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THE EU'S HUMAN RIGHTS ADVOCACY IN BOSNIA AND HERZEGOVINA (2000-2008)

Abstract

This chapter investigates how the EU's human rights conditionality operates in the enlargement context, and what is its real impact in the target countries on existing human rights practices. The fundamental question about the efficiency of conditionality is ultimately whether it can induce the transformation of existing norms and practices going beyond formal compliance. First, the various inconsistencies characterizing the EU's human rights promotion will be reviewed here, because the resulting lack of credibility seems to undermine this transformative effect. The second half of this chapter will demonstrate how these inconsistencies play out in an actual case through studying the EU's conditionality policy in Bosnia and Herzegovina before 2008. It will be shown that the credibility of conditionality policy was seriously compromised during this period as the EU practically accepted partial measures, which were never quite enough for putting the reforms in place as they were originally intended.¹

Keywords: European Union, Western Balkans, enlargement, human rights, conditionality, Bosnia and Herzegovina.

The EU's enlargement policy is generally viewed as the EU's most efficient foreign policy instrument in terms of its ability to transform existing practices and institutional structures outside of its borders. Moreover, the EU's annual progress reports testify to a meticulous examination of the partner countries' record in meeting human rights and democratic standards, including minority rights. Therefore, it is worth investigating how the EU's human rights conditionality operates in the enlargement context, and what is its real impact in the target countries on existing human rights practices.

However, most authors studying enlargement seem to share the view that the EU's record is mixed at best in spreading democratic norms in a credible and effective fashion during the accession process.² It is worth to be noted here that experiences from the Central Eastern European enlargement have also revealed the limits of the EU's democratic conditionality especially when it comes to implementation and post-accession performance.³ The fundamental question about the efficiency of conditionality is whether it can induce the transformation of existing norms and practices going beyond formal compliance. From this perspective, the various inconsistencies that characterize the EU's human rights promotion are important to consider, because the resulting lack of credibility seem to undermine this transformative effect. The EU defines itself as a normative power on the international scene, yet performance has been far below its rhetoric. As it is often being argued, the EU supports democracy and human rights in an opportunistic way: subordinates normative goals to wider strategic considerations, while applies double standards as to which countries it sanctions for the violation of human rights and democratic standards.⁴

This study therefore will first review the inconsistencies that were formulated by various scholars concerning the EU's human rights policy in the Western Balkans. The second half of this chapter will demonstrate how these inconsistencies play out in an actual case through studying the EU's conditionality policy in Bosnia and Herzegovina (Bosnia or BiH), by focusing on the process leading up to the signing of the Stabilization and Association Agreement (SAA) in 2008. During this period Bosnia was motivated by the prospect of receiving an SAA, which gave considerable leverage to the EU to push forward its own agenda, including on human rights. However, it will be shown that the credibility of conditionality policy was seriously compromised during this period as the EU practically accepted partial measures which were never quite enough for putting the reforms in place as they were originally intended. It is being argued here that Bosnia pursued the strategy of "reluctant compliance", by introducing some legal and institutional measures *just* not enough for reaching the originally desired effect of these reforms, thus falling short of implementation. Such tactics were applied concerning the broadcasting reform, which concerned the issue of media freedom, and was a key condition of the SAA.

A. Inconsistencies as Discussed by the Literature

There is a growing recognition not only among scholars but also within the EU institutions that the EU cannot live up to its own ideals in its foreign policy. A central question addressed by the existing works on enlargement is how to explain this underperformance.⁵ While explaining the weak results of the EU in promoting human rights in the Western Balkans, authors, on the one hand, tend to point to the special historical, political and social characteristics of South East Europe that pose unusual challenges, mostly related to the legacy of the conflicts in the 1990s and the early 2000s. The criteria enshrined in the Stabilization and Association Agreements (SAAs), which similarly to the Europe Agreements of the mid 1990s put a great emphasis on democratic conditions, also included additional requirements addressing issues related to state building and reconciliation, such as the return of refugees, ethnic and religious reconciliation, the requirement for regional cooperation and the extradition of war criminals.⁶ Thus the Western Balkan countries face enhanced conditionality as compared to previous enlargements whereas their institutional capacity is much more limited than that of the Central and Eastern European countries during their pre-accession period.

Moreover, as the EU has been engaged in state building in the Western Balkans' post conflict environments, this resulted in the construction of "minimalist states" which hardly fulfil functions that states ought to carry out, illustrated best by the example of BiH. Bosnia's constitution originating in the Dayton Peace Accords (DPA) violates individual human rights as the European Court of Human Rights (ECtHR) ruled in 2009, and created a highly fragmented and dysfunctional state, yet it was meant to maintain power-sharing among the three constituent peoples thus preserving the stability of the country. This case reveals that assisting post-conflict reconstruction and building future member states at the same time proved to be a challenging task. Consequently, the EU has been unable to effectively apply accession conditionality to transform institutions and norms in the target countries.⁷

As Schimmelfennig and Sedelmeier concluded, conditionality policy which resembles a rationalist bargaining process seems to lead to adoption of EU rules where high and credible incentives go along with low domestic adoption costs.⁸ However, while this "external incentive model" according to which external rewards help elites to overcome domestic costs worked effectively in Central and Eastern Europe, its application to the Western

Balkans is more problematic. Membership remains a relatively remote perspective, implying that the rewards of compliance in the present are limited. Moreover, the EU is interested in real rule adoption which goes beyond the mere transposition of rules and results in the transformation of values, norms and practices.

