rights. Moreover, when analysing the recitals of the first two SAAs (concluded with Croatia and the Former Yugoslav Republic of Macedonia), the lack of commitment on the part of the EU is remarkable. The strong engagement which the member states took in the Europe Agreements to actively contribute to the achievement of membership is absent in the SAAs.²¹ However, the Thessaloniki Declaration of June 2003 marked a turn in the reluctant stance of the Union. The European Council declared that “the future of the Balkans is within the EU” and committed itself to actively support integration of the Western Balkans states with the

¹⁵ The main conditions are: commitment to carry out democratic and market reforms, respect for human rights, return of refugees, commitment to a process of regional cooperation and cooperation with the ICTY.

¹⁶ Anastasakis & Bechev, *op.cit.*

¹⁷ Phippan, *op.cit.*, p. 234.

¹⁸ *Ibid.*, p. 235.

¹⁹ Phinnemore, ‘Stabilisation and Association Agreements’, *op.cit.*, p. 99.

²⁰ Phinnemore, ‘Beyond 25 – the Changing Face of EU Enlargement’, *op.cit.*, p. 12.

²¹ Phinnemore, ‘Stabilisation and Association Agreements’, *op.cit.*, p. 100.

EU.²² Moreover, by introducing 'European Partnerships' as an additional *accession* instrument of the SAP and granting candidacy status to Croatia in 2004, the membership perspective for countries from the Western Balkans appeared to be a lot clearer.²³ In addition to that, the SAP portfolio was moved to DG Enlargement in 2005, and FYROM too, was given candidacy status.²⁴

Nevertheless, there still seems to be some reluctance on part of the EU member states to actively pursue enlargement for the countries of the Western Balkans. Negotiations with FYROM have yet to start, the candidacy applications of Montenegro and Albania are still pending and the same fate will arguably fall to the future application of Serbia. Moreover, as one diplomat argued, "the last thing we want to do now is project dates for candidacy or accession of these states. We have become very prudent and won't be letting any countries in quickly. The goal of membership is a long-term goal and conditions need to be fulfilled before membership will be considered".²⁵ There is a membership perspective for Serbia, but it is long-term and should not be taken for granted.

2.1.2 The 'SAA Carrot'

Up until 2005 the condition of cooperation with the ICTY was not tied to any specific reward. After the fall of Milošević in 2001, there was a general reluctance in the EU to make the relations with Serbia dependent on cooperation with the ICTY.²⁶ It was mentioned as one of the conditions in the SAP, but the EU never explicitly linked the SAA to the fulfilment of the 'ICTY condition'. According to Carla del Ponte – Chief Prosecutor of the ICTY from 1999 to 2008 – the only external actor which had an impact on Serbia's cooperation before 2005 were the United States.²⁷ The US government and the House of Representatives have a yearly 'certification procedure' for aid and assistance to Serbia. This certification is conditioned upon the cooperation of Serbia with the ICTY and every year since the fall of Milošević, cooperation increased remarkably when the deadline drew near.²⁸ Nevertheless, it is remarkable to note that on one instance before 2005, cooperation increased visibly when the US deadline had already passed. Between the end of May and the

²² Council of the European Union, *EU-Western Balkans Summit – Declaration*, 10229/03 (Presse 163), Thessaloniki, 21 June 2003, p. 1.

²³ Phinnemore, 'And not Forgetting the Rest', *op.cit.*, p. 16.

²⁴ E.T. Fakiolas & N. Tzifakis, 'Transformation or Accession? Reflecting on the EU's Strategy towards the Western Balkans', *European Foreign Affairs Review*, vol. 13, no. 3, 2008, p. 389.

²⁵ Interview with diplomat C, The Hague, 9 February 2009.

²⁶ C. del Ponte, *Mevrouw de aanklager*, Amsterdam, De Bezige Bij, 2008, p. 152.

²⁷ *Ibid.*, pp. 152-153.

²⁸ *Ibid.*, pp. 155, 163, 221-223.

beginning of July 2003 Serbia arrested five suspects and extradited them to The Hague. This was exactly around the time the EU held its Western Balkans summit in Thessaloniki, pronouncing a clearer membership perspective and reiterating the need of cooperation with the ICTY as one of the key conditions for further integration.²⁹

However, it was not until 2005 that the 'SAA carrot' of the European Union started having an effect on Serbia. The reason for this timing is threefold. It was the first time that Commissioner Olli Rehn had explicitly linked the start of SAA negotiations to Serbia's cooperation with the ICTY.³⁰ It was also right after the two first SAAs had been implemented by Croatia and FYROM, and there was a sense within the Serbian government that they could not stay behind. And last but not least, it was the year in which Croatia started its accession negotiations, confirming the membership perspective for the countries of the Western Balkans. The effect was remarkable: cooperation increased dramatically and according to Carla del Ponte, the EU's pressure had contributed to the surrender and arrest of no fewer than 14 suspects.³¹ A second example of the EU's effectiveness in pressuring Serbia to cooperate with the ICTY was the arrest and extradition of Radovan Karadžić in July 2008. This too has largely contributed to the EU's stance of tying the ratification of the SAA to Serbia's cooperation with the ICTY.³²

Coming back to the hypothesis formulated at the beginning of this section, it could be argued that it has stood the test, since conditionality was effective once it was tied to immediate rewards (e.g. start of negotiations on SAA in 2005 and the entry into force of the SAA in 2008), and once it had become clear that the SAA was indeed the first step towards future accession to the Union. Contrary to what Schimmelfennig argues, the promise of membership can still be fairly distant and does not need to be the immediate reward for compliance to be stimulated. 'ICTY conditionality' can thus be effective if the overall incentive is considered big enough and the concrete reward immediate. However, even after 2005 and with the prospect of an SAA, compliance has not always been consistent. This is due to the impact of other factors in the relations between Serbia and the EU, which will be discussed below.

²⁹ Pippan, *op.cit.*, p. 241.

³⁰ Del Ponte, *op.cit.*, p. 455.

³¹ *Ibid.*, pp. 455-459.

³² E. Vuceva, 'Dutch Stance on Serbia "Very Unfair", Says Minister', *Euractiv*, 17 September 2008.

2.2 Credibility: a Question of Capacity and Consistency

Effectiveness of conditionality is in part determined by the credibility of the external actor who sets the conditions. Credibility in turn depends on the capacity of the actor to deliver its promised reward and the consistency with which the conditionality is employed.³³ This section will be divided in two parts, in which I will address these two sub-factors and determine to what extent they have limited the effectiveness of 'ICTY conditionality'.

