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**Ending the State-Building Impasse: What Can Be Learned
from Previous EU Enlargements that Might Offer Solutions
for Bosnia and Herzegovina**

BY

Nida Gelazis

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ABSTRACT: On the basis of the success of the two previous waves of European Union enlargement to postcommunist states, EU accession is the international community's solution for ending the state-building impasse in Bosnia and Herzegovina. Through a literature review of analysis of the recent EU enlargements, this paper compares those countries' experiences with the current situation in Bosnia, and raises questions about the ability of the EU to address state-building issues through the accession process. The paper concludes that the previous enlargements do not provide a model for state-building in Bosnia. Because the EU's attempts to help along the process of state building in Bosnia is a new type of policy project, the paper proposes how the enlargement process might be adapted to address the specific problems in Bosnia, particularly in terms using human rights norms to compel Bosnian leaders to adopt necessary reforms.

Ending the State-Building Impasse: What Can Be Learned from Previous EU Enlargements that Might Offer Solutions for Bosnia and Herzegovina

Nida Gelazis*

Over the last two years, the international community's policy has been to accelerate the process of state-building in Bosnia and Herzegovina, so that a strong, unified state can "plug into" European institutions. Certainly, the international community hopes that the EU can replicate the strong and positive impact it has had on its 10 member states from postcommunist Europe. At the same time, the European Union is eager to test the capacity of its Common Foreign and Security Policy in the Western Balkans and therefore has taken up the challenge to play a larger role in BiH and, hopefully, lead it through the EU accession process.

EU accession is essentially a very good long-term plan for the entire Western Balkan region. The EU enlargement process has been heralded as the most successful EU foreign policy, and many academics have agreed that the EU has had a positive impact on postcommunist democracies in East Europe. The beauty of the EU process is that it uses the "soft" power of conditionality to compel countries to adopt European standards for regulating the market and democratic governance. In exchange for implementing reforms, countries can become members of the EU, and become part of Europe's so-called "sphere of peace and prosperity."

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However, the idea that EU conditionality will work in Bosnia seems to have hit a few snags over the last year. First, the failure of the new constitution further delayed Bosnia's progress. Second, the campaign leading up to elections last fall seemed to be particularly divisive, and the electoral results did not produce a dramatic change that some may have hoped for: in the end analysis, the parties that succeeded tended to be those that promote continued ethnic-based governance in Bosnia, not those that could cooperate for the creation of a unified Bosnian state. Another indication that things are not going well seems to be best illustrated by the resignation of High Representative Christian Schwarz-Schilling and that the scheduled closing of the OHR in June 2007 has been delayed indefinitely.

In many ways, Bosnia and Herzegovina is facing the same problems that other countries transitioning from communism faced throughout the 1990s, when politicians (with no experience in democratic practices or institution building) were expected to make the right choices to create, out of the remnants of communism, open societies and market economies. Yet, Bosnia has additional hurdles to surmount due to the fact that it is a post-conflict state, loosely knitted together by the Dayton Peace Accords. Given this difference, it seems unlikely that Bosnia-Herzegovina will respond in the same way to EU conditionality as, say, Latvia has. This paper explores how these differences may play out in Bosnia's EU accession process, by comparing it to the experiences of the postcommunist EU member states as they have been described and analyzed by a variety of scholars. Among the variety of opinions about the achievements of the EU accession process, there seems to be consensus on the fact that while the EU has been successful in helping to transform the legal environment in accession countries, the EU can do little to

imbue societies with a liberal democratic spirit (let alone compel the intra-state unity needed in Bosnia) which is necessary to ensure that the newly adopted laws and norms will be implemented. I argue that Bosnia's accession process will require the Commission to come up with creative policies and targeted requests in order to be successful there.

Next, I will focus in on the issue of minority rights, as it is a prime candidate for a new and creative EU policy. In past enlargements, minority rights have not received the attention they deserved, and EU influence was limited in this sphere. In terms of adopting international legal norms to protect minorities, Bosnia appears to have fulfilled that which the EU required from other postcommunist countries. Some have claimed that these international norms are hardly suited to Bosnia's unique environment, since they were created with the hope of ending international conflict, as opposed to creating a tolerant multiethnic society or unitary state. Instead it has been argued that Bosnia should rebuild its institutional structure so that rights are funneled through Bosnian citizenship.¹ I argue that minority rights instruments should be re-evaluated as a helpful guide in the process of state building in Bosnia, and leaning on these norms may in fact help lead the international community and Bosnians out of the current state-building impasse.

European Integration for Bosnia: What went wrong?

The plan for the Western Balkans seems simple: with the EU accession process as a map, all of the countries of the conflict-ridden region will find peace and prosperity through

¹ As recommended by the Venice Commission. See Venice Commission, "Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative." CDL-AD (2005) 004. p. 25.

economic integration. However, several factors seem to be aligning in a way that may undermine this grand plan.