Such transformative effect captured by the notion of Europeanisation does not seem to follow if EU demands contrast with national identity, which has been the case in several countries in the region. Macedonia's unwillingness to compromise on the name issue, which hampers its NATO and EU accession is a case in point. Similarly in Bosnia and Herzegovina, meeting the EU's demands would have required constitutional changes, which would have undermined the power position of nationalist elites sustained by the current state structure. This significantly increases the costs of compliance thus weakening the chances of EU conditionality to succeed. The fragmented structure of BiH does not permit its institutions to function effectively and to adopt and implement EU legislation, which is why the EU has strongly promoted constitutional reform which would strengthen the state at the expense of the entities, albeit so far without any success.⁹ Although the EU does not require a specific constitutional order, any state seeking membership should be able to formulate positions about how it intends to implement the acquis.

Between 2009 and 2014, compliance with the judgment of the European Court of Human Rights in the so called *Sejdić and Finci* case was one of the main requirements of EU integration for Bosnia, which would allow minorities to run for the highest state offices currently reserved for the three constituent peoples: Bosniaks, Croats and Serbs. Without bringing the Bosnian constitution in line with this ruling, Bosnia could not become an EU candidate and also lost some of its EU funding. This is an exceptional case of directly tying EU candidacy to meeting a specific human rights condition. Yet, this particular human rights issue was elevated to this high position in the EU's conditionality policy because it would necessitate a change in the constitutional structure that the EU long has sought for. Thus promoting human rights became a tool of encouraging constitutional change and state building, which has been the highest priority on the EU's agenda. Yet, because this specific conditionality requirement cut to the heart of Bosnia's constitutional order and the power-sharing among the three constituent nations, it met the opposition of political elites.

There were further cases where formal adherence to the EU's expectations did not produce real compliance because of a clash between

the EU's norms and local values. Serbia's cooperation with the Hague Tribunal can be mentioned here as an example. Even though Serbia fulfilled the EU's expectations when it extradited the most wanted war criminals, its value system hardly changed, reflected by official rhetoric presenting the extraditions as necessary steps of getting closer to the EU.¹⁰ Serbia's compliance in the area of LGBT rights presents a similar scenario. As Mikus in his case study about Serbia's 2010 Pride Parade explained, while "the state communicated it as something required by the EU, it avoided open ideological confrontation with the opponents by condemning and legally sanctioning the violence as such, not as homophobic or ideology-based". By this rhetorical strategy, state representatives distanced themselves from the values the Pride symbolized, at the same time formally met the EU's demands by securing the event by heavy police presence.¹¹ However, some positive trends can be also observed. Changes in the party systems in Croatia and Serbia testify to the marginalization of radical nationalism and an opening toward Europe. Namely, in Croatia the HDZ's endorsement of EU integration and democratization, while in Serbia the emergence of the Serbian Progressive Party from the Serbian radicals and their compliance with the EU's requirements suggest gradual value transformation even if it is mostly driven by instrumental rationality.¹²

While these reasons outlined above stem from the special characteristics of the Western Balkans, the EU itself is also being blamed for various inconsistencies, which weaken the credibility of its engagement and undermine its transformative potential during the integration process. There is an apparent discrepancy between obligations of Member States and conditionality towards EU candidates, both in terms of the scope of rights and the meticulousness of the monitoring process. The EU's fundamental rights *acquis* as presented in Chapter 23 of the accession negotiations is broader than the list of rights related to Article 2 of the Treaty of the EU (TEU) or the EU Charter of Fundamental Rights (applying to Member States), illustrated by the issue of minority rights protection and media freedom. Moreover, the Charter constrains Member States only when they are implementing EU law, while in the case of candidates practically any act or policy can be checked on human rights' grounds by the EU. Although based on Article 7 TEU there is way to control Member States' conduct even when they act outside the scope of EU law, the process is fairly cumbersome as it requires unanimity from the European Council and support from the European Parliament. Importantly, it is a mechanism which has been never used.¹³ By contrast, throughout the

whole accession process, the Council can suspend negotiations with a candidate by a qualified majority decision. A more rigorous monitoring of meeting fundamental rights standards than before was introduced at the start of accession negotiations with Croatia and Turkey indicated by adding Chapter 23, a new chapter on judiciary and fundamental rights to the monitoring process. Furthermore, learning from the accession of Bulgaria and Romania, the EU began to use opening, interim and closing benchmarks, which allow Member States to suspend the whole accession process if they see problems regarding this specific chapter. Moreover, in Croatia's case an annex was added to the Accession Treaty which allowed the European Commission to evaluate Croatia's compliance concerning fundamental rights and judiciary even after accession.¹⁴