2.2.1 Capacity to Deliver

According to the 'external incentives model', *the less capable the EU is to fulfil its promises, the less credible and therefore the less effective the application of 'ICTY conditionality' will be.*³⁴ As I have already demonstrated above, this case study needs to be seen in the context of enlargement. After all, the Union's conditionality for Serbia only started having effect after the membership perspective was made clearer at the Thessaloniki summit in 2003. Nevertheless, the overall 'carrot' of membership should not be taken for granted in terms of delivery. As Phinnemore argues, "accession to the EU is becoming increasingly more difficult. Hence there is greater uncertainty about when – and indeed possibly whether – further enlargement will take place".³⁵ A few factors have indeed complicated the dynamics of the enlargement policy with regard to the Western Balkans. First of all, there is the issue of the language surrounding enlargement. The EU seems to be more reluctant to commit itself firmly to membership in general, avoiding a clear engagement.³⁶ Secondly, both the institutions of the EU and important member states such as France and Germany are more cautious and sometimes even hostile with regard to future enlargement as they are calling for "slowing down [...] accession business".³⁷ In addition to that, some countries – such as France and Austria – are now considering the option to put future enlargements to a referendum.³⁸ This would constitute an additional hurdle in the accession process, as public opinion – especially in the older member states – seems to be unsupportive of future enlargement.³⁹ However, it must be noted that many of the reservations vis-à-vis enlargement relate to the question of Turkish membership. Nevertheless, they give rise to the impression of a deeply entrenched feeling of 'enlargement fatigue'.

³³ Schimmelfennig & Sedelmeier, *op.cit.*, p. 665.

³⁴ *Ibid.*

³⁵ Phinnemore, 'Beyond 25 – the Changing Face of EU Enlargement', *op.cit.*, p. 8.

³⁶ *Ibid.*, p. 9.

³⁷ Pridham, *op.cit.*, p. 465.

³⁸ Schimmelfennig, *op.cit.*, p. 919.

³⁹ Fakiolas & Tzifakis, *op.cit.*, p. 395.

The current enlargement dynamics have also been influenced by the debate on the 'absorption capacity' or 'integration capacity' of the EU. This idea is as old as the process of enlargement but really came into the picture in 1993, when the EU stated that "[t]he Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries".⁴⁰ The member states reaffirmed this position in 2006 by stating that "the pace of enlargement must take the Union's absorption capacity into account".⁴¹ These statements became all the more topical when the Irish rejected the Lisbon Treaty in a 2008 referendum. This not only had a profound effect on the EU's internal dynamics, but also on the enlargement policy as both President Sarkozy of France and Chancellor Merkel of Germany stated that no further enlargement could take place without the Lisbon Treaty being ratified.⁴²

All elements considered, the conclusion is that 'enlargement' has become a contentious issue and that there are doubts on the Union's capacity to deliver the eventual reward of membership. This undoubtedly will have its impact on the effectiveness of 'ICTY conditionality', as this hurdle is part of a process leading to EU membership. It is the aim of Serbian leaders to accede in 2014, but with the current hesitance and reluctance surrounding enlargement this might be too optimistic.⁴³ If the credibility of the overall reward of membership is further reduced, it will become more difficult to motivate Serbia to comply with the conditions.

2.2.2 Consistency

Karen Smith argues that if conditionality is not applied consistently, it will diminish in force and effectiveness.⁴⁴ Consistency needs to be guaranteed on three levels: internally, over time and in different cases. In order for the EU to be consistent internally, member states and institutions need to 'sing from the same song sheet'. Pridham notes that since the 2004 and 2007 enlargements, the General Affairs and External Relations Council (GAERC) and the European Parliament have become

⁴⁰ European Council, *Conclusions of the Presidency*, 180/1/93, Copenhagen, 21-22 June 1993, p. 12.

⁴¹ European Council, *Conclusions of the Presidency*, 10633/1/06, Brussels, 17 July 2006, p. 19.

⁴² 'Sarkozy and Merkel Rule out Enlargement without Lisbon', *Euro Intelligence*, 20 June 2008, retrieved 10 April 2009, <http://www.eurointelligence.com/Article3.1018+M5895ad6ee9f.0.html>

⁴³ Serbian European Integration Office, *Djelic: If We Are Efficient, We Might Join EU in Four to Six Years*, Belgrade, SEIO, 15 July 2008.

⁴⁴ Smith, *op.cit.*, p. 105.

more involved in enlargement policy.⁴⁵ This evolution has created more discord within the EU. While the Parliament and some member states argue for a tougher approach on conditionality, others in the Council advocate a more lenient stance. Much of the opposition is case-specific, but these divisions have made it more difficult to operationalise conditionality. One example of this is the disagreement on how to assess compliance with the 'ICTY condition'. According to one diplomat, there are two distinct camps in the Council when it comes to the policy of conditionality vis-à-vis Serbia: there are the member states who advocate a strict policy of conditionality, in order to avoid a repeat of the 'mistakes' of the 2007 enlargement; and there are those who believe the EU's policy of conditionality would be more effective if it involved giving significant intermediate rewards to Serbia to show that its path to the EU is a credible one.⁴⁶

The main protagonists in the former camp are the Netherlands and Belgium, while the latter camp consists of Slovenia, Spain, Italy, Greece, France and Sweden, which has switched camps under Minister of Foreign Affairs Carl Bildt.⁴⁷ In her memoirs, Carla del Ponte seems to confirm this division, arguing that France under Chirac and with Hubert Védrine as Minister of Foreign Affairs, and Sweden under Carl Bildt, repeatedly argued that strict conditionality would destabilise Serbia and that a softer stance would be far more effective.⁴⁸ Several instances have been recorded when the divide within Europe on the policy of conditionality vis-à-vis Serbia has led to enormous tensions. The two most important incidents were both related to the negotiation and conclusion of the SAA with Serbia. When in 2006, the Commission and the Netherlands called for a suspension of negotiations because of a lack of cooperation, Germany blocked this suspension, causing Olli Rehn to postpone the deadline that was set for Serbia.⁴⁹ According to del Ponte, this was a show of weakness on the part of the EU.⁵⁰ As a result, the suspension which followed a couple of months later did not have a strong impact on Serbia's record of cooperation as the Serbian government realised that it could exploit the divisions within Europe and push for a resumption of the negotiations. The other incident came at the end of 2007 when Greece, Spain and Germany wanted to sign the SAA in order to boost the chances of Boris Tadić in the presidential elections of January 2008. While the Netherlands and Belgium argued that the Union should hold on to its conditionality,

⁴⁵ Pridham, *op.cit.*, p. 455.

⁴⁶ Interview with diplomat A, *op.cit.*

⁴⁷ *Ibid.*

⁴⁸ Del Ponte, *op.cit.*, pp. 140, 151, 167-168.

⁴⁹ Pridham, *op.cit.*, p. 466.

⁵⁰ Del Ponte, *op.cit.*, pp. 465-467.