First, there is no “plan B” for how to deal with the Balkans and this limits the EU’s power. In the first wave of EU accession by postcommunist states, the EU had a clear advantage in the negotiations, and it was often declared that postcommunist countries could either join the EU, or be left to try to muddle through the triple transformation whilst resisting negative influences of globalization alone. Countries, such as the Baltic States (which also feared Russian aggression) were particularly susceptible to being ‘cornered’ by the EU. Positive competition also played a role, particularly in Slovakia, which seemed to push towards democratization when it was not included in the list of accession countries included in the 1997 “Agenda 2000.” By contrast, in Bosnia, it is the EU and the wider international community that has the primary responsibility in fostering the development of a peaceful democracy, not the Bosnians. After a decade of both military and civilian international intervention, it still is not clear that there is enough of a democratic force within these societies to continue pursuing reforms. With the retreat of the US and UN from the region, the EU is the only plan left for the region. And since it is the only plan, the countries of the Western Balkans seem to be sitting on their hands, waiting for it to happen, rather than initiating the reform process. Moreover, the push to give away some of the “carrots” (e.g., visa facilitation) before conditions are met will further weaken the EU’s conditionality.

Second, BiH is far behind the countries involved in the last wave of enlargement, because the Dayton Peace Accord’s principles contradict European values. The list of

problems is very long,² for instance the Office of the High Representative, which essentially serves as an external governor general of the country is fundamentally undemocratic, and raises the question of Bosnia's sovereignty. Nevertheless, as recent experience seems to suggest, getting rid of the OHR may undermine the integrity of the state.³ Even without the OHR, the current constitutional structure, based on the Dayton Peace Accords has been deemed by the Venice Commission as "neither efficient nor rational and lack[ing in] democratic content."⁴ This is especially evident in the DPA's insistence on the protection of "ethnic rights" and the parallel institutions and quotas that this creates goes against the EUs insistence that societies and markets are open to free movement for all Europeans, and also creates an expensive and inefficient government.

Third, there seems to be a disconnect between how the EU is perceived in the US and Bosnia and how the enlargement process actually functions in practice. This disconnect is perhaps the most dangerous to the transatlantic partnership in the Western Balkans because it has already caused resentment and finger-pointing, with each side blaming the other for lost time. I do not think that this disconnect is not the fault of the US policy makers or the Bosnian leadership – if pressed, most Europeans would not be able to accurately and succinctly explain how the accession process works and what the effects of accession are. This process is extremely complex, and each country goes about it in its own style and in its own time. Moreover, each new accession country feels the

² An in-depth discussion of the obstacles to Bosnia and Herzegovina's Euro-Atlantic integration can be found in Gearoid O Tuathail (Gerarad Toal) "Embedding Bosnia-Herzegovina in Euro-Atlantic Structures: From Dayton to Brussels" *Eurasian Geography and Economics*, 2005, 46, No. 1, pp. 51-67.

³ See Nida Gelazis and Martin Sletzinger "Can Bosnia and Herzegovina Survive without the OHR?" found at <<http://www.wilsoncenter.org/index.cfm?topic_id=1422&fuseaction=topics.item&news_id=204876>>.

⁴ Venice Commission, "Opinion on the Constitutional Situation in Bosnia and Herzegovina." p. 25.

effects of accession differently, due to each country's unique set of priorities, problems, resources, etc.

Those seem to me to be some of the biggest problems, though there are other issues to consider, such as the perceived diminishing interest in further enlargement by some member states and the questionable capacity of the EU to accept new members before it reforms itself. But I think a lot of these other factors would be diminished if Bosnia and Herzegovina was truly ready to begin the accession process.

In order to get out of this status quo, I contend that there is a conceptual trap that we need to get out of so that we can be in the right mindset to figure out what to do in Bosnia. The trap is that policy makers on both sides of the Atlantic seem to be operating as though the EU is a democracy-building machine. The truth is that the EU was never designed to build democracies, or even states for that matter. The fact that it has helped democratization along in postcommunist countries seems probable, but precisely how those mechanisms work—and for what exactly the EU can take credit—remains a subject of research, analysis and debate.

The fact that we expect the EU to fulfill the role of democracy-builder is somewhat problematic, but it is easy to see how we fell into this trap in the first place. After all, democracy and minority rights feature prominently in the Copenhagen criteria, and pre-accession reports are full of criticisms of undemocratic policies. Although it is undeniable that EU conditionality has enabled it to compel countries to adopt democratic reforms, this is not what the EU was designed to do and as a result there are many areas in which the EU's capacity to foster change falls short. Most notably, the EU accession process does little to end inter-ethnic divides, as can be seen in the case of Cyprus.