A further discrepancy often pointed out is the one between values and interests; namely that the EU is being driven by security or other kinds of foreign policy goals, which tend to override human rights considerations.¹⁵ The EU's asylum policy is an example where "Europeanization" hardly means improving human rights standards. On the contrary, the EU's external asylum and immigration policy in the Western Balkans (and elsewhere) has been mostly driven by the aspiration to keep immigrants away from its borders "with little concern for human rights and international standards of refugee protection".¹⁶

In the Balkan context, tension between norms-based rhetoric and security interests could be observed in conditionality applied in relation to issues of "state-ness". While addressing remaining challenges of statehood, the EU most often makes normative claims, yet it is often driven by security considerations. The conditionality applied on Bosnia and more specifically the demand for compliance with the Sejdić-Finci case illustrates this well.¹⁷ As was explained above, the EU put this human rights condition so high on the agenda because of its potential for constitutional reform, which would be key to preserve unity of the state. At the end of 2014, faced with the lack of progress, the EU "postponed" thus practically dropped this demand from the list of essential conditions, which was a further sign that even the EU did not see the resolution of this issue as an urgent need from a human rights point of view. As Noutcheva pointed out, when the EU makes normative claims yet is obviously motivated by security considerations, fake, partial or non-compliance can be expected from the states which are subject to such conditionality policy.¹⁸ Thus, the rhetoric of rigorous conditionality often comes into conflict with interests related

to security and the aspiration to keep the affected countries on the course of European integration.¹⁹

Moreover, conditionality can succeed in accomplishing its ultimate goal of member state building only if it is linked to credible prospects of accession into the European Union. However, the weaker political and institutional capacity of these states is coupled not only with greater conditionality demands but also with a growing enlargement fatigue in the EU.²⁰ This creates confusion and ambiguity with regards to EU conditionality thus reducing the chances for real compliance.

A further source of confusion relates to the lack of conceptual clarity regarding human rights conditionality. As Ridder and Kochenov concluded while studying the 2004 enlargement round, “the EU has never reached any conceptual clarity on what constitutes a consolidated democracy”.²¹ In practice, a distinction can be made between *acquis* conditionality, which involves the rather straightforward task of transposing the EU’s *acquis communautaire*, and non-*acquis* conditionality, where the Union cannot legislate including democracy and human rights principles (even if the same principles are part of Article 2 of the TEU as the principles on which the EU is built).²² Similarly, the accession criteria concerning democracy, rule of law and human rights as anchored in the Copenhagen criteria provide very general and vague guidelines as to what is being exactly promoted. Democratic conditionality as was actually applied during the Central Eastern European enlargement process, was *ad hoc*, inconsistent and unpredictable. It was often a political question on the EU’s side whether a country managed to meet democratic standards. Part of the reason was that these issues fell outside of the scope of the *acquis communautaire*, thus the European Commission lacked clear benchmarks and indicators for serious assessment.²³ This points to a general problem of EU conditionality not constrained to human rights issues. Several empirical case studies revealed that the EU can promote reforms effectively in particular areas where it has a consensus about its own norms, which then allows it to make clear demands.²⁴

In the area of minority rights the EU tends to rely on external anchors such as the Council of Europe’s Framework Convention, or standards set by OSCE. Within this context the EU demands measures like anti-discrimination directives, inclusion strategies, and certain citizenship policies. Yet, it depends very much on the case what is being required exactly. For instance, as Kacarska demonstrated, the content of minority rights conditionality in Macedonia to a large extent was a

result of a dynamic interaction between national level policies and the EU. Macedonia adopted the law on the use of minority languages under informal EU pressure, yet initially this was not part of official conditionality. However, after the law's adoption in 2008, the EU regularly monitored its implementation.²⁵ Similarly, the EU applied minority protection conditionality both on Serbia and Romania, yet the content of requirements differed between the two cases. The EU supported cultural autonomy for Hungarians in Serbia but not in Romania, which can be explained by the difference in domestic dynamics within the two countries; namely that in Serbia a consensus emerged between the Serbian government and Hungarian minority parties about the desirability of cultural autonomy as opposed to Romania where such a consensus have been lacking. At the same time, the public use of minority languages and education in the minority's language were among the issues pushed by the EU in both states.²⁶ Thus these cases demonstrate that standards were an outcome of a negotiated process while compliance became a matter of political judgments in the absence of clear benchmarks.²⁷

This points to the general problem of human rights conditionality; that is how to determine sufficient levels of performance. The EU tends to pay attention to the adoption of specific legal measures, which sometimes amounts to mere window dressing without meaningful implementation. A study commissioned by the European Parliament explained the European Commission's monitoring of human and minority rights in the EU enlargement to the Western Balkans.²⁸ Enlargement Strategy Papers, Progress Reports, European and Accession Partnerships, Stabilization and Association Agreements, IPA and EIDHR programs were analyzed in order to establish how the Commission defined the priorities within this issue area, and whether it consistently and adequately followed up on these during its monitoring process. According to this study's findings, it was unclear how and why the Commission chose some human rights and not others as its focus. Important rights were left out from the monitoring process, such as freedom of movement, right to privacy or right to education just to name few. In the area of minority rights, progress tended to be measured by adopting requested legislation or action plans, while monitoring rarely relied on numbers, statistics or assessment of minority organizations. Importantly, there were no clear indicators to measure progress, which is why the conclusions reached by the Commission could often seem as arbitrary. Connected to this problem, specific recommendations as to how political criteria of respecting minority rights

could be met were usually missing.²⁹ Many of these findings – specifically about the lack of conceptual clarity of the content of human and minority rights, clear indicators and adequate attention paid to implementation – echo the conclusions reached by Ridder and Kochenov about the Central Eastern European enlargement.