Olli Rehn was pushed by the other members to 'initial' the text – the first step of the ratification procedure.⁵¹ When after the elections, the Dutch refused to proceed with the ratification of the SAA, the Serbs branded this move as 'unfair', especially in the light of the recent arrest of Radovan Karadžić.⁵² It is clear from this short analysis that the Union struggles to act and speak 'with one voice'. The lack of consistency in applying conditionality leaves scope for misinterpretation and manipulation on the Serbian part, which in turn undermines the effectiveness of conditionality. This issue will be dealt with in the next chapter where Serbia's track record of cooperation with the Tribunal will be analysed.

Regarding the consistency over time, I already noted the difference between the policy of the Union before and after 2005, as there was no clear or strong link between the condition of cooperation with the ICTY and any concrete reward up until 2005. But even after 2005, the EU did not always consistently pursue a policy of strong conditionality. The two incidents discussed above not only tell us something about the internal consistency of the Union, but also about the consistency over time. When it became clear that Serbia was not keeping its promise to arrest Ratko Mladić before an EU-set deadline, there was a general consensus within the GAERC to suspend negotiations in May 2006.⁵³ However, the unified position of the member states soon began to show cracks as the negotiations on the final status of Kosovo, led by UN special envoy Martti Ahtisaari, drew to an end in mid-2007. Carla del Ponte recalls that some member states – under the leadership of Italy and Greece – started to plead for a resumption of the negotiations to appease Belgrade on the Kosovo issue.⁵⁴ Moreover, after the Americans had softened their stance on 'ICTY cooperation' and given the Serbs the prospect of joining NATO's Partnership for Peace programme, pressure mounted on the EU to soften its policy of conditionality as well.

Austria, Hungary, France and Greece finally launched the proposal to resume the negotiations with Serbia.⁵⁵ Javier Solana, who temporarily took over from Olli Rehn, contended that it was difficult to keep the issue of 'ICTY cooperation' separate from the Kosovo issue, as the two cases were handled by the same Serbian government.⁵⁶ According to one diplomat, there was a general fear that Serbia would lapse into

⁵¹ Interview with diplomat A, *op.cit.*

⁵² Vucheva, *op.cit.*

⁵³ Commission of the European Communities, *Serbia 2006 Progress Report*, SEC(2006) 1389, Brussels, 8 November 2006, p. 5.

⁵⁴ Del Ponte, *op.cit.*, p. 489.

⁵⁵ *Ibid.*, p. 492.

⁵⁶ *Ibid.*, p. 494.

the Russian sphere of influence, if the EU pursued a policy of strict conditionality against the backdrop of negotiations on Kosovo.⁵⁷ Again the argument was made that “with an aggressive and hostile EU stance, cooperation would not be enhanced, nationalist sentiments would be fostered and the region would run the risk of being destabilized”.⁵⁸ Finally, even the most ardent advocates of ICTY cooperation were forced to back down. The EU resumed the talks with Serbia in June 2007, officially because “[a]fter months of stalemate in Serbia’s cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), the Serbian authorities made progress [...] which enabled the Commission to resume the SAA negotiations on 13 June 2007”.⁵⁹ In reality, this meant a serious compromise as “the EU reneged on the condition [of Mladić’s arrest] it had established a year earlier when it suspended negotiations”.⁶⁰

As explained above, in the second incident, the Commission – under pressure from Germany, Greece and Spain – signed the SAA, in order to boost Tadić’s chances in the presidential elections of 2008. This was all the more remarkable because the 2007 progress report of the Commission stated that the signing of the SAA was conditioned upon Serbia’s full cooperation, and the ICTY report of 2007 clearly said that “cooperation did not reach the point of being full and consistent”.⁶¹ Here too, the conclusion is that the EU does not apply ‘ICTY conditionality’ in a consistent way. By softening the European stance on cooperation with the Tribunal for political reasons, the EU sends out an image that its position is relative and that compromises can be made. This constitutes serious damage to the credibility of conditionality and undermines its effectiveness.

Finally, on consistency in different cases, the obvious case to study is Croatia. Croatia concluded its SAA, implemented it and started accession negotiations in 2005. According to the Serbs, this is unfair, as one of the main Croat fugitives and indictees, Ante Gotovina, was still at large when accession negotiations started.⁶² The EU Council of Ministers had postponed the planned opening of accession negotiations in March 2005 because of Croatia’s failure to arrest and extradite Gotovina. While

⁵⁷ Interview with diplomat B, *op.cit.*

⁵⁸ Massimo D’Alema, Italian Minister of Foreign Affairs, cited in del Ponte, *op.cit.*, p. 501.

⁵⁹ Commission of the European Communities, *Serbia 2007 Progress Report*, SEC(2007) 1435, Brussels, 6 November 2007, p. 16.

⁶⁰ Peskin, *op.cit.*, p. 89.

⁶¹ Commission of the European Communities, *Serbia 2007 Progress Report*, SEC(2007) 1435, Brussels, 6 November 2007, p. 4; United Nations, *A/62/172-S/2007/469*, New York, 1 August 2007, pt. 81.

⁶² Interview with Radomir Diklic Serbian Ambassador to Belgium, *op.cit.*

the reports of ICTY on Croatia's cooperation were still below par in September 2005, Carla del Ponte changed her stance in October 2005 declaring that Croatia was cooperating fully.⁶³ Although it was never acknowledged publicly, it was clear that the issue of Croatia had become mixed up with the Turkey dossier. As Austria, a great supporter of Croatian membership, stood isolated in its opposition on opening accession negotiations with Turkey, a package deal was made. Austria "would get Croatia" if it gave up its opposition on Turkey.⁶⁴ By putting pressure on del Ponte to soften her reports on Croatia's cooperation, the Union would not lose face in opening negotiations with the Croatian government. A concurrence of political factors created a 'window of opportunity' for Croatia, but also undermined the EU's credibility in holding on to a tough stance vis-à-vis Serbia as it gives the impression that conditionality is negotiable and variable from case to case. The example of Gotovina, also gives an extra argument to the advocates of a softer approach on conditionality, as the opening of accession negotiations did not permit Croatia to avoid its obligations. With the help of the Spanish government, Gotovina was arrested two months after the accession negotiations had started.⁶⁵

In conclusion, it could be argued that the Union does not seem to have the most consistent policy of conditionality. The internal divisions, the variation in terms of strictness over time, and the inconsistency of applying the 'ICTY condition' in different but comparable cases damage the EU's credibility. If a condition is not credible and consistent, it offers scope for manipulation to the target government and gives the impression that conditionality is negotiable. We will see in the part on Serbia's perspective, that this has indeed been the case and that the inconsistency of the EU has seriously damaged the effectiveness of 'ICTY conditionality'.