Another shortcoming is the EU's commitment to minority rights and other human rights protections. This shortcoming is clear when you consider that Estonia and Latvia became EU member states even though there remain large segments of the resident population that are still stateless due to the countries' ethnocratic policies. It is important to address this shortcoming of the EU accession process, particularly in the case of Bosnia, where ethnic division is so profound that state integrity is constantly challenged.

I would like to present a few observations that have been made about the EU accession process to offer a better sense of what goes on during accession, what mechanisms influence the reform process and what outcomes seem to be shared by all new member states. These observations are not mine, but come from a survey academic literature on the topic of EU accession. I hope that this will give us a better idea of how to tailor Bosnia's unique problems and priorities to the process of European integration.

What have we learned from the process of EU accession by postcommunist states?

1). EU conditionality is as good as it gets in terms of achieving positive external influence on democratically-adopted domestic reforms.⁵ The reforms adopted by the postcommunist member states in order to get into the EU were quite diverse (as they were geared towards specific issues that needed to be addressed). And they were also quite far-reaching in terms of effecting that which is traditionally thought of as the

⁵ Many authors have noted the positive effects the EU enlargement process has had on democracy-building in Central and Eastern Europe. To understand how the process of conditionality works and why the EU was so successful, see Milada Anna Vachudova, *Europe Undivided: Democracy, Leverage and Integration after Communism* (Oxford: Oxford University Press, 2005). See also "Conclusions" by Frank Schimmelfennig and Ulrich Sedelmeier in *The Europeanization of Central and Eastern Europe*, Frank Schimmelfennig and Ulrich Sedelmeier eds. (Ithaca: Cornell University Press, 2005) p.210-228. In terms of raising the standard of human rights see "The Effects of EU Conditionality on Citizenship Policies and Protection of National Minorities in the Baltic States" in *The Road to the European Union – Lithuania, Latvia and Estonia* ed. Jan Zielonka and Vello Pettai (Manchester University Press, 2003) also published as a Working Paper of the Robert Schuman Centre for Advanced Studies, No. 2000/68.

purview of the sovereign state: for instance several countries had to make constitutional amendments or amend their naturalization procedures in order to comply with EU requirements. The best thing about EU's influence is that it is so 'hands off': the EU insists that the solutions to problems and reforms must be conceived by the accession country, in accordance with that country's democratic institutional structure and legal culture. The EU can point out what is wrong with a country's laws, but it cannot draft legislation to fix that problem: proposals and solutions must come from the accession country.⁶ As a result, the reforms that are adopted are completely 'home grown' (even if the initiative to adopt them came from outside). So, at the end of this process, not only is the reform adopted, but the state's institutions and political parties have proven that they can solve differences through democratic means, and that they have what it takes to be a fully-functioning member of the EU.

2). The reforms that the EU requires need to be based on hard law within the *acquis communautaire*, or on other international institutions' treaties to which countries have become parties. The *acquis* define European norms, which are decided upon by consensus of all EU member states. This means that these norms are not necessarily comprehensive or coherent, since they only cover those issues on which the member states were able to agree upon by consensus. For example, there are lots of norms when it comes to non-discrimination policies within labor codes, or consumer protection issues, but absolutely nothing that deals with minority rights. This means that when there is little agreement among member states, then there is low "density" of *acquis* on an issue, and

⁶ See the discussion of the "lack of templates" in Heather Grabbe "How does Europeanization affect CEE governance? Conditionality, diffusion and diversity" *Journal of European Public Policy* 8:6 December, p. 1014.

therefore more room to maneuver for accession states.⁷ That begs the question of whether a “European model” exists and, if a model does not exist: how can the EU influence reform through enlargement?

Moreover, it seems important to consider that the enlargement process does not take into account the peculiarities of any individual country, but demands across-the-board adoption of the *acquis*. While there is some wiggle room in adopting the *acquis* into the country’s “legal culture” no opt-outs were allowed in the most recent enlargements. The EU has some flexibility to ask accession countries for more than what is in the *acquis*, by testing a country’s compliance to the treaties of other international organizations to which it is a party. In that way, institutions (namely the Council of Europe) that do have jurisdiction on issues such as minority rights can be brought into the accession process. However, experience shows that these norms are less strongly applied by the EU during the enlargement process than norms that are in the *acquis*.⁸

3). EU accession requires that a state be able to assimilate and comprehend a huge system of laws and participate in a complex supra-state bureaucratic structure. Therefore, even if it is not a specific priority or goal, the effect of the EU accession process is to centralize state power in the executive branch order to improve the state’s institutional capacity.⁹

⁷ Wade Jakoby *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe*. Cambridge: Cambridge University Press, 2004.