There is a further inconsistency which concerns the EU's credibility while keeping its own threats and promises. According to Schimmelfennig and Sedelmeier, this credibility of conditionality determines to a great extent whether compliance will follow.³⁰ This credibility suffers when candidates can get by with making formal changes without effective progress in the area of democratic norms and human rights, without any reprisal from the EU's side. Koinova enumerated the various institutional and legal steps Macedonia took regarding human and minority rights after signing the Ohrid Agreement, which could suggest a visible improvement in the human rights area. However, when measuring implementation based on monitoring of various human rights organizations, performance was just the same in the 2000s as in the 1990s, before the EU's engagement. In spite of this, Macedonia was awarded candidate status in 2005, and since 2009 the European Commission has recommended opening accession negotiations. This means that according to the EU, Macedonia fulfilled the Copenhagen political criteria, despite serious shortcomings in the field of human and minority rights.³¹ The Macedonian case falls in line with the experience of other post-conflict states in the Western Balkans, where due to the legacy of ethnic conflict, security concerns were prioritized over human rights issues.

In Macedonia however, the situation further deteriorated after the 2000s. Recent revelations suggest that during the last few years grave human rights violations were committed by the government, among them the surveillance of 20.000 people, "direct involvement in election fraud, abuse of the justice system and media" and covering up murder cases.³² Although the political scandal leading to the publication of these information broke out in February 2015, developments have been building up during the previous years. The EU's progress report as of October 2014 nevertheless considered "that the political criteria continue to be sufficiently met" and thus maintained "its recommendation to open accession negotiations".³³

This case also sheds light on the confusion surrounding the Copenhagen criteria, which includes the respect of human rights and the protection of minorities. In principle, only if a candidate already met these criteria

can start accession negotiations. However, the thorough monitoring of meeting fundamental rights standards during the accession process suggests otherwise. Why would the EU need to monitor something so rigorously which has been fulfilled already? Macedonia's case shows that fulfilling the Copenhagen criteria does not mean that a country could not have serious shortcomings in the area of fundamental rights.

In the following the requirement for consistency related to the credibility of the EU's conditionality policy will be examined here in further detail, by looking at the EU's human rights conditionality towards Bosnia before 2008. It will be shown that during the analyzed time period, the credibility of the EU's conditionality policy was compromised concerning the broadcasting reform which concerned the issue of media freedom, and which was set as an essential condition of progress on Bosnia's European integration path. This section will look at the period 2000-2008 through analyzing the instruments the EU deployed under the Stabilization and Association Process (SAP) in Bosnia: the EU Road Map of 2000, the Feasibility Study in 2003, the 2004 and 2006 European Partnerships, CARDS and IPA documents, and the 2005 and 2007 EU progress reports. The focus will be on what human rights priorities these instruments revealed, how these priorities had changed over time and how consistent they had been with each other. It will be also considered what was the weight and place of human rights within the EU's overall conditionality policy at that stage. Whether human rights concerns become "make or break issues" is the ultimate measure that is whether failure to meet the requirements results in suspension of the Stabilization and Accession Process or the cutting of assistance funds. By tracing the EU's human rights policy through focusing on these various instruments, it will be also demonstrated that the EU prioritizes some human rights over others despite the claimed commitment to the universality, indivisibility and interdependence of all human rights – civil, political, economic, social and cultural.

B. The EU's Human Rights Conditionality in Bosnia and Herzegovina (2000-2008)

Peace-building and EU integration were the main goals the EU sought to accomplish in Bosnia by following an integrated strategy through employing instruments belonging to different parts of the EU's institutional

machinery. The EU acted in close cooperation with other international actors in Bosnia such as the High Representative (HR) and NATO, and also used other instruments such as those of European Security and Defense Policy (ESDP)/Common Security and Defense Policy (CSDP) besides the ones employed under the SAP, which is the focus of the present research.

The HR had a very defining role on political developments and institution building in Bosnia, and had a close division of labor with the EU while often pursuing the same agenda. The Dayton Accords established the Office of the High Representative (OHR) and bestowed it with extraordinary powers to oversee the civilian aspect of peace implementation and coordination. In 1997 responding to mounting post-war tensions in Bosnia the Peace Implementation Council (PIC) at its Bonn conference endowed the OHR with great authority including dismissing elected officials and imposing legislation, which are generally called the Bonn powers. Owing to these strong competencies, the OHR has played a very influential if controversial role in Bosnia.³⁴ Although the OHR responds to the PIC including more than 50 donor countries, between 2002 and 2011 the HR became double hatted by assuming also the role of the EU Special Representative (EUSR). The two had separate mandates and the Bonn powers were bestowed only upon the High Representative and not on the EUSR, still in practice it is very difficult to disentangle the EU's agenda from that of the OHR given that the same person filled the two posts until 2011.