3. 'ICTY Conditionality' from the Serbian Point of View

Conditionality is a two-way process, in which the target state determines as much of its effectiveness as the external partner who sets the condition. Serbia's recent history of wars and ethnic conflicts still resonates into its current politics. The question of cooperation with the ICTY is therefore a very complex and sensitive one. Whether the Serbian government complies or not, there are always internal and external costs tied to its policy. By linking the issue of domestic costs to an overview of Serbia's track record of cooperation with the ICTY, we will have a better understanding of Serbia's

⁶³ Phinnemore, *op.cit.*, pp. 15-16.

⁶⁴ Interview with diplomat A, *op.cit.*

⁶⁵ 'Croatian Fugitive General Seized', *BBC News*, 8 December 2005.

'ICTY policy'. Another important factor to explain Serbia's cooperation is the role of veto players. I will demonstrate that the ousting of Milošević was not followed by the necessary changes in Serbia's state structures. By consequence, the foundations for a policy of full cooperation with the Tribunal were never laid.

3.1 Political Costs

As Schimmelfennig argued, "[i]n order to be effective, [...] EU conditionality has to fall on fertile domestic ground".⁶⁶ Therefore, *the domestic costs of compliance with 'ICTY conditionality' for the Serbian government must be low in order for conditionality to be effective.* In this section, I will assess the domestic costs of compliance and identify the strategies used by the different Serbian governments to keep them as low as possible.

3.1.1 What Price for Cooperation with the ICTY?

According to Epstein and Sedelmeier, the EU has difficulties in obtaining compliance from Serbia because the policy of conditionality implies high political costs on the domestic level.⁶⁷ This is due to the fact that the demands of the Union in part touch upon the Serbian national identity. The question of extraditing suspected war criminals is very sensitive because most of the indicted – and especially Karadžić and Mladić – are still seen as national heroes by a large part of the Serbian society and political elite.⁶⁸ Moreover, a majority of Serbs perceive the ICTY as a political instrument with an anti-Serbian bias.⁶⁹ Therefore, one of the major costs of cooperation with the ICTY for any Serbian government is that it goes against domestic public opinion. The Tribunal hurts the Serbian national pride and creates aversion towards the European Union and others who set such cooperation as a condition.⁷⁰ However, both Vladimir Matic and Milanka Saponja-Hadžić find that in certain moments in the past, the Serbian public has accepted cooperation with the ICTY.⁷¹ Both the extradition of Milošević in 2001 and the hunt on war criminals after the murder of Prime Minister Zoran Đinđić in 2003 could count on public support. Nevertheless, support has not been a constant given, and often the only factor that

⁶⁶ Schimmelfennig, *op.cit.*, pp. 918-919.

⁶⁷ Epstein & Sedelmeier, *op.cit.*, p. 801.

⁶⁸ V. Matic, 'Serbia at the Crossroads Again', *United States Institute of Peace*, Special Report, 2004, pp. 11-12.

⁶⁹ D.F. Orentlicher, 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia', *Open Society Institute*, May 2008, p. 11.

⁷⁰ Anastasakis & Bechev, *op.cit.*, p. 13.

⁷¹ Matic, *op.cit.*, p. 11; M. Saponja-Hadžić, 'Regional Report: Serbs Finally Back Hague Cooperation', *Institute for War and Peace Reporting*, 19-23 May 2003.

can help to overcome opposition vis-à-vis cooperation with the ICTY is external pressure. However, the risk of “alienating a substantial portion of the electorate” remains real.⁷² It is clear that public opinion functions as a brake for cooperation and erodes the efficiency of ‘ICTY conditionality’.

Both the popularity of the indictees and the negative public opinion vis-à-vis the Tribunal are connected to the broader issue of nationalism. Cooperation with the ICTY and extradition of suspected war criminals have stirred up nationalism and undermined the popularity of moderate forces in Serbian politics.⁷³ A large part of this is caused by the powerful right-wing nationalist media, which aim to create an “atmosphere that demonises reformers, promotes right-wing nationalism, and denigrates all who cooperate with The Hague”.⁷⁴ While publications are less flagrant now than in the past, most media still feed nationalism and effectively undermine any basis for cooperation with the Tribunal.⁷⁵ According to Vladimir Gligorov, this contributes to an ideological narrow-mindedness, and a political debate focused on nationalist ideas of the past.⁷⁶ Under such conditions, the political costs of advocating cooperation with the ICTY are very high. It becomes increasingly difficult to establish a pro ICTY-regime, since nationalist parties become more popular and are often needed to form a majority. Vojislav Koštunica’s Democratic Party of Serbia (DSS), which can hardly be labeled pro-ICTY or pro-Europe, has led most governments since the fall of Milošević. I will discuss its role in more detail below. A second important player is the Socialist Party of Milošević, which was necessary to provide support in parliament for Koštunica’s minority government established in 2004. In order to retain the support of the Socialists, Koštunica reversed the government’s policy on cooperation with the ICTY and became far more reluctant in pushing for arrests and extraditions.⁷⁷ The Serbian Radical Party of Vojislav Šešelj – on trial in The Hague – also remained a very potent force up until 2008. The party, which has now split, has a pro-Moscow and strong anti-Hague profile. Its acting leader until September 2008 was Tomislav Nikolić, a nationalist radical who was a redoubtable

⁷² International Crisis Group, *Serbian Reform Stalls Again*, Balkan Reports, no. 145, Belgrade/Brussels, 17 July 2003, p. 5.

⁷³ M.A. Vachudova, ‘Strategies for Integration in the Balkans’, in M. Cremona (ed.), *op.cit.*, p. 154.

⁷⁴ International Crisis Group, *op.cit.*, p. 9.

⁷⁵ ‘Human Rights, Hostage to the State’s Regression’, *Helsinki Committee for Human Rights in Serbia*, 2007, pp. 72-75.

⁷⁶ V. Gligorov, ‘Serbia Grinds to a Halt’, *Bosnian Institute*, 26 December 2008.

⁷⁷ Matic, *op.cit.*, pp. 5-6.

opponent for Boris Tadić during the 2008 presidential election.⁷⁸ The fact that nationalist parties still have a great weight in Serbian politics means that pro-ICTY parties have to compromise massively, and risk smear campaigns if they push for more cooperation. Moreover, most of the parties mentioned above do not see EU membership as a political priority, which is an additional factor undermining the effectiveness of the EU's policy of conditionality.⁷⁹

3.1.2 Strategic Cooperation

Throughout the years the Serbian authorities have always looked for ways to balance the external 'costs of no cooperation' with the internal costs of cooperation. This has produced a number of strategies. I will briefly outline the three most important ones as they give a better understanding of Serbia's track record of cooperation with the ICTY.