⁸ For specific evaluations of the application of minority rights criteria in the enlargement process see Nida Gelazis, “Statelessness in the Baltic States: Ramifications for European Citizenship and Social Stratification after EU Enlargement,” in the *European Journal of Migration and Law* 6: 225-242, 2004. See also, James Hughs and Gwendolyn Sasse, “Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs” in the *Journal on Ethnopolitics and Minority Issues in Europe* 1/2003.

⁹ Grabbe describes how the enlargement process empowers the executive: “Although the applicants have found different solutions to the organizational challenges of conducting negotiations, the EU’s demands for managerial competence and central co-ordination favour a concentration of efforts on a small team. This further encourages the trend towards a ‘core executive’, which was already emerging owing to other

4). The EU has no mechanism for civil society building or other traditional democracy-promotion efforts in which USAID and other bilateral actors as well as independent philanthropists have been engaged in postcommunist Eastern Europe. The EU's pre-accession funding and post-accession structural funds are not geared towards NGO development, election monitoring, government oversight, or human rights promotion.¹⁰

5). The final contention that has been presented in academic work is that for the EU accession to work, a country already has had to achieve a certain level of democratization.¹¹ This is because the EU has no mechanism for transmitting "democratic sensibilities" to other countries. Moreover, some scholars have suggested that accession countries were only successful in "faking" democratic values, rather than really embracing them.¹²

domestic factors." Op. cit. Grabbe, pp. 1018. Moreover, Jan Zielonka similarly argues that "the traditional parliamentary form of democracy is likely to suffer as a consequence of joining the union" in his article "The Quality of Democracy after Joining the European Union" *East European Politics and Societies*, Vol. 21, No. 1, Winter 2007 p. 163. Zielonka concedes that the EU accession process also requires states to devolve power to regional units that can administer structural funds (p. 164). However, a separate study concludes that the EU's ability to influence regional policy was actually quite limited: see *Europeanization and Regionalization in EU Enlargement* by James Hughes, Gwendolyn Sasse and Claire Gordon (Hampshire: Palgrave Macmillan 2004).

¹⁰ See Andrew Green's data comparing civil society development in Eastern Europe through 2004 at <http://www.dgmetrics.net/DGMetrics/Funding%20for%20Civil%20Society.pdf>

¹¹ "The evidence discussed in this book suggests that the prospect of EU membership helped to reinforce processes of democratization that were already well under way in most of the CEECs. EU conditionality for membership, on the other hand, was in practice so generic and had such diffused institutional and attitudinal impact in the policy area analysed here [regional policy] during enlargement, that it fits well within the definition of international conditionality more broadly as being in essence 'declaratory policy'." from *Europeanization and Regionalization in EU Enlargement* by James Hughes, Gwendolyn Sasse and Claire Gordon (Hampshire: Palgrave Macmillan 2004) p. 166. These conclusions are echoed in Frank Schimmelfennig and Ulrich Sedelmeier eds. *The Europeanization of Central and Eastern Europe* (Ithaca: Cornell University Press, 2005).

¹² Darina Malova and Timothy Haughton argue that the process of adopting 80,000 pages of *acquis* not domestic law led countries to adopt 'fast-tracking' legislative procedures, which bypassed regular democratic deliberation. See Darina Malova and Timothy Haughton "Making Institutions in Central and Eastern Europe and the Impact of Europe" (2002) *West European Politics*, 24 (2) pp. 101-120. Lynn Tesser

The sum of these observations point to the fact that, for EU conditionality to kick in, not only does a country need more or less functioning democratic institutions, it also needs to have the vast majority of its political parties agree in principle that EU enlargement is the shared priority of the country. This is a process that happens from within the country, when politicians let go of their differences in favor of working together for the one shared goal of the electorate: to become European.¹³ This requires a critical mass of the population to actively ask their politicians to make this a priority.

This has not yet happened in Bosnia, and it is difficult to see how the EU's institutions might help this process along. One could argue that it was the 1997 Agenda 2000 that made the EU's commitment to enlargement clear, and put all postcommunist countries on a path that would lead them to accession. Perhaps the Thessaloniki Council decision to commit to EU accession of the Western Balkans was comparable to the Agenda 2000, but it does not seem to have had the same effect in Southeast Europe. EU enlargement continues to take a back seat to other priorities in this region and until that changes, there will be nothing to kick-start the accession process in earnest.