In 1999 the European Commission launched the *Stabilization and Association Process* (SAP) offering contractual relations to the Western Balkan states modelled on the Europe Agreements with Central and Eastern Europe. In 2000 the European Commission prepared the *Road Maps* which contained the necessary steps target countries had to take for opening negotiations on the Stabilization and Association Agreements (SAAs). The CARDS program operating between 2000 and 2006 provided the financial basis of assistance of the SAP, which was replaced by the IPA program after 2006. Respect for fundamental principles such as democracy, rule of law and human and minority rights were conditions of accessing CARDS funds and autonomous trade measures which were both part of the SAP. Such aid programs also reinforced the EU's human rights strategy which was strongly geared towards security goals by placing emphasis on cross-ethnic civil society projects, refugee return or supporting moderate leaders.³⁵ Regional cooperation and good neighborly relations remained an important condition during the SAP as a significant share of

the CARDS funds – about 10 per cent – was dedicated to financing regional cooperation activities in areas such as integrated border management, infrastructure and institution building.³⁶

The SAP process cannot be separated from enlargement policy to the Western Balkans, being “the European Union’s policy towards the Western Balkans, established with the aim of eventual EU membership”.³⁷ Thus the Stabilization and Association Agreements (SAAs) provide the contractual framework of relations between the EU and the Western Balkan countries until they reach EU membership. The agreements operate on a bilateral basis yet the SAP also promotes regional cooperation which was set as one of its conditions.³⁸ In the following the various instruments presented by the EU will be analyzed in chronological order with a special emphasis on their human rights component.

The first step of the SAP process was the presentation of the so call *EU Road Map* in 2000 that identified eighteen conditions which were necessary for opening negotiations on the SAA. A third of these concerned measures in the “Fields of Democracy, Human Rights and Rule of Law”. The *Feasibility Study* published in 2003 examined whether Bosnia was prepared to start talks on the SAA by revisiting the conditions defined in the Road Map three years earlier. Among these the following touched upon human rights, besides “fully co-operating with the International Criminal Tribunal for the former Yugoslavia [ICTY], notably in bringing war criminals to justice before the Tribunal”:

- refugee return;
- “completing the transfer of human rights bodies to state control”;
- resolving all outstanding cases of the Human Rights Chamber transferring the latter’s responsibilities to the Constitutional Court;
- “assuming full national responsibility for the State Ombudsman and making progress in the merger of State and Entity Ombudsmen”;
- “ensuring the long-term viability of a financially and editorially independent State-wide public broadcasting system whose constituent broadcasters share a common infrastructure”.

It concluded that Bosnia was not yet ready for opening talks on the SAA and listed sixteen priorities that had to be further pursued. It is clear from the Road Map and the Feasibility Study, that the EU’s human rights agenda for Bosnia during this early phase of the SAP was very much focused on the creation of human rights institutions, such as setting up the state level ombudsman office and the transfer of the Human Rights’ Chamber’s tasks to the Constitutional Court. The broadcasting reform strongly promoted by

the EU concerned the issue of media freedom, besides which thus refugee return, and ICTY cooperation were the expressed human rights priorities.³⁹

However, the lacking functionality of the state able to negotiate an agreement with the EU and present a single, coherent national position was pointed out as the most important obstacle, as “BiH’s core challenge”. Originating from the Dayton Peace Accords, Bosnia has a highly decentralized state, made up by the two autonomous entities: the Federation of Bosnia and Herzegovina and the Republica Srpska (Serbian Republic: RS). In the Federation power is further devolved to ten cantons that function as mini states with their own government, parliament, court and police. Out of the ten cantons in the Federation, five have Bosniak majority, three have a Croat majority while two cantons have a mixed population. The Republica Srpska is dominated by Serb majority. At the state level there is parity among Bosniaks, Croats and Serbs, while at entity and lower levels the three constituent peoples have guaranteed representation, and have the possibility to veto decisions that they see as detrimental to their vital national interests.