The first one is that of 'minimum cooperation and appeasing'. Vojislav Koštunica – president from 2001 to 2004 and Prime Minister from 2004 to 2008 – was very reluctant to cooperate with the ICTY. Carla del Ponte writes that 'ICTY cooperation' never featured on top of his agenda and that his governments only delivered the absolute minimum of what was asked in order to appease the US and the EU.⁸⁰ Reports from the US Congress and the Chief Prosecutor confirm this. From 2001 to 2003 cooperation with the ICTY only increased when the US certification deadline for aid drew near.⁸¹ Carla del Ponte's addresses before the UN Security Council state that cooperation slowed down or often came to a standstill after the certification deadline and that Serbia never cooperated 'fully'.⁸² Koštunica often reassured the West through the adoption of laws and action plans on cooperation. In April 2002, for instance, the Federal Parliament of Yugoslavia adopted a law on cooperation with the ICTY. "Koštunica [...] claimed erroneously that cooperation could not proceed without this law."⁸³ While many in Europe and the US saw the adoption as a sign of Koštunica's will to cooperate with the ICTY, the Tribunal itself branded the law as

⁷⁸ 'Serbia Election Victory for Tadic', *BBC*, 4 February 2008, Tadić won the elections with 51% of the votes, while Nikolić stranded with 47%.

⁷⁹ Anastasakis & Bechev, *op.cit.*, p.15.

⁸⁰ Del Ponte, *op.cit.*, p. 236.

⁸¹ S. Woehrel, *Conditions on U.S. Aid to Serbia*, CRS Report for Congress, Washington D.C., 7 January 2008, pp. 1-3.

⁸² United Nations, *A/56/352-S/2001/865*, United Nations, New York, 17 September 2001, pp. 11-13; United Nations, *A/57/379-S/2002/985*, United Nations, New York, 4 September 2002, pp. 39-40; United Nations, *A/58/297-S/2003/829*, United Nations, New York, 20 August 2003, pp. 51-52.

⁸³ Peskin, *op.cit.*, p. 74.

flawed and unnecessary.⁸⁴ “[T]he law stipulated that the government could only give approval for the arrest of suspects who were indicted by the tribunal *before* the law entered into force”.⁸⁵ This effectively undermined the ongoing investigations which the Tribunal was carrying out in pending cases. A second example is the action plan Koštunica proposed to arrest Ratko Mladić when the EU had suspended negotiations on the SAA. According to Del Ponte, this plan was nothing but a smokescreen for a policy of non-cooperation, drafted with the aim to give the European member states something to resume the negotiations.⁸⁶ One diplomat branded this strategy as “a policy of false promises and constant delay”.⁸⁷

A second tactic employed by Koštunica came to the fore in 2003. In the run-up to the December parliamentary elections, Koštunica had watered down his stance on ICTY cooperation even more. He was afraid the current policy would play into the hands of the Serbian Radical Party and adopted a policy of ‘voluntary surrender’: the Serbian government would no longer arrest suspected war criminals but negotiate with them and convince them to voluntarily surrender.⁸⁸ When the Radical Party became the largest one in the Serbian parliament and Koštunica had to rely on the Socialist Party for a majority, this policy was reinforced and cooperation virtually came to a standstill. This led the Bush administration to suspend aid in 2004 and 2005.⁸⁹ Pressure subsequently mounted on Koštunica causing him to increase the incentives for the indictees to surrender voluntarily by promising money to their families and providing them with new cars.⁹⁰ The US pressure and suspension of aid actually caused a significant change in cooperation as no less than 14 indictees were transferred. The transfers were presented to the Serbian public as ‘voluntary’, but “[a]s one observer notes, there were ‘voluntary surrenders’ where people showed up in their pyjamas and with duct tape”.⁹¹

The last strategy I identified is the one used by the proponents of cooperation with the ICTY in Serbian politics. They too face the political costs discussed above. Remarkably enough they never frame ‘ICTY cooperation’ in a broader story of coming to terms with history and adhering to the underlying values such as respect for the rule of law. “Only a small minority of political figures has advanced the case

⁸⁴ Woehrel, *op.cit.*, p. 2.

⁸⁵ Del Ponte, *op.cit.*, p. 224 (emphasis added).

⁸⁶ *Ibid.*, p. 493.

⁸⁷ Interview with diplomat A, *op.cit.*

⁸⁸ Orentlicher, *op.cit.*, p. 44.

⁸⁹ Woehrel, *op.cit.*, p. 3.

⁹⁰ Del Ponte, *op.cit.*, p. 452.

⁹¹ Orentlicher, *op.cit.*

that Serbia should cooperate for moral rather than expedient reasons."⁹² Indeed, even pro-European politicians such as the late Zoran Đinđić and Boris Tadić have always framed their position in a pragmatic way.⁹³ They both used the external pressure from the US and the EU to justify their policy of cooperation. "[E]ven Serbian politicians who are supportive of the ICTY dare not contradict the Radicals' anti-Hague rhetoric with an alternative story lest they lose votes."⁹⁴ As argued before, this makes the promotion of norms and values which underpin a policy of cooperation with the Tribunal an extremely hard task for external actors. I will now briefly go into their influence on the domestic costs in Serbia, as they too have interfered indirectly into Serbian politics.

3.2 Veto Players

The capacity of compliance with conditionality is influenced by the number of veto players in the institutional structure of the target state. The more veto points, the more resistance there is to change.⁹⁵ Moreover, as Tsebelis argued, the more significant the change of the status quo, the more difficult it is to overcome these veto points.⁹⁶ In the following sub-sections I will discuss the role of three of the most important veto players: Vojislav Koštunica, the army and the secret service. This analysis will also give a better idea of the scope of change necessary for a policy of 'full cooperation'.

3.2.1 Vojislav Koštunica

Vojislav Koštunica is undoubtedly one of the most important veto players for ICTY cooperation since October 2000. He was president of the Federal Republic of Yugoslavia from 2000 to 2003 and Prime Minister of Serbia from 2004 until 2008. His relationship with the Chief Prosecutor of the ICTY was very uneasy. Del Ponte described him to the UN Security Council as a "man of the past", "a manipulative politician who would do his utmost to avoid cooperation".⁹⁷ Fact is that Koštunica had and still has an anti-Hague stance. Pushing for full cooperation with the ICTY would be renouncing his nationalist power base.⁹⁸ Moreover, he often used the argument that exerting great pressure on Serbia to cooperate with The Hague would

⁹² Peskin, *op.cit.*, p. 20.

⁹³ Orentlicher, *op.cit.*, p. 88.

⁹⁴ Srđjan Bogosavljević cited in Orentlicher, *ibid.*

⁹⁵ T.A. Börzel & T. Risse, 'When Europe Hits Home: Europeanization and Domestic Change', *European Integration online Papers*, vol. 4, no. 15, 2000, p. 7.