Moreover, there is clear resistance in Bosnia and Herzegovina to the EU's 'hands off' approach, since it would require all sides to adopt reforms through consensus and compromise. Bosnians seem to think that they cannot or will not agree with each other. Yet, even if the Bosnians *want* the Commission to draft reforms for them to adopt, the EU does not operate that way: the accession process is meant to allow a country to prove

argues that "Highly asymmetric West-East relations were also a factor in controversy surrounding the passage of minority protections, leading post-communist elites to sometimes pursue quick fixes to offer *displays of tolerance*." [emphasis added] See Lynn Tesser "The Geopolitics of Tolerance: Minority Rights under EU Expansion in East-Central Europe" *East European Politics and Societies* Vol. 17, No. 3., p. 531.

¹³ See Milada Anna Vachudova, *Europe Undivided: Democracy, Leverage and Integration after Communism* (Oxford: Oxford University Press, 2005).

that it has what it takes to draft and adopt reforms through democratic means. Moreover, it is important to remember that the EU's *acquis* were not adopted with Bosnia in mind, and were never intended to serve as a legal framework for state-building, but as a supra-state legal structure to bind the states of the Union together. Therefore, the accession process *presupposes* that an accession country has already successfully built a state, and is ready to adapt its existing institutional and legal system so that it can be embraced by the EU legal system.

Nevertheless, in the most recent enlargement, the EU did manage to compel certain constitutional and human rights related reforms through the accession process. The Commission's Regular Reports on the progress of acceding countries were used to guide countries to adopt certain reforms by indicating what laws or practices run counter to European values or EU law. This is an important tool since it makes specific reference to problematic national legislation, and I will suggest some methods of tailoring it to the Bosnian case in the following sections.

Regarding the issue of the centralizing effect of EU enlargement, this will be something that would require a wholesale reform of the Dayton Peace Accord (DPA). At the end of the day, the institutional system built upon Dayton will need to be almost entirely revamped¹⁴ in order for Bosnia to follow the process that other postcommunist countries have undergone. The question is whether EU's "magnetism" is strong enough in Bosnia to hold the country together without the DPA? That is the central challenge and it is one that will require long-term, focused interest and investment, not only by the EU but by the United States as well. The EU accession process should not be seen as a way

¹⁴ The Venice Commission report states this quite clearly: Venice Commission, "Opinion on the Constitutional Situation in Bosnia and Herzegovina." p. 8.

around the most difficult problems facing Bosnia. Rather, the EU accession process will make the issues of Bosnia's state structure, ethnic-based voting, and state cohesion all the more critical. What is needed now is not a policy based upon faith in the EU's "magnetism," but a complex policy based in EU and international law that is tailored to Bosnia's unique problems.

The EU already has made some adjustments to its enlargement policy in Bosnia. Most notably, while the previous EU enlargement process had virtually no civil society building component, the EU introduced the "CARDS" program to help foster democracy and civil society in the Western Balkans, and has been funding programs to enhance civil society activity and public participation since 2004. Other initiatives have begun in the region as well, including the "Minority Rights in Practice in Southeast Europe"¹⁵ project, which supports minority rights NGO development. Nevertheless, these projects are not geared to address the extreme case of problematic inter-ethnic relations in Bosnia and Herzegovina. The specific shortcomings of minority rights policies will be addressed below, but for now it is enough to say that the problems of ethnic relations are much too entrenched in Bosnia: It is hard to imagine how fostering NGO development would positively impact upon the fundamental problem of state unity, for example. It is not surprising, therefore, that little of this funding has trickled down to Bosnia and Herzegovina (although the Minority Rights in Practice project includes Bosnia and Herzegovina in the list of countries that would qualify for this initiative, there is no specific project in Bosnia yet¹⁶).

¹⁵ see <<http://www.dianet.org/dmdocuments/MRPinSEE.pdf>> (visited 3/23/2007).

¹⁶ See <http://www.kbs-frb.be/CODE/page.cfm?id_page=125&ID=751&Cnt=EN>, visited 3/26/2007.

How the EU promotes minority rights in accession countries

In June 1993, the Copenhagen European Council recognized the right of the countries of central and eastern Europe to join the European Union when they have fulfilled three criteria: political; stable institutions guaranteeing democracy, the rule of law, human rights and respect for minorities; economic; a functioning market economy; incorporation of the Community acquis; adherence to the various political, economic and monetary aims of the European Union. These accession criteria were confirmed in December 1995 by the Madrid European Council, which also stressed the importance of adapting the applicant countries' administrative structures to create the conditions for a gradual, harmonious integration. Accession countries must adopt, and to some extent implement and enforce, all the acquis to be allowed to join the EU. In addition to changing national laws, this often means they must set up or change the necessary administrative or judicial bodies to oversee the implementation of the legislation.

It is important to consider that while the Copenhagen criteria call for the respect for minorities, the body of EU law does not have a single mention of minority rights and therefore no norms or standards for minority rights implementation. In fact, the concept of minority rights in the EU context is so contentious that there has been an active campaign by certain member states to keep it out of the EU legal framework.