All this resulted in complicated mechanisms of power-sharing among the three constituent peoples, which often paralyzed the state. The European Commission admitted that every reform that Bosnia had achieved was due to engagement of the OHR, which questioned whether Bosnia would be able to sustain the SAA.⁴⁰ In the human rights area, the OHR was involved in war crimes prosecution, refugee return and the broadcasting reform matching general EU priorities. The OHR was preparing the conditions for domestic war crimes prosecution in Bosnia and supported the work of the Srebrenica Commission investigating the Srebrenica massacre. It was closely monitoring the return process and ensured the harmonization of entity laws with that of the state. Together with the European Commission, the OHR was “lobbying the Bosnia and Herzegovina parliament to address outstanding issues and to ensure the sustainability of public broadcasting in Bosnia and Herzegovina”.⁴¹

Concerning the public broadcasting reform, the EU’s goal was the “Assurance of the long-term viability of a financially and editorially independent single state-wide public broadcasting system for Bosnia and Herzegovina, whose constituent broadcasters share a common infrastructure allowing efficiency and quality improvements.”⁴² The Public Service Broadcasting (PSB) reform had become a major focus of the OHR and a central element of EU conditionality. Under pressure of the OHR, a state-level, cross ethnic broadcaster was created besides the two already

existing entity broadcasters, which started its operation in August 2004 covering almost the entire Bosnia and Herzegovina territory. Bosnia then had three broadcasting services – one at the level of the state and two at the level of the entities – which according to the EU’s agenda were expected to cooperate in program production, asset management and to jointly establish a single public broadcasting system. The goal was to overcome ethnic divisions and achieve territorial integration in broadcasting services, not least to prevent political instrumentalization of broadcasting services. After 2002 the OHR slowly withdrew from the process which was taken over by conditionality policy led by the Commission. From 2003 PSB reform became an essential condition of the SAP, as will be shown in the subsequent sections. Thus media reform fundamentally aimed at overcoming the fragmentation of the broadcasting services along ethnic lines and creating a single public broadcaster.

In 2004 the EU presented the first *European Partnership* for Bosnia to assist the reform process by introducing mid-term priorities with specific deadlines and planned budgetary resources, which also served as the basis for CARDS assistance planning.⁴³ Altogether, the Partnership highlighted the following human rights issues: the prosecution of war crimes, minority rights, rights of the Roma, refugee return, fight against human trafficking, the consolidation of the ombudsman’s office and the harmonization of laws with the European Convention of Human Rights. Support for the media was included as a sectoral thus not as a human rights priority, and focused on the broadcasting reform. The Partnership also indicated financial sources and required actions. While looking at planned financing sources, the reconstruction of refugee houses was the only human rights related action which was planned to receive CARDS assistance.⁴⁴ Considering the overall CARDS assistance dedicated to Bosnia between 2000 and 2006, in the category of democratic consolidation the return and re-integration of refugees and IDPs and support for the media and civil society were the two human rights causes that received CARDS financing. Overall one third of CARDS financing was dedicated to these two human rights issues during the whole period, however between 2001 and 2006 financing priorities shifted away to other fields, such as to institution building and economic and social development. Altogether only one of the Partnership’s human rights priorities – refugee return – received financing from CARDS, while the media was supported as a sectoral partnership priority.⁴⁵

In November 2005 the Commission recommended opening negotiations for the SAA, which officially started during the same month.

In its communication to the Council the Commission followed up on the requirements formulated in the Feasibility Study recognizing that Bosnia fulfilled a number of conditions outlined there. In the human rights field it found that Bosnia's compliance was satisfactory concerning the first four items:

legislation necessary to support refugee returns has been adopted, and that a Bosnia and Herzegovina Refugee Return Fund has been established and is in operation. Human rights-related competencies have been transferred from the Entity-level to the State-level, as recommended by the CoE and other international bodies. The Human Rights Commission has been established; it is working within the Constitutional Court and is ensuring due follow up to human rights-related cases.

The Commission also approvingly noted that there has been progress regarding cooperation with the ICTY as a "substantial number of indicted war criminals has been transferred to The Hague in recent months". However, cooperation with the Tribunal was still not regarded as sufficient. Moreover, the Commission singled out three conditions that still had to be fulfilled by the deadline of February 2006 under the threat of suspending negotiations: police reform, the adoption of the law on public broadcasting service and ICTY cooperation.⁴⁶ In addition, a number of issues were listed that "the authorities should pay special attention to and achieve substantial progress on". Among these some were related to human rights such as the "implementation of the outstanding Council of Europe post-accession obligations, in particular in the areas of electoral law and education and adoption of the legislation necessary for the establishment of a single Ombudsman in Bosnia and Herzegovina". Adoption of the laws establishing the Data Protection Commission and the Information Society Agency were also mentioned.⁴⁷

Altogether, among the still outstanding conditions, besides continuing ICTY cooperation and the requirement of media reform about broadcasting, no other human rights issue was highlighted as a strict essential precondition of opening negotiations on the SAA. Several human rights related requirements of the European Partnership were omitted from SAA conditionality, such as those concerning minorities and the Roma, while harmonization of legislation with the ECHR and creation of the state ombudsman office were highlighted as important but not essential conditions.

In 2006 Bosnia received its second European Partnership. Again, ICTY cooperation and the broadcasting reform were the only human rights related topics listed among key priorities in the Partnership. Among its short and medium term priorities the Partnership highlighted the following human rights issues:⁴⁸

- granting full electoral rights to minorities in line with ECHR;
- abolishing the death penalty in Republica Srpska;
- meeting reporting requirements of international conventions;
- solving outstanding human rights cases;
- improving the legal framework protecting national minorities and its implementation;
- social inclusion of the Roma;
- refugee return and social and economic inclusion of returnees;
- anti-trafficking measures and protection of victims of trafficking.