⁹⁶ Tsebelis cited in Schimmelfennig & Sedelmeier, *op.cit.*, pp. 666-667.

⁹⁷ Carla del Ponte cited in Peskin, *op.cit.*, pp. 65-66.

⁹⁸ Orentlicher, *op.cit.*, p. 11.

enforce the position of the ultra-nationalists, and that it would destabilise Serbia and the region.⁹⁹

Koštunica's DSS has functioned as a brake for the reforms that were necessary in the Serbian government's apparatus to guarantee full ICTY cooperation. "[H]e and his advisers consistently obstructed the [...] coalition from purging the [...] army [and the security service] of Milosevic supporters. The DSS also opposed efforts to reform the judiciary and [...] actively obstructed cooperation with the ICTY."¹⁰⁰ According to Eric Gordy, the 'soft and gradual' transition Koštunica advocated, boiled down to a standstill.¹⁰¹ As long as significant elements of the state structures from the Milošević era were not purged instantly, they would continue to obstruct fundamental change in the Serbian society. Even after the murder of Đinđić, the 'reformist zeal' of the Serbian government was short-lived. The government announced that the army would be put under civilian control, that the security structures were being reformed and that all outstanding demands from the ICTY would be addressed within the year.¹⁰² However, the changes made in the army and the Serbian Civilian Security Agency (BIA) – two institutes which obstructed full cooperation with the Tribunal – remained very limited. As Eric Gordy writes, the Serbs "had succeeded in bringing about 'October 5' (the actual date on which Milošević was compelled to leave power in 2000), but [...] 'October 6' (the imaginary date that symbolized the definitive break of Serbian political culture from the legacy of the Milošević period) never occurred".¹⁰³

The explanation for Koštunica's reluctance is two-fold. Firstly, he was elected on the basis of a nationalist agenda. Hence, the lack of political will to pursue reforms in order to establish full cooperation with the ICTY. It is now widely acknowledged that Koštunica played a part in the protection of Ratko Mladić up until 2005. He signed the approval for Mladić's retirement and claimed he could do nothing to stop the army paying the general's pension.¹⁰⁴ Moreover, the Serbian Ambassador to Belgium admitted that Koštunica must have had detailed information on the whereabouts of Radovan Karadžić in 2008, but did not have the political will to arrest him.¹⁰⁵ The second reason for Koštunica's reluctance to fully cooperate with The Hague is that

⁹⁹ Del Ponte, *op.cit.*, p. 144.

¹⁰⁰ International Crisis Group, *Serbia's U-Turn*, Europe Report, no. 154, Belgrade/Brussels, 26 March 2004, p. 6.

¹⁰¹ Gordy, *op.cit.*, p. 14.

¹⁰² International Crisis Group, *Serbian Reform Stalls Again*, *op.cit.*, pp. i, 3.

¹⁰³ Gordy, *op.cit.*

¹⁰⁴ Orentlicher, *op.cit.*, p. 31; Del Ponte, *op.cit.*, p. 450.

¹⁰⁵ Interview with Radomir Diklic Serbian Ambassador to Belgium, *op.cit.*

pressure was not exerted consistently by the US and the EU. "The absence of pressure appears to have emboldened Koštunica's defiance of the tribunal."¹⁰⁶ The many shortcomings in the policy of conditionality as discussed in the previous chapter were repeatedly exploited by Koštunica through a policy of minimum cooperation and constant promising.¹⁰⁷ Nevertheless, Serbia's Prime Minister was not the only veto player blocking full cooperation. Both the army and the secret service played a crucial role in obstructing reformist pressures and protecting the most wanted suspects on del Ponte's list.

3.2.2 The Army

The army has long protected former army officials from the indictments of the ICTY. In her memoirs, Carla del Ponte lists some of the evidence that shows the involvement of high-level military officials in the protection of Ratko Mladić. Up until 2002 the army still paid Mladić's salary.¹⁰⁸ There are indications that he received medical treatment in a Belgrade hospital in 2003 and travelled to several military training grounds in Serbia in that same year. Mladić also received a military pension until 2005.¹⁰⁹ On several occasions del Ponte was told by Serbian officials that the arrest of Mladić was a case for the army and not for the civilian authorities.¹¹⁰ In response, General Krga of the Yugoslav Army contended that the army gave no refuge to indictees, and passed the buck on to the Ministry of Interior Affairs. However, after intelligence was presented to him by the office of the Prosecutor of the ICTY, Krga admitted that Mladić had been in Serbia in 2003 and 2004, had received protection of members of his former staff and had enjoyed access to grounds and facilities of the army. Nevertheless, he maintained that this was a situation of the past and that Mladić received no more protection as of 2005.¹¹¹

As I have argued above, the political response to the obstruction of the army has been rather weak. In the period between October 2000 and March 2003 no significant reforms were carried out.¹¹² Even the (short) reformist boost following the assassination of Đinđić has proven to be insufficient. It emerged, for instance, that new high-level appointees were also implicated in war crimes during the Kosovo war of 1999. In addition to that, the dissolution of the dubious Commission for

¹⁰⁶ Peskin, *op.cit.*, p. 64.

¹⁰⁷ Interview with diplomat A, *op.cit.*

¹⁰⁸ Del Ponte, *op.cit.*, p. 157.

¹⁰⁹ *Ibid.*, pp. 242, 247.

¹¹⁰ *Ibid.*, pp. 157, 245, 247.

¹¹¹ *Ibid.*, pp. 246-248, 253.

¹¹² Gordy, *op.cit.*, p. 14.

Cooperation with the Hague Tribunal (CAC)– a military body responsible for cooperation with the ICTY – did not bring about the reforms the Tribunal thought were necessary to ensure full cooperation.¹¹³ Both Tadić and Koštunica maintained that the cooperation in the search for indictees between the civilian authorities and the army was excellent and that there were no signs that suspects such as Mladić were being protected by the army.¹¹⁴ Yet, according to reports from the Helsinki Committee for Human Rights in Belgrade, the army is still withholding crucial documents from the Prosecutor's office.¹¹⁵ Del Ponte, too, still believes Mladić is being protected by the army and contended that the Serbian government is not doing enough to arrest him.¹¹⁶ The key to overcome the veto position of the army thus seems to lie in the hands of the politicians. Once again, a lack of political will to purge the army from elements that protect suspects such as Mladić limits Serbia's ability to cooperate with the ICTY and slows down the country's progress of integrating with Europe.