The contention stems from the more general debate on the issue between communitarian and liberal perspectives on the issue. Communitarians believe that minorities, due to their essential difference from the majority, need special rights to protect their way of life. The goal of these additional rights and extra measures is to

create pluralism in decision making in a diverse polity. Liberals believe that everyone is equal under the law, and therefore, everyone is entitled to the same set of rights. Unlike the communitarians, they believe that pluralism already exists, since individuals are already so different from each other. Nevertheless, some individuals need extra protection because they belong (whether they chose it or not) to a minority. Namely, states must ensure that individuals who belong to a minority have the same opportunities afforded to the majority in order to maximize their individual freedom.

The debate surrounding minority rights is contentious, since each side believes that concessions to the other side would lead to certain “evils.” On the one hand, some argue that the logical conclusion to the communitarian concept of minority rights is self-rule and ultimately secession from the state, which could lead to social instability and ethnic conflict. On the other hand communitarians fear that a liberal interpretation based on the sameness of all individuals would lead to the loss of culture through assimilation.¹⁷

The two sides were able to come to an awkward agreement on these two seemingly irreconcilable positions in the Council of Europe, in the creation of the Framework Convention for the Protection of National Minorities (FCPNM) in the mid-1990s, but only because they were compelled to act in an effort to stem the ethnic violence that everyone feared would spread from the conflicts in the former Yugoslavia.

The EU member states feared that enlargement to postcommunist Eastern Europe would mean importing ethnic conflict into the EU. With no EU standard on minority rights to follow, the Commission relied upon the Council of Europe¹⁸ and the

¹⁷ John Packer, “On the Content of Minority Rights.” in J. Raikka ed., *Do We Need Minority Rights?* (Leiden: Kluwer Law International, 1996) pp. 121-178.

¹⁸ James Hughes and Gwendolyn Sasse “Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs” p. 9.

Organization for Security and Cooperation in Europe (OSCE) through its High Commissioner on National Minorities, to evaluate the progress in raising the standard of human rights in East European candidate countries. In addition to adhering to all of the Protocols of the European Convention on Human Rights, EU accession countries were also compelled to sign and ratify the FCPNM as part of the enlargement process. To ensure that accession countries adhered to the standards set by the Council of Europe and the OSCE, the European Commission relied upon the information provided by a wide range of reports prepared by NGOs in its assessments of progress of the accession countries, which were known as the “Regular Reports.”

An additional remedy against backsliding was also adopted by the Council to assuage fears that after enlargement post-communist countries may reverse their liberal reforms. In order to retain some leverage over the new member states, the Council adopted a measure that would allow them to suspend the Council vote of any country that violated human rights. Shortly thereafter, Austria elected Jorg Hayder to the office of the Prime Minister and the EU threatened to invoke the new measure they had adopted ostensibly to be used against future postcommunist member states. Although the directive was only threatened and never invoked, this incident awakened many in the EU that having a strong human rights rhetoric without having a clear set of human rights norms would mean that all of the member states would risk being held to a changeable standard at any given time, not just the new member states and candidate countries: the European Charter of Fundamental Rights was ultimately adopted at the Nice Council in 2000.

Despite these limitations, the EU did more than any other international community or individual state actor to regularize relations between states that host

significant populations of national minorities from the bordering country. One example of the EU's power to compel reform can be seen in the case of Estonia and Latvia, which significantly liberalized their citizenship policies during the accession process. The EU encouraged both countries to simplify naturalization procedures for stateless residents (particularly children), to improve the delivery of language instruction in an effort to remove one of the main obstacles to citizenship, to delete discriminatory articles from the language laws, and to ratify the Framework Convention for the Protection of National Minorities (FCPNM).

However, the limits of the EU's powers can also be seen in this case, since the problem of statelessness in Estonia and Latvia was ultimately left unresolved prior to their accession in 2004 and nearly 500,000 residents remain stateless in that region today.¹⁹ Despite changes in legislation, it was difficult for both countries to raise the numbers of applications from among the residents eligible for citizenship. The most significant barrier to citizenship in both countries is the requirement of understanding the national language. The EU targeted substantial funds to language programs in both countries, as well as social integration projects, so that Russian speakers could study the languages at no cost. These courses continue to be overburdened with students, and waiting lists are long. EU pressure also prompted Latvia to substantially lower naturalization fees in an effort to boost applicant numbers.

The optimal solution in terms of protecting human rights would have been to compel Estonia and Latvia to simply extend citizenship to resident non-citizens in the way that Russia, Lithuania and other FSU countries had done. Politically

¹⁹ For an in-depth description of this process see Nida Gelazis "The European Union and the Statelessness Problem in the Baltic States." 6 *European Journal of Migration and Law* (2004) 3, pp 225-242.

disenfranchising a group of people based on their ethnicity is, after all, the ultimate violation of minority rights. But the EU was content to see the Estonian and Latvian problem as a special case in international law, and the EU did not push for a complete resolution of the problem. This seems to be a missed opportunity for the EU, since it certainly seemed to have the power to transform the situation.