The *European Commission's yearly progress reports* have been among the most important and comprehensive instruments of conditionality in the context of the SAP and enlargement policy. Yet, they usually present a rather general discussion of a wide range of issues while the partnerships have been much more strategic in setting out a clear "to do" list for the respective countries. Therefore, it is worth to look at which issues highlighted in the 2005 EU progress report were followed up in the Partnership, and which were omitted from it. The Partnership even though touched upon media freedom, yet only with regards to the broadcasting reform while other aspects mentioned in the progress report such as intimidation and political pressure on the media were not raised. Minority rights were addressed in the Partnership most specifically from the aspect of electoral rights. Other aspects of discrimination against minorities such as in education and employment and the phenomenon of ethnically motivated incidents discussed extensively in the progress report, largely remained un-addressed in the Partnership. Prison conditions, right to legal aid, religious intolerance, discrimination on other basis than ethnicity such as sexual orientation, women's rights, children's rights, the situation of civil society and access to social protection were further problems raised in the progress report, which were not included among the Partnership priorities. All this suggest that some human rights were more important for the EU than others, forming a first and a second order of human rights issues. Even though the EU did monitor a number of human rights problems in its progress reports, the lack of progress in most of these areas did not put an obstacle to Bosnia's advancement on

its EU integration path. In practice, only essential conditions mattered and even there partial measures sufficed for a positive evaluation as will be explained through the case of the broadcasting reform below.

After the CARDS program ended in 2006, *the Instrument for Pre-accession (IPA)* became the framework of EU financial assistance for SAP countries. Main priorities for the first three years were set in the so called Multi-annual Indicative Planning Document (MIPD) 2007-2009 for Bosnia and Herzegovina, which claimed to follow medium term priorities and key short term priorities of the European Partnership from January 2006.⁴⁹ Among political objectives, the following human rights areas were identified as priorities for EU intervention: civil society, media freedom, war crimes prosecution, refugee return and minority protection. Yet, expected results reveal more about the content of these human rights goals. Civil society development aimed at generating a permanent dialogue between authorities and the civil society so that NGOs “become better ‘watchdog’ and also stronger partners of the Government”. Media freedom meant strengthening the broadcasting service thus it will “remain an independent, self-sustainable, technically efficient institution”. Thus other challenges to media freedom such as violence, intimidation and political pressure against journalists stressed in the 2005 progress report were again left unaddressed. Reform of the judicial system implied more efficient prosecution of war crimes so that they “will be in line with international standards”. Refugee return and protection of minorities and vulnerable groups primarily aimed at social inclusion of returnees, minorities, children and disabled persons, presenting potentially effective tools against various aspects of discrimination discussed in the progress report but less elaborated upon in the partnership document. The support for civil society became a financial priority that was completely left out from the partnership goals. Otherwise, importantly, key partnership priorities were matched with financial assistance.

Since the SAA was initialed in December 2007 and signed in June 2008, it is worth to look into the 2007 progress report published in October 2007 in order to see what had changed as compared to 2005, to what extent Bosnia met the European Partnership requirements, and by the time of granting the signature what had remained outstanding in the human rights area. In the 2007 progress report police reform and full cooperation with the ICTY were spelled out as essential requirements, while the need for significant progress in broadcasting and public administration reform were also stressed. Thus, besides cooperation with the ICTY and

broadcasting reform which was meant to strengthen media freedom, no other human rights issue was turned into a make or break condition for signing the SAA.⁵⁰

By comparing the 2005 and the 2007 progress reports, the lack of progress in the human rights field is apparent. There were very few improvements registered. As the 2007 report evaluated the situation, “some progress has been made as regards civil society organizations” explained by the fact that “the Council of Ministers signed an agreement on cooperation with the non-government sector and appointed a senior programming officer”. However, it was added immediately that “civil society organizations continue to register mainly at Entity level, because the registration process at State level is perceived as more bureaucratic. Few NGOs are therefore active country-wide.” The report similarly recorded “very limited progress” with regards to economic and social rights and minority rights, cultural rights and the protection of minorities. As the only clear success the securing of property rights for displaced persons and refugees and cooperation with the ICTY were mentioned.⁵¹ Indeed, according to the report, “the process of repossession of property by displaced persons has been successfully completed”. At the same time, the “limited progress” concerning minority rights referred to the improvement of the security situation for returnees, “although isolated incidents of violence have occurred”. The report was basically silent about the general conditions of returnees, all we could learn was that “many refugees and internally displaced persons (IDPs) still not benefit from basic pension and health provisions”. Cooperation with the Hague Tribunal was deemed generally satisfactory although still not reaching the level of full cooperation. Otherwise, concerning all the monitored human rights issues, the situation remained more or less the same as in 2005. Several problems that were emphasized in previous years, the report remained silent about, such as attacks on journalists and political pressure on the media.