3.2.3 The Serbian Secret Service (BIA)

An important domestic factor behind Serbia's failure to comply with 'ICTY conditionality' is the veto position of the security services.¹¹⁷ Srđjan Cvijić calls a reform of the security services the top requirement for Serbia's swift integration into the EU.¹¹⁸ After the ousting of Milošević the structures of the BIA were never purged from anti-ICTY elements. Đinđić had secured the resignation of the security chief Radomir Marković, a top ally of Milošević who was suspected of having a hand in several political murders.¹¹⁹ However, the changes at the top have not prevented the lower levels from keeping a firm grip on the BIA's functioning and obstructing cooperation with the ICTY.¹²⁰ According to the International Crisis Group, the BIA has significant information on war crimes committed during the Milošević era, but is not making it public to protect its own members. "Those compromised by such activities

¹¹³ International Crisis Group, *op.cit.*, pp. 1, 4. The Army's CAC was a semi-official body of retired generals established to foster cooperation with the ICTY. However, instead of enhancing it obstructed cooperation by not giving access to documents. In addition, many members of the Commission had direct links with Milosevic or Mladic.

¹¹⁴ Del Ponte, *op.cit.*, p. 291.

¹¹⁵ 'Human Security in an Unfinished State', *Helsinki Committee for Human Rights in Serbia*, Belgrade, 2006, p. 69.

¹¹⁶ 'Human Rights, Hostage to the State's Regression', *op.cit.*, p. 86.

¹¹⁷ Orentlicher, *op.cit.*, p. 39.

¹¹⁸ S. Cvijić, *The New Serbia: Fast Forward towards the EU?*, Brussels, European Policy Centre, January 2009, p. 4.

¹¹⁹ Orentlicher, *op.cit.*, p. 40.

¹²⁰ E. Gordy, 'Serbia After Djindjic: War Crimes, Organized Crime and Trust in Public Institutions', *Problems of Post-Communism*, vol. 51, no. 3, 2004, p. 15.

have formed powerful parallel structures within the security organs that play a significant role in obstructing cooperation with the ICTY.”¹²¹ The Humanitarian Law Centre in Belgrade comes to the same conclusion, stating that “[i]t is obvious that parts of [...] security agencies [...] play a major role among those who protect the ICTY indictees”.¹²²

The assassination of Đinđić, in which BIA members were involved, was the wake-up call for the government to reform the security structures. Yet, the reformist action taken in the aftermath of the murder appears to have been a “one-off reaction” and “the BIA remains almost completely unreformed and free of public scrutiny or true parliamentary control”.¹²³ Once again, the determining factor seems to be a lack of political will to reform the structures from the Milošević regime. The International Crisis Group points to the ties of the governing parties with the financial oligarchy of the 1990s. These dubious groups have a vested interest in keeping the security structures unreformed and are obstructing the necessary reforms Serbia needs for a policy of full cooperation with the ICTY.¹²⁴

Coming back to the hypothesis, it could be argued that cooperation with the ICTY requires a great change away from the status quo. Structures of important veto players such as the army and the security service need to be reformed because their direct or indirect involvement in the war crimes committed in the 1990s makes them into the main obstructing force for cooperation. Tough political action is needed to reform these institutions. However, my research has shown that the governing parties have often lacked political will to push for reforms and have not always been in favour of ICTY cooperation. Especially Prime Minister Vojislav Koštunica has been a major brake on reforms and has never seen cooperation with the Tribunal as a priority for Serbia. The power of the veto players has indeed been a major factor in stalling Serbia’s progress on compliance with the conditionality set by the EU.

3.2 Current Situation

With Tadić elected president in February 2008 and the formation of a government led by the Democratic Party (DS) and *without* the Radical Nationalists or Koštunica’s DSS, the conditions for a pro-European course seem favourable. According to Vladimir Gligorov, Tadić’s victory and the formation of a pro-European government

¹²¹ International Crisis Group, *op.cit.*, p. 14.

¹²² Humanitarian Law Centre, *Serbia’s Cooperation with ICTY*, Belgrade, January 2007.

¹²³ International Crisis Group, *op.cit.*, pp. i, 15.

¹²⁴ *Ibid.*, p. 17.

in July 2008 meant the Serbian electorate has given a clear mandate to the government to move closer to Europe and fulfill the outstanding conditions.¹²⁵ Moreover, the Radical Party split after the elections over their policy on integration with the EU.¹²⁶ The political situation thus seems to be favourable at last to pursue a clear policy of cooperation with the ICTY. The arrest and extradition of Radovan Karadžić only a few weeks after the new government took office, sent a clear message to the EU about Serbia's new policy of cooperation. Not only were the street protests minor, but according to Ambassador Diklić it became clear that the political will to cooperate fully with the Tribunal is finally there and that the Serbian authorities will do anything within their possibilities to extradite the remaining fugitives.¹²⁷ Diklić also claimed there is a wind of change in the BIA with a newly appointed chief and that the army has been purged of officers who have ties with Ratko Mladić.¹²⁸

However, not all domestic conditions are right for an unbridled policy of cooperation with the Tribunal. The formation of the new government was a cumbersome process in which the Socialist Party of the late Milošević played the role of kingmaker.¹²⁹ This not only poses questions in terms of the pro-Europeanness of the government (the SP has not exactly been an advocate of cooperation with the ICTY and more integration with the EU), but it also shows the ever present split in Serbian society. Although the Western media proclaimed the pro-European parties to be victorious in the 2008 parliamentary elections, Šešelj's Radical Party and Koštunica's DSS still managed to get more than 40% of the votes with an anti-European program. One might wonder what the Socialists asked in return for their support of a DS-led government? According to Ambassador Diklić, all Socialists in the government are pro-European and have made a firm commitment for a policy geared towards European integration.¹³⁰ Yet, not everyone in the EU is at ease with the Socialist presence. "We wonder what the effect of a Socialist Minister of Interior Affairs will be on the issue of cooperation with the Tribunal", said one diplomat.¹³¹

So far the Chief Prosecutor's reports have been positive since the new government took office. Whereas Serge Brammertz – who replaced Carla del Ponte in January

¹²⁵ Gligorov, *op.cit.*

¹²⁶ Cvijic, *op.cit.*, p. 2.

¹²⁷ Interview with Radomir Diklic Serbian Ambassador to Belgium, *op.cit.*

¹²⁸ *Ibid.*

¹²⁹ 'Serbia: A Pro-EU Government in the Making', *Stratfor*, 27 June 2008.