From the EU's perspective the end of the statelessness problem in the Baltic States was only a matter of time: Estonia and Latvia had done much to reform their citizenship laws, and now it is up to the non-citizens to apply for citizenship and pass the exams. In other countries, where minority rights issues were not as profound, it was sufficient for them to adopt the FCPNM and ensure good relations with their neighbors for the EU to accept that the country respects minority rights. Thus, the EU's leverage in the accession was not matched with a strong will to resolve minority rights problems in postcommunist East Europe.

Taking minority rights seriously in the case of Bosnia and Herzegovina

It seems clear that although minority rights were highlighted in the Copenhagen Criteria, the EU's willingness to promote change in that sphere has been diluted in the recent enlargements, either by the fact that the EU-15 could not agree on a clear standard of minority rights protection, or simply because minority rights were lost among the 80,000 pages of *acquis* that needed to be adopted by the accession countries. If the EU did not treat minority rights as a high priority in postcommunist Europe, it seems likely to follow a similar path in future waves of enlargement, requiring little more from the accession countries than the adoption of certain international legal instruments that offer domestic legal remedies for those whose rights might be violated. However, I argue that the

minority rights platform could aid the EU in securing necessary and difficult reforms in Bosnia and Herzegovina.

The current institutional structure in Bosnia and Herzegovina takes traditional minority rights policy (which is associated with building inter-ethnic peace) but puts it on its head: rather than offering collective rights to minority groups where they reside within the state, each of the three ethnic groups claims and protects their collective rights as though each were a minority within the larger state. The political structure of Bosnia as realized through the Dayton constitution attempts to follow the model Will Kymlicka has called multination federalism, in which the minority group becomes the majority in local government. This would seem to be a good model to follow, since democratic multination federations have largely succeeded in creating peaceful, democratic prosperous states that respect inter-group equality and individual rights.²⁰ Yet, while it makes sense to allow territorially-defined minorities within larger strong, centralized democratic countries to govern themselves to some extent, in Bosnia these “ethnic rights” are in fact the inverse of minority rights, since they consolidate the power of the three majority ethnic groups and exclude minorities and non-nationalists. Moreover, giving rights to the dominant ethnic groups before there is a state to define and ensure those rights has only helped to undermine the state-building project. As a result, the current interpretation of minority rights as ethnic rights in Bosnia and Herzegovina has resulted in the realization of the three pitfalls associated with minority rights: 1) community leaders may in fact consist of unaccountable people who purportedly mischaracterize the

²⁰ Will Kymlicka “Multiculturalism and Minority Rights: West and East” *Journal on Ethnopolitics and Minority Issues in Europe* 4/2002. It is important to note that this article primarily critiques multination federalism for failing to improve inter-group relations or removing secession from the political agenda. Therefore the failure of Bosnia’s non-functioning multination federation to address these two issues should come as no surprise.

aspirations of the group; 2) minority territorial autonomy regimes that reflect a 'special status' running counter to equality of treatment; and 3) they constitute a threat to the cohesion and stability of the country.²¹

In past enlargements, the EU has been satisfied with an accession country's standard of minority rights protection as long as it signed on to certain international legal standards (such as the FCPNM) and that inter-ethnic relations would not jeopardize security within the EU. In the case of Bosnia, international conventions have already been signed, and so EU standards would seem to have already been met to a large extent. Yet, such an assessment would be absurd, considering that inter-ethnic relations continue to impede state-building in Bosnia, and may even be seen to have deteriorated over the last year.

If the EU were to take a stronger line on minority rights, putting pressure on Bosnian leaders to address the minority rights violations inherent in the current institutional structure, this could serve as an argument for constitutional change. The Constitutional Court in Bosnia as well as the Venice Commission have already identified the contradiction between Bosnia's system based on collective ethnic rights and the principle of individual rights and equality of citizens.²² The challenge now will be for the EU to be the main agent to drive the ethnic relations away from what Kymlicka calls "security-based" policies (which ended the war) to "justice-based" policies that more closely follow the principles that underpin international laws on minority rights.

²¹ Gaetano Pentassuglia "Minority Rights and the Role of Law: Reflections on Themes of Discourse in Kymlicka's Approach to Ethnocultural Identity" *Journal on Ethnopolitics and Minority Issues in Europe* 4/2002.

²² Venice Commission, "Opinion on the Constitutional Situation in Bosnia and Herzegovina." p. 17-20

What would a new EU strategy involve?