The SAA was initialed in December 2007 and officially signed in June 2008 without Bosnia meeting even the essential conditions,⁵² as even the formal conditions of the broadcasting reform remained unfulfilled. The State law on the public broadcasting system was adopted in October 2005 thus complying with a condition set in the Feasibility Study of *opening* negotiations on the SAA. Finishing this reform meaning the “adoption and implementation of all necessary public broadcasting legislation” was set as a criterion of closing SAA negotiations.⁵³ This meant that relevant

legislation also had to be adopted at the Entity level, while the ultimate goal was to bring together the three public broadcasters (the two Entity broadcasters and the nation-wide one) into a single legal entity managed through a single steering board. After SAA talks were opened in the end of 2005, continuing these legislative reforms was turned into an essential condition repeated also by European partnerships. Among the two entities the Republica Srpska passed the relevant laws, yet the Federation had not by the signing of the SAA in 2008, only a few months later. However, what had remained outstanding even after that was the harmonization of State and Entity level legislation, as well as full implementation, including the establishment of the Bosnia and Herzegovina Corporation of the Public Broadcasting Services. As we saw from the discussion, the EU invested heavily into the broadcasting reform, not only its political energies but also financial means since supporting the PSB was one of the two CARDS human rights priorities, besides refugee return.

It is also worth to repeat here the original aspiration formulated in the Feasibility Study in 2003 concerning the broadcasting reform, which was “ensuring the long-term viability of a financially and editorially independent State-wide public broadcasting system whose constituent broadcasters share a common infrastructure”. It can be argued that the initial, ambitious goal set in the Feasibility Study which in principle should have been met *by the start* of SAA negotiations, was moderated during the years by being replaced by demands for adopting specific legislation which served to reach this original goal. Although Bosnia passed the necessary laws thus complying with the formal conditions set for each stage, the overall goal of the reform was never reached. Going well beyond the analyzed period here, in 2014 the Entity laws on public broadcasting services still remained to be harmonized with State-level law, while “the adoption of the Public Broadcasting Corporation’s statute was [still] pending”. As the 2014 EU progress report concluded, “the Public Broadcasting System reform has not been completed”.⁵⁴

Regarding human rights issues monitored in the progress reports, the failure to improve them had no consequences. (The Stabilization and Association Agreement itself says nothing about human rights conditionality, it only states that the respect of human rights is among the general principles of the agreement.)⁵⁵ It seems that the most important human rights issue beside the prosecution of war crimes was refugee return. Success in this area was indicated by the fact that more than a million refugees returned by October 2006, and most received back

their property. This was a serious achievement even if the numbers were probably exaggerated since many returned temporarily just to sell their property.⁵⁶ This was an area where clear progress was registered and in which the EU invested heavily, although interestingly refugee return was not an essential condition after 2005.

C. Concluding remarks

Altogether, the human rights agenda of the EU during the SAA negotiations which is the initial stage of EU integration had limited ambitions. By looking at the period between 2000-2008 and focusing on the instruments the EU deployed under the SAP in Bosnia it is visible that the EU focused just on a few human rights topics, such as minority rights and the rights of the Roma, refugee return, broadcasting reform which was related to media freedom, the consolidation of human rights institutions and ICTY cooperation. Among these only two became essential conditions that were only indirectly related to human rights: ICTY cooperation and the broadcasting reform. By the end of this period, there was significant progress in the creation and consolidation of human rights institutions, in the area of war crimes prosecution and refugee return. EU influence played only a partial role in achieving these results, because the OHR's engagement was at least as important. The OHR and EU coordinated their actions among themselves in several issue areas, while several reforms were outcomes of the OHR's interventions. Yet in other areas which were not part of this "first order human rights issues", not much progress could be reported.

According to Schimmelfennig and Sedelmeier, the credibility of conditionality policy meaning that rewards will be withdrawn in the case of non-compliance, seriously affects the effectiveness of rule adoption. During the analyzed period, the credibility of the EU's conditionality policy was compromised concerning the broadcasting reform which concerned the issue of media freedom. Broadcasting reform was a condition set by the Feasibility Study – i.e. "ensuring the long-term viability of a financially and editorially independent State-wide public broadcasting system whose constituent broadcasters share a common infrastructure" –, which was a very ambitious requirement of *opening* negotiations of the SAA. This criterion was unmet not only by the start of negotiations in November 2005, but by the signing of the SAA in 2008. After 2008 the EU dropped

this issue from essential conditions even though it has not been fulfilled until today. Bosnia seems to have gotten away with this kind of approach of “complying without complying” with an essential condition while still reaping the reward, in this case getting an SAA. Although implementation of the SAA was delayed until June 2015, yet for other reasons such as the lack of harmonization of the state constitution with the ruling of the European Convention of Human Rights on the Sejdić-Finci case. The EU compromised on this condition faced with the political realities of Bosnia while trying to keep the country on the track of EU integration. Applying strict conditionality is difficult in a country where political leaders are not that keen on EU integration. This proved to be a challenge even before 2008 although this was the period when the EU still had considerable leverage over Bosnia demonstrated by its aspiration to get an SAA. After 2008 the EU’s influence over Bosnia further diminished.

NOTES

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