¹³⁰ Interview with Radomir Diklic Serbian Ambassador to Belgium, *op.cit.*

¹³¹ Interview with diplomat C, *op.cit.*

2008 – branded Serbia's cooperation as insufficient in June 2008, his address to the Security Council of December was far more positive.¹³² He hailed the extradition of Karadžić as a milestone in Serbia's cooperation and said that "[t]he changed general political environment has led to a more decisive and proactive approach to cooperation by authorities at the political, judicial and operational levels".¹³³ Yet Brammertz refrained from calling cooperation full: there are still problems with the protection of witnesses, important documents are missing and two indictees have yet to be apprehended, Ratko Mladić and Goran Hadžić.¹³⁴ Moreover, Vladimir Gligorov questions whether there is a strong strategy on how to integrate more with the EU.¹³⁵ With a pro-European mandate and the opposition weakened by splits, Gligorov rightly wonders what more is stopping the governing parties on carrying out the necessary reforms and complying with conditionality.¹³⁶ The Serbian government is saying that change is happening, but that it takes time. Nevertheless, it is confident that it will soon get the label of 'full cooperation' from Prosecutor Brammertz – regardless of Mladić's arrest – and will be able to proceed on its path to the EU.¹³⁷ Only time and future research will tell whether the new government has really brought about substantial change and manages to overcome the remaining obstacles for 'full cooperation' with the ICTY.

4. Conclusions

The demand for cooperation with the ICTY is a relatively new form of conditionality employed by the EU vis-à-vis certain aspiring members. This paper asked to what extent the EU's policy of 'ICTY conditionality' has been effective in the case of Serbia. Many authors agree that without external pressure, Serbia's willingness and capacity to cooperate with the Tribunal would have been much lower.¹³⁸ Every time extraditions were made or cooperation increased, this was due to a strict policy of conditionality by either the US or the EU. The most eye-catching results were undoubtedly the extradition of Milošević in 2001, the transfer of 14 indictees in 2005 and the extradition of Karadžić in 2008. All three instances were linked to either the US threatening to suspend financial aid for Serbia or the EU threatening to suspend proceedings on the SAA. These events show that conditionality is most effective

¹³² S. Jennings, 'Brammertz Slams Serbian Tribunal Cooperation', *Institute for War and Peace Reporting*, 6 June 2008.

¹³³ S. Brammertz, *A/63/210-S/2008/515*, UN Security Council, New York, 12 December 2008.

¹³⁴ *Ibid.*

¹³⁵ Gligorov, *op.cit.*

¹³⁶ *Ibid.*

¹³⁷ Interview with Radomir Diklic Serbian Ambassador to Belgium, *op.cit.*

¹³⁸ Peskin, *op.cit.*, p. 90; Orentlicher, *op.cit.*, p. 90; del Ponte, *op.cit.*, p. 459.

when compliance is tied to real benefits and immediate rewards. Yet, from the case study it also emerged that Serbia's cooperation has not been consistently high. The theoretical framework provided the tools to identify those factors which influenced the effectiveness of the policy of conditionality throughout the years.

First of all, up until 2005 the EU did not tie cooperation with the ICTY to any specific reward. It was the US government which had the biggest impact on Serbia's policy of cooperation by making the certification of aid dependent on Serbia's progress in cooperating with the Tribunal. The employment of 'ICTY conditionality' on the part of the EU must be seen in terms of the renewed attention for potential candidate members after the 'big bang' enlargement of 2004. Nevertheless, even after that date, the EU's policy of 'ICTY conditionality' has not always been effective. A lack of consistency in the application of the condition is one of the major factors explaining this shortcoming. The EU has failed to apply 'ICTY conditionality' consistently over time and across cases. Cooperation with the ICTY did not feature on top of the EU's agenda with Serbia until 2005. And even after that date, the EU has at times softened its stance on significantly. Either with the aim to boost pro-European forces during elections or with the objective of making Serbia more flexible on the issue of Kosovo. Moreover, the example of the Croatian accession talks show that the EU has not been consistent in applying 'ICTY conditionality' in different cases. The standards in the Croatian case appeared to be much lower than those in the Serbian case. The reason for these inconsistencies is two-fold. Firstly, the EU is not a monolithic actor. Its decisions on conditionality are made on the basis of political negotiations between the member states and not on a set of pre-described rules. Secondly, the policy of conditionality with regard to enlargement has changed over time. The premature accession of Romania and Bulgaria in 2007, a feeling of 'enlargement fatigue' and concerns about the EU's 'absorption capacity' have triggered a much stricter policy of conditionality in which even technical steps – such as the signing of an agreement – are linked to certain conditions.

The inconsistency with which the EU has applied its conditionality has left the door open for manipulation on part of the Serbian government and gave the impression that conditionality is something which is negotiable. I have showed that especially Prime Minister Koštunica has exploited these shortcomings by pursuing a policy of minimum cooperation. Nevertheless, conditionality is a two-way process and its effectiveness does not depend on the EU alone. There are important domestic factors to take into consideration when assessing 'ICTY conditionality'. First of all, the precarious political situation in Serbia makes it difficult to push for full cooperation

with the Tribunal. Not only is the public's opinion largely negative vis-à-vis the Tribunal, but war criminals are still seen as national heroes by a significant part of the Serbian society. Pushing for cooperation with the Tribunal thus entails significant political costs as it plays into the hands of nationalist forces. In addition to that, the section on veto players has shown that reforms in the army and security structures are necessary to ensure a stable basis for a policy of cooperation. I have demonstrated that it is partly due to a lack of political will to pursue these reforms that Serbia has failed to establish a consistent policy of cooperation.

Finally, this case study has produced some useful observations on the renewed policy of conditionality that the EU is pursuing vis-à-vis potential or future members. It is clear that conditionality today is tougher than in past enlargement dossiers, but that the inconsistency with which it is applied is a major shortcoming. The divisions among the member states on how to promote change and reforms prevent the EU from having a strong and unified policy of conditionality. Moreover, this research has shown that 'ICTY conditionality' has not brought about the changes in values that the EU is aiming for. This is partly due to a lack of clarity on the EU's side to link its policy of conditionality with the underlying values of democracy and respect for the rule of law. However, it is also due to the unwillingness of Serbian leaders to inform the Serbian public about the work of the Tribunal and about the importance that suspects are brought before a judge.

The analysis has also taught us something about the changing dynamics of enlargement. The case of Serbia shows that the EU is less clear in putting forward a membership perspective and that eventual membership cannot be taken for granted. It also demonstrated that steps in the accession process which used to be relatively easy to reach are increasingly tied up to compliance with certain conditions. The signing and entry into force of the SAA or the granting of the candidate status have become significant 'rewards' for aspiring members. If this case study has shown one thing, it is that Serbia's road to membership is still long and rocky. It is unclear what the future holds and how the EU will assess Serbia's compliance with the 'ICTY condition'. Nevertheless, the policy of conditionality will not stop once the issue of cooperation with the Tribunal is resolved. The question of Kosovo will surely be one of the next 'big issues' on the negotiation table between Serbia and the EU. It will be interesting to see how the findings of this paper apply in that particular case and how the EU's policy of conditionality will evolve over time.

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