The security-based policies in Bosnia and Herzegovina created a system that entrenched ethnic majority power within a given territory, through the creation of the Republika Srpska and the various cantons within the Federation. The incorporation of international minority rights legislation into the Constitution, namely the European Charter for Regional of Minority Languages, seemed to justify the creation of parallel institutions for education, police and even healthcare, resulting in a system in which 1) the concept of 'ethnic rights' trumps minority rights; 2) minority rights policies are geared toward avoiding international conflict and focus on decentralization (rather than on preserving national unity). Both of these issues affect the constitutional structure of the state – which means that they could be overcome by simply changing the constitutional structure of the country, but brings us back to the essential questions of Bosnia's statehood. It was not easy for all sides to agree on the DPA, so why do we think that it will be any easier to reshape the constitutional structure now? Even if the EU were to become more closely involved in this process, how will the EU's leverage (passive or active) work, when the IC and the OHR have had to be the prime motivators of both the DPA and the current constitutional amendment process? Moreover, it would be foolish to ignore the possibility that entering into the process of redrawing the institutional map of Bosnia would give secessionists the opportunity to legally, democratically reach their goals.

In this complicated situation, the variable that seems to have the most room for maneuver is through the EU partnership and, eventually, accession process. I posit that perhaps the style of that process might be changed to meet the demands of Bosnia's special case. For instance, if the Commission was to tackle Bosnia's institutional

problems through the perspective of human rights and minority rights principles—which have already been adopted into Bosnia’s constitutional framework—it could offer guidance to Bosnia on issues that are most contentious without superceding its power. The Commission’s 2006 Progress Report on Bosnia and Herzegovina already does this in a limited way, for example, by advocating for streamlining the office of the president on the basis that the current tripartite presidency contradicts the European Convention for Human Rights.²³ The fact that the ECHR is directly invoked in Article II of the Constitution of Bosnia and Herzegovina means that the institutional structure of Bosnia runs counter to its own legal culture, and therefore the EU would not be seen as undermining Bosnia’s sovereignty, but simply helping the country normalize its existing institutions according to its own legal culture.

According to this argument, the Commission could begin to further elaborate upon what Bosnia needs to do to ensure that its legal practice and institutional structures are internally compatible. It would require a sort of human rights/minority rights “mainstreaming” through the many distinct chapters of the *acquis*. The way this might work would be augment the normal process of testing compliance with the *acquis*, point out the shortcomings of Bosnia’s institutional structure and present solutions based on what Bosnia has already signed on to in terms of international human rights and minority rights law. This might help avoid the problem in Bosnia that each step of the accession process would require revisiting the DPA, which has only served as an opportunity for ethnic groups to reassert their differences.

²³ Commission of the European Communities, “Bosnia and Herzegovina 2006 Progress Report” SEC (2006) 1384, p. 7.

Given Bosnia's parallel state institutions and services, each catering to a different ethnicity, international minority rights instruments are seen by some international observers as an obstacle to streamlining the institutional structure in the country, since international instruments seem to justify the maintenance of parallel institutions. For example, the European Charter for Regional or Minority Languages (ECRML) (which is incorporated into the constitutional structure in Annex I of the Constitution of Bosnia and Herzegovina) is seen as hindering integration of schools, since Part III.1 encourages the state to make minority language study available at various levels, therefore seeming to justify the existence of parallel schools systems for each ethnic group. However, the ECRML, like other minority rights instruments, presupposes the existence of centralized state power, and encourage the state to open itself up to minority influence. Therefore, these instruments should not be interpreted as allowing Bosnia's institutional chaos to continue, but as a way out of the current impasse: through close consultation with these instruments, Bosnians could build state capacity while still catering to the three main ethnic groups *as well as* the neglected "others," which represent the true minorities.

I do not wish to suggest that this would be a new or easy solution: there is no doubt that the international community, through the OSCE office and the OHR, has been attempting to compel all sides in Bosnia to come together to agree on state building exactly as I describe. What may offer a new angle from which to approach the problem is if international human rights and minority rights instruments were invoked in the Commission's requirements beyond simply the section on human rights. This could provide a mechanism for the EU to direct the Bosnians in the process of building their central state institutions without raising questions that the EU is unjustly infringing upon

the country's sovereignty. An obvious candidate for such human rights mainstreaming would be educational policy, as described above. But other sectors could be influenced positively as well, such as creating a foundation for non-discriminatory labor policies, or improvements to the local administrative and operational capacity.

Even if this initiative were followed, it would be foolish to believe that the process would be quick or painless. The problems of Bosnia and Herzegovina, as well as those of the wider region, are far too entrenched and deeply rooted to believe that a simple solution, such as NATO or EU enlargement, would satisfactorily resolve these issues. The region's problems will still be the world's problems for a long time to come.